SCC Court File No.:

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)

APPLICATION FOR LEAVE TO APPEAL
(THE HONOURABLE MAXIME BERNIER, APPLICANT)
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985)

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3. Documents Relied Upon

1

SCC Court File No.:

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BETWEEN:

THE HONOURABLE MAXIME BERNIER

APPLICANT
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(THE HONOURABLE MAXIME BERNIER, APPLICANT)
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985, c S-26)

TAKE NOTICE that the Applicant applies for leave to appeal to the Supreme Court of Canada, under section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156 from the judgment of the Federal Court of Appeal (File no. A-253-22) made on November 9, 2023, and for any further or other order that the Court may deem appropriate.

AND FURTHER TAKE NOTICE that this application for leave to appeal is made on the following grounds and that the case presents issues of national importance:

- Presently, how should courts, in exercising their discretion in mootness cases, consider mootness in the context of emergency orders? Should the principles on exercising discretion for an alleged moot case be altered by the reality that emergency orders were in fact used herein?

and

- From a future perspective, herein and in other pan-Canadian jurisprudence, should the principles guiding judicial discretion in determining whether to hear a moot case be updated to address modern-day emergency orders?

Dated at the City of Calgary, Province of Alberta this 8th day of January, 2024.

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Nabil Ben Naoum

Self-represented Appellant at the FCA

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Leesha Nikkanen, Ken Baigent, Drew
Belobaba, Natalie Grcic,
and Aedan Macdonald

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

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SCHEDULE "A"

A. Reasons for Judgment and Judgment of the Federal Court by the Associate Chief Justice Gagné, issued October 20, 2022, dated October 27, 2022, *Ben Naoum v. Canada (Attorney General),* 2022 FC 1463

B. Order on Costs of the Federal Court by the Associate Chief Justice Gagné, January 6, 2023

C. Reasons for Judgment of the Federal Court of Appeal by Justices Locke, Leblanc and Goyette, November 9, 2023, *Peckford v. Canada (Attorney General),* 2023 FCA 219

D. Judgment of the Federal Court of Appeal, November 9, 2023

Federal Court Cour fédérale

Date: 20221027

Dockets: T-145-22
T-247-22
T-168-22
T-1991-21

Citation: 2022 FC 1463

Ottawa, Ontario, October 27, 2022

PRESENT: The Associate Chief Justice Gagné

Docket: T-145-22

BETWEEN:

NABIL BEN NAOUM

Applicant

et

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-247-22

AND BETWEEN:

THE HONOURABLE MAXIME BERNIER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-168-22

AND BETWEEN:

THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, AND AEDAN MACDONALD

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1991-21

AND BETWEEN:

SHAUN RICKARD AND KARL HARRISON

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT
(judgment issued to the parties on October 20, 2022)

I. Overview

[1] The Applicants challenge the constitutionality of air and rail sector vaccine mandates, which were implemented through a series of orders put in place by Transport Canada. They

required full vaccination against COVID-19 in order to board a plane or a train to travel within or departing Canada.

[2] All four groups of Applicants challenge the Interim Orders [IOs] that implemented the air passenger vaccine mandate; one group of Applicants also challenges the requirement for rail passengers, implemented through a Ministerial Order [MO].

[3] On June 20, 2022, the in-force iterations of the challenged IOs and MO were repealed, replaced by orders not requiring vaccination or, in the case of the air sector vaccine mandate, allowed to expire. On June 28, 2022, the Respondent filed his Notice of Motion seeking an Order to strike the Applications for mootness.

[4] Given that a five-day judicial review in these matters was scheduled for October 31, 2022, the Judgment was issued with reasons to follow. This was done to avoid additional preparation time by the parties, and because the proceedings leading to the issuance of this decision were conducted in both official languages and thus pursuant to section 20(1)(b) of the *Official Languages Act*, RSC 1985, c 31 (4th sup.), the Court's reasons are to be issued simultaneously in both languages. The time required for translation did not allow for issuing the Judgement and reasons in both official languages sufficiently ahead of the scheduled hearing so as to give the parties sufficient notice that it would not be proceeding.

II. Facts

A. *Air Passenger Vaccine Mandate*

[5] From June 2020 onwards, but prior to the period at issue in these Applications, the Minister of Transport made a series of 14-day IOs pursuant to subsection 6.41(1) of the *Aeronautics Act*, RSC 1985, c A-2, in order to respond to the risk to aviation or public safety caused by the COVID-19 pandemic (IOs 1 to 42). Subsection 6.41(2) of the *Aeronautics Act* provides that any such IO ceases to have effect fourteen days after it is made unless it is approved by the Governor in Council within that fourteen day period. When that is the case, the *Aeronautics Act* sets out a process to follow to transform the IO into a regulation having the same effect as the IO.

[6] In fact, none of the impugned IOs were submitted for approval by the Governor in Council, instead, each IO was replaced by a new IO every fourteen days.

[7] On October 29, 2021, IO 43 introduced the first elements of a federal vaccine mandate in the air transportation sector. It allowed for testing as an alternative to vaccination for air passengers.

[8] From November 30, 2021 (when IO 47 came in to effect) onwards, testing was no longer allowed as an alternative to vaccination. Vaccination was a requirement for air travel within or departing Canada with limited exceptions including medical inability to be vaccinated, essential medical care, sincerely held religious beliefs, foreign nationals (non-residents) departing Canada,

travel in support of national interests, travel to or from remote communities, or cases of emergency travel.

[9] This air passenger vaccine mandate was maintained through IOs until June 20, 2022.

[10] The Applicants each independently filed Notices of Application for judicial review challenging the orders. The earliest was filed on December 24, 2021 and the last on March 11, 2022. Because of the differences in time when they initiated their Applications, there are differences as to which specific iteration of the IO they challenge (one Applicant challenges IO 49, two challenge IO 52, and one challenges IO 53).

B. *Rail Passenger Vaccine Mandate*

[11] The rail passenger vaccine mandate was implemented by way of MOs made pursuant to section 32.01 of the *Railway Safety Act*, RSC 1985 c 32 (4th Supp.). From MO 21-08 (which entered into effect on October 29, 2021) onwards, rail passengers were required to be fully vaccinated against COVID-19 to board a train.

[12] From that time, the MOs were repeated, with slight modifications, until the implementation of MO 22-02, which repealed a previous MO, and did not itself implement any further vaccination requirements.

[13] Only the Applicants in file T-1991-21, Shaun Rickard and Karl Harrison, challenge the rail provisions, as set out in MO-21-09.

III. Issues

[14] The Applicants and the Respondent both agree that the applicable test on a motion for mootness is the one articulated by Justice Sopinka in *Borowski v Canada (Attorney General)*, 1989 1 SCR 342. Unsurprisingly, they take very opposite positions on both of the two key stages as set forth in *Borowski*. Namely, they disagree on i) whether the issue is moot, and on ii) whether the Court should exercise its discretion to nonetheless hear the case, if it is found moot.

[15] The Respondent's motion therefore raises the following issues:

A. *Are the issues raised by these Applications for judicial review moot; is there a live controversy?*

B. *If the issues are moot, should the Court nevertheless exercise its discretion to hear the merits?*

[16] Since this motion was taken under reserve, the Court received several letters. By way of two separate letters the Respondent submitted without further comment two decisions rendered after the hearing on the issue of mootness in cases of vaccination mandates (*Gianoulias et al c Procureur Général du Québec*, 2022 QCCS 3509 (CanLII) and *Lavergne-Poitras v The Attorney General of Canada et al*, 2022 FC 1391). In response, the Applicants in file T-1991-21 filed an additional six-page reply submission. The Court has considered both decisions and the Applicants' reply submission.

[17] In addition, the Court received a letter from an individual who attended the hearing on the Zoom platform (attendance peaked at 2300 people during the day), who wanted to remind the

Court of the "gravity" of its decision. This letter is totally inappropriate and will be disregarded. There is a clear line to be drawn between observing a hearing on one hand, and attempting to become a participant by voicing ones views in a letter to the assigned judge, on the other. That line must not be crossed. The principle of judicial independence requires judges to be able to prepare their decisions without pressure or interference.

IV. Analysis

A. *Are the issues raised by these Applications for judicial review moot; is there a live controversy?*

[18] As indicated above, because these Applications were filed at different times, they target different IOs/MO. With that in mind, the following is a summary of the remedies sought by the Applicants:

- That the IOs/MO be quashed and/or declared invalid and inoperative;
- Declarations that the IOs are *ultra vires* of the *Aeronautic Act* and/ or made for an improper purpose;
- Declarations that the IOs/MO are unconstitutional and made in breach of the Applicants sections 2 a), b), c) and d), 3, 6, 7, 8 and 15 *Charter* rights, in a way that can not be saved by section 1;
- Declarations that the IOs violated their rights under section 1 of the *Canadian Bill of Rights* and violated Articles 7, 12, 18 and 26 of the *International Covenant on Civil and Political Rights.*
- An order that the IOs/MO be amended to include recognition or natural immunity or allow travelers to show proof of a negative PCR test before travel;
- A prohibition against future provisions that may be similar to the impugned IOs/MO or a declaration of invalidity for breaches of *Charter* rights for future mandates;

- A declaration that the IOs breached the *Canada Elections Act*.

[19] The Respondent submits that the repeal of the air and rail passenger vaccine mandates on June 20, 2022 means that there is no live controversy between the parties. The Respondent raises four main reasons why the Court should find in favour of his motion:

1. That the IOs/MO that the Applicants challenge no longer exist in law;

2. That each Application is limited by the legislation challenged in the Notice of Application;

3. That the Applicants have generally obtained the ultimate remedy sought: the elimination of the vaccine mandate provisions;

4. That the request for declaratory relief cannot sustain a moot case in and of itself; the declaratory remedies sought by the Applicants fail to provide live issues for judicial review.

[20] The Applicants argue that there remains a live controversy because of statements by the Government of Canada that travel restrictions have only been "suspended", suggesting that they may be re-implemented at any time if the COVID-19 public health situation worsens. In that sense, the Respondent's motions would be premature. The Applicants rely on a press release issued by the Treasury Board of Canada Secretariat, statements made by Ministers at a June 14, 2022 press conference, and in an interview that the Minister of Intergovernmental Affairs gave to the CBC shortly afterwards.

[21] Firstly, the hearing of these Applications for judicial review is set for five days commencing on October 31, 2022. Since the hearing of this Motion, Transport Canada has removed the requirement to wear a mask on planes and trains and repealed the last remaining IO.

In my view, the situation is as likely to improve as it is to worsen by the time the hearing of these Applications on their merits is over. The Applicants' argument is highly speculative and does not support their position that the controversy is still ongoing.

[22] Secondly, a comment made by a Minister to a journalist, taken outside its context, does not amount to a decision by that Minister and it is no more an indication of a live controversy. Even if the Minister called what occurred in June 2022 a suspension, the reality is that all IOs/MO that had contained a vaccination mandate have legally expired and none that contain such a mandate have been reissued since June.

[23] The question is whether the IOs/MO have any effect on the Applicants' rights and the answer to that question is no; they all ceased to have any adverse effect on the lives and livelihoods of the Applicants the minute they were repealed.

[24] It follows that this argument by the Applicants should be dismissed.

[25] The Applicants argue that the IO in force at the time of their response continued to require disclosure of private medical information by passengers, which the Applicants argued in their Notice of Application violated their section 8 right to privacy. They target section 3 of the IO, which they refer to as the "notification requirement." This requirement applied to air carriers or private operators departing from any other country than Canada. The Court also notes that the contents of section 3 have varied between IOs (notably including between the IO 52 which this group of Applicants challenged and IO 68 which they refer to in their submissions), but that in any case no such section, let alone IO, is in force in any form as of October 1, 2022. Finally, in

all iterations of the challenged IOs, it was not strictly an obligation imposed on the Applicants, but rather an obligation on air carriers/private operators to notify air passengers of their own obligations under the *Quarantine Act*, SC 2005, c 20.

[26] Finally, the Applicants argue that even where the main relief sought is moot, this does not preclude the court from granting declaratory relief which would be binding on any *Charter* damages claim that may be brought as separate actions.

[27] Of note, after the IOs/MO were repealed and the Respondent had given notice of its motion for mootness, the Applicants in file T-1991-21 filed a Notice of Motion seeking orders to amend their Notice of Application to assert damages and indicating that their Application would proceed as an Action. On August 3, 2022, Associate Judge Tabib denied the motion, noting "it appears that one of the goals of the proposed amendments is to attempt to insulate the Applicants from the potential consequences of the Respondent's motion to declare this application moot." She considered the implications of a dismissal of the motion for mootness and concluded that "I am, accordingly, not satisfied that the dismissal of this application for mootness, if it is ordered, would substantially prejudice the Applicant's ability to pursue a claim for damages by way of action. More importantly, I am not satisfied that the possibility of a future dismissal, with the resulting costs and inefficiency, justifies, at this time, the extraordinary remedy sought by the Applicants."

[28] Generally speaking, the Applicants seek declarations of invalidity, on various grounds, in respect of the repealed air and rail passenger vaccine mandates. Yet, it is well known that Courts should refrain from expressing opinions on questions of law in a vacuum or where it is

unnecessary to dispose of a case. Any legal or constitutional pronouncement could prejudice future cases and should be avoided (*Phillips v Nova Scotia Commissioner of Inquiry into the Westray Mine Tragedy*, [1995] 2 SCR 97, at para 12).

[29] Two groups of Applicants also seek a prohibition against speculative future provisions that may be similar to the impugned IOs/MO. First, this Court cannot issue a prohibition against future undefined legal provisions. Second, and as we have seen since the outbreak of this pandemic, the measures taken by all governments have fluctuated with time and have been driven by the evolution of the situation and scientific knowledge.

[30] As stated by the Ontario Superior Court of Justice in *Work Safe Twerk Safe v Her Majesty the Queen in Right of Ontario*, 2021 ONSC 6736 (CanLII), at para 7:

> I do not agree with counsel for the applicant that the possibility of new discriminatory regulations in the future keeps the issues alive. The validity of any new regulation would have to be determined on the facts and circumstances at that time. There is no basis in the record to suppose that the regulations were repealed and replaced to evade judicial review in this court. Quite the contrary, the COVID-19 crisis has led the government to revisit its response to the public health crisis on an ongoing basis, as circumstances have changed, and the changes to regulations affecting establishments affected by the impugned regulations reflect this pattern.

[31] One group of Applicants seeks an order that the IOs/MO be amended to include recognition of natural immunity, or to permit travelers to show proof of a negative PCR test. Even if the IOs/MO in question were not repealed, it is not for the Court to rewrite legislative provisions it declares invalid.

[32] Finally, I agree with the Respondent that requests for declaratory relief cannot sustain a moot case in and of itself and that the declaratory remedies the Applicants seek fail to provide live issues for judicial resolution. Mootness "cannot be avoided" on the basis that declaratory relief is sought (*Rebel News Network Ltd v Canada (Leaders' Debates Commission),* 2020 FC 1181, at para 42). Courts will grant declaratory reliefs only when they have the potential of providing practical utility, that is, if when they settle a "live controversy" between the parties. The Court sees no practical utility in the declaratory reliefs sought by the Applicants.

[33] It follows that these Applications for judicial review are moot for lack of live controversy.

B. *Should the Court nevertheless exercise its discretion to hear the merits?*

[34] The Supreme Court in *Borowski* also provided guidance with respect to this second branch of the test. More specifically, Courts must look into:

- The presence of an adversarial context (this is not contested in the present case, the parties having spent a day in Court debating this motion being a strong indication it is the case);
- The concern for judicial economy; and
- The need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

(1) Judicial economy

[35] On this front, the Applicants argue that the Court has already dedicated significant resources to these Applications — by hearing motions and making procedural orders, that a

strong evidentiary record has been established, and that the majority of the steps have been completed.

[36] Second, they state that a decision by the Court may have practical effects on the rights of the parties if the government brings similar mandates back; allowing the Government's lifting of the measures to render the Applications moot would undermine public confidence in the administration of justice.

[37] Third, the Applicants argue that this is a case dealing with issues of public importance and that the societal cost and uncertainty regarding the constitutionality of vaccine mandates outweighs the concern for judicial economy.

[38] Finally, the Applicants argue that without this Court's decision on their Applications, the impugned IOs/MO would be evasive of review. They state that the Quebec Superior Court decision in *Syndicat des métallos, section locale 2008 c Procureur Général du Canada*, 2022 QCCS 2455 (heard by the Quebec Superior Court before the parties in the present case filed their written submissions but issued before their oral submissions) did not settle the issues at hand and that in any case there is no horizontal *stare decisis*.

[39] In the Court's view, none of these arguments are sufficient to justify additional resources being allocated to these files.

[40] It is true that the parties, and to some extent the Court, have already invested financial and human resources in these files. However, most of the Court resources are yet to come with a

five-day judicial review hearing and extensive writing time (these files comprise 23 affidavits and 15 expert reports totaling approximately 6,650 pages). That is without considering potential appeals to the Federal Court of Appeal and to the Supreme Court of Canada.

[41] As stated above, these proceedings will have no practical effect on the rights of the Applicants. They have obtained the full relief available to them and a decision of the remaining declaratory relief would provide them no practical utility. If they suffered damages as a result of these IOs/MO being in force, they would have to bring an action against the Crown and have their respective rights assessed in light of all the relevant facts.

[42] In addition, there is no uncertain jurisprudence. These Applications arose in a very specific and exceptional factual context: that of the COVID-19 global pandemic. Deciding these Applications would simply result in applying settled *Charter* jurisprudence to those exceptional — hopefully not to be repeated — circumstances; that is to a particular epidemiological point in the pandemic that is unlikely to be exactly replicated in the future. Federal and provincial health safety measures, adopted in the context of the pandemic, have been constitutionally challenged across the country as they were in full force and effect (see for example, challenging federal measures: *Monsanto v Canada (Health),* 2020 FC 1053, *Spencer v Canada (Health)*, 2021 FC 621, *Canadian Constitution Foundation v Attorney General of Canada*, 2021 ONSC 4744, *Turmel v Canada* 2021 FC 1095, *Wojdan v Canada (Attorney General)*, 2021 FC 1341, *Neri v Canada*, 2021 FC 1443, *Zbarsky v Canada*, 2022 FC 195; and challenging provincial measures: *Taylor v Newfoundland and Labrador,* 2020 NLSC 125, *Ingram v Alberta (Chief Medical Officer of Health),* 2020 ABQB 806, *Beaudoin v British Columbia,* 2021 BCSC 512, *Lachance c*

Procureur général du Québec, 2021 QCCS 4721, *Murray et al v Attorney General of New Brunswick,* 2022 NBQB 27).

[43] In that sense, the IOs/MO are not evasive of judicial review.

[44] In *Syndicat des métallos*, Justice Mark Phillips of the Quebec Superior Court recently found that the IOs/MO did not breach the plaintiffs section 7 *Charter* rights and that if they did, the violation would be saved by section 1 of the *Charter* for being one that is justified in a democratic society. As is the case here, Justice Phillips was seized with an application for judicial review. As the IOs/MO were repealed during his deliberation, he exercised his discretion to nevertheless issue his decision. In doing so he considered i) the resources already invested in the case, ii) the existence of related labour disputes between the same parties, and iii) the fact that all parties desired to have a decision on the issues raised by the case. Quite different from the situation at hand.

[45] Justice Phillips studied the choice imposed on the Applicants — accepting to be fully vaccinated against COVID-19 or loosing one's employment — and found that even if the vaccination was subject to the consent of the individual, there is nevertheless a breach of section 7 if the refusal has important consequences; as a result, the IOs/MO violates the liberty and security of the person in their psychological dimension (*Syndicat des métallos*, at para 179). However, he found that the measure was neither arbitrary, nor excessive or disproportionate and that, according to the evidence before him, the deprivation was made in accordance with the principles of fundamental justice and therefore did not violate section 7 (paras 212-213).

[46] Additionally, the rail passenger vaccine mandate is also challenged for breaching sections 2(a), 7, 8 and 15 of the *Charter* in several actions in damages before this Court (files no. T-554-22 and T-533-22), and the air passenger vaccine mandate in the Alberta Court of King's Bench (file no. 2203 09246). It is true that none of these proceedings will test the IOs/MO against section 6 of the *Charter* but, as indicated above, considering that they are no longer in force, the proper vehicle would be an action in damages if the Applicants suffered any damages as a result of these temporary measures. The Court would then have the proper factual background to assess the Applicants' *Charter* rights.

[47] As a result, the Court is of the view that the judicial economy considerations outweigh the alleged important public interest and uncertainty in the law.

V. Conclusion

[48] For the above reasons, these Applications will be struck as moot. The air and rail passenger vaccine mandates were repealed, as have other related public health measures. The Applicants have substantially received the remedies sought and as such, there is no live controversy to adjudicate.

[49] There is no important public interest or inconsistency in the law that would justify allocating significant judicial resources to hear these moot Applications.

[50] Finally, it is not the role of the Court to dictate or prevent future government actions. If the air and rail vaccine mandates are re-introduced in the future, they can be properly challenged and should be weighed against the reality in which they are implemented.

[51] As agreed during the hearing of this Motion, the parties have 10 days from the date of these Reasons to provide the Court with their written submissions on costs (not exceeding 5 pages).

JUDGMENT in T-145-22, T-247-22, T-168-22, and T-1991-21

THIS COURT'S JUDGMENT is that:

1. The Respondent's Motion is granted;
2. The Applicants' Applications for judicial review are struck out as moot;
3. The parties shall provide written submissions on costs, not exceeding 5 pages, within 10 days of these Reasons.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-145-22, T-247-22, T-168-22 AND T-1991-21
DOCKET:	T-145-22
STYLE OF CAUSE:	NABIL BEN NAOUM v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-247-22
STYLE OF CAUSE:	THE HONOURABLE MAXIME BERNIER v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-168-22
STYLE OF CAUSE:	THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, AND AEDAN MACDONALD v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-1991-21
STYLE OF CAUSE:	SHAUN RICKARD AND KARL HARRISON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO & HELD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 21, 2022
REASONS FOR JUDGMENT:	GAGNÉ A.C.J.
DATED:	OCTOBER 27, 2022

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Attorney General of Canada Winnipeg, MB	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

Federal Court Cour fédérale

Date: 20230106

Dockets: T-145-22
T-247-22
T-168-22
T-1991-21

Ottawa, Ontario, January 6, 2023

PRESENT: The Associate Chief Justice Gagné

Docket: T-145-22

BETWEEN:

NABIL BEN NAOUM

Applicant

et

LE PROCUREUR GÉNÉRAL DU CANADA

Respondent

Docket: T-247-22

AND BETWEEN:

L'HONORABLE MAXIME BERNIER

Applicant

and

LE PROCUREUR GÉNÉRAL DU CANADA

Respondent

Docket: T-168-22

AND BETWEEN:

THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, AND AEDAN MACDONALD

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1991-21

AND BETWEEN:

SHAUN RICKARD AND KARL HARRISON

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER

UPON considering that on October 27, 2022, the Court granted the Respondent's motion to strike these four Applications for judicial review for mootness and gave the parties ten days from the issuance of its reasons to provide submissions on costs, which they all did except for the Applicant in file T-247-22;

AND UPON considering that the Respondent is seeking costs in the lump sum of $42,000.00, only consisting of steps undertaken subsequent to the June 20, 2022 lifting of the challenged measures;

AND UPON considering that the Respondent further suggests that costs be divided one third each for the Applicants in files T-1991-21 and T-168-22 and one sixth each for the Applicants in files T-145-22 and T-247-22; this apportionment would take into account the role of each group of Applicants in contributing to the complexity and length of these proceedings;

AND UPON considering that only the Applicants in file T-1991-21 contest this proposed apportionment;

AND UPON considering that the Applicants who filed submissions all argue that the Respondent should not be entitled to costs as their Applications for judicial review were all put forward in the public interest;

AND UPON considering that in the alternative:

- The Applicants in file T-1991-21 assert that costs should be limited to those incurred on the Respondent's motion to strike; they also question a few specific items of the Respondent's bill of costs;
- The Applicant in T-145-22 argues that it would be unreasonable to grant costs incurred starting June 20, 2022, as the Respondent's motion to strike was only served on June 28; it would defy the principle of access to justice to condemn a self-represented litigant to pay $7,000.00 in excess of what he has already paid to advance his claim;
- The Applicants in file T-168-22 state that costs should be pursuant to Column I of Tariff B, not Column IV, in addition to questioning specific items claimed by the Respondent;

AND UPON having considered all of the parties submissions, the Court exercises its discretion and grants the Respondent costs in the lump sum of $10,000.00, to be divided as follows:

- File T-1991-21: $3,300.00;
- File T-168-22: $3,300.00;
- File T-145-22: $1,700.00;
- File T-247-22: $1,700.00.

THIS COURT ORDERS that:

1. The Applicants shall pay costs to the Respondent in the lump sum of $10,000.00, to be divided as follows:
    - File T-1991-21: $3,300.00;
    - File T-168-22: $3,300.00;
    - File T-145-22: $1,700.00;
    - File T-247-22: $1,700.00.

"Jocelyne Gagné"
Associate Chief Justice

Federal Court of Appeal | Cour d'appel fédérale

Date: 20231109

Dockets: A-251-22 (Lead file)
A-252-22
A-253-22
A-254-22

Citation: 2023 FCA 219

CORAM: **LOCKE J.A.**
LEBLANC J.A.
GOYETTE J.A.

Docket: A-251-22 (Lead file)

BETWEEN:

THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, and AEDAN MACDONALD

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-252-22

AND BETWEEN:

SHAUN RICKARD and KARL HARRISON

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-253-22

AND BETWEEN:

THE HONOURABLE MAXIME BERNIER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-254-22

AND BETWEEN:

NABIL BEN NAOUM

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 11, 2023.

Judgment delivered at Ottawa, Ontario, on November 9, 2023.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: LEBLANC J.A.
GOYETTE J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20231109

Dockets: A-251-22 (Lead file)
A-252-22
A-253-22
A-254-22

Citation: 2023 FCA 219

CORAM: **LOCKE J.A.**
LEBLANC J.A.
GOYETTE J.A.

Docket:A-251-22 (Lead file)

BETWEEN:

THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, and AEDAN MACDONALD

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-252-22

AND BETWEEN:

SHAUN RICKARD and KARL HARRISON

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket:A-253-22

AND BETWEEN:

THE HONOURABLE MAXIME BERNIER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-254-22

AND BETWEEN:

NABIL BEN NAOUM

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

LOCKE J.A.

I. Background

[1] Four groups of appellants ask this Court to set aside the dismissal (by the Federal Court) of their respective judicial review applications before that Court. Those applications took issue with the air and rail vaccine mandates that, with certain exceptions, required air and rail

travellers to be vaccinated against COVID-19. The mandates were imposed by a series of Interim Orders (IOs) and Ministerial Orders (MOs), and were in force from October 29, 2021 until June 20, 2022. The parties disagree on whether the mandates were repealed or merely suspended, but there is no dispute that they have not been in force since June 20, 2022.

[2] Pursuant to a motion by the respondent, after the vaccine mandates ended, the Federal Court (2022 FC 1463, *per* Associate Chief Justice Jocelyne Gagné) struck the appellants' applications on the basis that they had become moot and that hearing the applications despite their mootness was not warranted.

[3] One of the appellant groups (Shaun Rickard and Karl Harrison, hereinafter the Rickard Appellants) argues that the Federal Court erred in finding that the applications were moot. Further, all of the appellants argue that the Federal Court erred in refusing to exercise its discretion to hear the applications.

[4] Despite the parties' passionate submissions, both in writing and orally, I would dismiss the present appeals for the reasons that follow.

II. Standard of Review

[5] Key to these appeals is the fact that the dismissal of the underlying applications was the Federal Court's decision. While this Court's role is to scrutinize the Federal Court's decision, we do not simply re-decide.

[6] On appeals like these, this Court applies standards of review as directed in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: questions of law are reviewed on a standard of correctness, whereas questions of fact and of mixed fact and law from which no question of law is extricable are reviewed on a standard of palpable and overriding error.

[7] In order to set aside a decision on the palpable and overriding error standard, the appellants must establish that the alleged error is obvious and goes to the very core of the outcome of the case. It is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38 (*Benhaim*), quoting from *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46. A palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye, and it is impossible to confuse these last two notions: *Benhaim* at paragraph 39, quoting from *J.G. v. Nadeau*, 2016 QCCA 167 at para. 77. As discussed in *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at para. 62, examples of palpable errors include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.

[8] Two of the four groups of appellants do not address the standard of review at all in their memoranda of fact and law. The other two argue that the standard of review in these appeals is correctness. However, in oral submissions, the appellants now acknowledge that this Court must follow the appellate standards of review described in the previous paragraph.

III. The Federal Court's Decision

[9] In its decision under appeal, the Federal Court correctly identified the approach on a motion to strike for mootness. As indicated by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (*Borowski*), the approach involves a two-step analysis in which the court decides first whether the case is moot. Where no present live controversy exists which affects the rights of the parties, a case is said to be moot.

[10] Where a case is found to be moot, the second step is for the court to decide whether to exercise its discretion to hear the case despite its mootness. *Borowski* addressed the exercise of discretion over several pages, noting three underlying rationales. The appellants rightly do not take issue with the Federal Court's summary of the relevant considerations (see paragraph 34 of its reasons):

- The presence of an adversarial context;
- The concern for judicial economy; and
- The need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

[11] On the first step of the two-step analysis, the Federal Court found that the appellants' applications were moot for lack of live controversy as a result of the repeal of the vaccine mandates. The Federal Court acknowledged the possibility that the vaccine mandates might be reinstated, but found this to be highly speculative.

[12] The Federal Court also found that the fact that declaratory relief was sought in the appellants' applications was insufficient to avoid mootness, even where the declarations sought might be relevant to separate actions claiming damages. The Federal Court noted the principles that:

> A. Courts should refrain from expressing opinions on questions of law in a vacuum or where it is unnecessary to dispose of a case (see paragraph 28 of the Federal Court's reasons, citing *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paragraph 12); and

[13] A request for declaratory relief cannot sustain a moot case in and of itself (see paragraph 32 of the Federal Court's reasons, citing *Rebel News Network Ltd v. Canada (Leaders' Debates Commission)*, 2020 FC 1181 at paragraph 42 (*Rebel News*)).

[14] On the second step of the *Borowski* analysis (the exercise of discretion), the Federal Court noted first that it was not contested that there remained an adversarial context.

[15] The Federal Court's decision to exercise its discretion not to hear the applications was largely influenced by the concern for judicial economy. In this regard, *Borowski* indicated that the following should be taken into account: (i) whether the court's decision will have some practical effect on the rights of the parties, (ii) whether the case is of a recurring nature but brief duration that might be evasive of review, and (iii) whether the case raises an issue of such public importance that a resolution is in the public interest.

[16] The Federal Court made the following observations in considering judicial economy:

A. Though resources had already been invested by the parties and the Court in the appellants' applications, most of the required expenditure of Court resources was yet to come (see paragraph 40 of the Federal Court's reasons);

B. The applications would have no practical effects on the appellants' rights because they had already obtained the full relief that was available to them, and the declaratory relief they sought would be of no practical utility – any claim for damages resulting from the IOs and MOs would have to be the subject of a separate action (see paragraph 41 of the Federal Court's reasons);

C. There was no uncertainty in the jurisprudence to be resolved (see paragraph 42 of the Federal Court's reasons); and

D. The impugned IOs and MOs were not evasive of review (see paragraphs 42 and 43 of the Federal Court's reasons).

[17] The Federal Court did not include a distinct section in its analysis for the third consideration in deciding whether to exercise its discretion to hear a case despite its mootness (the need for the Court to be sensitive to its role as the adjudicative branch in its analysis). However, the Federal Court did observe at paragraph 50 of its reasons (in its Conclusion section) that "it is not the role of the Court to dictate or prevent future government actions."

IV. Analysis

[18] The appellants raise many issues in their memoranda of fact and law and in their oral submissions. Several of these issues relate to the merits of their applications. However, the merits of the applications are beyond the scope of the present appeals.

[19] Even on the issues that are properly before this Court for consideration, the appellants' written arguments generally fail to recognize that we must apply the appellate standards of review. Except on pure questions of law, we will not interfere with the Federal Court's decision in the absence of a palpable and overriding error. This is a highly deferential standard. As stated in *Plato v. Canada (National Revenue)*, 2015 FCA 217 at para. 4:

> The identification of the legal factors to determine if a case is moot is a question of law reviewable under the standard of correctness (*Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40, [2013] 4 F.C.R. 155, at paragraph 57). Once it is established that a case is moot, the Judge has a broad discretion to hear the matter or not, but must properly weigh the criteria established in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, (*Borowski*). This fine exercise of balancing is a mixed question of facts and law. Deference is owed to that decision.

[20] As stated above, the conclusions that the appellants' applications were moot and that discretion should not be exercised to hear them were for the Federal Court to make, not this Court. Many of the cases cited by the appellants (though not all) can be distinguished on the basis that they involved the appellate court's own exercise of discretion, not an appeal of a lower court's discretionary decision.

[21] In the following paragraphs, I discuss the appellants' arguments.

A. *Whether the Federal Court erred in finding that the appellants' applications are moot*

[22] As indicated at paragraph 3 above, the Rickard Appellants argue that the Federal Court erred in finding that the underlying applications are moot. They argue that a live controversy remains based on their requests for declaratory relief. The Rickard Appellants cite certain jurisprudence in support of this argument, but nothing that contradicts the statement in *Rebel News* that a request for declaratory relief cannot sustain a moot case in and of itself.

[23] The Rickard Appellants attempt to distinguish *Rebel News* on the basis that injunctive relief had been granted in that case, but I see nothing therein that limits the application of the principle that a request for declaratory relief cannot by itself avoid mootness. In *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 832, the Supreme Court of Canada stated that "a declaration will not normally be granted when the dispute is over and has become academic." If it were otherwise, then virtually any case could be saved from being moot by simply including a claim for declaratory relief. The applications in *Rebel News* were found moot on essentially the same basis as in the present case: the applicants had obtained the core of the relief they were seeking (see *Rebel News* at para. 38).

[24] I note that the Court of Appeal for British Columbia (BCCA) recently confirmed the correctness of the Federal Court's statement that a request for declaratory relief cannot by itself avoid mootness: *Kassian v. British Columbia*, 2023 BCCA 383 at para. 31 (*Kassian*).

[25] The Rickard Appellants argue that the Federal Court erred in stating at paragraph 32 of its reasons that "Courts will grant declaratory reliefs only when they have the potential of providing practical utility, that is, if when (sic) they settle a 'live controversy' between the parties." The Rickard Appellants argue that the jurisprudence does not support such an absolute bar to declaratory relief without practical utility. I see no error by the Federal Court in this regard. The quoted statement is well supported by the Supreme Court of Canada's decision in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 at para. 11, and this Court's decisions in *Right to Life Association of Toronto v. Canada (Attorney General)*, 2022 FCA 220 at para. 13, and *Spencer v. Canada (Attorney General)*, 2023 FCA 8 at para. 5. Moreover, this statement was made in determining the first step of the *Borowski* analysis (whether the matter was moot). The Federal Court went on to consider the second step separately, thus leaving open the possibility that a case could be heard despite seeking only declaratory relief without practical utility.

[26] Some of the appellants argue that the Federal Court erred in finding that a factual vacuum exists in this case. On the contrary, the appellants argue that considerable evidence was before the Federal Court, including 15 expert reports, 23 affidavits and transcripts of weeks of cross-examinations. However, the Federal Court did not state that there was a factual vacuum. Rather, it cited the principle that courts should refrain from expressing opinions on questions of law in a vacuum or where it is unnecessary to dispose of a case (see paragraph 12A above). It is the second part of this principle (where it is unnecessary to dispose of a case) that is applicable in this case.

[27] I am not convinced that, on its conclusion of mootness, the Federal Court made either an error of law or a palpable and overriding error of fact or of mixed fact and law from which no question of law is extricable.

B. *Whether the Federal Court erred in refusing to exercise its discretion to hear the applications despite their mootness*

[28] At the outset of this section, I repeat that the exercise of discretion is a question of mixed fact and law. Therefore, this Court can intervene only in the case of a palpable and overriding error by the Federal Court, or an extricable error of law. Many of the appellants' arguments, in writing at least, are directed to urging this Court to decide for itself whether to exercise discretion. Again, that is not our role.

[29] Turning to the relevant considerations, the Federal Court acknowledged that there was an adversarial context, and so I need not discuss any of the appellants' arguments based on this consideration. Some appellants criticize the Federal Court for not saying more about the adversarial context, but I see no reviewable error here.

[30] Some appellants argue that the Federal Court failed to take into account the third consideration relevant to the exercise of discretion: the need for the Court to be sensitive to its role as the adjudicative branch in our political framework. Though it would have been preferable if the Federal Court had explicitly discussed this consideration in its Analysis section, it is my view that the following references in the Federal Court's reasons are sufficient to indicate that it was considered:

A. Paragraph 34, in which this consideration is explicitly acknowledged;

B. Paragraphs 31 and 50, regarding the limited role of the Court; and

C. Paragraph 28, noting that Courts should refrain from expressing opinions on questions of law where it is unnecessary to dispose of a case.

[31] On the issue of the concern for judicial economy, the Federal Court identified the appellants' arguments at paragraphs 35 to 38 of its reasons, and addressed each of them.

[32] Some of the appellants argue that the Federal Court erred by failing to adequately consider the public interest in a decision on their applications. They argue that it made only passing references to this issue at paragraphs 47 and 49 of its reasons. I disagree. Those paragraphs provide conclusions reached after having considered the absence of any uncertainty in the jurisprudence and the fact that the appellants' applications "arose in a very specific and exceptional factual context" that is "unlikely to be exactly replicated in the future": see paragraph 42 of the Federal Court's reasons. It follows from this that the Federal Court was of the view that any decision that would be made on the appellants' applications would be of limited value. Though the appellants note several facts that were not acknowledged by the Federal Court in its reasons in this regard, I see neither palpable and overriding error nor extricable error of law here.

[33] It is true, as some of the appellants suggest, that the Federal Court's statement about the absence of uncertainty in the jurisprudence refers to Charter jurisprudence. However, the same

appears to apply to jurisprudence in other areas that might be relevant to the appellants' applications, such as whether the IOs and MOs were *ultra vires* or whether they violated the *Canada Elections Act*, S.C. 2000, c. 9. The appellants have not convinced me otherwise. Moreover, *Borowski* at p. 361 makes clear that the relevant public interest concerns the interest in resolving uncertainty in the law.

[34] The appellants cite several examples of decisions in which other courts exercised their discretion to hear a case despite its mootness. Some of these decisions have treated the public interest as a factor in favour of hearing cases related to the COVID-19 pandemic. However, those cases, based on different circumstances and different exercises of discretion, do not establish that the Federal Court made a reviewable error in this case. For example, I distinguish the decision of the BCCA in *Kassian* on the basis that the trial court in that case had exercised its discretion to hear the matter, and had rendered a decision thereon (unlike the present case). The BCCA exercised its discretion on the basis that one of the points addressed by the trial court was an important one (see *Kassian* at paragraphs 42-43). The BCCA also noted at paragraphs 34-36 that the decision to hear a moot case is discretionary, and that several courts have refused to exercise their discretion in respect of measures against COVID-19.

[35] I also note that there is a difference between a case that raises an issue in which many people are personally interested in having a decision, and a case that raises "an issue of public importance of which a resolution is in the public interest", *per Borowski* at p. 361. The Federal Court was clearly concerned that a decision in the appellants' applications would not be of sufficient value to the public in future circumstances to justify the significant resources that

would be required to hear and decide them. It is notable that, in *Borowski* itself, the issues in debate (the validity of certain provisions of the *Criminal Code* relating to abortion, and the Charter rights of a foetus) were, and remain, of intense public interest. Despite this, the Supreme Court of Canada refused to exercise its discretion to hear that matter despite its mootness.

[36] Some of the appellants argue that the Federal Court erred by failing to find that the IOs and MOs in issue are of a recurring nature but brief duration that are evasive of review. I see no reviewable error here. The Federal Court acknowledged the fact that these orders were periodically replaced with other orders of similar effect, such that a whole series of orders was effectively in issue. However, the finding of mootness is unrelated to the temporary nature of the orders. Whether or not they were of a recurring nature but brief duration, the appellants' applications became moot because of the repeal (or suspension) of the entire series. Any argument of evasiveness of review would have to be based on the possibility that the vaccine mandates would be reinstated.

[37] This brings me to the appellants' argument that the Federal Court erred by failing to consider adequately the threat that the vaccine mandates would be reinstated. Again, I find no merit in this argument. The appellants' argument based on that threat was considered by the Federal Court but dismissed as highly speculative (see paragraph 21 of the Federal Court's reasons). I see no reviewable error in this conclusion. The fact that the Federal Court's discussion in this regard is found in its analysis of the first step of mootness (rather than the second step of exercise of discretion) is of no moment. There is no reason to believe that it was not in the Federal Court's mind while considering the exercise of discretion. Moreover, though

the appellants take issue with the Federal Court's view that the vaccine mandates ended with the repeal of the IOs and MOs, rather than their suspension, it is clear that the Federal Court did not misunderstand what happened.

[38] In addition, even in the event that the vaccine mandates were reinstated at some point, it would be speculative to argue that they would be evasive of review at that time. Any party before either the Federal Court of Appeal or the Federal Court who is concerned that their proceeding may become moot before it can be decided should bear in mind that our Courts are able to expedite proceedings on request, and do so in appropriate circumstances. As an example, earlier this year, this Court, in an appeal from a decision of the Competition Tribunal involving a major proposed merger of Canadian telecommunications companies, was able to hear and render a decision within 26 days after the filing of the notice of appeal (see *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2023 FCA 16). The Court responded appropriately to circumstances in which it was convinced that a quick decision was required.

[39] Some of the appellants argue that the Federal Court erred when it concluded that the declaratory relief sought in the appellants' applications would provide them no practical utility. I disagree. Though the appellants might wish to have a decision on the merits of their applications, I see no reviewable error in the Federal Court's analysis of this consideration, including its conclusion that the appellants had obtained the full relief available to them.

[40] I see no reviewable error that would permit this Court to intervene.

V. Conclusion

[41] For the foregoing reasons, I would dismiss all of the present appeals.

[42] As to costs, having considered the parties' oral submissions, I would award them to the respondent in the all-inclusive amount of $5,000, to be divided equally between the four appeals.

"George R. Locke"
J.A.

"I agree
René LeBlanc J.A."

"I agree
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-251-22 (Lead file), A-252-22, A-253-22 and A-254-22
DOCKET:	A-251-22 (Lead file)
STYLE OF CAUSE:	THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, and AEDAN MACDONALD v. ATTORNEY GENERAL OF CANADA
AND DOCKET:	A-252-22
STYLE OF CAUSE:	SHAUN RICKARD and KARL HARRISON v. ATTORNEY GENERAL OF CANADA
AND DOCKET:	A-253-22
STYLE OF CAUSE:	THE HONOURABLE MAXIME BERNIER v. ATTORNEY GENERAL OF CANADA
AND DOCKET:	A-254-22
STYLE OF CAUSE:	NABIL BEN NAOUM v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 11, 2023
REASONS FOR JUDGMENT BY:	LOCKE J.A.
CONCURRED IN BY:	LEBLANC J.A. GOYETTE J.A.
DATED:	NOVEMBER 9, 2023

APPEARANCES:

Allison Kindle Pejovic Chris Fleury	FOR THE APPELLANTS THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, and AEDAN MACDONALD and FOR THE APPELLANT THE HONOURABLE MAXIME BERNIER
Sam A. Presvelos Evan Presvelos	FOR THE APPELLANTS SHAUN RICKARD and KARL HARRISON
Nabil Ben Naoum	FOR THE APPELLANT (ON HIS OWN BEHALF)
J. Sanderson Graham Robert Drummond Virginie Harvey	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

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Presvelos Law LLP Toronto, Ontario	FOR THE APPELLANTS SHAUN RICKARD and KARL HARRISON
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

Federal Court of Appeal | Cour d'appel fédérale

Date: 20231109

Docket: A-253-22

Ottawa, Ontario, November 09, 2023

CORAM: **LOCKE J.A.**
LEBLANC J.A.
GOYETTE J.A.

BETWEEN:

THE HONOURABLE MAXIME BERNIER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT

The appeal is dismissed with costs in the all-inclusive amount of $1,250.

"George R. Locke"
J.A.

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This test case is about the legal test for mootness in the context of court challenges of executive legislation made during a declared public health emergency. It raises issues of public importance:

- *Presently*, how should courts, in exercising their discretion in mootness cases, consider mootness in the context of emergency orders? Should the principles on exercising discretion for an alleged moot case be altered by the reality that emergency orders were in fact used herein?

  and

- *From a future perspective*, herein and in other pan-Canadian jurisprudence, should the principles guiding judicial discretion in determining whether to hear a moot case be updated to address modern-day emergency orders?

2. The following underlying facts of this case highlight contradictions and problems within the mootness analysis to date:

- No Canadian court has adjudicated the issue of whether it is a justified infringement of Canadians' section 6 *Charter*[1] rights to prohibit air, rail and sea travel based on their willingness to be injected with a novel medication.

- No Canadian court has adjudicated the issue of whether it is a violation of the *Canada Elections Act*[2] to prohibit a leader of a federal political party from travelling across the country by air, where it is necessary for him to do so in order to participate in the democratic political process fairly and equally.

- Never before has the federal government prohibited a class of Canadians who were not facing criminal charges from leaving Canada.

---

[1] *Canadian Charter of Rights and Freedoms*, s. 6.
[2] *Canada Elections Act*, SC 2000, c. 9, s. 81.1.

- The federal government publicly threatened to reinstate the travel vaccine mandate without hesitation should it decide it was necessary.

3. The Application Judge below declined to exercise her discretion and found that judicial economy would not be served by hearing this case on its merits, despite the fact that the federal government threatened to reinstate the travel vaccine mandate. The Federal Court of Appeal chose not to interfere with her discretion. Is it time that the mootness test, last comprehensively determined by this Honourable Court over three decades ago in *Borowski v. Canada*[3], be developed incrementally to ensure that it properly accounts for the nature of emergency orders?

4. The provincial, territorial, and federal use of emergency powers during the COVID-19 crisis were unprecedented in Canada, yet many legal challenges to various emergency orders were dismissed for mootness because the cases could not be heard before the emergency orders were lifted. The seminal mootness test from *Borowski* lacks consideration of the unique circumstance of emergency orders, which are not laws created after careful Parliamentary and legislative debate. Emergency orders of all types, implemented by all levels of government, restricted and impaired some of the most fundamental rights cherished by all Canadians. There is significant public interest in having this Honourable Court weigh in on whether *Borowski* ought to be updated with a new framework which considers emergency orders and their profound effects on Canadians and their rights.

5. The utilization of temporary emergency orders through executive action is a common theme throughout the pandemic period of 2020-2022. Emergency orders are by nature evasive of review. Often, they are statutorily mandated to have a short, set duration and expiration. In this case, they lasted only from the end of November 2021 to June 2022. It is unrealistic to expect that a judicial review can be prepared in such a short time, with complicated legal and scientific issues to resolve.

6. The issue of mootness in the emergency order context is of immense public importance. Without elucidating the applicable principles, courts will have no guidance on how to fit expired emergency orders into *Borowski*'s mootness test. National guidance from Canada's national court

[3] *Borowski v. Canada*, [1989] 1 SCR 342 ["*Borowski"*].

is needed as to how mootness governs judicial scrutiny with respect to emergency orders and to provide a balance between judicial efficiency and the proper administration of justice.

B. Background

7. On August 13, 2021, two days prior to calling the federal election, the federal government announced its intention to create a COVID-19 travel vaccine mandate.

8. On November 30, 2021, the Minister of Transportation issued an Interim Order pursuant to the *Aeronautics Act* which required all commercial aviation travelers to provide proof of having received a COVID-19 vaccine.[4] The *Aeronautics Act* only allows Interim Orders for a limited period of time, and the Minister was required to renew them continuously, which he did until June 20, 2022 when the final Order lapsed and was not renewed.[5]

9. The Applicant, the Honourable Maxime Bernier, is a Canadian citizen who was denied the ability to board a commercial aircraft because of the Orders. He is the leader of the People's Party of Canada ("PPC"), which came in fifth place in the 2021 general election.[6] He was effectively restricted from leaving Canada, and from practically travelling interprovincially, since air travel was the only realistic form of travel. He attested that his *Charter* rights of religion, conscience, right to participate equally in the democratic process, mobility, bodily autonomy and informed consent, and equality were infringed by the Orders.

10. Specifically, the Applicant travels across Canada on a regular basis for his work as the leader of the party. He meets thousands of people across the country, and travels throughout Canada to meet supporters, give speeches and build infrastructure for his party.[7] In 2021, Mr. Bernier flew 79,000 km across Canada for his political work for the PPC. Neither he nor the PPC can afford to charter a private plane, so he relies on commercial aviation to travel vast distances.

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[4] Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 47, dated November 30, 2021, online; *Aeronautics Act*, RSC 1985, c A-2, s. 6.41.
[5] *Ben Naoum v. Canada (Attorney General)*, 2022 FC 1463 at paras. 8-9 ("Application Judge's decision"); see also Interim Order for Civil Aviation Respecting Requirements Related to Vaccination due to COVID-19, dated May 19, 2022, online.
[6] Affidavit of the Honourable Maxime Bernier, sworn March 13, 2022 at para 6 [Application for Leave to Appeal ("LTA"), Tab 3A].
[7] *Ibid* at para. 15.

Air travel is the only viable option as driving across Canada would greatly reduce the amount of political events he could attend due to him spending time on the road.[8]

11. The Applicant, beginning on February 11, 2022, commenced a judicial review at the Federal Court to have the Orders declared unconstitutional for being a breach of sections 2, 3, 6, 7, and 15 of the *Charter*.[9] He also asked the Federal Court to find that the Orders violated section 81.1 of the *Canada Elections Act,*[10] as he argued that they were an obstacle to his equal participation in the democratic political process.[11]

12. The hearing was scheduled for October 2022. However, the Government moved to have the application dismissed on the basis of mootness as the Orders lapsed and were not renewed in June 2022.[12]

C. The Decision of the Federal Court

13. The Application Judge granted the motion and dismissed the application ten days prior to the scheduled commencement of the hearing. She found that while an adversarial context did exist between the parties, concerns for judicial resources outweighed the Applicant's claims of public interest in the matter.[13] She also found that the jurisprudence in this area of the law was settled due to all of the prior COVID matters that had been adjudicated, and that hearing this case would not add anything useful to the legal landscape.[14] She also elected not to formally outline her reasons in respect of the court's proper adjudicative role.

14. The Application Judge ordered costs against the Applicant.

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[8] *Ibid* at paras. 22-23.
[9] Notice of Application for Judicial Review, dated February 11, 2022 [LTA, Tab 3B].
[10] *Canada Elections Act*, SC 2000, c. 9, s. 81.1.
[11] Application Judge's decision at para. 10.
[12] Application Judge's decision at paras. 3-4.
[13] Application Judge's decision at para. 49.
[14] Application Judge's decision at para. 42.

D. The Decision of the Federal Court of Appeal

15. The Federal Court of Appeal dismissed the appeal of the mootness ruling.[15] It found that there were no errors in the lower court's decision, and refused to interfere with the discretionary order which dismissed the Application.

16. It also ordered costs against the Applicant.

PART II – STATEMENT OF ISSUES

17. This leave application raises the following questions of national importance which merits consideration by this Honourable Court:

- Presently, how should courts, in exercising their discretion in mootness cases, consider mootness in the context of emergency orders? Should the principles on exercising discretion for an alleged moot case be altered by the reality that emergency orders were in fact used herein?

  And,
- From a future perspective, herein and in other pan-Canadian jurisprudence, should the principles guiding judicial discretion in determining whether to hear a moot case be updated to address modern-day emergency orders?

PART III – STATEMENT OF ARGUMENT

Issue of Public Importance: Developing the Test for Mootness to Properly Account for Emergency Orders

18. The seminal case on mootness is *Borowski.* In that case, this Honourable Court identified three principal rationales that should be weighed when considering whether to exercise discretion for a moot case. The three rationales are:

a. an existence of an adversarial context; and

b. circumstances that warrant expenditure of limited judicial resources (judicial economy); and

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[15] *Peckford v. Canada (Attorney General)*, 2023 FCA 219 at para. 40 ("Court of Appeal decision").

c. courts' proper adjudicative role so that they do not intrude on the legislative sphere by making freestanding, legislative-like pronouncements.[16]

19. Applying these rationales in the context of modern-day emergency orders highlights shortcomings with respect to the current approach to mootness and how it overly protects government conduct from judicial scrutiny. One reason for this is because of the nature of emergency orders. They are brief in duration, as they are statutorily mandated to expire after a short time. Yet, the continuing circumstances of an emergency may be unique. For example, a pandemic, a natural disaster, or terrorist crisis may all require emergency orders. Each example is unique on its facts. If each of these circumstances are unique, it follows that courts can deflect and avoid reviewing the use of blanket orders by merely citing the doctrine of mootness.

20. Emergency orders also have significant impacts on protected rights and are expansive in scope. For example, in the case at bar, the Applicant was barred from commonplace methods of travel, which he needed for his political activities. Even without considering the underlying merits of the case, this bar is already a significant interference with an activity that the Applicant relies on in his daily life.

21. The first rationale with respect to adversarial context was not at issue in the present case as both courts below acknowledged there was indeed an adversarial context.[17] It was the other two rationales – judicial economy and court's proper adjudicative role – which were relied on to strike the application as moot. These will be addressed in turn below.

A. Judicial Economy

(i) Evasiveness of review

22. Evasiveness of review falls under the judicial economy branch of *Borowski.* It tells courts that issues that are reoccurring but relatively brief in duration militate in favour of a hearing despite mootness.[18]

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[16] Cited in *R. v. Smith,* 2004 SCC 14 at para. 39.
[17] Court of Appeal decision at para. 28.
[18] *Borowski* at p. 360.

23. The evasiveness of review factor has not been seriously considered by this Honourable Court since *Borowski. Borowski* itself dealt with legislation that was already struck down by this Honourable Court, and thus there was nothing further to review. While this Honourable Court has considered evasiveness of review, it has done so only in a very cursory fashion.[19] For example, in cases such as *LaPress Inc. v. Quebec*, *Khela v. Mission Institution*, and *Doucet-Boudreau v. Nova Scotia (Department of Education)* this Honourable Court merely noted that the legal matter at issue was evasive of review and thus ought to be given consideration despite mootness.

24. To illustrate the point, this Honourable Court has repeatedly stated that bail matters are evasive of review because of their repetitive nature, and their brief duration before appellate review.[20] Yet, this Court has never reviewed the exercise of emergency powers through Cabinet. How should Canadian courts consider the issue of evasiveness of review when Government is wielding extraordinary power, which is easily changed and completely lacking in any transparency?

25. In the cases referenced above, it seemed that this Honourable Court found that it was self-evident that the issues were evasive of review and capable of repetition. It is quite easy to figure out why bail orders fit such criteria. However, the use of emergency orders has never been considered by this Court in the mootness context.

26. Further, the courts' approaches to mootness in legal challenges to COVID-19 orders have been, to speak plainly, wildly inconsistent, especially in respect of the application of the principle of "evasiveness of review". The Court of Appeal below wrote:

> Some of the appellants argue that the Federal Court erred by failing to find that the IOs and MOs in issue are of a recurring nature but brief duration that are evasive of review. I see no reviewable error here. The Federal Court acknowledged the fact that these orders were periodically replaced with other orders of similar effect, such that a whole series of orders was effectively in issue. However, the finding of mootness is unrelated to the temporary nature of the

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[19] See *LaPress Inc v. Quebec,* 2023 SCC 22; *R. v. Penunsi,* 2019 SCC 39; *R. v. Myers,* 2019 SCC 18; *R. v. Oland,* 2017 SCC 17; *Khela v. Mission Institution,* 2014 SCC 24; *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services),* 2006 SCC 7; *R. v. Smith,* 2004 SCC 14; *Doucet-Boudreau v. Nova Scotia (Department of Education),* 2003 SCC 62; *New Brunswick v. G(J),* [1999] 3 SCR 46.

[20] *Supra, R. v. Penunsi, R. v. Oland,* and *R. v. Myers.*

> orders. Whether or not they were of a recurring nature but brief duration, the appellants' applications became moot because of the repeal (or suspension) of the entire series. **Any argument of evasiveness of review would have to be based on the possibility that the vaccine mandates would be reinstated.**[21]

27. Thus, the Federal Court of Appeal equates evading review with a requirement that the travel vaccine mandate could be reinstated (which the federal government conceded was a possibility).[22]

28. In contrast, in *Gateway Bible Baptist Church et al. v. Manitoba et al*., the Manitoba Court of Appeal dismissed Manitoba's mootness argument on appeal in part because it found that the Manitoba public health orders at issue in the constitutional challenge (which were expired at the time the appeal was heard) would be evasive of review if it did not adjudicate the appeal.[23] Unlike in this case (where the federal government openly conceded it would not hesitate to bring back the travel vaccine mandate), there was no evidence led that the public health orders restricting religious worship or outdoor gatherings could return. Justice Cameron, writing for the Manitoba Court of Appeal, wrote:

> Regarding judicial economy, they [the appellants] argue that, because the restrictions imposed by the impugned PHOs vary in terms of severity, and the timeframes during which they are in force are relatively short, judicial consideration of the constitutionality of them only when they are in effect would result in "installment litigation". They argue that such a situation would effectively relieve Manitoba of the responsibility to design a program that is constitutionally proportional. They submit that any decision resulting from these proceedings will have an impact on measures taken by Manitoba in the future.
> …
> I am persuaded by the applicants' argument that the impugned PHOs were of brief duration, have varied in the degree of restrictions placed, and are evasive of review.[24]

29. As part of its analysis of "evasiveness of review", the Manitoba Court of Appeal considered that its decision could impact Manitoba's design of future public health orders. That same argument was made and was either rejected or not considered by the Federal Court of Appeal in

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[21] Court of Appeal decision at para. 35 (Emphasis added).
[22] Affidavit of Karl Harrison, sworn August 7, 2022 at Exhibit "B" [LTA, Tab 3C].
[23] *Gateway Bible Baptist Church et al v. Manitoba et al*, 2023 MBCA 56 at paras. 29, 32.
[24] *Gateway Bible Baptist Church et al v. Manitoba et al*, 2023 MBCA 56 at paras. 20, 32.

the present case. These two divergent mootness analyses in respect of what constitutes "evasiveness of review" in emergency orders in the *Borowski* discretionary test highlights the need for this Honourable Court's intervention and guidance.

30. As another example, in *Kassian v. British Columbia*[25] the British Columbia Court of Appeal dealt with an appeal of the lower court's decision in respect of the constitutionality of the British Columbia vaccine passport regime in that province in 2021-2022. Without specifically citing the *Borowski* factor of "evasiveness of review", the British Columbia Court of Appeal wrote, in its decision dismissing the Crown's mootness motion: "The nature of public health emergencies is such that there is a significant possibility that orders like those under challenge in this case may arise in future. Their duration, however, may well not be so long as to allow an appeal to come before this Court during the currency of a live controversy."[26] In that case, the British Columbia Court of Appeal appears to agree that emergency orders are evasive of review due to their short duration.

31. In contrast, the Ontario Court of Appeal in *Harjee et al v. Ontario*[27] refused to hear an appeal about the constitutionality of vaccine passports in Ontario, despite the facts being nearly identical to those in the *Kassian* decision, and the appellants arguing similar issues on appeal. The lower court chose to hear the matter and adjudicated the *Charter* issues despite finding that the application itself was moot. The Ontario Court of Appeal declined to exercise discretion and decided not to hear the appeal, despite the Crown not moving to dismiss the appeal for mootness. The Ontario Court of Appeal held that if a vaccine passport was reintroduced, the facts would be different.[28] It found:

> Our point is not that the factual circumstances in these other cases are identical to the current appeal; rather, it is that there is sufficient judicial guidance on the applicable principles. To the extent that governments may enact public health measures in the future that are challenged on constitutional grounds, the assessment of the constitutionality of those measures is better considered in the presence of a live controversy, based on the factual context at issue and the record in support of constitutional claims

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[25] *Kassian v. British Columbia*, 2023 BCCA 383.
[26] *Kassian* at para. 41.
[27] *Harjee et al v. Ontario*, 2023 ONCA 716.
[28] *Ibid.* at para. 5.

> asserted. We are not persuaded that these issues are so evasive of review as to warrant deciding this moot appeal.[29]

32. Further, in *Spencer v. Canada (Attorney General)*, the Federal Court of Appeal dismissed the appellants' appeal of the lower court's dismissal of their constitutional challenge to the COVID-19 orders requiring returning Canadian travellers to stay at quarantine hotels on the basis of mootness.[30] In that case, the Federal Court of Appeal did not explain why it did not exercise its discretion to hear the appeal, writing simply that: "With respect to the Court's exercise of discretion to hear the appeals despite their mootness, we have considered the relevant factors set out in *Borowski* and agree that the exercise of our discretion is not warranted. It is not necessary to hear the merits of the appeals."[31]

33. As these cases illustrate, these four appeal courts have taken demonstrably different approaches to mootness under the *Borowski* test involving recurring but expired emergency orders. The British Columbia Court of Appeal and the Manitoba Court of Appeal were concerned about the COVID-19 orders at issue being evasive of review if their constitutionality was not adjudicated, while the Ontario Court of Appeal and the Federal Court of Appeal did not share those concerns in their respective COVID-19 cases. The inconsistent findings between all of these courts warrants this Honourable Court's intervention and guidance so that the potential for a new framework may be set post-*Borowski* to account for declared emergencies, both herein and in the future.

(ii) *"Public Interest" in the Context of A Declared Emergency*

34. *Borowski* established that public interest is a factor under the discretionary test for mootness.[32] This Honourable Court wrote: "There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law."[33]

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[29] *Harjee* at para. 7.
[30] *Spencer v. Canada (Attorney General)*, 2023 FCA 8.
[31] *Ibid*. at para. 6.
[32] *Borowski* at p. 361.
[33] *Ibid*.

35. What exactly is public interest in this context? In this regard, the Federal Court of Appeal below found:

> I also note that there is a difference between a case that raises an issue in which many people are personally interested in having a decision, and a case that raises "an issue of public importance of which a resolution is in the public interest", *per Borowski* at p. 361. The Federal Court was clearly concerned that a decision in the appellants' applications would not be of sufficient value to the public in future circumstances to justify the significant resources that would be required to hear and decide them.[34]

36. In the case at bar, it can be readily estimated that millions of Canadians were adversely impacted by the Interim Orders and thus greatly hampered or even barred their ability to leave Canada. Should the number of people affected by the laws or Orders at issue not be a factor within the "public interest" analysis? It is difficult to imagine other such executive orders that would have such an immediate and significant impact to a large number of Canadians. As such, the decisions below set the bar extremely high as to what would satisfy the public interest criteria.

B. Courts' Proper Adjudicative Role in Reviewing Expired Emergency Orders

37. The third branch of the *Borowski* discretionary test involves an analysis of the court's proper law-making role. Of that analysis, this Honourable Court wrote:

> The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability.[35]

38. The Applicant poses an important question in respect of this third element of the discretionary test: In the context of an emergency, is it the role of the courts in Canada to adjudicate whether drastic and unprecedented state action during a declared emergency was lawful? Put another way, *should Canadians have a right to know whether harsh state action during a declared emergency was lawful*? The decision-making process behind emergency orders is protected by privilege. The public has hence no way of knowing what the government considered when it decided to implement drastic and far-reaching decisions. In *Conseil scolaire francophone de la*

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[34] Court of Appeal decision at para. 34.
[35] *Borowski* at p. 362.

Colombie-Britannique v. British Columbia,[36] this Honourable Court discussed the importance of transparency in the law-making process. It refused to grant qualified immunity for policies created by government because it is not transparent, nor tabled on the floor of Parliament and publicly debated.[37] Additionally, this Honourable Court did not consider whether orders-in-councils or regulations ought to be captured by this rule regarding qualified immunity.[38]

39. Further, in *RJR MacDonald Inc. v. Canada (Attorney General)*, this Honourable Court discussed the important balancing role of Parliament versus the role of the courts:

> Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.[39]

40. Building on that legal analysis, is it the proper role of the courts in Canada to ensure that a government which enacts an emergency order that is not debated on the floor of Parliament, is held accountable to Canadians even after it is expired? A law that is duly passed and granted Royal Assent but repealed before it can be judicially reviewed can be scrutinized by the public through the debates held on the floor. An expired emergency order cannot. Where does that leave Canadian citizens whose lives have been significantly affected by unprecedented government action? Do Canadians have a right to know whether the emergency action taken by their own governments that was not debated, and for which they were not consulted, passes constitutional and legal muster?

41. The opening words of the *Charter* set out that "…Canada is founded upon principles that recognize the supremacy of God and the rule of law."[40] Especially in a time of a declared emergency, is it not inherent in the *Charter* that once citizens have rights enshrined in the Constitution the right of a citizen to know whether these rights have been violated by government action overrides mootness? Should the adjudication of *Charter* rights during such an emergency

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[36] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13.
[37] *Ibid.* at para. 173.
[38] *Ibid.* at para. 178.
[39] *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 SCR 199.
[40] *Canadian Charter of Rights and Freedoms*, at Preamble.

be subject to whether the emergency has ended, be at the discretion of a judge, and subject to the mootness discretionary analysis in the same way as when adjudicating disputes that are not emergency-related? What is the point of individual rights and freedoms being enshrined in our Constitution if the Judiciary, citing *Borowski* as it presently stands, actually prevents citizens from knowing whether their rights were violated by unilateral executive emergency orders?

42. This Honourable Court has not so far considered the inscrutability of emergency orders in the context of mootness. The reality is that without judicial review, the public has no way of knowing whether the government violated constitutional fundamental rights. Is regulatory secrecy susceptible to bad faith and improper purpose on the part of government?

43. As the disparate decisions coming out of the pandemic have demonstrated, there is no principled stance upon which to handle the unique nature of emergency orders. Two nearly identical circumstances can result in one case being heard while the other is dismissed on mootness. While it is true that hearing a moot case is discretionary and thus disparate results can occur, the courts have not provided principled reasons for why. Neither have they yet explained how the public is protected from government caprice, especially when evidence reveals that there may have been improper motivations behind certain measures.

44. The novelty of a situation may also be a factor. Many of the emergency orders were unprecedented. In the case at bar, the Applicant cannot submit a situation that was remotely analogous, despite the Application Judge's claim that "[d]eciding these Applications would simply result in applying settled *Charter* jurisprudence…"[41] In such cases, should the novelty of a legislative instrument also be considered as a factor in favour of exercising discretion to provide governments with guidance on how to proceed in the future?

45. For example, this case deals with section 3 democratic rights and section 6 mobility rights under the *Charter.* The issues raised by the Applicant were novel and never considered before. As Justice Estey observed in *Law Society of Upper Canada v. Skapinker*,[42] mobility rights "…have a common meaning until one attempts to seek its outer limits."[43] Section 6 rights themselves are

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[41] Application Judge's decision at para. 42.
[42] *Law Society of Upper Canada v. Skapinker*, [1984] 1 SCR 357.
[43] *Ibid.* at p. 377.

relatively uncanvassed. We only know the extreme ends of the spectrum: the state cannot bar entry or exit from Canada, and the state has no obligation to recover Canadians or permanent residents from abroad.[44] The case at bar presents a nuanced issue: can the state increase the burdens of the means to leave Canada? In essence, can it indirectly stop Canadians from leaving Canada? This is a significant juridical novel issue that has never been considered before and lies between the extreme range of issues in section 6 jurisprudence.

Conclusion

46. The issue before this Honourable Court is of national public importance. It does not deal with just the merits of the case at bar, but with how expired emergency orders should be handled by courts in the future. The world is becoming increasingly unstable, with new crises arising most years. Should Government have constitutional immunity to reach for emergency orders as a convenient tool to avoid the inconvenient hassle of the democratic process in order to respond quickly to emergent events? While these powers have a purpose and may be necessary, is there also a way for governments using them to be accountable in a free and democratic society? If not, is that not an affront to the rule of law? It falls on this Honourable Court to provide guidance on how government should be held to account for the exercise of this power.

47. And, of course, these orders have drastic impacts on *Charter*-protected rights and are usually short in duration and opaque in reasoning, as all decisions are protected by cabinet privilege. Canadians can only resort to judicial review to determine the status of their rights. Even if the exact same orders are not re-implemented, the use of emergency powers will likely occur again, albeit in different circumstances. It is likely that each emergency circumstance will be unique on its facts, but nonetheless informed by past conduct. If this Honourable Court does not provide guidance on the issue of exercising discretion for moot cases, the deployment of emergency powers will be evasive of review. The inconsistency in how mootness was treated during the pandemic delineates this problem.

48. Without proper guidance on the review of emergency orders, this Honourable Court will essentially be giving *carte blanche* for Government to use emergency orders in an unreviewable

[44] *Canada v. Boloh 1(a),* 2023 FCA 120 at paras. 12-13, leave to appeal dismissed.

manner – with the exception of courts' inconsistent exercises of discretion to hear those cases. Should several factors be considered – such as evidence of bad faith, novelty of the issues, and volume of persons affected by an emergency order – as a part of the discretionary balancing? Clear, principled, and well-reasoned exercises of discretion are of immense importance when a case dealing with moot emergency orders comes before a court. Without a principled reason to hear or dismiss a review of a moot emergency order, Canadians are left with the uneasy and uncomfortable feeling that Government can act without accountability or consequence. In addition, it remains unclear as to whether Canadians can reasonably turn to the courts to challenge these types of orders without having the cases struck for mootness and facing significant costs awards.

49. The main issue in this application for leave to appeal is with respect to whether there needs to be an incremental development as to the proper set of factors for reviewing emergency orders that are protected by Cabinet privilege. Who else is going to hold governments to account for exercise of such awesome, sweeping, and secretive uses of power? *Quis custodiet ipsos custodes?*

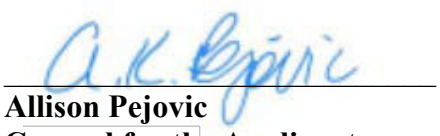
PART IV – SUBMISSIONS ON COSTS

50. The Applicant does not seek costs against the Respondent. He submits that a cost award against him would be inappropriate in this case due to the precedential value and public interest at a national level.

PART V – ORDER SOUGHT

51. The Applicant respectfully requests that this Honourable Court grant leave to appeal, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of January, 2024.



Allison Pejovic
Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

CASE	Cited at paragraph
Borowski v. Canada, [1989] 1 SCR 342	3, 4, 6, 18, 22, 23, 29, 30, 32, 33, 34, 37, 41
Canada v. Boloh 1(a), 2023 FCA 120	45
Conseil scolaire francophone de la Columbie-Britannique v. British Columbia, 2020 SCC 13	38
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SECONDARY SOURCES	
Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 47, dated November 30, 2021, online	8
Interim Order for Civil Aviation Respecting Requirements Related to Vaccination due to COVID-19, dated May 19, 2022, online	8

LEGISLATION	**Section(s)**
Aeronautics Act, RSC 1985, c A-2 *Loi sur l'aéronautique*, L.R.C. (1985), ch. A-2	6.41 6.41
Canada Elections Act, SC 2000, c. 9 *Loi électorale du Canada*, L.C. 2000, ch. 9	81.1 81.1
Canadian Charter of Rights and Freedoms *Charte canadienne des droits et libertés*	Preamble, 2, 3, 6, 7, 15 Préambule, 2, 3, 6, 7, 15

Dossier N° T-247-22 (CF)

COUR FÉDÉRALE

ENTRE :

L'HONORABLE MAXIME BERNIER

Demandeur

et

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeurs

AFFIDAVIT DU DEMANDEUR MAXIME BERNIER
(Assermenté le 13 mars 2022)

Je soussigné, MAXIME BERNIER, ayant mon domicile professionnel au 1, rue Nicholas, suite 700, en la ville d'Ottawa, province de l'Ontario, Canada, K1N 7B7, DÉCLARE SOUS SERMENT QUE :

1. Je suis demandeur en l'instance.

2. Je suis né le 18 janvier 1963 à Saint-Georges, en Beauce, au Québec.

3. Après des études en administration et en droit, j'ai occupé, dans les années 1990 et au début des années 2000, des emplois dans les domaines de la finance et de l'économie.

4. Entre 2006 et 2019, j'ai eu le privilège de siéger à la Chambre des Communes du Canada en qualité de député de Beauce.

5. Je suis le chef fondateur du Parti populaire du Canada (« **PPC** ») l'automne 2018; je me consacre à cette fonction à temps plein. Je défends une philosophie politique qui tient du libéralisme classique, prônant la liberté et responsabilité individuelles. Je préconise un gouvernement fédéral de taille relativement réduite, qui respecte notre Constitution, notre *Charte des droits et libertés* ainsi que la division des pouvoirs entre le palier fédéral et les provinces.

6. Le PPC est un parti fédéral de premier plan. Ayant obtenu plus de 840 000

voix et 4,9% des votes, il est arrivé au cinquième rang à l'issue de l'élection générale de 2021.

7. Je suis le seul chef d'un parti politique fédéral majeur qui défende vraiment la liberté et la responsabilité individuelles, le libre marché, la levée des barrières commerciales interprovinciales, la réforme de la formule de péréquation, l'abolition de l'aide étrangère (sauf lors de catastrophes majeures), l'abolition des subventions aux entreprises, l'abolition de la gestion de l'offre en matière agricole et le retrait du Canada de *l'Accord de Paris sur le climat* et du *Pacte mondial sur les migrations* des Nations Unies, pour ne nommer que quelques-unes de nos politiques.

8. J'ai participé à la rédaction de l'*Avis de demande de contrôle judiciaire* daté du 10 février 2022 et produit au dossier T-247-22. Les faits qui y sont allégués sont vrais à ma connaissance personnelle.

9. J'ai pris connaissance de l'*Arrêté d'urgence n^{o} 53 visant certaines exigences relatives à l'aviation civile en raison de la COVID-19*, ainsi que des arrêtés qui l'ont précédé et suivi (ci-après, collectivement, « **Arrêtés** »).

10. Je retiens des Arrêtés qu'il est interdit aux personnes non « entièrement vaccinée[s] » de voyager par avion, sauf exemption médicale.

11. Je retiens, en outre, que les personnes qui seraient en mesure de démontrer qu'elles ont déjà contracté la Covid-19 ou qui ont des anticorps contre la Covid-19 ne sont pas considérées comme « entièrement vaccinée[s] »

12. En ce qui concerne la Covid-19, je suis le seul chef d'un parti politique fédéral majeur qui soit franchement et ouvertement opposé, par principe et depuis le début de la pandémie, aux mesures de confinement, aux restrictions au droit de circuler, aux couvre-feux, à la fermeture obligée des commerces et lieux de rassemblement, à l'obligation de porter le masque dans les lieux fréquentés par le public, à l'instauration d'un passeport vaccinal comme préalable au droit de travailler ou d'obtenir des biens et services généralement offerts au public, à la répression des manifestations pacifiques d'opposition aux mesures dites sanitaires (*Freedom Convoy 2022*, notamment).

13. Or, les grands médias écrits, radiophoniques et télévisuels canadiens n'accordent au PPC que très peu d'attention relativement aux autres partis fédéraux. Les revues de presse que me procure mon directeur des communications quotidiennement et ce, depuis quelques années, me permettent de l'affirmer ici avec certitude.

14. Ce refus des grands médias d'accorder au PPC une attention à peu près représentative de son poids politique m'oblige, pour arriver à diffuser le message politique du PPC, à investir plus d'énergie dans des façons

alternatives de rejoindre les électeurs : conférences, rallyes et autres activités « en présentiel ».

15. En qualité de chef d'un parti national, je dois aller la rencontre de milliers de personnes à chaque année et participer à diverses activités politiques et intellectuelles dans toutes les régions du pays : rencontrer les membres des associations de comté du PPC, prononcer des discours dans des universités et des chambres de commerces à travers le pays, rencontrer des candidats potentiels pour notre parti, aider à bâtir l'infrastructure du PPC dans chaque circonscription, et

16. Je ne nie pas l'utilité des médias sociaux comme Twitter, YouTube et Rumble, mais j'ai pu constater, depuis mes débuts en politique élective, que les activités de terrain (en personne) sont celles qui offrent à un chef de parti les meilleures conditions de communication avec les citoyens. En effet, il n'existe aucun substitut valable à la présence humaine.

17. De plus, la réalité des régions est difficile à saisir à travers le seul prisme des grands médias, car ceux-ci sont essentiellement métropolitains. Selon mon expérience, rien ne remplace un séjour sur place pour bien percevoir les enjeux régionaux et le pouls de la population, des entreprises et organismes locaux.

18. La possibilité de rencontrer les gens en personne prend aussi une importance particulière chez les électeurs aînés qui sont moins (ou pas du tout) familiers avec Internet et les technologies de l'information.

19. Contrairement à certains politiciens au pouvoir, je pratique la politique « en présentiel ». Je ne m'isole pas chez moi ou au chalet pour de vagues raisons sanitaires, je n'esquive pas mes adversaires politiques, je ne suis pas partisan de la fermeture arbitraire du Parlement, je ne méprise pas mes concitoyens et n'évite pas d'aller à leur rencontre quand ils sont en désaccord avec moi.

20. En 2021, j'ai parcouru plus de 79 000 km en avion au Canada pour les besoins de mon travail.

21. Le PPC et moi n'avons pas les moyens de noliser un avion pour mes activités politiques. Cela représenterait une dépense de plusieurs milliers de dollars par voyage.

22. J'habite à Montréal avec mon épouse. À l'échelle d'un trimestre ou d'une année, voyager autrement que par avion n'est raisonnablement faisable que dans un rayon relativement limité autour de mon lieu de résidence.

23. Parcourir des dizaines de milliers de kilomètres en voiture ou en autobus prendrait beaucoup plus de temps que ne le permet un emploi du temps efficace.

24. Le 16 décembre 2021, le premier ministre a enjoint au ministre des Transports d'exiger que les voyageurs sur les vols commerciaux à l'intérieur et au départ du Canada soient vaccinés, tel qu'il appert de la lettre de mandat du 16 décembre 2021, **annexe A**. Le ministre des Transports a pris les Arrêtés en conséquence.

25. Les Arrêtés font de moi le seul chef d'un parti fédéral majeur qui soit empêché de voyager par avion pour accomplir sa mission politique, laquelle inclut, ironiquement, la contestation des mesures Covid du gouvernement libéral.

26. En restreignant ma mobilité en fonction de mon statut vaccinal, les Arrêtés violent mes droits de participation aux discussions démocratiques et au processus électoral.

27. Depuis janvier 2022, en raison des Arrêtés, j'ai dû renoncer à plusieurs activités démocratiques qui s'inscrivaient dans le cadre normal de mes fonctions politiques. Je n'ai pas pu participer en tant qu'orateur dans des rallyes à Calgary en janvier dernier, à St-John's Terre-Neuve-et-Labrador en février dernier et à Victoria en Colombie-Britanique ce mois-ci.

28. Je suis en bonne condition physique. J'ai toujours été plutôt sportif. J'ai joué au football aux niveaux secondaire et collégial. Depuis mes 30 ans, je fais régulièrement de la course à pied – entre 40 et 70 kilomètres par semaine.

29. En fait de Covid-10, les chances de guérison des personnes de moins de 60 ans sans comorbidités (groupe dont je fais partie) excèdent 99,9%.

30. J'ai choisi de ne pas me faire inoculer contre la Covid-19 en raison des risques associés à ce médicament biologique expérimental, aux effets à court et à long terme encore méconnus.

31. À ma connaissance, six vaccins sont actuellement autorisés au Canada pour traiter les symptômes de la Covid-19 : AstraZeneca, Moderna, Pfizer, Johnson & Johnson, Novavax et Medicago, tel qu'il appert des avis de Santé Canada ci-joints comme **annexe B**.

32. Ces vaccins sont toujours en cours d'essais cliniques, dont l'achèvement est prévu en 2023 ou plus tard.

33. Il est notoire et de connaissance judiciaire qu'aucun desdits vaccins n'empêche l'infection ou la transmission de la Covid-19.

34. Au fil des mois depuis les débuts de la campagne de vaccination à la fin 2020, je me suis renseigné sur les effets secondaires potentiels répertoriés par Santé Canada, tel qu'il appert des données et avis ci-joints en liasse comme **annexe C**.

35. Les effets secondaires du vaccin peuvent être sévères, voire mortels : myocardite, péricardite, paralysie de Bell, thrombose, thrombocytopénie immunitaire et thromboembolie veineuse, par exemple. Je crains légitimement ces possibles conséquences indésirables.

36. Je ne suis pas moralement opposé à la vaccination. J'ai déjà eu le vaccin contre la choléra, le tétanos, la diphtérie, l'hépatite A et B, la méningite à méningocoques et la fièvre typhoïde. J'ai d'ailleurs conseillé à mon père, âgé de 87 ans et diabétique, de se faire vacciner.

37. Vaccinés comme non-vaccinés peuvent être infectés par la Covid-19 et la transmettre.

38. Je préfère développer une immunité naturelle et j'accepte les risques découlant de cette décision.

39. J'ai d'ailleurs contracté la Covid-19 à l'automne 2021, tel qu'il appert des documents médicaux ci-joints comme **annexe D**, dont j'ai caviardé les informations confidentielles (numéro RAMQ, numéro de dossier du médecin, adresse résidentielle).

40. Je me suis remis sans mal de cette infection. Environ une semaine après l'apparition des premiers symptômes, j'ai retrouvé un état général normal : aucun manque d'énergie, aucune douleur, etc. Je ne garde aucune séquelle de la Covid-19.

41. L'environnement des aérodromes et des aéronefs ne présente aucun risque particulier ou accru de propagation de la Covid-19. Les Arrêtés ne parent donc à aucun risque appréciable pour la sûreté aérienne ou la sécurité du public en contexte aéronautique.

42. Le premier ministre du Canada a tenu des propos intolérants et diffamatoires au sujet des personnes qui refusaient le vaccin contre la Covid-19, tel qu'il appert des extraits audio et vidéo ci-joints comme **annexe E**.

43. J'ai pu constater, depuis le début 2021, le colportage de stéréotypes, de propos dégradants et diffamatoires, de mensonges et d'allégations quasi haineuses au sujet des non-vaccinés par de grands médias d'information, des personnalités publiques influentes et nombre de politiciens fédéraux et provinciaux, tel qu'il appert des extraits écrits, audio et vidéo ci-joints en liasse comme **annexe F**.

44. À l'instar de ces discours discriminatoires et répréhensibles, les Arrêtés traitent les personnes non vaccinées, dont je suis, comme des citoyens de seconde zone, des indésirables, des pestiférés.

45. Les Arrêtés, lus dans le contexte des autres mesures gouvernementales

relatives à la Covid-19, me semblent punitifs et d'autant plus vexatoires qu'ils sont futiles sur le plan de la santé et de la science.

46. Les faits que j'allègue au présent affidavit sont vrais à ma connaissance personnelle.

Déclaré sous serment devant moi par l'Honorable Maxime Bernier, à distance, le 13 mars 2022, conformément aux normes d'assermentation applicables dans la province du Québec.

Maxime Bernier

Alexandra Pasca, avocate
Commissaire à l'assermentation
[redacted]

Dossier N° T-247-22

e-document

FEDERAL COURT
COUR FÉDÉRALE

FILED — DÉPOSÉ

11 février 2022

Yanick Gagnon

Montréal, QC

COUR FÉDÉRALE

ENTRE :

L'HONORABLE MAXIME BERNIER

Demandeur

et

LE MINISTRE DES TRANSPORTS ET LE PROCUREUR GÉNÉRAL DU CANADA

Défendeurs

DEMANDE EN VERTU des articles 18 et 18.1 de la *Loi sur les Cours fédérales*, LRC 1985, ch. F-7, et des règles 300(a) et 317 des *Règles des Cours fédérales*, DORS/98-106

AVIS DE DEMANDE DE CONTRÔLE JUDICIAIRE

AUX DÉFENDEURS :

UNE INSTANCE A ÉTÉ INTRODUITE CONTRE VOUS par le Demandeur. La réparation demandée par celui-ci est exposée ci-après.

LA PRÉSENTE DEMANDE sera entendue par la Cour aux date, heure et lieu fixés par l'administrateur judiciaire. À moins que la Cour n'en ordonne autrement, le lieu de l'audience sera celui choisi par le Demandeur. Celui-ci demande que l'audience soit tenue à Ottawa.

SI VOUS DÉSIREZ CONTESTER LA DEMANDE, être avisé de toute procédure engagée dans le cadre de la demande ou recevoir signification de tout document visé dans la demande, vous-même ou un avocat vous représentant devez déposer un avis de comparution établi selon la formule 305 des *Règles des Cours fédérales* et le signifier à l'avocat du Demandeur ou, si ce dernier n'a pas retenu les services d'un avocat, au Demandeur lui-même, DANS LES DIX JOURS suivant la date à laquelle le présent avis de demande vous est signifié.

Des exemplaires des *Règles des Cours fédérales* ainsi que les renseignements concernant les bureaux locaux de la Cour et autres renseignements utiles peuvent être obtenus, sur demande, de l'administrateur de la Cour, à Ottawa (nº de téléphone : 613-992-4238), ou à tout bureau local.

SI VOUS NE CONTESTEZ PAS LA DEMANDE, UN JUGEMENT PEUT ÊTRE RENDU EN VOTRE ABSENCE SANS QUE VOUS RECEVIEZ D'AUTRE AVIS.

Le 11 février 2022

Délivré par : 

_____

(Fonctionnaire du greffe)

Adresse du bureau local :

[redacted]

DESTINATAIRES :

À : **L'Administrateur de la Cour fédérale**

[redacted]

ET À : **Procureur général du Canada**

Procureur des Défendeurs
Ministère de la Justice Canada

[redacted]

DEMANDE

LE DEMANDEUR REQUIERT LE CONTRÔLE JUDICIAIRE, en vertu des articles 18 et 18.1 de la *Loi sur les Cours fédérales*, LRC 1985, ch. F-7, de l'*Arrêté d'urgence n^{o} 53 visant certaines exigences relatives à l'aviation civile en raison de la COVID-19* (« **Arrêté** ») qu'a pris par le ministre des Transports le 28 janvier 2022.

1. Sauf rares exceptions, l'Arrêté interdit aux personnes non « entièrement vaccinée[s] » contre la Covid-19 de voyager par avion. Il en résulte une discrimination et une violation flagrante des droits constitutionnellement protégés des Canadiens.

2. Des données scientifiques ont maintes fois confirmé que les vaccins en question n'empêchaient pas l'infection ni la transmission du virus connu sous le nom de SRAS-CoV-2 (ou de variants tels qu'Omicron).

3. En restreignant la mobilité des citoyens en fonction de leur statut vaccinal, l'Arrêté viole les droits de participation du Demandeur aux discussions démocratiques et au processus électoral.

4. L'Arrêté ne pare à aucun risque appréciable pour la sûreté aérienne ou la sécurité du public en contexte aéronautique.

5. La présente demande de contrôle judiciaire (« **Demande** ») relève du droit constitutionnel et quasi constitutionnel; les conclusions recherchées reposent sur l'article 52 de la *Loi constitutionnelle de 1982*, l'article 24(1) de la *Charte canadienne des droits et libertés* (« **Charte** ») et l'article 2 *in limine* de la *Déclaration canadienne des droits*, SC 1960, c. 44 (« **Déclaration canadienne** »);

6. Les remèdes souhaités comprennent :

    a. Une ordonnance de *certiorari* annulant l'Arrêté;

    b. Des déclarations d'inconstitutionnalité et d'inapplicabilité de l'Arrêté;

    c. Une ordonnance de prohibition contre toute éventuelle décision similaire à l'Arrêté eu égard au statut vaccinal des personnes.

LE DEMANDEUR RECHERCHE les réparations et ordonnances suivantes :

7. Un jugement annulant l'Arrêté ou :

    a. Déclarant constitutionnellement inopérant ou inapplicable l'Arrêté ou, subsidiairement, ses articles 1(6) et (7), 2(3) et (4), et 17.1 à 17.17 (« **Clauses vaccinales** »), et

    b. Déclarant que l'Arrêté ou, subsidiairement, ses Clauses vaccinales violent les droits garantis au Demandeur par les articles 2(b), c) et d), 3, 6, 7 et 15 de la Charte et ce, sans justification suffisante au regard de l'article 1 de celle-ci;

    c. Déclarant que l'Arrêté ou, subsidiairement, ses Clauses vaccinales violent l'article 81.1 de la *Loi électorale du Canada*;

8. Subsidiairement, une déclaration selon laquelle une personne dotée d'une immunité naturelle au Covid-19 est « entièrement vaccinée » au sens de l'Arrêté ou d'une éventuelle décision ou norme comportant des dispositions similaires aux Clause vaccinales;

9. Une ordonnance interdisant au ministre des Transports de prendre d'éventuels arrêtés ou autres mesures analogues à l'Arrêté ou aux Clauses vaccinales qui restreindraient l'accès des personnes non vaccinées au transport aérien;

10. Des ordonnances abrégeant le délai de signification de la présente Demande et permettant à celle-ci d'être instruite de manière accélérée;

11. Conformément à la règle 317 des *Règles des Cours fédérales*, la divulgation de renseignements et de documents pertinents détenus par l'office fédéral;

12. La condamnation des Défendeurs aux dépens de cette Demande;

13. Tout autre redressement que le Demandeur pourrait demander et que cette honorable Cour pourrait accorder.

LES MOTIFS DE LA DEMANDE sont les suivants :

A) LES PARTIES

14. Le Demandeur travaille à temps plein comme chef du Parti Populaire du Canada, cinquième formation politique fédérale en importance selon le nombre de votes reçus lors de l'élection générale de septembre 2021.

15. Le Demandeur a contracté la Covid-19 à l'automne 2021 et s'en est remis sans mal; il a repris ses activités normales depuis et n'en garde apparemment aucune séquelle.

16. Le Demandeur est en bonne santé; il a 59 ans et fait du sport régulièrement. Il risquerait fort peu de tomber gravement malade ou de perdre la vie s'il contractait de nouveau la Covid-19.

17. Les Défendeurs sont :

    a. Sa Majesté la Reine du chef du Canada, représentée par le Procureur général du Canada au nom du Gouverneur général en conseil;

    b. L'honorable Omar Alghabra, ministre des Transports, et Transports Canada.

B) EXPOSÉ SOMMAIRE DES FAITS

a. Genèse de l'Arrêté

18. Dans les mois qui ont précédé la publication de l'Arrêté, le premier ministre du Canada a fait des déclarations vitrioliques au sujet de personnes qui refusaient le vaccin.

19. Le 16 décembre 2021, le premier ministre a enjoint au ministre des Transports d'exiger que les voyageurs sur les vols commerciaux à l'intérieur et au départ du Canada soient vaccinés. Le ministre a adopté des instruments en conséquence, l'Arrêté étant le plus récent.

20. Le 28 janvier 2022, le ministre des Transports a pris l'Arrêté sous ce qu'il estimait être l'autorité de l'article 6.41 de la *Loi sur l'aéronautique*. L'Arrêté est entré en vigueur le jour même et n'a pas de date d'expiration.

21. Les Clauses vaccinales exigent que tous les voyageurs aériens présentent une preuve de vaccination contre la Covid-19 pour monter à bord d'un avion au départ d'un aérodrome qui figure à l'annexe 1 de l'Arrêté.

22. L'Arrêté discrimine un groupe identifiable (les personnes non vaccinées) et ne prévoit pas d'exemptions pour les individus qui ont développé une immunité naturelle contre la Covid-19 ni pour ceux qui souhaitent participer au processus démocratique.

b. Les vaccins

23. Quatre vaccins sont actuellement autorisés au Canada pour traiter les symptômes de la Covid-19 : AstraZeneca, Moderna, Pfizer et Johnson & Johnson. Ces vaccins sont toujours en cours d'essais cliniques, dont l'achèvement est prévu en 2023 ou plus tard. Aucun d'entre eux n'empêche l'infection ou la transmission de la Covid-19.

24. Ces vaccins peuvent causer des effets indésirables sévères, voire mortels, dont la myocardite, la péricardite, la paralysie de Bell, la thrombose, la thrombocytopénie immunitaire et la thromboembolie veineuse.

25. Vaccinés comme non-vaccinés peuvent être infectés par la Covid-19 et la transmettre.

26. Les chances de guérison des personnes de moins de 60 ans sans comorbidités avoisinent 99,997%.

c. Préjudice causé au Demandeur

27. Le Demandeur est bien au fait des propos presque haineux que tiennent, au sujet des personnes non vaccinées, nombre de personnalités médiatiques et politiques canadiennes. L'Arrêté, lui aussi, est porteur d'une discrimination dont le Demandeur fait aujourd'hui l'amère expérience.

28. Le Demandeur a choisi de ne pas se faire inoculer contre la Covid-19 en raison des risques associés à un médicament biologique qu'il juge expérimental, développé à la hâte et dont les effets à court et à long terme restent à déterminer. Il préfère développer une immunité naturelle et accepte les risques découlant de cette décision. Le requérant peut d'ailleurs prouver qu'il a développé des anticorps à la suite d'une infection passée à la Covid-19.

29. Le Demandeur a examiné les effets secondaires potentiels du vaccin répertoriés par Santé Canada; il craint légitimement ces possibles conséquences indésirables. Le Demandeur n'est pas moralement opposé à la vaccination en tant que telle, cependant; s'il était très âgé ou de santé fragile, il aurait envisagé de prendre le vaccin.

30. En qualité de chef de parti, le Demandeur se doit d'aller à la rencontre de milliers de personnes chaque année et de participer à diverses activités politiques, intellectuelles et caritatives dans toutes les régions du pays. Voyager autrement que par avion n'est raisonnablement faisable que dans un rayon relativement limité autour de son lieu de résidence, au Québec.

31. En 2021, le Demandeur a parcouru plus de 79 000 km en avion au Canada pour les besoins de son travail.

32. Ni le Demandeur ni son parti n'ont les moyens de noliser un avion pour lui.

33. Parcourir de telles distances en voiture prendrait beaucoup plus de temps que le permet l'horaire du Demandeur. Cela l'exposerait, du moins sur la route, à des conditions météorologiques et sécuritaires relativement dangereuses, et le désavantagerait par rapport à d'autres candidats fédéraux.

34. L'Arrêté conditionne l'accès au transport aérien à la vaccination du passager. Il prévoit de rares possibilités d'exemption, dont aucune n'est ouverte au Demandeur.

35. N'étant pas vacciné, le Demandeur ne peut pratiquement plus voyager au Canada. En lui interdisant de prendre l'avion, l'Arrêté nuit au travail du Demandeur et l'empêche de participer pleinement à la vie démocratique de son parti et de son pays.

C) EXPOSÉ SOMMAIRE DES MOYENS DE DROIT

36. Ironiquement, c'est à l'heure où s'élève la voix solitaire du Demandeur contre les excès de zèle sanitaire que ses adversaires politiques emploient contre lui le prétexte de la Covid-19 pour l'empêcher de jouer son rôle dans la démocratie canadienne.

37. L'exigence de l'Arrêté selon laquelle les Canadiens doivent être vaccinés pour voler ne pare à aucun « risque appréciable — direct ou indirect — pour la sûreté aérienne ou la sécurité du public » au sens de l'article 6.41 de la *Loi sur l'aéronautique*. Elle n'a pas d'incidence significative sur la probabilité qu'un voyageur introduise ou propage la Covid-19.

38. L'environnement des aérodromes et des aéronefs ne présente aucun risque particulier ou accru de propagation de la Covid-19.

39. L'Arrêté et ses Clauses vaccinales violent les droits du Demandeur en vertu de la Charte :

    a. Articles 2(b), (c) et (d), et 3 : en exigeant que le Demandeur se soumette à la vaccination pour voyager en avion et en ne prévoyant pas d'exception ou d'exemption pour la participation aux activités de son parti, aux discussions démocratiques et au processus électoral;

    b. Article 6 : en privant le Demandeur du seul véritable moyen de parcourir de longues distances, notamment interprovinciales, dans des conditions raisonnables;

    c. Article 7 : en violant les droits du Demandeur à la liberté et la sécurité de sa personne, en l'empêchant – par des moyens coercitifs, arbitraires, excessifs et grossièrement disproportionnés – de circuler dans son vaste pays, sauf en se soumettant contre son gré à la vaccination.

    d. Article 15 : son droit à l'égalité, en l'étiquetant effectivement comme non « entièrement vacciné », en le traitant comme un citoyen de second ordre, voire un paria, tout en permettant aux Canadiens « entièrement vaccinés » de voler, bien que ces deux catégories arbitrairement créées ne diffèrent guère quant aux risques qu'elles posent à la sûreté et à la sécurité aériennes. Les Clauses vaccinales cherchent à punir le Demandeur et les personnes non vaccinées pour l'exercice qu'ils font de leurs droits fondamentaux.

40. L'Arrêté n'est pas justifié au regard de l'article 1 de la Charte. Il ne sert pas l'intérêt public – sauf à assimiler celui-ci à la stratégie médiatique de certains gouvernants – et n'est pas un moyen rationnel de poursuivre l'objectif déclaré. L'Arrêté ne porte pas minimalement atteinte aux droits du Demandeur et cette atteinte n'est pas proportionnée aux bienfaits espérés, s'il en est.

41. L'Arrêté et ses Clauses vaccinales sont incompatibles avec les droits du Demandeur à l'égalité devant la loi, à la liberté et à la sécurité de sa personne, et à ses libertés de parole, de réunion et d'association tels que reconnus par l'article 1 de la Déclaration canadienne des droits.

42. L'Arrêté contrevient à l'article 81.1 de la *Loi électorale du Canada*, car il fait obstacle au droit de participer au processus démocratique en toute égalité.

43. L'Arrêté ne constitue pas une application régulière de la loi. Il est si exorbitant de l'article 6.41 de la *Loi sur l'aéronautique* qu'il constitue en fait une forme de législation déguisée, court-circuitant la procédure parlementaire et usurpant la fonction du législateur fédéral.

44. Tout autre moyen que les procureurs du Demandeur pourraient présenter et que cette honorable Cour pourrait autoriser.

D) LÉGISLATION INVOQUÉE

45. Le Demandeur invoque les textes suivants :

    a. *Charte canadienne des droits et libertés*;

    b. *Loi constitutionnelle de 1982*;

    c. *Loi constitutionnelle de 1867*;

    d. *Déclaration canadienne des droits*, SC 1960, ch. 44 ;

    e. *Loi sur l'aéronautique*, LRC (1985), ch. A-2 ;

f. *Loi électorale du Canada*, LC 2000, c. 9;

g. *Arrêté d'urgence nº 53 visant certaines exigences relatives à l'aviation civile en raison de la COVID-19*;

h. Toutes autres autorités et lois que les procureurs du Demandeur pourraient présenter et que cette honorable Cour pourrait accepter.

E) PREUVE AU SOUTIEN DE LA DEMANDE

46. Le Demandeur entend déposer, avec annexes ou pièces jointes :

a. Sa propre déclaration assermentée;

b. D'autres preuves par affidavit, y compris des dépositions d'experts et de témoins factuels.

c. Toute autre preuve que les procureurs du Demandeur pourraient proposer et que cette honorable Cour pourrait autoriser.

F) DEMANDE DE DOCUMENTS À L'OFFICE FÉDÉRAL

47. En vertu de l'article 317 des *Règles des Cours fédérales*, le Demandeur requiert que le ministre des Transports, Transports Canada, le procureur général du Canada et le Gouverneur en conseil fournissent une copie certifiée conforme des documents et renseignements suivants :

a. Tous les renseignements relatifs au statut vaccinal des personnes et sur lesquels le ministre des Transports se serait fondé pour prendre l'Arrêté ;

b. Tous les renseignements et documents obtenus ou élaborés par le ministre des Transports à l'occasion de ses communications avec toute personne ou organisme qu'il aurait estimé « opportun de consulter », au sens de l'article 6.41(1.2) de la *Loi sur l'aéronautique*;

c. Tous les documents, y compris, mais sans s'y limiter, les recherches, les analyses, les documents d'orientation, les rapports d'information, les études, les propositions, les présentations, les rapports, les notes de service, les opinions, les conseils, les lettres, les courriels et toute autre communication qui ont été préparés, commandés, examinés ou reçus par le gouvernement du Canada relativement à l'*Arrêté d'urgence n^{o} 53 visant certaines exigences relatives à l'aviation civile en raison de la COVID-19* ;

d. Toutes les correspondances, lettres, courriels et autres communications liées à l'*Arrêté d'urgence n^{o} 53 visant certaines exigences relatives à l'aviation civile en raison de la COVID-19*, entre les Défendeurs et :

   i. Le Gouverneur général en conseil;

   ii. Le premier ministre du Canada;

   iii. Le Bureau du Conseil privé;

   iv. Le ministère de la Justice ;

   v. Affaires mondiales Canada;

   vi. Relations Couronne-Autochtones et Affaires du Nord Canada;

   vii. Les provinces et territoires du Canada, y compris le ministre des Transports de chaque province et territoire ;

   viii. Les représentants élus, nommés ou héréditaires des Premières Nations et des peuples autochtones du Canada ;

   ix. Les municipalités du Canada.

G) INSTRUCTION ACCÉLÉRÉE

48. En vertu de l'article 385 des *Règles des Cours fédérales* et vu la nécessité d'une solution expéditive au présent litige, le Demandeur requiert que le dossier fasse l'objet d'ordonnances qui permettront une procédure et une instruction accélérées.

Montréal, le 10 février 2022

LIS s.a.
(M^e^ Samuel Bachand)
[redacted]
Procureurs du Demandeur

DESTINATAIRES :

À : **L'Administrateur de la Cour fédérale**
[redacted]

ET À : **Procureur général du Canada**
Procureur des Défendeurs
Ministère de la Justice Canada
[redacted]

88

Nº T-247-22
Cour fédérale
HON. MAXIME BERNIER Demandeur et **LE MINISTRE DES TRANSPORTS ET LE PROCUREUR GÉNÉRAL DU CANADA** Défendeurs
AVIS DE DEMANDE DE CONTRÔLE JUDICIAIRE
Original
Me Samuel Bachand **LIS s.a.** [redacted]

Court File No.: T-1991-21

FEDERAL COURT OF CANADA

BETWEEN:

SHAUN RICKARD AND KARL HARRISON

Applicants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

THE AFFIDAVIT OF KARL HARRISON

(Sworn August 7th, 2022)

I, KARL HARRISON, IN THE CITY OF VANCOUVER, THE PROVINCE OF BRITISH COLUMBIA, MAKE OATH AND SAY:

1. My name is Karl Harrison. I am one of the Applicants in this proceeding. As such, I have personal knowledge of the matters hereinafter set out, except where such matters are based on information and belief in which case, I have stated the source of that information, and believe it to be true.

2. As I previously detailed in my affidavits sworn March 10th, 2022, and July 12th, 2022, my co-Applicant, Shaun Rickard, and I brought this Application seeking redress from this Court in response to several Ministerial Orders, made by the Minister of Transportation, implementing a vaccine mandate prohibiting unvaccinated Canadians or permanent residents from travelling by air, rail or ship (except in very narrow or limited exempted circumstances). I believe these Ministerial Orders were unconstitutional and unlawfully force me, and other Canadians, to decide between forfeiting my constitutionally guaranteed bodily autonomy (by receiving an unwanted

and irreversible medical treatment, i.e., a COVID-19 vaccine) or forfeiting my constitutionally guaranteed mobility rights (which would prevent me from freely travelling within and outside of Canada). This is a choice I never thought I would have to make.

3. This Application is important to my co-Applicant and me. So much so that we have invested significant time and resources in advancing it on a timely basis. We made numerous personal sacrifices – including taking time away from our respective businesses and families. This litigation has taken a substantial toll on my personal and professional life.

4. For these reasons, I am disheartened by the fact that a late-breaking and unexplained decision by the Minister (i.e., the true Respondent in this Application) can jeopardize whether or not our Application will be heard. The very institution Mr. Rickard and I are looking to hold accountable is now able to alter the landscape without having to answer for its unprecedented conduct over the last eight months.

The "Suspension" of the Vaccine Mandate for Travel

5. On June 14, 2022, I became aware through the Canadian media and my own research, that the Ministerial Orders we are challenging in this Application were being "suspended". I reviewed both official statements from Transport Canada and the Treasury Board, and as best as I could tell, there was no clear reason or rationale provided by the Canadian Government for this sudden reversal of policy.

6. I use the word "suspended" above because that is the word various public officials used to describe the decision at the time it was announced. I saw this in multiple statements made by public officials, in which they affirmed that Transport Canada was maintaining or preserving its position

to re-introduce these same mandates quickly at a later time. Attached hereto as **Exhibit "A"** is a true copy of Transport Canada's Press Release: *Suspension of the mandatory vaccine requirement for domestic travellers and federally regulated transportation workers* and attached hereto as **Exhibit "B"** is a true copy of a News Release from the Treasury Board of Canada Secretariat, *Suspension of the vaccine mandates for domestic travellers, transportation workers and federal employees.*

7. In addition to the statements noted above, I saw a similar position being expressed by the Honourable Dominic LeBlanc, Minister of Intergovernmental Affairs, during a CBC interview he participated in on June 13, 2022. It was my impression that he made clear that the Ministerial Orders and vaccine mandates could return swiftly. Among other things he explained:

> …if the situation changes this fall or this winter we are prepared to bring back whatever measures are necessary …
>
> […]
>
> … we suspended [the vaccine mandates], we haven't lifted them in a way that can't be put back in place…

8. Attached hereto as **Exhibit "C"** is a copy of Minister LeBlanc's interview on CBC with Vassy Kapelos which aired June 13, 2022.

9. As far as I am concerned, and I would think this is not a controversial point, when a government representative makes public statements, we should take them at their word. For these reasons, I am left with the impression that there is significance to the government's deliberate representations that their most recent lifting of the vaccine mandates is effectively a "suspension".

10. This position, communicated by various public officials, concerns me. It suggests that these mandates may be re-implemented without hesitation and with an immediate and absolute effect on

my *Charter* rights. I mentioned that I am disheartened by the prospect of our challenge not being heard on its merits due to the Respondent's own conduct, but the thought that we, and other applicants, would have to start the process all over again is prejudicial to me and my co-Applicant having regard to the time and money spent as well as the sacrifices we have made with our families and professional life.

Lack of Transparency in Government's Decision-Making on the Vaccine Mandates

11. In June 2022, I attended all the cross-examinations of the Respondent's fact and expert witnesses. What I observed only compounds my concerns about the Respondent's request that the Application be dismissed for mootness, despite the Canadian Government acknowledging the challenged mandates may be re-introduced at any time.

12.

(a) In particular, I am troubled that a number of facts may not be considered by the Court and that the government's conduct will essentially evade any constitutional scrutiny or oversight, only to be repeated in the event mandates are reinstated (which appears more and more likely). For example: Ms. Jennifer Little, the Director of Transportation Canada's Covid-19 Recovery Team (which was responsible for developing the vaccination policy) explained during her cross-examination that, among other things:

(i) she was unaware as to any specific, identifiable criteria used to implement or maintain the vaccine mandates;

(ii) she was unaware of any evidence that the vaccine mandates were specifically recommended by the Public Health Agency of Canada ("**PHAC**") or Health Canada;

(iii) the mandatory vaccine policy was constantly under review and, despite receiving updated scientific information regarding Covid-19, the vaccine mandate was never changed to reflect the prevailing evidence (as of June 9, 2022); and,

(iv) that the policy was put in place to protect the "safety and security of the transportation system" but indicated that if the vaccination rates in Canada were low, the policy would not have been implemented (begging the question, what logic is actually informing the government's mandate policy decision).

(b) Even when we attempted to understand what the government was doing with new data and changing science related to new variants, like Omicron, we were provided no answers. Ms. Little refused to completely and transparently share what recommendations she made to the Associate Deputy Minister of Transport and her other superiors to reflect the changing science with the Omicron variant. Attached hereto as **Exhibit "D"** is a true copy of Ms. Little's cross-examination transcripts.

(c) Dr. Eleni Galanis, the Director for Integrated Risk Assessment with PHAC, explained that a risk assessment was never done for Omicron (although a formal risk-assessment was very recently done for the latest Omicron subvariants BA4 and BA5) and that the vaccine mandates were "rarely" discussed in her weekly meetings with Dr. Tam. Attached hereto as **Exhibit "E"** is a true copy of Dr.

Galanis' cross-examination transcripts dated June 23, 2022, together with Dr. Galanis' answers to undertakings; and,

(d) Dr. Elizabeth Harris, the Scientific Director at PHAC, who was involved in Covid-19 testing programs at Canada's borders, explained during her cross-examination that she was unaware as to what an acceptable or ideal positivity rate (or positivity range) for Covid-19 would be at Canada's boarders and how that might be determined. Attached hereto as **Exhibit "F"** is a true copy of Dr. Harris' cross-examination transcripts from June 16, 2022.

13. As it stands, we still do not understand what changed to warrant the suspension of mandates, let alone what science or criteria the Government is even relying on to enact, suspend, or re-enact mandates. My experience during the pandemic, and over the course of this Application, has revealed one persistent fact: the Government's public health response to Covid-19 is largely unpredictable and lacks cogent transparency. For example, on July 14, 2022, I reviewed a News Release from PHAC which indicated that "mandatory random testing will resume as of July 18, 2022, for travellers who qualify as fully vaccinated". This came after the Government ended mandatory testing just a month prior on June 11, 2022. Attached hereto as **Exhibit "G"** is a true copy of PHAC's News Release, *Government of Canada is re-establishing mandatory random testing offsite of airports for air travellers* dated July 14, 2022.

14. Given recent commentary from various public officials regarding concerns about a "Seventh Wave" of Covid-19, it seems to me to be plausible that the vaccine mandates would be re-enacted by the time this matter is heard on its merits. For example:

(a) Recently, and despite the Ministry of Transportation citing changes in the epidemiological situation in Canada, in June 2022, Dr. Theresa Tam addressed Canadian Parliament advising them to prepare for a seventh wave this fall. Attached hereto as **Exhibit "H"** is a true copy of an article from the National Post, *Seventh COVID wave possible this fall, Tam tells MPs: 'The pandemic is not over'* dated June 8, 2022.

(b) The following month, Quebec's Director of Public Health, Dr. Luc Boileau, announced that the seventh wave was already underway in his province. Attached hereto as **Exhibit "I"** is a true copy of a CBC news article, *7th wave has begun, but no new COVID-19 restrictions coming Quebec health officials say* dated July 7, 2022; and,

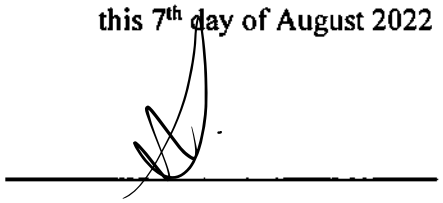
(c) In a presentation (briefing deck) produced as an undertaking to Ms. Little's cross-examination, the Covid-19 Recovery Team outlined four (4) "options for the Transition to Up-to-Date Vaccination" two of which recommended "temporarily" suspending the vaccine mandates. Attach hereto as **Exhibit "J"** is a true copy of Ms. Little's briefing deck.

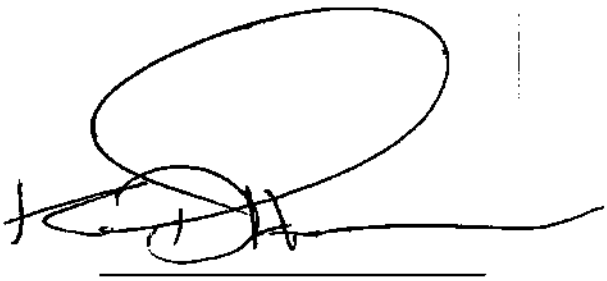
15. I brought this Application to hold the Canadian Government accountable for what I believe is unconstitutional conduct which infringed my *Charter* rights. I continue to believe the Government did not act with due regard to our constitutional rights. I believe the surrounding circumstances (i.e., the unprecedented nature of the Government's conduct) and the legitimate risk that vaccine mandates may be re-enacted with little notice, let alone any explanation, are reason enough for our Application to be considered on its merits.

16. At a minimum, my co-Applicant and I, and the millions of Canadians who are unvaccinated but require or desire to travel freely within and outside of their Country, will have some clarity regarding their constitutional rights and the reach of the Government with respect to this public health mandate which it continues to believe is constitutional and, therefore, an appropriate and available public health measure for the future. Based on the evidence contained in this affidavit and more generally in this Application, I believe the same issues will soon be of interest to *all* Canadians if their Government presses ahead with its desired "up-to-date vaccination" status. This would replace the current "fully vaccinated" status and would therefore require mandating additional injections for any Canadian seeking to board a plane or train in Canada.

17. I swear this affidavit in response to the Attorney General's motion to dismiss this Application and for no other or improper purpose.

Sworn before me)
)
by videoconference)
)
at the City of Toronto,)
in the Province of Ontario,)
this 7th day of August 2022)





KARL HARRISON

This is **Exhibit "B"** referenced in the Affidavit of Karl Harrison, sworn August 7th, 2022

Commissioner of Taking Affidavits

SAM A. PRESVELOS

Government of Canada / Gouvernement du Canada

Suspension of the vaccine mandates for domestic travellers, transportation workers and federal employees

From: Treasury Board of Canada Secretariat

News release

June 14, 2022 – Ottawa, Ontario – Treasury Board of Canada Secretariat and Transport Canada

Following a successful vaccination campaign, 32 million (or nearly 90%) of eligible Canadians have been vaccinated against COVID-19 and case counts have decreased. Canadians have stepped up to protect themselves and the people around them and rates of hospitalization and deaths are also decreasing across the country, and Canada has one of the highest rates of vaccination in the world.

Vaccination continues to be one of the most effective tools to protect Canadians, including younger Canadians, our health care system and our economy. Everyone in Canada needs to keep up to date with recommended COVID-19 vaccines, including booster doses to get ready for the fall. The Government of Canada will continue to work with provinces and territories to help even more Canadians get the shots for which they are eligible.

Throughout the pandemic, the Government of Canada's response has been informed by expert advice and sound science and research. As the COVID-19 pandemic has evolved, so too have public health measures and advice, which includes vaccination requirements that were always meant to be a temporary measure.

As such, the government announced today that, as of June 20, it will suspend vaccination requirements for domestic and outbound travel, federally regulated transportation sectors and federal government employees.

While the suspension of vaccine mandates reflects an improved public health situation in Canada, the COVID-19 virus continues to evolve and circulate in Canada and globally. Given this context, and because vaccination rates and virus contrc in other countries varies significantly, current vaccination requirements at the border will remain in effect. This will reduce the potential impact of international travel on our health care system and serve as added protection against any future variant. Other public health measures, such as wearing a mask, continue to apply and will be enforced throughout a traveller's journey on a plane or train.

Travellers and transportation workers

- As of 00:01 EDT on June 20, 2022, the vaccination requirement to board a plane or a train in Canada will be suspended.
- In addition, federally regulated transport sector employers will no longer be required to have mandatory vaccination policies in place for employees.
- Due to the unique nature of cruise ship travel, vaccination requirements for passengers and crew of cruise ships will continue to remain in effect.
- Masking and other public health protection measures will continue to be in place and enforced on planes, trains, and ships.

- Current border measures, including the existing vaccination requirement for most foreign nationals to enter Canada, and quarantine and testing requirements for Canadians who have not received their primary vaccine series, remain in effect.

Federal public service

- Also on June 20, the *Policy on COVID-19 Vaccination for the Core Public Administration (CPA) Including the Royal Canadian Mounted Police* will be suspended.
- Employees of the CPA will be strongly encouraged to remain up to date with their vaccinations; however, they will no longer be required to be vaccinated as a condition of employment.
- As such, employees who are on administrative leave without pay for noncompliance with the Policy in force until now will be contacted by their managers to arrange their return to regular work duties.

Crown corporations and separate agencies will also be asked to suspend vaccine requirements, and the vaccination requirement for supplier personnel accessing federal government workplaces will also be suspended. With the suspension of vaccination requirements, employees placed on unpaid leave may return to work. The government and other employers will ensure that these employees can resume their duties as seamlessly as possible.

Furthermore, the Government of Canada is no longer moving forward with proposed regulations under Part II (Occupational Health and Safety) of the *Canada Labour Code* to make vaccination mandatory in all federally regulated workplaces.

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.

Quotes

> “Throughout this pandemic, our government’s approach has been rooted in close collaboration with our provincial and territorial partners. We all have a role to play in keeping Canadians safe. Our government will continue to make decisions based on the best public health advice and adjust its measures accordingly.”
>
> - The Honourable Dominic LeBlanc, Minister of Intergovernmental Affairs, Infrastructure and Communities

> “The mandatory vaccination requirement successfully mitigated the full impact of COVID-19 for travellers and workers in the transportation sector and provided broader protection to our communities. Suspending this requirement is possible thanks to the tens of millions of Canadians who did the right thing: they stepped up, rolled up their sleeves, and got vaccinated. This action will support Canada’s transportation system as we recover from the pandemic.”
>
> - The Honourable Omar Alghabra, Minister of Transport of Canada

"As the country's largest employer, the Government has led by example to help protect the health and safety of the federal workforce, as well as those in the federally regulated travel sector. We are now in a much better place across Canada, and vaccination mandates helped us to get there. As we move forward, we will continue to take action to keep public servants safe, and all employees are strongly encouraged to keep their vaccinations current so they get all recommended doses."

- The Honourable Mona Fortier, President of the Treasury Board

"While the suspension of vaccine mandates reflects an improved public health situation in Canada, the COVID-19 virus continues to evolve and circulate in Canada and globally. The science is also perfectly clear on one thing: vaccination remains the single most effective way to protect ourselves, our families, our communities, and our economy against COVID-19. We don't know what we may or may not face come autumn, but we know that we must remain prudent, which is why our government continues to strongly encourage everyone in Canada to stay up to date with their COVID-19 vaccines, which includes recommended booster doses."

- The Honourable Jean-Yves Duclos, Minister of Health

Related products

- Backgrounder: Government of Canada suspends mandatory vaccination for the federal workforce
- Backgrounder: Suspension of the mandatory vaccination requirement for domestic travellers and federally regulated transportation workers
- Backgrounder: Preventing or limiting the spread of COVID-19 on cruise ships

Associated links

- COVID-19 vaccination for federal public servants
- COVID-19: Boarding flights, trains, and cruise ships in Canada
- COVID-19: Cruise ship travel
- COVID-19: Travel, testing, and borders
- COVID-19: Provincial and territorial resources

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