

SCC Court File No.:

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

BETWEEN:

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

**APPLICANTS
(Appellants)**

- and -

ATTORNEY GENERAL OF CANADA

**RESPONDENT
(Respondent)**

**APPLICATION FOR LEAVE TO APPEAL
(THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN,
KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, and
AEDAN MACDONALD, APPLICANTS)
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985)**

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APPLICANTS
(Appellants)

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RESPONDENT
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NOTICE OF APPLICATION FOR LEAVE TO APPEAL
**(THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN,
KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, and
AEDAN MACDONALD, APPLICANTS)**
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985, c S-26)

TAKE NOTICE that the Applicants apply 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-251-22) 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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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*.

SCHEDULE “A”

- A. Reasons for Judgment and Judgment of the Federal Court by the Associate Chief Justice Gagné, 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 Judgment 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 (*Gianoulis 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 losing 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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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

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(ON HIS OWN BEHALF)

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Federal Court of Appeal



Cour d'appel fédérale

Date: 20231109

Docket: A-251-22

Ottawa, Ontario, November 09, 2023

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

BETWEEN:

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

Appellants

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 the Minister of Transport has the power, under the *Aeronautics Act*,² to make Interim Orders of a public health nature.
- Never before has the federal government prohibited a class of Canadians who were not facing criminal charges from leaving Canada.
- The federal government publicly threatened to reinstate the travel vaccine mandate without hesitation should it decide it was necessary.

¹ *Canadian Charter of Rights and Freedoms*, s. 6.

² *Aeronautics Act*, RSC 1985, c A-2.

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 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.

³ *Borowski v. Canada*, [\[1989\] 1 SCR 342](#) [*"Borowski"*].

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 Applicants were all Canadians who were denied the ability to board a commercial aircraft because of the Orders. They were effectively restricted from leaving Canada, and some of them were restricted from practically travelling interprovincially, since air travel was the only realistic form of travel. They attested that their *Charter* rights of religion, conscience, mobility, bodily autonomy and informed consent, privacy and equality were infringed by the Orders.

10. Specifically:

- The former Premier of Newfoundland, the Honourable Brian Peckford, was unable to travel by air from his home on Vancouver Island to visit his family members more than 7000km away in Newfoundland by any method other than walking, bicycle, or by car.⁶
- Mr. Ken Baigent lives in Ontario and commuted to work in the Northwest Territories by air. He attempted to commute by car once the Orders were put into

⁴ Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No, 47, dated November 30, 2021, [online](#).

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 A. Brian Peckford, sworn March 11, 2022 [Application for Leave to Appeal (“LTA”), Tab 3A] at para 3.

place, but attested that the winter driving conditions were too treacherous and his safety was compromised. He quit his job as a result.⁷

- Ms. Natalie Grcic was unable to travel to visit her aging and sick parents and other family in Europe and her native South Africa.⁸
- Mr. Drew Belobaba lives in England and owned a property in Canada at the relevant time of the Interim Orders. He was unable to travel to Canada to perform necessary maintenance on his Canadian property because he would be barred from boarding a plane back to England to be with his family.⁹
- Ms. Leesha Nikannen was unable to travel from her home in Surrey, British Columbia, to visit family including her elderly father in Ontario as she could not afford to take weeks off of work to drive there and back.¹⁰
- Mr. Aedan MacDonald, a university student studying in British Columbia, was unable to visit his family in Ontario for Christmas in 2021 and over the winter in early 2022 unless he drove, which presented weather safety hazards.¹¹

11. The Applicants, beginning on February 1, 2022, commenced judicial reviews at the Federal Court to have the Orders declared unconstitutional for being a breach of sections 2, 6, 7, 8 and 15 of the *Charter*.¹² They also asked the Federal Court to declare the Orders *ultra vires*, as they argued that they were made outside of the Minister of Transport's jurisdiction, and for an improper purpose.¹³

⁷ Affidavit of Kenneth Baigent, sworn March 10, 2022 [LTA, Tab 3B] at para. 23; Answers to Written Examination, sworn June 1, 2022 [LTA, Tab 3C] at paras. 12-13.

⁸ Affidavit of Natalie Grcic, sworn March 10, 2022 [LTA, Tab 3D] at para. 20.

⁹ Affidavit of Robert Drew Belobaba, sworn March 11, 2022 [LTA, Tab 3E] at paras. 2, 5, 19-20.

¹⁰ Affidavit of Leesha Nikkanen, sworn March 11, 2022 [LTA, Tab 3F] at paras. 3, 13-15.

¹¹ Affidavit of Aedan MacDonald, sworn March 11, 2022 [Tab 3G] at para. 8.

¹² Notice of Application for Judicial Review, dated January 31, 2022 [LTA, Tab 3H].

¹³ Application Judge's decision at para. [10](#).

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 2022.¹⁴

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 Applicants' claims of public interest in the matter.¹⁵ 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.¹⁶ 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 Applicants.

D. The Decision of the Federal Court of Appeal

15. The Federal Court of Appeal dismissed the appeal of the mootness ruling.¹⁷ 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 Applicants.

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

¹⁴ Application Judge's decision at paras. [3-4](#).

¹⁵ Application Judge's decision at para. [49](#).

¹⁶ Application Judge's decision at para. [42](#).

¹⁷ *Peckford v. Canada (Attorney General)*, [2023 FCA 219](#) at para. [40](#) ("Court of Appeal decision").

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
- c. courts' proper adjudicative role so that they do not intrude on the legislative sphere by making freestanding, legislative-like pronouncements.¹⁸

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 Applicants were barred from commonplace methods of

¹⁸ Cited in *R. v. Smith*, [2004 SCC 14](#) at para. [39](#).

travel. Even without considering the underlying merits of the case, this bar is already a significant interference with an activity that the Applicants rely on in their daily lives.

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.¹⁹ It was the other two rationales – judicial economy and court’s proper adjudicative role – which were relied on to strike the applications 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.²⁰

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.²¹ 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.²² 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

¹⁹ Court of Appeal decision at para. [28](#).

²⁰ *Borowski* at p. 360.

²¹ 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](#).

²² *Supra*, *R. v. Penunsi*, *R. v. Oland*, and *R. v. Myers*.

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 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.**²³

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).²⁴

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.²⁵ 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

²³ Court of Appeal decision at para. [35](#) (Emphasis added).

²⁴ Affidavit of Karl Harrison, sworn August 7, 2022 [LTA, Tab 3I] at Exhibit "B".

²⁵ *Gateway Bible Baptist Church et al v. Manitoba et al*, [2023 MBCA 56](#) at paras. [29](#), [32](#).

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.²⁶

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 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*²⁷ 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.”²⁸ In that case, the British Columbia

²⁶ *Gateway Bible Baptist Church et al v. Manitoba et al*, 2023 MBCA 56 at paras. [20](#), [32](#).

²⁷ *Kassian v. British Columbia*, [2023 BCCA 383](#).

²⁸ *Kassian* at para. [41](#).

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*²⁹ 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.³⁰ 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 asserted. We are not persuaded that these issues are so evasive of review as to warrant deciding this moot appeal.³¹

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.³² 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."³³

²⁹ *Harjee et al v. Ontario*, [2023 ONCA 716](#).

³⁰ *Ibid.* at para. [5](#).

³¹ *Harjee* at para. [7](#).

³² *Spencer v. Canada (Attorney General)*, [2023 FCA 8](#).

³³ *Ibid.* at para. [6](#).

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.³⁴ 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.”³⁵

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.³⁶

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

³⁴ *Borowski* at p. 361.

³⁵ *Ibid.*

³⁶ Court of Appeal decision at para. [34](#).

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.³⁷

38. The Applicants pose 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 Colombie-Britannique v. British Columbia*,³⁸ 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.³⁹ Additionally, this Honourable Court did not consider whether orders-in-councils or regulations ought to be captured by this rule regarding qualified immunity.⁴⁰

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

³⁷ *Borowski* at p. 362.

³⁸ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020 SCC 13](#).

³⁹ *Ibid.* at para. [173](#).

⁴⁰ *Ibid.* at para. [178](#).

within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.⁴¹

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."⁴² 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 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

⁴¹ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995 CanLII 64 \(SCC\)](#), [1995] 3 SCR 199.

⁴² *Charter*, at [Preamble](#).

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 Applicants 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..."⁴³ 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 6 mobility rights under the *Charter*. The issues raised by the Applicants were novel and never considered before. As Justice Estey observed in *Law Society of Upper Canada v. Skapinker*,⁴⁴ mobility rights "...have a common meaning until one attempts to seek its outer limits."⁴⁵ Section 6 rights themselves are 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.⁴⁶ 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

⁴³ Application Judge's decision at para. 42.

⁴⁴ *Law Society of Upper Canada v. Skapinker*, [1984] 1 SCR 357.

⁴⁵ *Ibid.* at p. 377.

⁴⁶ *Canada v. Boloh 1(a)*, 2023 FCA 120 at paras. 12-13, leave to appeal dismissed.

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 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 Applicants do not seek costs against the Respondent. They submit that a cost award against them would be inappropriate in this case due to the precedential value and public interest at a national level.

PART V – ORDER SOUGHT

51. The Applicants respectfully request 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 Applicants

PART VI – TABLE OF AUTHORITIES**Cases**

Case	Cited at paragraph
<i>Borowski v. Canada</i> , [1989] 1 SCR 342	3, 4, 6, 18, 22, 23, 29, 30, 32, 33, 34, 37,
<i>Canada v. Boloh 1(a)</i> , 2023 FCA 120	45
<i>Conseil scolaire francophone de la Colombie-Britannique v. British Columbia</i> , 2020 SCC 13	38
<i>Doucet-Boudreau v. Nova Scotia (Department of Education)</i> , 2003 SCC 62	23
<i>Gateway Bible Baptist Church et al v. Manitoba et al</i> , 2023 MBCA 56	28
<i>Harjee v. Ontario</i> , 2023 ONCA 716	31
<i>Kassian v. British Columbia</i> , 2023 BCCA 383	30, 31
<i>Khela v. Mission Institution</i> , 2014 SCC 24	23
<i>LaPress Inc. v. Quebec</i> , 2023 SCC 22	23
<i>Law Society of Upper Canada v. Skapinker</i> , [1984] 1 SCR 357	45
<i>Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)</i> , 2006 SCC 7	23
<i>New Brunswick v. G(J)</i> , [1999] 3 SCR 46	23
<i>R. v. Myers</i> , 2019 SCC 18	23, 24
<i>R. v. Penunsi</i> , 2019 SCC 39	23
<i>R. v. Oland</i> , 2017 SCC 17	23, 24
<i>R. v. Smith</i> , 2004 SCC 14	18, 23
<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , 1995 CanLII 64 (SCC) , [1995] 3 SCR 199	39
<i>Spencer v. Canada (Attorney General)</i> , 2023 FCA 8	32

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

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FEDERAL COURT OF CANADA

BETWEEN:

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

Applicants

-and-

**THE MINISTER OF TRANSPORT and
THE ATTORNEY GENERAL OF CANADA**

Respondents

APPLICATION UNDER ss. 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and Rules 300(a) and 317 of the Federal Courts Rules, SOR/98-106

**AFFIDAVIT OF THE
HONOURABLE A. BRIAN PECKFORD
(Sworn March 11, 2022)**

I, The Honourable A. Brian Peckford, of the City of Parksville, in the Province of British Columbia, SWEAR AND SAY THAT:

1. I am one of the Applicants herein, and as such have a personal knowledge of matters hereinafter deposed to, except where they are based on information and belief, in which case I verily believe them to be true.

Background Personal Information

2. I am 79 years old. I was born in the Town of Whitbourne Newfoundland. I am a Canadian citizen and I currently live in the small City of Parksville on Vancouver Island, British Columbia.

3. Most of my family, including my daughter and two grandchildren, live in Newfoundland, where I served as the third Premier of Newfoundland for ten years, from March 26, 1979, to March 22, 1989. The distance between where I live in Parksville and where my daughter and grandchildren live is 7,195 kilometers. I also have one brother in Nova Scotia and two brothers in Ontario.
4. It is my normal practice to travel across Canada by commercial airlines both for personal and business reasons.
5. During my tenure as Premier of Newfoundland, I was personally involved in the extensive federal and provincial negotiations where I reviewed the various drafts of what is now the *Constitution Act, 1982*, including the *Charter of Rights and Freedoms* (the "*Charter*"). This was one of the most rewarding and challenging moments of my personal life and political career. Negotiating and drafting the *Constitution Act* was an undertaking that all First Ministers took incredibly seriously as we recognized the gravity and long-lasting implications of such a momentous legal document that defines the limits of government infringement of our fundamental rights and freedoms.
6. I am the only living signatory and First Minister who helped draft the *Constitution Act*. I was appointed to the Queen's Privy Council of Canada in 1982.
7. I am gravely concerned about how the Federal Government is restricting my rights and freedoms protected under the *Constitution Act* and infringing the *Charter* rights of all Canadians in response to Covid-19.
8. The negotiation process between the First Ministers took approximately 18 months prior to November 5, 1981, when the deal was finally struck. The days, weeks and months leading up to this day were intense. They involved numerous proposals and revisions of the *Charter*, particularly those relating to section 1 exceptions that would allow governments to infringe *Charter* rights.

9. My discussions and negotiations relating to section 1 of the *Charter* occurred directly with the then Prime Minister Pierre Trudeau and other provincial Premiers, including Angus MacLean (Prince Edward Island), Richard Hatfield (New Brunswick), John Buchanan (Nova Scotia), Rene Levesque (Quebec), Bill Davis (Ontario), Sterling Lyon (Manitoba), Allan Blakeney (Saskatchewan), Peter Lougheed (Alberta), and Bill Bennett (British Columbia),
10. Through those negotiations, the proposal from Newfoundland's delegation was one of the reasons that section 1 of the *Charter* was introduced. The concern that I and other Premiers had was that the *Charter* needed to allow the governments to take extraordinary measures in extraordinary situations when the Country's very existence is at stake. Circumstances such as an imminent war or insurrection or the Country being in some other equally dire state.
11. As a First Minister, I understood the historic moment involved in drafting the *Charter*. The *Constitution Act* was meant to instill permanence, continuance, sustainability, unlike any other regular law made by one government. The narrow scope of circumstances under section 1 of the *Constitution Act* that would allow the government to override rights was deliberately designed to reflect a situation involving the permanence of our nation's fundamental rights and freedoms.
12. When the First Ministers and I negotiated and signed the *Charter*, I took my roles and responsibilities in protecting Canadians very seriously. I continue to do so to this day.

Federal Travel Ban

13. In and around August of 2021, I became aware that the Federal Government was preparing to make a law that restricted unvaccinated Canadians from travelling by air and rail in and outside Canada.
14. I understand that on or around October 29, 2021, the Federal Government announced that they had enacted *Interim Order Respecting Certain Requirements for Civil Aviation Due*

to *COVID-19, No. 43* (the "Travel Ban"). I understand the Travel Ban has been amended several times, and currently, Order No. 56 of the Travel Ban is in force. Attached hereto and marked as **Exhibit "A"** to this my Affidavit is a copy of that Order.

15. In or about September 2021, Prime Minister Justin Trudeau made concerning and alarming comments regarding unvaccinated people. Specifically, the Prime Minister said:

We are going to end this pandemic with vaccination.

We know people who are a little hesitant, who can be convinced.

But also people who are fiercely opposed to vaccination...who do not believe in science.

Who are often misogynistic, often are racist. There are not very many of them, but they take a lot of space.

And there, we have a choice to make, as a leader, as a country. Do we tolerate these people?

Or do we say: come on... most people 80% of Quebecers have done the right thing, gotten vaccinated, we want to get back to the things we like.

It's those people who are going to block us now...

Attached hereto and marked as **Exhibit "B"** to this my Affidavit is a copy of the certified translation and transcript of the Prime Minister's comments that were made on public television in or around September 2021. Here is the link to that video [Prime Minister Calling Unvaccinated Misogynistic Racist TV Interview 2021](#).

16. On December 21, 2021, Prime Minister Justin Trudeau issued a mandate letter to the Minister of Transportation. The Prime Minister expressly directed the Minister of Transportation to "enforce vaccination requirements across the federally-regulated

transport sector" and to "require that travellers on interprovincial trains, commercial flights, cruise ships and other federally-regulated vessels be vaccinated." Attached hereto and marked as **Exhibit "C"** to this my Affidavit is a copy of the mandate letter.

17. Knowing my objectives and those of the other First Ministers when we signed the *Charter*, I am concerned about my, and my fellow Canadians, rights to travel anywhere in Canada or leave Canada, to pursue a livelihood anywhere in Canada, freedom to assemble, to associate, and the right to life, liberty and the security of the person and the right to equality before the law. These are all fundamental individual rights and freedoms protected by the *Charter* held by me and all Canadians.
18. As the last living First Minister who helped draft the *Charter*, the circumstances we have been facing from December 2021 and through to March 2022 with Covid-19 are not the type of peril that I had intended would fall within the overriding provisions of section 1 of the *Charter*.
19. When we negotiated and drafted the *Charter*, I understood that I was creating a law of permanence and significant effect, hence the *Constitution Act* - not just a federal or provincial statute that could be easily changed in the political winds of changing parties or social views. I only intended section 1 to be applied in extraordinary circumstances where the survival of Canada as a country was in peril from war, or insurrection or other existential threat. I had drafted and agreed to a similar threshold in section 4(2) regarding the special circumstances for continuation of a House of Commons or Legislative Assembly.
20. The official Government of Canada's advisories as of February 16, 2022, regarding Covid-19 highlight the nature of circumstances posed by Covid-19:

Most people with mild symptoms will recover on their own.
Adults and children with mild COVID-19 symptoms can stay at home
while recovering. You don't need to go to the hospital.

and

It's important that you continue to follow the recommendations and restrictions of your local public health authority on quarantine or isolation if you:

- may have COVID-19 (for example, you feel sick or have been exposed)
- have tested positive for COVID-19

If you have to quarantine or isolate, follow appropriate precautions to reduce the risk of illness spreading within your home.

Adults and children with mild COVID-19 symptoms can stay at home while recovering. You don't need to go to the hospital if symptoms are mild.

Attached hereto and marked as **Exhibit "D"** and **Exhibit "E"** to this my Affidavit is the official Government of Canada's advisory regarding Covid-19. "Most people with mild symptoms will recover on their own", "quarantine or isolate" and "you don't need to go to the hospital". The advisory does not say the Country is in peril, war, or insurrection

21. As a 79-year-old man, I do not consider myself to be a health threat to others, and if anything, others may expose me to various risks, including Covid-19. I am aware that my age puts me in a high-risk category for Covid-19. However, I believe I should be allowed to assess the risk and benefit of taking the Covid-19 vaccination. Living in a free country involves making choices and assessing risks. I can understand the risks of exposure to Covid-19 and am perfectly capable of determining whether this is a risk I am willing to take. If others are afraid, they should limit who they see, but I disagree that others' fears can be used to override protections guaranteed under the *Charter* and shut down various parts of our society and trample on my rights and the rights of everyone else.
22. The Travel Ban has hindered me from being able to attend speaking engagements across Canada because I am unable to travel by plane. I am also unable to visit my family in Ontario, Newfoundland and Nova Scotia, which I regularly do once or twice a year. At the age of 79, I am not prepared to drive over 7000 kilometres one way to see my family. That drive could take me a week, and I would have to do it again just to get home. As both a driver and a passenger, I have experienced icy and snow-covered roads on interprovincial

highways during the winter months. I believe that making that return trip, especially in the winter, would put my life at risk.

23. My conscience is very strong, and I am fiercely against coercion. I believe that I should not be pressured or coerced into taking a medical treatment which is new, just to get on an airplane. My conscience is deeply affected by the knowledge that the federal government is preventing people from seeing their families who live far away, simply because they have not taken a novel medical treatment. My conscience is also strongly impacted by the pressure imposed upon me by the federal government to take this new medical treatment without fully explaining the various risks of doing so. I do not see the Minister of Transport or the Prime Minister doing press conferences explaining the known side effects or possible known adverse events of these new Covid-19 vaccines. I know that Health Canada has warning labels on these vaccines for blood clots, Bell's Palsy, myocarditis, and other serious conditions, but the risks of these conditions and others have never been explained to me by the very people who are telling me I cannot board an airplane without taking the medical treatment. I feel under duress and that I cannot give my fully informed voluntary consent to this medical treatment.
24. I am angry that the federal government has imposed a requirement that forces me to reveal my personal medical status in order to board an airplane to see my family. It is not the federal government's business to learn what vaccines I have or have not taken. Medical information ought to be private and confidential. Forcing an intrusion on my privacy in order to travel across Canada is egregious.
25. What I find perhaps the most disturbing is that the federal government has mandated a two-tiered society where one group of people has benefits while another group is disadvantaged. As a person who has chosen not to receive the new medical treatment, I am all of a sudden treated as an outcast, labelled a racist and misogynist, and as an undesirable person not fit to be seated with vaccinated people on an airplane. The Covid-19 vaccinated are allowed to travel by airplane and to see their families and the unvaccinated are not. This is not the Canada I know and love, and this type of segregation causes me utmost sadness.

26. I believe that what is happening in our nation is a flagrant disregard for sacred individual written rights and freedoms in our most supreme legal document that is only 40 years old. The Government of Canada has been enforcing arbitrary and coercive Covid-19 measures while discriminating against unvaccinated Canadians like me.

27. I swear this affidavit *bona fide* in support of the within application to strike down the Travel Ban and for no improper purpose.

SWORN BEFORE ME by A. Brian Peckford,)
 of the City of Parksville, in the Province of)
 Alberta, before me at the City of Brampton, in)
 the Province of Ontario, this 11th day of)
 March 2022 in accordance with O. Reg.)
 431/20 Administering Oath or Declaration)
 Remotely)
)

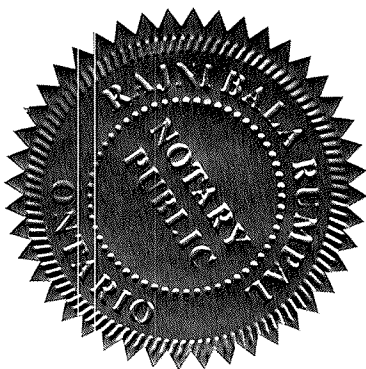
DocuSigned by:
 [Redacted Signature]

A. BRIAN PECKFORD P.C.

[Redacted Signature]

A Notary Public in and
 for the Province of Ontario

Rosy Rajni B. Rumpal
 [Redacted Signature]



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FEDERAL COURT

BETWEEN:

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

Applicants**and****THE MINISTER OF TRANSPORT AND ATTORNEY GENERAL OF CANADA****Respondents**

**AFFIDAVIT OF KENNETH B. BAIGENT
(Sworn March 10, 2022)**

I, Kenneth B. Baigent, of the City of Yellowknife, in the Territory of the Northwest Territories,
SWEAR AND SAY THAT:

1. I am one of the Applicants herein, and as such have a personal knowledge of matters hereinafter deposed to, except where they are based on information and belief, in which case I verily believe them to be true.

Background Personal Information

2. I am 57 years old Canadian citizen. I am married to my lovely wife Elizabeth, and we are proud parents to our son, Jakob. We are a Christian family with long held and sincere religious beliefs, and our trust in God has guided our lives including our health and healing.
3. In 2012, I was recruited to work in Yellowknife as an Energy Management Specialist with my employer, the Arctic Energy Alliance. My wife and son joined me in Yellowknife in

2013, where we all lived full-time. Due to a severe medical condition with my mother-in-law, my wife & son returned to Ontario in late 2014 to support her eldercare.

4. I was faced with the challenge of how to accommodate my career in Yellowknife and still have a good quality family life. I had many meetings with my Executive Director. Ultimately, a creative accommodation was made that would allow me to continue full-time employment, where I could work rotationally between Yellowknife, NWT (performing work that required onsite work) and from Jordan, ON (completing client analyses, reports & other required projects).
5. My rotational work schedule has continued from 2015 to the present. Typically, I fly eight to 12 times per year with WestJet between Ontario and the Northwest Territories. Even under these circumstances, I have continuously proven my ability to deliver a high volume of work and have been assigned to manage various programs & projects, earning a promotion to Senior Energy Management Specialist.
6. When Covid-19 arrived in Canada in March of 2020, my employer suggested I fly back to Ontario a bit earlier than scheduled. There was a concern that air travel may soon be temporarily suspended in Canada and my employer wanted me to be with my family during this period of lockdown.
7. Air travel started to open in June, and I flew back to Yellowknife on July 6, 2020. During the Covid-19 pandemic, I flew business class with WestJet 13 times between Ontario and the Northwest Territories during which time I followed all the required public health and safety guidelines of the airline industry both in the airport and on the airplane (health screening, temperature checks, sanitizing, masking, physical distancing). I was proud to do my part and believe the combined efforts of the airlines and passengers resulted in the very low risk of Covid-19 transmission that is highlighted on Transport Canada's website. Attached hereto and marked as **Exhibit "A"** to this my Affidavit is a printout of Transport Canada's website.
8. In addition to the airline travel health & safety requirements, the Northwest Territories Health, and Social Services Authority (NTHSSA) banned all non-resident travel to the

Northwest Territories and implemented a self-isolation policy for all returning residents. With my rotational work schedule, I completed eight self-isolation plans, for a total of 102 days (14.6 weeks, or 28% of a year) in self-isolation between July 6, 2020, and February 22, 2022. My employer was very accommodating of my situation, and I appreciated his support in these unusual circumstances and government-mandated restrictions.

9. My office has about 25 staff and we all follow Northwest Territories Workers' Safety & Compensation Commission (WSCC) Covid-19 Health & Safety guidelines and workplace practices. Covid-19 vaccinations in the Northwest Territories commenced on December 30, 2020 and were initially listed on the NTHSSA website as being voluntary.
10. After the Federal Government introduced the concept of a vaccine mandate for Federal Employees on August 13, 2021 (and rolled it out in late September), the Government of the Northwest Territories (GNWT) followed suit in September to introduce a vaccination policy of Staff that would require all GNWT Staff to be fully vaccinated by November 30, 2021 or submit to regular rapid testing & additional use of PPE. For GNWT Staff, there would be no requirement to apply for an exemption to the policy or suffer being placed on a Leave of Absence without pay – the alternative option was to wear the personal protective equipment and submit to the regular rapid testing.
11. I have been proactive in personally informing my Executive Director about my long-held and sincere religious beliefs and that I would not be taking the Covid-19 vaccine. I follow all required Covid-19 health and safety protocols in the respective region I am in Canada and for my airline travel back & forth.
12. I believe my *Charter* rights are being violated. I cannot travel freely for work, my religious beliefs, my medical freedoms, and my privacy rights are not being respected, and I feel as though I am being discriminated against just for being unvaccinated.
13. In order to be fit for work and ensure that I am not a risk to my colleagues, I voluntarily complete three rapid antigen self-tests per week. I contacted Levitt Safety in October 2021 and ordered my own "Health Canada" approved test kits (a 25-test kit package of the

Abbott Panbio Ag Nasal tests) at a personal cost of about \$275 per box. I could do the same for boarding an airplane to ensure that I am not a risk to other passengers.

Federal Travel Ban

14. On August 13, 2021 (2 days before the federal election was called), I heard the Federal Government announce they were planning to restrict unvaccinated Canadians from federally regulated domestic air, rail and marine transport in Canada, commencing by the end of October 2021.
15. Following the election results on September 20, 2021, another announcement was issued on October 6, 2021, to confirm the domestic travel restrictions would be implemented commencing October 30, 2021. From October 30 through November 29, 2021, passengers could board by either being fully vaccinated or by providing a negative Covid-19 molecular test conducted within 72 hours of travel. Commencing November 30, 2021, only the fully vaccinated would be allowed to travel. Attached hereto and marked as **Exhibit “B”** to this my Affidavit is a copy of the website on the Government of Canada travel mandate.
16. I understand that in the fall of 2021, the Federal Government announced that they had enacted *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19* (the “Travel Ban”). It is my understanding that the Federal Government is constantly changing the Travel Ban. I am having a hard time understanding the constantly changing laws and requirements and how it will affect my ability to travel for work and return home to visit my family.
17. Following the Federal Government’s announcement, I knew I needed to travel by air to work and wanted to book the following three flights:
 - a) The first week of December 2021 from YZF to YYC;
 - b) The first week of February 2022 from YYC to YZF; and
 - c) The first week of April 2022 from YZF to YYC.

18. I have been a patron with WestJet for over 25 years and am currently a Gold Rewards member. With very little information coming from the Federal Government about how the Travel Ban will affect me and my ability to work, I finally saw a CTV News article on October 15, where Andrew Gibbons, VP of Government Relations and Regulatory Affairs, was quoted saying: “Ultimately verifying the legitimacy of people’s vaccination records should reside with government.” Attached hereto and marked as **Exhibit “C”** to this my Affidavit is a copy of the CTV News Article.
19. Details from the Federal Government regarding the exemption program to the Travel Mandate were minimal. I send a letter to Ed Simms, President and CEO of WestJet, and copied Andrew Gibbons regarding how to submit a request for an exemption. Mr. Gibbons responded to me within one week and has been very kind; however, he stated that he had no details on the process to request an exemption at that time. Attached hereto and marked as **Exhibit “D”** to this my Affidavit is a copy of my letter.
20. From what I could gather that was made public regarding the Travel Ban, the new domestic travel restriction was supposed to accommodate long held and sincere religious beliefs via an exemption application & approval process; however, the specific application details were not being made available.
21. From October 15 – November 22, 2021, I have been contacting WestJet, my Northwest Territories MP (Michael MacLeod), and the Federal Minister of Transport (Omar Alghabra) numerous times in order to get some direction and clarity on how to apply for a religious exemption. Attached hereto and marked as **Exhibit “E”** to this my Affidavit is a copy of my emails.
22. On November 22, 2021, Wendy Nixon, Director General, Aviation Security at Transport Canada wrote the following:

For domestic and outbound travel from Canadian airports, airlines and railways will administer the process for considering a traveller’s medical inability to be vaccinated, essential medical services and treatment, sincere religious beliefs, and emergency/urgent travel (including for urgent medical reasons). Travellers who think they may be eligible for one of

these exemptions should contact their airline or railway company to obtain the necessary form and submit it in accordance with their carrier's approval process (forms available starting November 30, 2021). Travellers may need to adjust their travel plans in the weeks following November 30 to allow time for their air carrier to process their exemption request. Please note that travellers who are exempted from the vaccination requirement will require a valid COVID-19 molecular test result before boarding.

A copy of that correspondence is attached hereto and marked as **Exhibit "F"** to this my Affidavit.

23. The content of Ms. Nixon's email made it clear that my religious beliefs exemption application & approval would not be completed in time for me to fly to Ontario during the first week of December. I then made the difficult decision that, to see my wife and son in December, I would need to drive 5000 km from Yellowknife, NWT to Jordan, ON. This required me to book off a week of vacation from work and drive across Northern & Remote Arctic Canada in extreme cold, snow and ice-covered roads during a time of year with very little daylight. I do not have the financial means to pay to fly by private chartered aircraft to visit family or travel for work.
24. On November 30, 2021, and upon arrival in Ontario, I could see the WestJet Airlines website had been updated with the process to apply for a religious beliefs exemption for domestic travel. I completed and submitted my application on December 2, 2021. Attached hereto and marked as **Exhibit "G"** to this my Affidavit is a copy of my WestJet religious exemption request application form.
25. On November 19, 2021, I completed and submitted a religious exemption application to the NWT Office of the Chief Public Health Officer (NWT CPHO). Attached hereto and marked as **Exhibit "H"** to this my Affidavit is a copy of my religious exemption application to the NWT CPHO.
26. I also received a religious exemption from the City of Yellowknife Council for the City of Yellowknife Proof of Vaccine Policy.

27. On the evening of Friday, December 3, 2021, my religious exemption application was approved by the NWT CPHO. Attached hereto and marked as **Exhibit “I”** to this my Affidavit is a copy of the approval letter from NWT CPHO. I provided a copy of the approval letter from NWT CPHO to WestJet to add to my religious exemption application. I also provided a copy to the City of Yellowknife Council to confirm my approved exemption to their Proof of Vaccine Policy. Attached hereto and marked as **Exhibit “J”** to this my Affidavit is a copy of my religious exemption request to WestJet and my updated religious exemption request of December 4, 2021.
28. I was informed that the WestJet religious beliefs exemption process would take about 3 weeks, and I expected a response by December 23, 2021. In the interim, I saw some concerning information regarding the process:
- a) A December 12, 2021, article in the Globe and Mail where WestJet and Air Canada both state that the airlines should not be the ones to evaluate exemptions applications for religious beliefs.
 - b) A December 16, 2021, video that includes Andrew Gibbons, VP of Government Relations and Regulatory Affairs WestJet, talking about Federal Government airline travel restrictions not being based on science and data.
- Attached hereto and marked as **Exhibit “K” and “L”** respectively, are copies of those articles.
29. On December 23, 2021, I received a notice from WestJet indicating that my religious beliefs exemption application had been declined and there was no appeal process. I was in shock and disbelief. Attached hereto and marked as **Exhibit “M”** to this my Affidavit is a copy of the denial from WestJet.
30. Between Christmas and New Year’s, I considered applying for a religious exemption with Air Canada. However, the Air Canada website had been updated and the religious beliefs exemption application (which I had previously downloaded) was removed. The updated Air Canada website said:

Passengers who are entitled to be accommodated on the basis of their sincerely held religious beliefs. The government has asked air carriers to administer these exemption requests, indicating that they must be submitted 21 days in advance of travel. However, we have carefully considered this reason for an exemption, the interests of all parties involved, and other factors relating to the accommodation of sincere religious beliefs, and do not anticipate being able to accommodate any exemption request on this basis in the present circumstances.

31. The Air Canada website page referenced above was found at <https://www.aircanada.com/ca/en/aco/home/book/travel-news-and-updates/2021/travellers-vaccine-rules.html#/> but has since been removed, and a copy of that page, which was accessed on December 29, 2021, is attached hereto and marked as **Exhibit “N”** to this my affidavit.
32. As a result of the Travel Ban and the difficulty in obtaining a religious exemption from WestJet or Air Canada, I was left with no other option than to drive 5,000 km back to Yellowknife during early February, again facing extremely dangerous driving conditions. I am now uncertain if my employer will have the patience to continue accommodating my position if I am unable to resume flights for my work within the NWT. We have 32 northern remote communities outside of Yellowknife and many of them can only be accessed by flights from Yellowknife (our hub community). Because of my vaccination status, I cannot board a plane out of Yellowknife to any of our remote northern communities so that I can perform the fieldwork required of my job.

Restricting My Rights and Freedoms

33. I cannot take the Covid-19 vaccination because it contradicts my long-held and sincere religious beliefs that are to be protected under Section 2 of the *Charter*.
34. I am a Christian who has accepted my Lord, our God, Jesus Christ as my creator and savior. Through my personal and prayerful relationship with Him, Jesus teaches me through the Bible (both the Old & New Testaments), how great His love for me truly is and to fully trust in Him. His teachings through the Bible are rock solid to those who truly

believe and trust in Him. I know that Jesus guides me, protects me, loves me unconditionally, and provides for my health & healing.

35. I have fully outlined my beliefs in my religious exemption application requests to:

a) The Northwest Territories Office of the Chief Public Health Officer (CPHO)

- Exemption from October 22, 2021 Proof of Vaccination restrictions
- Application submitted November 21, 2021
- Approval received December 3, 2021

b) WestJet Airlines Ltd.

- Exemption from the November 30, 2021 Domestic Travel Ban
- Application submitted December 2, 2021
 - i. Updated on December 4, 2021, to include the CPHO Approval Letter
- Declination received December 23, 2021

The information contained in both applications is the same, however, WestJet decided to go against the decision rendered by my Territorial Chief Public Health Officer. Based on the concern the airline industry raised on December 12, 2021 (stating they should not be the ones to evaluate exemptions applications for religious beliefs), I suspect Transport Canada may have intervened. Air Canada updated their website between Christmas and New Year's to remove the ability for anyone to apply for a religious exemption to the Travel Ban.

36. I do not believe the process regarding the application for a religious exemption has been transparent or genuine. I believe the Federal Government (Transport Canada) has no sincere interest in recognizing the *Charter* Rights of Canadians in relation to the Travel Ban against the unvaccinated. They have obviously not established the Travel Ban, based on Covid-19 science and data:

- a. By following the airport & airline Covid-19 health and safety procedures, there has been no significant risk of Covid-19 transmission onboard planes;
- b. During the month of November 2021, unvaccinated Canadians could only board an airplane, by providing a negative PCR test conducted within 72 hours prior to boarding (making these folks the safest ones on the planes); and
- c. Effective November 30, 2021, only the fully vaccinated (still defined as two vaccines) and children under 12 can freely board domestic airplanes. It is known that even the vaccinated are catching and transmitting Covid-19 infections from November 30, 2021, to the present.

37. Based on my own understanding and conscience and after an extensive review of the scientific research and medical data, I will not be taking the Covid-19 vaccine.

38. The Travel Ban is infringing on my *Charter* rights, human rights, and is a violation of the Nuremberg Code. I am disappointed in the Government of Canada, how it has treated Canadians in a divisive and disrespectful manner. I have always been a law-abiding Christian and I have been vilified, shamed, and discriminated against like a criminal by my own government.

39. I swear this affidavit *bona fide* in support of the within application and for no improper purpose.

SWORN BEFORE ME by Ken Baigent, of the)
 City of Yellowknife, in the Territory of the)
 Northwest Territories, before me at the City of)
 Brampton, in the Province of Ontario, this 10th)
 day of March 2022 in accordance with O. Reg.)
 431/20 Administering Oath or Declaration)
 Remotely)



 KENNETH B. BAIGENT



 A Notary Public in and
 for the Province of Ontario

Barrister & Solicitor

Court File No. T-145-22

FEDERAL COURT

BETWEEN:

NABIL BEN NAOUM

Demandeur

et

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Court File No. T-247-22

AND BETWEEN:

L'HONOURABLE MAXIME BERNIER

Demandeur

et

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Court File No. T-168-22

AND BETWEEN:

**THE HONOURABLE A. BRIAN PECKFORD, LEESHE NIKKANEN,
KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC,
AND AEDEN MACDONALD**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

SHAUN RICKARD AND KARL HARRISON

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ANSWERS TO WRITTEN EXAMINATION

AFFIDAVIT OF KENNETH B. BAIGENT

TO : ATTORNEY GENERAL OF CANADA

c/o Sharlene Telles-Langdon

Department of Justice Canada

Prairie Regional Office (Winnipeg)

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

I, KENNETH B. BAIGENT, of the Hamlet of Jordan Station, in the Province of Ontario, SWEAR THAT the answers set out in Exhibit A to this affidavit to the questions dated May 4, 2022, submitted by the Respondent, Attorney General of Canada, are true, to the best of my information, knowledge and belief:

SWORN REMOTELY by videoconference)
by Kenneth B. Baigent, of the Hamlet of)
Jordan Station, in the Province of Ontario,)
before me at the City of Brampton, in the)
Province of Ontario, this 1 day of June)
2022 in accordance with O. Reg. 431/20)
Administering Oath or Declaration)
Remotely)

[REDACTED]

Barrister and Solicitor in the
Province of Ontario

[REDACTED]

KENNETH B. BAIGENT

This is Exhibit "A" referred to in the Affidavit
of **KENNETH B. BAIGENT**, sworn before me
remotely this 1st day of June 2022



Barrister and Solicitor in the
Province of Ontario

11. Given the above, I did not file a complaint with the Canadian Human Rights Commission pursuant to the *Canadian Human Rights Act*, challenging WestJet's decision to deny my exemption request.
12. As an additional note, I am no longer a resident of Yellowknife. I have now driven across Canada three times since November 2021, when the Travel Ban was introduced, and narrowly missed being involved in a huge pileup on the TransCanada highway 10 km outside Winnipeg. The undercarriage of my car was damaged and needed repairs in Winnipeg before I could continue my travels.
13. It is completely unreasonable for me to drive 5,000 km across Canada and feel safe. I feel like I am risking my life when I do so, and I had to make a decision between seeing my family in Ontario or continuing with my employment in Yellowknife. Regrettably, I had to resign my full-time Senior Energy Management Specialist position effective June 30, 2022, because of the federal government's travel ban.
14. Life was simpler when I could just board a plane in Toronto or Yellowknife and "safely" be at my destination within 10 hours. This is something I was freely able to do 10-12 times each year for the past seven years, but no longer can.

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FEDERAL COURT OF CANADA

BETWEEN:

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

Applicants

-and-

**THE MINISTER OF TRANSPORT and
THE ATTORNEY GENERAL OF CANADA**

Respondents

APPLICATION UNDER ss. 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and Rules 300(a) and 317 of the Federal Courts Rules, SOR/98-106

**AFFIDAVIT OF NATALIE GRCIC
(Sworn March 10th, 2022)**

I, Natalie Grcic, of the City of Gatineau, in the Province of Quebec, SWEAR AND SAY THAT:

1. I am one of the Applicants herein, and as such have a personal knowledge of the matters hereinafter deposed to, except where they are based on information and belief, in which case I verily believe them to be true.

Background Personal Information

2. I am a 38-year-old married mother of one who immigrated to Canada with my husband in August 2016 from South Africa. I am a permanent resident of Canada. Before coming to Canada, I attended law school and was qualified as an attorney. I worked as an Executive Assistant in Montreal from 2020 to 2021 before relocating from Montreal to Gatineau in June 2021, where we currently reside. Presently, I am a stay-at-home mom and homemaker. We lead a relatively quiet and secluded lifestyle.

3. I have not been vaccinated for Covid-19, but I am also not an "anti-vaxxer." I willingly received all my vaccinations and took my infant daughter for her Canadian recommended vaccinations. I am deeply distraught and have been negatively impacted due to elected officials and other government officials negatively labelling, shaming, and discriminating against people who have chosen not to or are unable to receive the Covid-19 vaccine. I vehemently oppose such labels and mischaracterization, particularly from influential people who portray me as a bad mother, stupid and anti-science. Specifically, on August 31, 2021, the Prime Minister of Canada stated publicly:

So the folks out there tonight shouting, the anti-vaxxers, they're wrong. They're wrong about how we get through this pandemic, and more than just being wrong – cause everyone's entitled to their opinions – they are putting at risk their own kids, and they're putting at risk our kids as well. That's why we've been unequivocal. If you want to get on a plane or a train in the coming months, you're gonna have to be fully vaccinated so families with their kids don't have to worry that someone is going to put them in danger, in the seat next to them or across the aisle.

Attached hereto and marked as **Exhibit "A"** to this Affidavit is a transcript of Prime Minister Trudeau's public speech on August 31, 2021.

4. I have observed the Prime Minister also publicly call unvaccinated Canadians "misogynist and racist." I am offended by the Prime Minister's labelling of me and other Canadians in this disparaging way especially because I have a deep interest in well-tested and established vaccination, medical advancement, and science. Attached hereto and marked as **Exhibit "B"** to this my Affidavit is a translated transcript of the Prime Minister making these comments.
5. On October 6, 2021, I learned that the Federal Government was preparing to make a law that restricted unvaccinated Canadians from travelling by air and rail within and outside of Canada.

6. I believe that on October 29, 2021, the Federal Government announced that they had enacted *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43* (the "Travel Ban"). Attached hereto and marked as **Exhibit "B"** to this my Affidavit is copy of that Order. It is my understanding that the Travel Ban is amended often and that as of today's date, the Travel Ban currently in force is *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 56* which was enacted on February 28, 2022. Attached hereto and marked as **Exhibit "C"** to this my Affidavit is a copy of that Order.
7. I have had a hard time understanding the constantly changing Covid laws and requirements. Attached hereto and marked as **Exhibit "D"** to this my Affidavit is a table outlining all of the amendments to the Travel Ban and the dates the changes were made.
8. As a result of the constant changes to the Travel Ban and uncertainty about the Covid laws in Canada, I have experienced a lot of undue anxiety and stress, especially because these laws restrict my freedom of movement and choice about what I consent to being put into my body as well as the personal medical information that I have to share.

My Concerns Regarding the Covid-19 Vaccine

9. I have done extensive personal research into the various vaccines and have genuine concerns about taking the Covid-19 vaccines. I have discussed my concerns with medical professionals that are entrusted with helping me make decisions regarding my health. The vaccines currently being offered to Canadians/Permanent Residents have a limited long-term safety and efficacy profile. It is my view that until long-term safety trials are complete, a vaccine is still experimental. I have declined to be a part of the experiment.
10. From my life experience, I have observed the normal amount of time for vaccine development. I know that they can take years to develop. I believe the Covid 19 vaccine development and rollout was rushed. One of the published articles that I have read regarding safety assessments of vaccines was from the College of Physicians and Surgeons in Philadelphia where it states: "*Vaccine development is a long, complex process, often*

lasting 10-15 years and involving a combination of public and private involvement." Attached hereto and marked as **Exhibit "E"** to this my Affidavit is an article from the College of Physicians and Surgeons in Philadelphia.

11. I would like to have another child, and I have legitimate concerns and fears over the risks a vaccine that has not completed long-term testing and the impact it may have on my reproductive health.
12. I am a healthy, relatively young woman, who is careful about what I put into my body, including what I eat. My health, and the health of my family is of paramount importance, so I undertake extensive personal research before committing to medicines, supplements, treatments, vaccinations, and other personal health decisions. Furthermore, I know that sometimes pharmaceutical companies and drug approval agencies make mistakes and I have not forgotten the horrors of the drug Thalidomide. In high school, I completed a study and essay on this drug, the horrific impacts to women and babies and the regulatory system that allowed that to happen. While the true impacts of Thalidomide have been known now for 60 years there is no way to correct the deformed and dead babies that the drug caused many years ago.
13. Given my legal background, I am analytical and assess the supporting data. This has caused me to critically assess information that I am receiving and not simply accept without question what the pharmaceutical companies or government officials are saying.
14. I am also concerned that governments have shielded the pharmaceutical companies from liability or responsibility for me or my family if we suffer an adverse effect from one of the Covid-19 vaccines. I believe that if the pharmaceutical companies have no liability it can reduce the incentive for them to produce a safe product.
15. I read the report in *The British Medical Journal* where it is documented that an internal Pfizer researcher made a public interest disclosure on data integrity issues in Pfizer's Covid-19 vaccine trial. Attached hereto and marked as **Exhibit "F"** to this my Affidavit is a copy

of that report. This increases the risk that the safety of the Pfizer vaccine has not been properly assessed and informs my decision to decline this vaccine.

16. My understanding is that none of the Covid-19 vaccines offered in Canada have been given full approval and are still under "emergency use authorization.". Given my efforts to inform myself, I do not consent to this vaccine being put into my body. Therefore, forcing or coercing me or my family members into taking the Covid-19 vaccine is an assault and amounts to a violation of the Nuremberg Code.
17. I personally have observed how the vaccine is not effective at stopping people from catching and spreading Covid-19. My fully vaccinated sister-in-law, my mother-in-law and her husband contracted Covid-19. I also know many other vaccinated and unvaccinated people who caught Covid-19 and recovered from it.
18. Given the known risks with the Covid-19 vaccines and continued transmissibility of the virus despite vaccination, as a healthy young woman of childbearing age, I am more comfortable exercising my choice over bodily autonomy than exposing myself to the risk of taking this vaccine.

Restricting My Rights and Freedoms

19. As an immigrant to Canada, aside from a cousin on the other side of Canada, in Victoria, British Columbia, my entire extended family is overseas. The Travel Ban bars me from leaving Canada to travel to my home country for any reason, such as bereavement, or to assist my family should they need my help. This is extremely distressing to me as I am a family-oriented person, and my parents are now very elderly and require assistance and may pass soon.
20. I also fear that this will negatively impact my three-year-old child and her relationship with my family as she will not be able to form relationships with my family because I

cannot take her to see them. I do not have the financial means to pay to fly by private chartered aircraft to visit family.

21. As a result of the Federal Government announcement on October 6, 2021 about its plan to implement travel bans, I quickly made plans for me and my daughter to leave Canada prior to November 30, 2021 (the effective date of the ban, as I understood it). I had been previously planning to return to South Africa for the Christmas Holidays due to concerns about my elderly father's health and in hopes of having him connect with his grandchild while we were able to.
22. My husband was unable to travel with us because of work commitments but he hoped that reason would prevail and that the ban would somehow be stopped before Christmas so that he could join us. Since the Travel Ban remained in place, my husband was forced to spend Christmas in a new home, in a new city, alone and isolated from his family as he is unvaccinated and was not able to board an airplane. He was also prevented from travelling to South Africa to see his mother and family.
23. I had an especially hard time when I arrived in South Africa without my husband and I just suffered from a miscarriage, potentially due to the stress while travelling without him, together with the stress caused by this Travel Ban and other COVID-19 measures.
24. I also understand that while Canada is one of the largest by land mass, it is the only Country that prevented domestic air and rail travel to unvaccinated individuals. Attached hereto and marked as **Exhibit "G"** to this my Affidavit is my review of travel restrictions due to Covid-19 around the world.
25. Based on my own understanding and conscience and after an extensive review of the scientific research and medical data, I am unable to take the Covid-19 vaccine at this time. I believe that taking the Covid-19 vaccine at this time would be a real and significant risk to my current, and especially future, health and wellbeing.

26. I believe that the Travel Ban is infringing on my *Charter* rights, human rights and the Nuremburg code and is an attempt to coerce me to take a medical treatment that I consider experimental, at this stage, just to be able to leave the country and visit my family overseas. I feel like I am being discriminated against, and that there is no basis for it, based on the evidence that both vaccinated and unvaccinated travellers pose a risk of transmitting Covid-19.

27. We are not criminals or dirty Canadians but that is how we have been painted by our elected officials and rhetoric about being labeled "anti-vaxxers". Living through this time was incredibly hard emotionally, physically, and spiritually. It is my belief that the government and media messaging about the unvaccinated caused people to turn on each other. My friends and family turned on each other and on us and are divided over the issue of one's Covid-19 vaccination status. We have lost numerous close friendships and my father-in-law (who lives in Montreal) has refused to see us or his granddaughter. This is not the Canada I dreamed about and came to.

28. I am simply a person who wishes to visit my home country and visit my family if and so when the need arises. I am asking to be able to go home and see my family if and when I need or want to do so. I do not want to be trapped in Canada and discriminated against for exercising a personal medical choice.

29. I swear this affidavit bona fide in support of the within application and for no improper purpose.

SWORN REMOTELY by Natalie Grcic of)
the City of Gatineau in the Regional)
Municipality of Outaouais in the Province of)
Quebec before me at the City of Brampton in)
the Regional Municipality of Peel in the)
Province of Ontario on March 10th, 2022, in)
accordance with O.Reg 431/20,)
Administering Oath or Declaration Remotely.)

NATALIE GRC



Rosy Rajni B. Rumpal
Barrister, Solicitor & Notary Public



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FEDERAL COURT OF CANADA

BETWEEN

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

Applicants

-and-

**THE MINISTER OF TRANSPORT and
THE ATTORNEY GENERAL OF CANADA**

Respondents

**AFFIDAVIT OF ROBERT DREW BELOBABA
(Sworn March 11th, 2022)**

I, Robert Drew Belobaba, of the Village of Horton in the County of Somerset, England, SWEAR AND SAY THAT:

- I am one of the Applicants herein, and I have a personal knowledge of the facts and matters herein referred to me except where indicated to be on information and belief, and where so stated, I verily believe them to be true.

Background Personal Information

- I am a 48-year-old Canadian Citizen. I moved to the United Kingdom in November 2005 from Canada. I am a non-practicing member of the Law Society of Saskatchewan and the Law Society of England and Wales. I have practiced law in Canada and the United Kingdom, including personal injury law.
- Currently, I am working as a self-employed courier. In addition to this, I am also a partner in an antiques and vintage furniture online retail business.

4. Having practiced personal injury law, I am confident in my ability to comprehend specialist medical writing. My wife is a practicing pharmacist who holds a highly educated understanding of naturopathic nutrition.
5. I have visited Canada in 2016, 2017, 2018, and three times in 2019. In 2019, I inherited property in Outlook, Saskatchewan.
6. In the spring of 2019, I was diagnosed with Type II diabetes. From the time I had discovered that I have Type II diabetes, I have taken a proactive role in monitoring and maintaining my health.
7. In late December 2019 or early January 2020, I read about reports of mysterious cases of pneumonia in Wuhan, China. I continued to follow the news about the disease, which became steadily more alarming. As more continued to develop with Covid-19, I became especially concerned about my Diabetes, as people with Diabetes who contract Covid-19 were more likely to have a potentially fatal outcome from this co-morbidity. I began reading the scientific literature on Covid to understand the disease. As a result of my research, I started taking daily supplements of Vitamins C, D, and Zinc.
8. During the first lockdown (March to June 2020), the sales of my antique business collapsed. I needed to find alternative employment, and I deliberately chose to get a job at a large warehouse because I knew the work would be physical and help me lose weight. I knew that being overweight was a very significant co-morbidity that could lead to a bad outcome if I contracted Covid-19. From the beginning of my employment there in late June 2020 until my resignation in August 2021, I lost approximately 15 kg in weight and improved my overall health.
9. I was receptive to getting vaccinated when the Covid-19 vaccines were first announced in autumn 2020. However, by the time I was eligible to receive a vaccine in the spring of 2021, I was less confident and resolved to wait and see whether they had any serious side effects before making a decision. Several occurrences had taken place that made me no longer want a vaccination. My elderly father was vaccinated last spring. After his first

dose of the vaccine, he became very weak and ill. He subsequently contracted pneumonia and was hospitalized. My business partner received two doses of the Astra Zeneca vaccine. About a month after her second dose, she suffered from blood clotting. Weeks after this, while receiving treatment for her blood clotting, she began hemorrhaging from her mouth and eventually was hospitalized for a month. A friend's mother was vaccinated and then caught Covid anyways, as did my stepbrother. In his case, he was very ill and took several weeks to recover.

10. The language used by Canadian politicians, and in particular our Prime Minister Justin Trudeau towards the unvaccinated Canadians, is disturbing. The divisional words Justin Trudeau spoke in his interview during his last Federal election in the summer of 2021 were alarming. In this interview, Justin Trudeau communicated in French that unvaccinated people are "racists" and "misogynists." Attached hereto and marked as **Exhibit "A"** to this my Affidavit is a certified translated transcription of Justin Trudeau's public comments on public television.
11. In another public interview, Justin Trudeau also said:

When people see that we're in lockdowns or serious public health restrictions right now because of the risk posed to all of us by unvaccinated people, people get angry. And we have put forward many, many different measures to encourage, to reassure, to incentivize, to educate, to cajole, to remind people that it is never too late to do the right thing.

We need to continue to do the right thing, the way all Canadians -- or the vast majority of Canadians are, keep each other safe, make sure our country gets back to the things we love as quickly as possible.

It is disturbing to me to see Justin Trudeau make such discriminatory remarks about good, hardworking and law-abiding Canadians. Attached hereto and marked as **Exhibit "B"** to this my Affidavit is a certified transcription of Justin Trudeau's public comments on January 5, 2021.

12. To me, the divisive words used by Justin Trudeau are frighteningly reminiscent of the demonization suffered by my Serbian relatives at the hands of the Ustashe government in Croatia during the Second World War as part of its genocidal policies towards its minority citizens.
13. I believe that the steps I have taken to improve my health and my immune system during Covid-19 have paid off. On or about August 1, 2021, I developed a cough. The following day I had chills and felt a little unwell. I did a Lateral Flow Test at home, and the test results came back positive for Covid-19. I subsequently took a PCR test which confirmed a Positive Covid-19 diagnosis. Attached hereto and marked as **Exhibit “C”** to this my Affidavit is an extract from my medical records showing that I had a positive PCR test on August 4, 2021.
14. My symptoms from Covid-19 were very mild. The most serious symptom I experienced was losing my sense of smell. Beyond this, I just felt lethargic and a little “off.” My wife also contracted Covid-19 during the time I did. My wife was not as diligent as me in taking preventative measures and, as a result, suffered considerably worse than me. When my wife and I contracted Covid-19, all three of our children were homebound with us. One of my children just had a runny nose for a couple of days. My other two children never displayed any symptoms of Covid-19.
15. On or about the 29th day of November 2021, I attended a private medical clinic to obtain a Covid-19 Antibodies test. The test results of this Antibody Test indicated that I did have a recent or prior Covid-19 infection. Attached hereto and marked as **Exhibit “D”** to this my Affidavit is a copy of the correspondence I received from Bupa on November 29, 2021, confirming that I had tested positive for Covid-19 antibodies.
16. During the federal election campaign, our Prime Minister of Canada and leader of the Liberal Party of Canada, Justin Trudeau, promised that he would ban all unvaccinated Canadians from travelling by air; if reelected. Around October 2021, I learned that the Federal Government was preparing this law that restricted unvaccinated Canadians from air and rail, both in and outside Canada.

17. I understand that at the end of October 2021, the Federal Government announced that they had enacted *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43*(the “Travel Ban”). They have subsequently changed the Order many times and in force currently is *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 52*.
18. It is my understanding the Travel Ban has changed numerous times since it was first enacted. I have had a hard time understanding the constantly changing laws and requirements.
19. The Travel Ban causes significant, negative impacts on my life by preventing me from returning to Canada. Although I can still fly into Canada as an unvaccinated individual, I cannot fly directly from the United Kingdom into the Saskatoon airport, the closest airport to my Canadian residence. There are no direct flights from the United Kingdom to airports in Saskatchewan. I would have to fly into Calgary or Winnipeg and then hire a car to drive to my Canadian residence.
20. In addition, there are no direct flights to Kelowna airport either, the nearest airport to where my elderly father resides. Furthermore, I would be unable to board a flight to return home to the United Kingdom as an unvaccinated traveller and do not have the financial means to pay to fly by private chartered aircraft to visit family or travel for work.
21. Based on my conscience, belief, personal understanding and extensive review of the scientific research and medical data, I cannot take the Covid-19 vaccinations for a variety of the following reasons:
- a I have acquired natural immunity to Covid-19 through contracting and recovering from the disease;
 - b I have taken responsibility for improving my general health and believe that my body can sufficiently fight off any future Covid-19 infections;

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FEDERAL COURT OF CANADA

BETWEEN:

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

Applicants

-and-

**THE MINISTER OF TRANSPORT and
THE ATTORNEY GENERAL OF CANADA**

Respondents

APPLICATION UNDER ss. 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and Rules 300(a) and 317 of the Federal Courts Rules, SOR/98-106

**AFFIDAVIT OF LEESHA NIKKANEN
(Sworn March 11th, 2022)**

I, Leesha Nikkanen, of the City of Surrey, in the Province of British Columbia, SWEAR AND SAY THAT:

1. I am one of the Applicants herein, and as such have a personal knowledge matters hereinafter deposed to, except where they are based on information and belief, in which case I verily believe them to be true.

Background Personal Information

2. I am a Canadian citizen born in Ontario. I am a certified high school teacher with over ten years of teaching experience in Canada and overseas in Beijing, China.

3. I currently live and work in Surrey, British Columbia. I have a degree in English and History from Queen's University in Kingston, Ontario. I also have my Bachelor of Education from Queen's University.
4. I got married in February of 2019 in Saskatchewan, had a wedding celebration in Ontario (in June of 2019 and then moved to Surrey with my husband, Bradley, in August 2019 because this is where we can make a livable wage. We both acquired well-paying jobs, but many of our family members live elsewhere. Most of my family lives in Ontario, and others live in Calgary and the United States. My mother died in 2016, and my father is getting elderly. I am very worried about him and miss him terribly.
5. My husband's mother, a sixties indigenous scoop survivor, and his grandmother, an indigenous residential school survivor, live in Edmonton, Alberta. We are very close to his family.
6. I recently suffered from a miscarriage. This was my first pregnancy, and we were incredibly excited about having a baby. I hope to be pregnant very soon again, but the stress and uncertainty about what we can and cannot do and the government changing the rules all the time and treating us like criminals is not helping my mental and physical wellbeing.

The Federal Travel Ban

7. In October 2021, I heard that the Federal Government was preparing to make a law restricting unvaccinated Canadians from air and rail in and outside Canada.
8. I understand that currently, *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 56* (the "Travel Ban ") is in effect. I have had a hard time understanding the constantly changing laws and requirements. I also found that the government did not provide much information about the Travel Ban, and I had to rely on my airline companies and the news to inform myself about the Travel Ban.

9. I was very angry and frustrated at the government for even considering creating these laws, and I felt pretty unsure about how to proceed. I was shocked, and I honestly did not believe that the government would go through with this law. I lived in communist China for three and a half years, and this action by the government is precisely what they do in China to limit freedoms. The Chinese Communist Party creates propaganda to scare citizens, and then they pass laws to limit travel or limit the assembly of people, etc.
10. Given my frustration in learning about the impending Travel Ban, I reached out to Swoop airline in October and November of 2021. I unsuccessfully attempted to speak with a Swoop agent many times, and I left numerous messages for them to contact me to understand if and how my travel rights would be affected.
11. I kept reassuring my husband that we would be able to fly home for Christmas because I could not fathom that the federal government would ever restrict our right to travel within Canada and deny our right to see our families. I could never see that happening in the Country I grew up in and love. I love Canada because we feel safe having the *Charter* and laws protecting us from government and institutional abuse. I have seen firsthand how government abuse affects its citizens, and it is terrifying. I still cannot comprehend that the government would tell my indigenous husband and me that we could not fly in the land that belonged to his ancestors.
12. In or around February of 2021, my husband and I contracted Covid-19. We were sick for a few days and recovered like the regular flu during a flu season. We stayed home for the entire two-week quarantine period. I had a cough that lingered a bit longer.
13. The Travel Ban has had a massive impact on our lives. We can no longer see our family without flying because my husband only gets paid when he is working. We cannot afford to take the two or three weeks off that would be needed to drive to Edmonton or Ontario. We also do not have the financial means to pay to fly by private chartered aircraft to visit family or travel for work.

14. I have not seen my mother-in-law, his grandma, or any of my family from Ontario since our wedding celebration in June 2019, with the exception of my dad, brother, and sister-in-law in February 2020 just before the pandemic when they flew out for a conference. Finances and other circumstances prevented us from going before this Christmas. I was very excited that I was finally going to be able to make it home for Christmas in 2021.
15. My mom has passed away, my father is on his own, and he is getting elderly. I want to see him at least a few times before he also passes. I had not seen him since right before Covid hit when he travelled to British Columbia with my brother and sister-in-law, but he has since stopped travelling beyond a short drive from his home. With the Travel Bans now in place. I worry that I will not be able to attend his funeral, and I am devastated at this prospect if the Covid mandates and laws do not change soon.
16. I am saddened that the government is stealing family memories from me. They have no right, and I am angry and worse, I feel helpless in this situation.
17. My husband and I both sought a religious exemption. After numerous attempts to call and email Swoop, I finally got through to a Swoop Airlines representative, and the woman suggested that I apply with their parent company WestJet. The forms were available on the website, and I filled them out that night. We got them signed the very next day with a notary public and emailed them out the day after they were available, as our trip back to Ontario for Christmas (2021) was three weeks away. We had booked our flights on July 21st, 2021, before the Travel Ban was passed. We were supposed to fly with Swoop Airlines from Abbotsford to Toronto on December 21st, 2021, returning a week later. Attached hereto and marked **Exhibit "A"** to this my Affidavit is a copy of the flight's book for December 21st, 2021.
18. The WestJet exemption forms were complicated to fill out technically and substantially. WestJet only provided one line in the fillable pdf to answer challenging and complex questions about my deep-held religious beliefs. It felt like they were trying to trick us. Attached hereto and marked **Exhibit "B"** to this my Affidavit is a copy of my religious exemption request to WestJet.

19. On December 16th, 2021, I received an email from WestJet airlines that my husband and my exemptions had been denied. We were not given any reasons why we were denied. The email also stated we could not ask for feedback, nor could we apply again. Attached hereto and marked as **Exhibit "C"** to this my Affidavit is a copy of the denial. This made me feel like the whole process was fixed. It felt like the WestJet form was made, so it was impossible to get an exemption, and they had no intention of offering an exemption in any event. WestJet's email states that we do "not meet Transport Canada's requirements for this exemption," which made me angrier as I, as a Canadian citizen, was not privy to these "guidelines" that they seemed to be experts on. And I questioned why Transport Canada was counselling WestJet on the exemption requirements.
20. I have an English/History degree, yet I was starting to feel like you needed a law degree and know someone in power to uphold my rights. I went on the Canadian government website before I filled out the forms. They did not give guidelines for the general public, and it made me question why private companies are given more direction on these mandates than the average layperson.
21. Also, isn't the government supposed to provide clear guidance on how to fill out these forms to help citizens be successful at making their requests? On the day when I checked, all the government websites provided as "guidance" was a list of Christian sects that had leaders who made public statements in support of the vaccines; my religious sect was not listed. I have always gone to Pentecostal/non-denominational, Vineyard churches or charismatic churches. No leader from any of these sects was quoted on the website as accepting the vaccine. The Covid-19 vaccine violates my religious beliefs on several levels. Firstly, it is known that vaccines use fetal cells from aborted fetuses in formulating vaccines. Our faith sees abortion as murder, and I cannot, in all conscience, support a product that supports this industry. Despite this, my religious exemption was denied.
22. Further, WestJet did not tell me why I was denied, they said I couldn't talk to anyone for feedback about why I was denied, and the email stated that I could not apply again. I am angered beyond words that a private company has been given this much power over my

freedom to move freely within Canada. This is nothing short of fascism. The whole process felt and feels like a big sham.

23. I also have many allergies and insensitivities to foods and chemicals, which I am greatly concerned about. I have reacted recently to antibiotics, to a vitamin which caused such extreme pain that I went into the emergency room, and to a cleaner that my work deemed "safe," but to which I had an anaphylactic reaction and had to be put on oxygen. I continue to avoid all medication and many foods. Due to my health issues, I feel that taking the vaccine will pose more risk than benefit; for me, taking the vaccine is like playing Russian Roulette. Further, it is next to impossible to get a complete list of ingredients in the vaccines due to proprietary reasons. This is very concerning to me, given my medical issues. I have also heard that the medical exemptions were extremely difficult to obtain, and I did not want to feel betrayed by the system again after my request for a religious exemption. Everything about this process has been incredibly stressful, unpleasant and disappointing. I feel like I am being stripped of my rights and liberties. I have not done anything criminal, and I feel like I am being treated like a criminal.
24. My main reasons for opting out of this vaccination experiment are my allergies and severe sensitivities. Last year, I was put on oxygen after reacting to a cleaning product at work which I was told was 'safe.' I have a doctor's note that I am allergic to the contents of that product. Attached hereto and marked as **Exhibit "D"** to this my Affidavit is a copy of my doctor's note.
25. I am also insensitive to wheat/gluten, soy, sulphites and some medications. Last year, my dentist put me on an antibiotic, and I broke out in boils after one day; I discontinued use after one day. Sulphites give me such extreme pain that I can hardly walk. I have also reacted to some vitamins. Costco's vitamin D makes me so sick that I thought I had a bladder infection last year and was off work for a week. Several months later, in September, when I started retaking their vitamin D, I had to go to the emergency room because of shooting pain in my stomach. That's when I figured out that I was reacting to their vitamin D, as that is all I had changed in my regular diet. If some of these everyday products and foods cause severe reactions, I cannot put my life and health at risk for a

vaccine I don't even know what is in it. It is unconscionable that anyone could try to force me to risk my life and health like that.

26. One of the reasons that I cannot take the Covid-19 inoculation is because I have allergies and chemical sensitivities.
27. I also do not want to support an unethical product that uses aborted fetal tissue. This violates my religious beliefs and my conscience. I was pregnant, and I didn't want to risk having a miscarriage. The Covid-19 vaccines are still in the testing phase, and I do not want to participate in this medical experiment. And I don't want to risk not being able to get pregnant again.
28. I do not support companies that make these vaccines and their forcing countries worldwide to waive their liability. This does not instill confidence in the product and the manufacturer. It also makes me question how our government agrees to this type of waiver of liability and still mandating these products on us.
29. It is unbelievable and unjustified to me that the government can impose a medical experiment that seems to have more risk than benefit. I do not wish to partake in this worldwide human experiment.

Restricting My Rights and Freedoms

30. Based on my own understanding and conscience, I will not be taking the inoculation after an extensive review of the scientific research and medical data.
31. The Travel Ban is infringing on my *Charter* rights, human rights and the Nuremberg Code to take an experimental mRNA gene therapy. Further, I find these travel bans and other mandates incredibly discriminatory. I have had friends, colleagues, superiors refer to unvaccinated people negatively. I heard my Prime Minister Justin Trudeau call unvaccinated people racist and misogynistic. I cannot believe that the leader of Canada is using language that can cause so much hate and division in Canada.

- 32. I am disgusted and distraught that I cannot fly with my indigenous husband to see his sixties scoop victim mom and his residential school surviving grandma. This is outrageous. When I lived in China, I asked my Chinese mentor how the Chinese government could arrest Christians, Muslims, etc., when they say that religion is not illegal. This is how there is a literal genocide in China of Muslim Uyghurs. The government restricts citizens' right to travel freely and assemble and then arrest whomever they choose - which tends to be anyone who believes in God or is spiritual. It has been eerie to watch these communist tactics play out on Facebook, on the news media, and between friends since Covid.

- 33. This is why I am challenging the Federal Government's Travel Ban. I need to fight while we still have an ounce of democracy left. I do not believe that the government has the right to coerce me, threaten me and bully me into putting something into my body that I do not want. By maintaining that the Constitution is supreme and maintaining that even this Federal government cannot get away with taking away our right to travel freely and practice our faith, then we are standing up for democracy. I will fight for my freedom, even when it is difficult or uncomfortable.

- 34. I swear this Affidavit *bona fide* in support of the within application and for no improper purpose.

SWORN BEFORE ME by Leesha Nikkanen,)
of the City of Surrey, in the Province of)
British Columbia, before me at the City of)
Brampton, in the Regional Municipality of)
Peel, this 11th day of March 2022 in)
accordance with O. Reg. 431/20)
Administering Oath or Declaration Remotely)

_____)
LEESHA NIKKANEN)

_____)
A Notary Public in and)
for the Province of Ontario)



Rosy Rajni B. Rumpal
Barrister, Solicitor, Notary Public

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COURT FILE NO: T-168-22-ID-1

FEDERAL COURT OF CANADA

BETWEEN

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

Applicants

-and-

**THE MINISTER OF TRANSPORT and
THE ATTORNEY GENERAL OF CANADA**

Respondents

APPLICATION UNDER ss. 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and Rules 300(a) and 317 of the Federal Courts Rules, SOR/98-106

**AFFIDAVIT OF AEDAN MACDONALD
(Sworn March 11th, 2022)**

I, Aedan MacDonald, of the City of Langley, in the Province of British Columbia, SWEAR
AND SAY THAT:

1. I am one of the Applicants herein, and as such have a personal knowledge matters hereinafter deposed to, except where they are based on information and belief, in which case I verily believe them to be true.

Background Personal Information

2. I am an 18 first-year student attending Trinity Western University on partial academic and athletic scholarships. I was born in London, Ontario, where I spent eight years before

moving to Nairobi, Kenya, in August 2011. In 2016, my family and I moved to Toronto, where I finished high school, before moving to British Columbia to further my studies.

3. I have spent my high school career training to play rugby in university. Prior to restrictions with BC Rugby, I trained 4 days a week for a total of 8.5 hours a week including extensive weight training. I invested significant time and energy training to be ready to play at the highest level of competition of university rugby in Canada. Doing so was no easy task, but it was something I needed both for my physical and mental health. In early November of 2021, I was told by my coach that I was no longer permitted to play in competition, and worse, I was not able to train at all. The mental strain this caused me was extremely detrimental. I was isolated, depressed, losing critical training for the future of my rugby career in university, and felt entirely separated from my teammates.
4. I have continued to train on my own because doing so is important for my physical and mental well-being and I hope to be able to return to play with my team very soon.
5. In late September 2021, I heard that the Federal Government was preparing to make a law restricting unvaccinated Canadians from travelling by air and rail domestically and internationally.
6. On October 29, 2021, the Federal Government announced that they had enacted the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43* (“Travel Ban”) which I understand restricts my right to travel by air or rail in Canada or out of Canada. I understand that the Travel Ban was amended several times after that day.
7. I have had a hard time understanding the constantly changing laws and requirements and how they apply to me. The seemingly uncertain decisions made by our Federal Government concerning the Travel Ban leave me with an overwhelming feeling of distrust.

8. The Travel Ban is negatively impacting me in several ways. I am unable to travel freely home to Ontario or Quebec. I was unable to go home for the Christmas holidays in 2021, while vaccinated individuals were permitted to travel abroad without providing proof of a negative molecular Covid-19 test.
9. I find it hard to understand the public health rules and what changed in the one-month span between when I had travelled in November to when the Travel Ban was enacted on December 20, 2021.
10. On January 6th, 2022, I contracted Covid-19, and within a matter of days, I recovered completely. I experienced mild headaches, sore throat and a cough. Despite now having natural immunity to the virus, I am still not able to travel either by air or rail. I do not have the financial means to pay to fly by private chartered aircraft to visit family.

Restricting My Rights and Freedoms

11. I cannot take the Covid-19 vaccination in good conscience because the vaccine was developed using the abortion-derived HEK-293 cell line. As a devout Christian of the Reformed Presbyterian Church, on the advice of religious leaders, and through my own conscience, I understand the absolute inadmissibility of medicines prepared using aborted fetal cells. In the past I have received vaccines which had been developed using the HEK-293 cell line. However now in my adulthood and being able to consciously make decisions based on my own personal health and bodily autonomy, I have decided to abstain from, to the absolute best of my ability, all medical procedures and products which have used this cell line in their production.
12. I am also alarmed about the potentially dangerous side effects of the Covid-19 vaccine in young males, particularly athletes, and specifically the rapid rise in cases of myocarditis. I have observed that the Federal Government and public health officials have stated that it is “rare” and “most cases have been mild and resolved quickly.” Attached hereto and marked as **Exhibit “A”** to this my Affidavit is a copy of the Government of Canada advisory regarding myocarditis following Covid-19 vaccination.

13. I find it concerning that public health officials suggest that inflammation of a vital organ, like the heart, can be regarded as a minor incident. As a young athlete in my first year of university, I take my health and future health with an extreme level of care and consideration.
14. For me, the possibility of developing myocarditis is far too significant a risk to outweigh the yet unknown and changing benefits of the Covid-19 vaccine.
15. The federal government has not properly explained these risks to me, or the other risks of this new medical treatment. Nowhere on Transport Canada's website lists the risks and known adverse events associated with the Covid-19 vaccine. Without doing my own research, I never would have known that these vaccines have safety warnings for blood clots, Bell's Palsy, myocarditis, or other serious conditions that could affect me and my future.
16. Based on my sincerely held religious beliefs and my conscience, and after an extensive review of the scientific research and medical data, I see no positive factors in which I would be persuaded to override my religious convictions and my personal concerns for my health and wellbeing.
17. I also feel segregated from other Canadians. It is astounding how I am being treated differently and like a second-class citizen merely for exercising my freedom to choose what medical treatment I receive and for looking out for my health and safety.



Court File No.:

FEDERAL COURT

T-168-22

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

Applicants

and

THE MINISTER OF TRANSPORT AND ATTORNEY GENERAL OF CANADA

Respondents

APPLICATION UNDER ss. 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and Rules 300(a) and 317 of the Federal Courts Rules, SOR/98-106.

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the Applicants. The relief claimed by the Applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicants. The Applicants request that this application be heard at Ottawa.

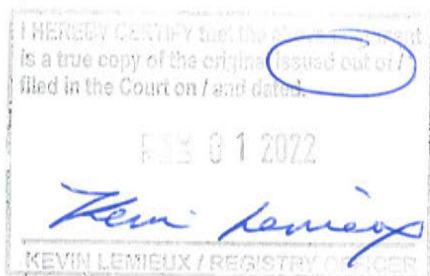
IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you

must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicants' solicitors WITHIN 10 DAYS after being served with this Notice of Application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January 31, 2022



ORIGINAL SIGNED BY
KEVIN LEMIEUX
A SIGNÉL'ORIGINAL

Issued by: _____
(Registry Officer)

Address of
Local office: Canadian Occidental Tower
635 Eighth Avenue SW
3rd Floor, P.O. Box 14
Calgary, Alberta
T2P 3M3

TO: ATTORNEY GENERAL OF CANADA
Deputy Attorney General of Canada



Solicitor for the Respondents

APPLICATION

1. This is an application, made pursuant to sections 18(1) and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review in respect of the Minister of Transport's decision to make an interim order restricting the mobility and other rights of Canadians based on their Covid-19 vaccination status. The Minister's decision was made pursuant to section 6.41 of the *Aeronautics Act*, R.S.C. 1985, c. A-2 ("the *Aeronautics Act*") and was communicated to the Applicants on or about January 15, 2022, in the form of *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No. 52* (the "Decision").
2. The Decision implements restrictions on Canadians that are not related to a "significant risk, direct or indirect, to aviation safety or the safety of the public" and are *ultra vires* the authority of the *Aeronautics Act*. The Decision, with limited exceptions, effectively bans Canadians who have chosen not to receive an experimental medical treatment from domestic and international travel by airplane. The result is discrimination and a gross violation of the constitutionally protected rights of Canadians, as guaranteed by the *Canadian Charter of Rights and Freedoms* (the "Charter").
3. This is an Application for Judicial Review; and is a constitutional and quasi-constitutional *vires* challenge in relation to the Decision in respect of the *Constitution Act, 1867*, 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (*Constitution Act, 1867*), the *Constitution Act, 1982*, and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (*Charter*), and on the basis that:
 - a. The Decision has been created and promulgated in a manner, means and in a form which is incorrect, unreasonable, an impermissible sub-delegation of authority, tainted by preconceived notions and consideration of extraneous and irrelevant factors, lacking in natural justice, and otherwise *ultra vires* the enabling statute, the *Aeronautics Act* and, or in the alternative, the *Constitution Act, 1867*;
 - b. The Decision breaches the rights afforded to the Applicants by sections 2(a), 6, 7, 8, and 15 of the *Charter*; and

- c. The Decision is inconsistent with and contrary to the *Canadian Bill of Rights*, SC 1960, c 44 (*Bill of Rights*).

4. This Application seeks, *inter alia*,

- a. An order of *certiorari* quashing and setting aside the Decision; and
- b. A Declaration that said Decision is *ultra vires* the *Aeronautics Act* and an unconstitutional breach of the Applicants' *Charter* rights.

1. Relief Sought

(a) *Relief regarding Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No. 52*

5. The Applicants make application for:

- a. A Declaration pursuant to section 18(1) of the *Federal Courts Act* that the Decision is *ultra vires* the *Aeronautics Act* and therefore of no force and effect;
- b. A Declaration that the Decision is invalid due to errors in law, jurisdiction, fact and/or mixed fact and law;
- c. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that sections 17.1 to 17.4, 17.7, 17.9, 17.10, 17.22, 17.30 to 17.33, 17.36 and 17.40 of the Decision (“the Vaccine Provisions”) violate the Applicants’ sections 2(a), 6, 7, 8, and 15 *Charter* rights as set out below, and that these violations are not demonstrably justified under section 1 of the *Charter*;
- d. Disclosure from the Governor in Council, of all information relied upon by the Minister of Transport in forming the Decision that the freedom of mobility of Canadians should be restricted based upon vaccination status, pursuant to Rule 317 of the *Federal Courts Rules*;
- e. Disclosure from the Respondents, of all information obtained pursuant to section 6.41(1.2) of the *Aeronautics Act*, RSC 1985, c A-2 and any relevant materials relied on in forming the Decision and obtained during the course of consultations with

“any person or organization” the Minister of Transport considered appropriate in the circumstances;

- f. In the alternative, a Declaration pursuant to section 24(1) of the *Charter* that the Vaccine Provisions of the Decision unreasonably and unjustifiably infringe:
 - i. Section 2(a) of the *Charter*;
 - ii. Section 6 of the *Charter*;
 - iii. Section 7 of the *Charter*;
 - iv. Section 8 of the *Charter*; and
 - v. Section 15 of the *Charter*.
- g. A Declaration that the Vaccine Provisions of the Decision violate sections 1(a) and (b) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and are *ultra vires* or otherwise unlawful;
- h. A Declaration that the Vaccine Provisions of the Decision violate Articles 7, 12, 18, and 26 of the *International Covenant on Civil and Political Rights*;
- i. In the further alternative, a Declaration that “natural immunity to Covid-19”, as evidenced by a serology test, be recognized as equivalent to being “fully vaccinated”, as defined in the Decision;
- j. A Declaration prohibiting the Respondents from issuing subsequent orders of a substantially similar or identical nature that prohibit or further restrict individuals who are not vaccinated against Covid-19 from boarding aircraft leaving Canadian airports;
- k. An Order pursuant to section 18(1) of the *Federal Courts Act* and section 24(1) of the *Charter* in the nature of *certiorari* quashing the Vaccine Provisions of the Decision;
- l. An Order abridging the time for service of this Application and allowing the

Application to proceed on an expedited and urgent basis;

- m. An order for an Extension of Time to file supporting affidavits and documents pursuant to Rule 8 of the *Federal Courts Rules*;
- n. The costs of this application; and
- o. Such further and other relief as counsel may request and this Honourable Court may permit.

2. The grounds for the application are:

(a) *The Parties*

The Honourable A. Brian Peckford

6. The Applicant, The Honourable A. Brian Peckford (“Mr. Peckford”), is a 79-year-old man residing in the City of Parksville, on Vancouver Island in the Province of British Columbia. He is a Canadian citizen and served as the third Premier of Newfoundland between March 26, 1979, and March 22, 1989. He is the last surviving First Minister who drafted the *Constitution Act, 1982*, including the *Charter*.

Leesha Nikkanen

7. The Applicant, Leesha Nikkanen, (“Ms. Nikkanen”), is a 44-year-old woman residing in Surrey, British Columbia. She is a Canadian citizen, a high school teacher, and Career Development Facilitator in Surrey. She lives with her husband in Surrey, but the rest of her family lives in Ontario and Alberta.

Ken Baigent

8. The Applicant, Ken Baigent (“Mr. Baigent”), is a 57-year-old man residing part-time in Yellowknife, Northwest Territories since 2012. His wife and son had to relocate to Jordan, Ontario in 2015 to manage parental elder-care needs. He is a Canadian citizen and is a Senior Management Specialist for the Arctic Energy Alliance in Yellowknife. For the past seven years, he has worked a hybrid schedule where he completes field work in the

Northwest Territories and completes client reports and other project work from an office in Jordan, Ontario.

Drew Belobaba

9. The Applicant, Drew Belobaba (“Mr. Belobaba”) is a 48-year-old man residing in the United Kingdom, who has family in Canada and a residence in Outlook, Saskatchewan. He is a Canadian citizen and is self-employed as a courier.

Natalie Grcic

10. The Applicant, Natalie Grcic (“Ms. Grcic”) is a 38-year-old woman residing in Gatineau, Québec. She was born in South Africa and is a permanent resident in Canada. She is trained as a lawyer but is currently a homemaker. Ms. Grcic has elderly parents and close family in South Africa and other family living in Europe.

Aedan MacDonald

11. The Applicant, Aedan MacDonald (“Mr. MacDonald”) is an 18-year-old man attending his first year at Trinity Western University (“Trinity”) on a rugby scholarship. He currently resides in Langley, British Columbia. He is from Ontario, where his family still resides. He is a Canadian citizen.

The Respondents

12. The Respondents are:
- a. Her Majesty the Queen (in right of Canada), as represented by the Attorney General of Canada on behalf of the Governor General in Council (“GIC”);
 - b. The Honourable Omar Alghabra, Minister of Transport; and
 - c. Transport Canada.

(b) *Brief Statement of Facts*

13. On January 15, 2022, the Respondent, the Honourable Omar Alghabra issued the Decision pursuant to section 6.41 of the *Aeronautics Act*. The Decision came into effect January 15,

2022 and does not have an expiry date. It is the ninth order since October 29, 2021, to prohibit Canadians who have chosen not to receive the experimental Covid-19 vaccines from air travel.

14. Sections 17.1 to 17.9 of the Decision require all air travellers to show proof of Covid-19 vaccination to board an airplane departing from an airport in Canada that is listed in Schedule 2 of that Order, including all major airports in Canada.
15. Each of the Applicants herein have chosen not to receive the current Covid-19 vaccines.
16. In the months leading up to the issuance of the Decision, the Prime Minister of Canada made pejorative and discriminatory statements toward Canadians who have made the decision not to receive the Covid-19 vaccine including by calling them “racists”, “misogynists” and asking “[d]o we tolerate these people?”
17. On December 16, 2021, the Prime Minister wrote to the Respondent Minister of Transport expressly directing him to enforce vaccination requirements across the federally regulated transport sector, and requiring travellers on commercial flights within and departing Canada to be vaccinated.
18. The resulting Decision provides a limited number of classes of individuals that are exempt from the requirement to show proof of Covid-19 vaccinations. The Applicants have been deemed not to qualify for any of the exemptions.
19. Four vaccines are currently authorized in Canada to treat symptoms of Covid-19: AstraZeneca, Moderna, Pfizer, and Johnson & Johnson. All Covid-19 vaccines are still undergoing clinical trials, which are scheduled for completion in 2023 or later. None of these vaccines prevent the infection or transmission of Covid-19, including the Omicron variant.
20. Covid-19 vaccines, while recommended by Canadian public health authorities, are also known to cause severe adverse effects and injuries for some individuals, including serious disabilities and death. Health Canada has placed warning labels on all of the Covid-19 vaccines available in Canada for various serious conditions, including myocarditis,

pericarditis, Bell's Palsy, thrombosis, immune thrombocytopenia, and venous thromboembolism.

21. Vaccinated and unvaccinated Canadians can be infected with and transmit Covid-19. However, individuals under 60 years old without co-morbidities have an approximately 99.997% chance of recovery from Covid-19.
22. The Decision discriminates against an identifiable group of Canadians (those who have not received a Covid-19 vaccine) and does not provide exemptions for Canadians who have natural immunity to Covid-19 or those with conscientious objections.
23. The Decision's requirement for Canadians to be vaccinated to fly does not address a matter of "significant risk, direct or indirect, to aviation safety or the safety of the public" and would not prevent travellers from introducing or spreading Covid-19.

(c) *The Impact of the Decision on the Applicants*

24. Mr. Peckford relies on air travel in order to visit his family in Ontario, Newfoundland, and Nova Scotia. He also has flown to various speaking engagements across Canada since the Covid-19 pandemic began. Since he lives on Vancouver Island, travelling by car across the country is impractical and dangerous depending on weather conditions. Mr. Peckford does not have the financial means to travel across Canada in a private chartered aircraft.
25. Mr. Peckford is a healthy and active man, and fears the potential side effects of Covid-19 vaccine products after reviewing the listed potential side effects of such products by Health Canada. Further, he believes that there is too much uncertainty and risk with this medical intervention for him to give informed consent to receiving it. Mr. Peckford did not apply for a medical or religious exemption, as he objects to the use of such products in exercise of his conscience, bodily autonomy, life, liberty, and security of the person, and believes that having to disclose his vaccination status to the Respondents as a condition of boarding an airplane is a violation of his privacy. Mr. Peckford also has been segregated from other vaccinated Canadian air travellers, which renders him a second-class citizen.
26. Ms. Nikkanen relies on air travel to visit her extended family in Ontario and Alberta. She does not wish to drive to Ontario and Alberta without her husband, and together they cannot

take enough vacation time from their employment to drive to and from their families' residences to visit. She recently suffered a miscarriage and is anxious to try to become pregnant again. Ms. Nikkanen also enjoys annual winter vacations to Mexico and can only get there by airplane. Mexico does not require non-citizens or tourists to provide proof of Covid-19 vaccination to enter the country. Ms. Nikkanen does not have the financial means to travel across Canada or to Mexico in a private chartered aircraft.

27. Ms. Nikkanen is a healthy and active individual and fears the potential side effects of Covid-19 vaccine products after reviewing the listed potential side effects of such products by Health Canada. She further fears the unknown potential risks to her fertility. Ms. Nikkanen believes that there are already too many known risks and further uncertainty with this novel medical intervention for her to properly exercise informed consent. By contrast, Health Canada data and peer reviewed research shows that persons in her age bracket are of very low risk from Covid-19. She objects to the use of aborted fetuses in the Covid-19 vaccine testing phase, or otherwise in the vaccine's production. She applied for a religious exemption to Westjet Airlines which was denied. She objects to the use of such vaccines based on her religious beliefs and conscience, exercise of her bodily autonomy, life, liberty, and security of the person. Ms. Nikkanen has been segregated from vaccinated Canadian air travellers which renders her a second-class citizen.
28. Mr. Baigent completes multiple return flights annually from Ontario to Yellowknife for his employment. From July of 2020 to September of 2021 he safely flew with Westjet Airlines between the two cities ten times. As a result of the first interim order prohibiting unvaccinated people from boarding an airplane that came into effect on November 30, 2021, Mr. Baigent had to drive 5,000 kilometers of dangerous highways in extreme winter weather conditions to reunite with his family in Ontario. He will have to make the return trip in February of 2022, under the same extreme winter weather conditions. He will have to complete this journey four more times in 2022. Mr. Baigent does not have the financial means to travel to and from work in a private chartered aircraft.
29. Ms. Baigent is a healthy and active individual and fears the potential side effects of Covid-19 vaccine products after reviewing the listed potential side effects of such products by

Health Canada. Further, he believes that there is too much uncertainty and risk with this novel medical intervention, while having less concern with his ability to overcome the negative effects of Covid-19 infection in his age group. Mr. Baigent applied to the Northwest Territories Chief Public Health Officer for a religious exemption to vaccine passport restrictions in the Northwest Territories, and the exemption was approved on December 3, 2021. For his domestic commercial air travel, he submitted a request for a religious exemption from Westjet Airlines, however it was declined on December 23, 2021. The only other major commercial airline that flies between Yellowknife and Toronto is Air Canada, however they updated their website after Christmas of 2021 to indicate they will not accept or approve any religious exemptions.

30. Mr. Baigent objects to the use of the Covid-19 vaccines based on his long held and sincere religious beliefs, his conscience, the exercise of his bodily autonomy and security of the person, and that having to disclose his vaccination status to the Respondents is a violation of his privacy. Mr. Baigent also has been segregated from vaccinated Canadian air travellers which renders him a second-class citizen.
31. Mr. Belobaba needs to return to Canada from the United Kingdom so that he can attend to his home in Outlook, Saskatchewan. While he can board an airplane to Canada without showing proof of Covid-19 vaccination, he will not be able to return to the United Kingdom by airplane where his wife and children currently reside. Mr. Belobaba does not have the financial means to travel from Saskatchewan to the United Kingdom in a private chartered aircraft.
32. Ms. Belobaba is a healthy and active individual and fears the potential side effects of the Covid-19 vaccine products after reviewing the listed potential side effects of such products by Health Canada. Mr. Belobaba had Covid-19 in August 2021 and recovered. Mr. Belobaba believes that there are already too many known risks and further uncertainty with this novel medical intervention for him to properly exercise informed consent. Further, he does not fear Covid-19 because he already recovered from the disease and has natural immunity. Mr. Belobaba objects to the use of the Covid-19 vaccines based on his conscience, the exercise of his bodily autonomy, life, liberty, and security of the person, and that having to disclose his vaccination status to the Respondents is a violation of his

- privacy. Mr. Belobaba also has been segregated from vaccinated Canadian air travellers which renders him a second-class citizen.
33. Ms. Grcic is currently in South Africa with her young daughter to visit her elderly parents. She plans to return to Québec in the future to reunite with her husband but will not be able to take an airplane to visit her parents again, or to visit her extended family in Poland, Croatia, and United Kingdom, and Victoria, British Columbia. Ms. Grcic does not have the financial means to travel internationally in a private chartered aircraft.
 34. Ms. Grcic is a healthy and active individual and fears the potential side effects of Covid-19 vaccine products after reviewing the listed potential side effects of such products by Health Canada. She is of childbearing age, would like to have more children, and fears the unknown potential risks of the Covid-19 vaccine products on her fertility. Ms. Grcic believes that there are already too many known risks and further uncertainty with this novel medical intervention for her to properly exercise informed consent. By contrast, Health Canada data and peer reviewed research shows that persons in her age bracket are of very low risk from Covid-19. She did not apply for a medical or religious exemption, as she objects to the use of such vaccines based on her exercise of bodily autonomy, life, liberty, and security of the person, and that having to disclose her vaccination status to the Respondents is a violation of her privacy. Ms. Grcic has been segregated from vaccinated Canadian air travellers which renders her a second-class citizen.
 35. Mr. MacDonald travelled to British Columbia by air in August 2021 to attend his first year at Trinity in Langley. In choosing post-secondary institutions, he expected he could rely on air travel to visit his family in Ontario, which is approximately 4,000 km away. Driving home to Ontario would take approximately three days one-way and is not feasible with his school schedule. During his first year away, he was not able to reunite with his family for the Christmas season.
 36. Mr. MacDonald is a healthy and active young man and fears the potential side effects of Covid-19 vaccine products after reviewing the listed potential side effects of such products by Health Canada. After assessing the potential risks, particularly the risk of myocarditis in young active men, he believes that there is too much uncertainty and risk with this novel

medical intervention in order for him to properly exercise his informed consent. By contrast, Health Canada data and peer reviewed research shows that persons in his age bracket are of very low risk from Covid-19. Mr. MacDonald objects to the use of the Covid-19 vaccines based on his religious beliefs, his conscience, the exercise of his bodily autonomy, life, liberty, and security of the person. Mr. MacDonald also has been segregated from vaccinated Canadian air travellers which renders him a second-class citizen.

(d) *Interim Order 52 is ultra vires the enabling statute*

37. The Decision is *ultra vires* the authority delegated to the Minister of Transport under section 6.41(1) of the *Aeronautics Act* which restricts the Minister's order-making power to matters related to aviation safety consistent with the scope and objects of the Act. The Decision is *ultra vires* as it was made for an improper purpose, and in bad faith in furtherance of an ulterior motive to pressure Canadians into taking the Covid-19 vaccines.
38. In making the Decision, the Minister of Transportation erred in law, jurisdiction, fact and/or mixed fact and law, which errors merit judicial review of the Decision, including but not limited to:
 - a. Abusing and/or fettering his order-making discretion and authority by:
 - i. Allowing the Prime Minister to direct the contents of the Decision;
 - ii. Failing to give any or adequate consideration to highly relevant factors and giving weight to irrelevant considerations;
 - iii. Exercising his discretion unreasonably and with an ulterior motive;
 - iv. Exercising his discretion in the absence of necessary evidence or on the basis of insufficient evidence; and
 - b. Such further and other grounds as counsel may advise and this Honourable Court may allow.

(e) *Charter violations*

39. The Minister of Transport is constrained by the *Charter*, the *Constitution Act, 1982*, and the *Bill of Rights*. The Minister of Transport cannot:
- a. Deprive any individual of their rights to liberty or security, except in accordance with the principles of fundamental justice; or
 - b. Deprive any individual of their rights to freedom of conscience, liberty, privacy, and mobility, except by due process of law.
40. The Vaccine Provisions of the Decision are a violation of the Applicants' *Charter* rights:
- a. Section 2(a): freedom of religion and conscience by requiring the Applicants to take Covid-19 vaccines to travel by air which violate their religious and personal beliefs without providing a lawful policy for religious exemptions;
 - b. Section 6: right to leave the country and travel within the country for business or pleasure by prohibiting the Applicants' only means of exiting Canada or travelling long distances interprovincially in a timely and safe fashion, without submitting to an experimental medical procedure;
 - c. Section 7: life, liberty, and security of the person, by prohibiting air travel unless the Applicants receive an experimental medical procedure contrary to their will and without their fully informed consent, which violates *The Nuremberg Code (1947)*, interferes with their bodily autonomy, subjects them to the risks of harmful side effects or death, and impedes their ability to move freely across the country or internationally, all in a coercive manner that is arbitrary, overbroad, and grossly disproportionate;
 - i. The Decision and conduct of the Minister of Transport are also contrary to section 7 of the *Charter* as they unduly impair the rights of liberty and security of the person and are contrary to the principles of fundamental justice;

- ii. The Decision invokes the section 7 right to liberty and security of the person because it creates a state-imposed prohibition on air travel for those who have elected not to receive the Covid-19 vaccines prior to the completion of clinical trials. The Decision will cause a loss of liberty and security for the Applicants, who rely on air travel;
 - iii. The Applicants are deprived of their section 7 rights to life, liberty, and security of the person by state action as a result of the existence and operation of the Decision;
 - iv. This deprivation is more than trivial. The Decision restricts unvaccinated Canadians from air travel, creating a serious harmful effect that negatively impacts liberty and security of the person;
 - v. Section 7 *Charter* rights can only be infringed in accordance with the principles of fundamental justice. The principles of fundamental justice require that the impugned legislation not be grossly disproportionate, arbitrary, or overly broad; and
 - vi. The Decision does not accord with those principles of fundamental justice. In particular, there is no rational connection between the infringement of rights and what the Decision seeks to achieve, demonstrating the Decision is arbitrary and overbroad. Further, the deprivation of rights is grossly disproportionate to the objective of the Decision;
- d. Section 8: right to privacy, by forcing the Applicants to disclose private medical information to be able to board an airplane; and,
 - e. Section 15: equality rights, by discriminating and labelling the Applicants as “unvaccinated” and barring them from boarding aircraft in Canada, while permitting a “vaccinated” class of Canadians to fly from Canadian airports.
41. The Vaccine Provisions of the Decision violate the Applicants’ *Charter* rights and punish them for the lawful exercise of their fundamental constitutional rights and freedoms.

42. The Decision is not justified under section 1 of the *Charter*. The Decision is not in the public interest, is not a rational means to pursue the stated objective as there is no evidence to show that the prohibition of unvaccinated Canadians from air travel limits or reduces the spread of Covid-19. The Decision does not cause minimal impairment to the rights of the Applicants. Further, the deleterious and negative impact of the Decision is not proportional to the minimal or non-existent benefits it may have.

(f) *Contravention of the Bill of Rights*

43. The *Bill of Rights* has among its objects the affirmation of the dignity and worth of the human person in Canadian society, and the respect for the rule of law. It is paramount to other federal legislation and regulations and is quasi-constitutional in nature. The *Aeronautics Act* and the Decision must be construed and applied as not to abrogate, abridge or infringe, or to authorize the abrogation, abridgment or infringement, of the rights and freedoms recognized and declared in the *Bill of Rights*.

44. The Decision unduly impairs the Applicants' rights to life, liberty, and security of the person, and the right not to be deprived thereof except by due process of law, as set out in section 1(a) of the *Bill of Rights*.

45. The Decision was not made by due process of law. Among other things,

- a. The Decision was not subject to legislative controls customarily applied to the introduction of a new law. As a result, Canadians did not receive the benefit of multiple readings or parliamentary debate and scrutiny;
- b. The Minister of Transport has made the Decision in an overly broad manner, without due consideration of the rights of the Applicants; and
- c. There was no, or insufficient, stakeholder engagement or consultation prior to the Decision.

(g) Legislation, regulations, and enactments

46. The Applicants rely on the following legislation, regulations, documents, and enactments:

- a. *Canadian Charter of Rights and Freedoms*, ss. 1, 2, 6, 7, 8, 15 and 24(1);
- b. *Constitution Act, 1982*;
- c. *Canadian Bill of Rights*, S.C. 1960, c. 44;
- d. *Federal Court Rules*, SOR/98-106;
- e. *Aeronautics Act*, R.S.C., 1985, c. A-2;
- f. *International Covenant on Civil and Political Rights*;
- g. *The Nuremberg Code (1947)*;
- h. *The International Health Regulations (2005)*;
- i. *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No. 52*; and
- j. Such further and other authorities and legislation as counsel may advise and this Honourable Court may accept.

This application will be supported by the following material:

47. The following Affidavits and exhibits thereto, to be filed:

- Affidavit of The Honourable A. Brian Peckford, to be sworn;
- Affidavit of Leesha Nikkanen, to be sworn;
- Affidavit of Ken Baigent, to be sworn;
- Affidavit of Drew Belobaba, to be sworn;
- Affidavit of Natalie Grcic, to be sworn;

- Affidavit of Aedan MacDonald to be sworn; and
- Other affidavit evidence, including affidavits from experts and fact witnesses, to be filed.

48. Such further and other evidence as counsel may advise and this Honourable Court may permit.

3. Request for Material from the Tribunal

49. Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicants request that the Minister of Transport, Transport Canada, the Attorney General of Canada, and the Governor in Council provide a certified copy of the following materials that are not in the possession of the Applicants, but are in the possession of the Attorney General of Canada, to the Applicants and the Registry:

All records, including but in no way limited to research, analysis, policy papers, briefing reports, studies, proposals, presentations, reports, memos, opinions, advice, letters, emails and any other communications that were prepared, commissioned, considered or received by the Government of Canada in relation to:

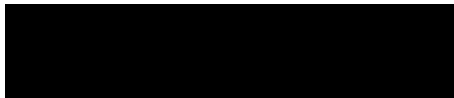
- a. *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No. 52*;
- b. All correspondence, letters, emails, and any other communications related to *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No. 52*, between the Respondents and:
 - i. The Governor General in Council;
 - ii. The Prime Minister of Canada;
 - iii. The Privy Council Office;
 - iv. The Department of Justice;
 - v. Global Affairs Canada;

- vi. Crown Indigenous and Northern Affairs Canada;
- vii. The Provinces and Territories of Canada, including the Minister of Transport of each Province and Territory;
- viii. The elected, appointed or hereditary representatives of First Nations and Indigenous people of Canada; and
- ix. The municipalities of Canada.

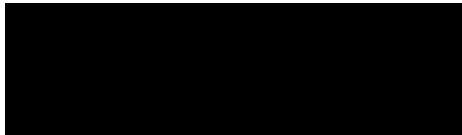


January 31, 2022

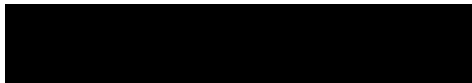
WILSON LAW OFFICE



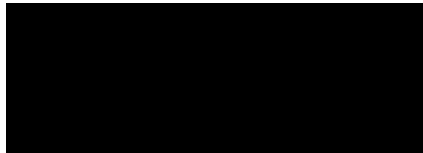
Keith Wilson, Q.C.



**JUSTICE CENTRE FOR CONSTITUTIONAL
FREEDOMS**



Allison Kindle Pejovic / Eva Chipiuk



Solicitors for the Applicants

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 borders 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:

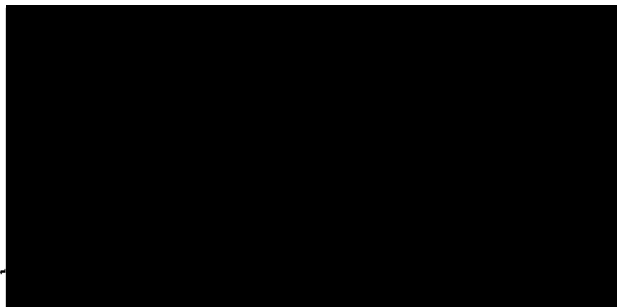
- (a) Recently, and despite the Ministry of Transportation citing changes in the epidemiological situation in Canada, in June 2022, Dr. Theresa Tam addressed Canadian Parliament advising them to prepare for a seventh wave this fall. Attached hereto as **Exhibit “H”** is a true copy of an article from 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.

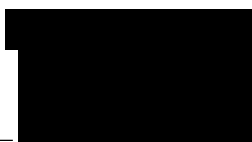
17. I swear this affidavit in response to the Attorney General’s motion to dismiss this Application and for no other or improper purpose.

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



[Canada.ca](#) > [Treasury Board of Canada Secretariat](#) > [06](#)

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 control 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](#)

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