FEDERAL COURT

Docket: T-145-22

BETWEEN:

NABIL BEN NAOUM

demandeur

et

LE PROCUREUR GÈNÈRAL DU CANADA

défendeur

Docket: T-247-22

AND BETWEEN:

L'HONORABLE MAXIME BERNIER

demandeur

et

LE PROCUREUR GÈNÈRAL DU CANADA

défendeur

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

WRITTEN REPRESENTATION BY THE APPLICANTS, THE HONORABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRIC, AND AEDAN MACDONALD IN RESPONSE TO THE RESPONDENT'S NOTICE OF MOTION

August 5, 2022

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TABLE OF CONTENTS

I. INTRODUCTION

1. This is a case of national public interest and importance. These Applicants allege that the Respondent has committed one of the most substantial *Canadian Charter of Rights and Freedoms* (the "*Charter*") breaches in Canadian history. The integrity of the Canadian Constitution is at issue.

2. The Respondent proffers that:

> 1. On June 20, 2022, the Orders implementing vaccine mandates on air and rail passengers were repealed.
>
> 2. The air and rail passenger vaccine mandate provisions that the Applicants challenge no longer exist in law. These Applications are moot. Each set of Applicants seeks declarations in respect of legislative instruments that are no longer in effect. There is no live issue between the parties. An order will have no practical effect.
>
> 3. The Court ought not to exercise its discretion to hear these moot Applications. While there continues to be an adversarial context represented by counsel taking opposing positions, a ruling on these Applications will have no practical benefit to any of the parties and would not be an appropriate use of scarce judicial resources.

3. The Applicants object to the Respondents' mootness application and submit that dismissing this matter will set a dangerous precedent for government actors. It will allow them to be at liberty to enact, albeit temporarily, unlawful laws, and at their whim revoke them and argue mootness when challenged. Further, these Applicants submit that at no time did the Respondents have the factual or legal justification to enact the impugned law and the only forum to objectively and fairly assess this matter is in Court.

4. Most importantly, in order to ensure Canadians' confidence in our justice system this application, on its merits, it is important that this matter be heard expeditiously. Canadians have the right to know whether it is lawful for the Respondent to violate their mobility rights and infringe on their personal autonomy in the manner they have as alleged in the application on this matter.

5. Furthermore, significant procedural steps have been completed and the hearing on the merits is scheduled to be heard within months. This matter was handled by both parties and the Court on an expedited basis because of the significant public interest issues it raises. Four cases were consolidated in order to effectively and efficiently utilize judicial resources.

6. The Respondents also allege that the merits of this case do not have to be heard because other matters have been filed and a precedent has been set in a recent Quebec case *USW Local 2008 v. Attorney General of Canada* ("*USW"*).[1] The Applicants submit that that is entirely incorrect. All aspects of this matter are distinguishable from the *USW* case and are unique, including the matter, the issues, the court, the scope of expert evidence, the language, the applicants, the breath of the implications, the parties, the volume of evidence and cross-examination material, and the pace of the file. Particularly distinguishing elements of the *USW* case were: (1) vaccine safety was not challenged; (2) the main issue in *USW* was the affect of mandates on worker absenteeism, not air travel; and (3) the *USW* section 7 *Charter* arguments did not contain submissions on arbitrariness and overbroadness.

7. In every sense of the term, this matter is unprecedented. It is not an overstatement to say that no other matter, in any court in Canada, resembles this matter. On all points, these Applicants submit that this matter is a matter of national importance, is unique, the controversy remains "live" and it must be heard on its merits.

II. BACKGROUND INFORMATION

A. Interim Orders

8. Transport Canada first enacted additional Covid-related aviation requirements in *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19* pursuant to section 6.41 of the *Aeronautics Act* on March 17, 2020 ("Interim Order"). Interim orders under the *Aeronautics Act* can only be enacted for a limited length of time and the Minister of Transportation or his designate have consistently renewed them throughout most of 2020, all of 2021 and into 2022. [2]

[1] *USW Local 2008 v. Attorney General of Canada*, 2022 QCCS 2455.
[2] *Aeronautics Act* (R.S.C., 1985, c. A-2), at section 6.41 ["*Aeronautics Act*"].

9. On October 29, 2021, Interim Order No. 43 significantly expanded the aviation restrictions relating to Covid including restrictions on Canadians' rights of mobility and other fundamental rights. Interim Order No. 43 established a Covid vaccination mandate for both international and domestic flights departing from Canada ("Travel Vaccine Mandate"), with limited exceptions[3] resulting in millions of unvaccinated Canadians being unable to travel by air.[4]

10. On May 19, 2022, the Minister of Transportation separated several of the Covid restrictions into two separate interim orders: Interim Order No. 63 varied the Travel Vaccine Mandate to require carriers to notify passengers about the requirement under the *Quarantine Act*.[5] Order in Council, *Minimizing the Risk of Exposure to COVID-19 in Canada Order*[6] to provide their vaccination status, but does not prohibit them from travelling, while *Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19* continued the ban on unvaccinated air travel.

11. On June 14, 2022, the Transportation Minister along with other federal ministers held a press conference in Ottawa and announced that as of June 20, 2022, the Travel Vaccine Mandates would be "suspended". The written press release was titled "Suspension of the vaccine mandates for domestic travellers, transportation workers and federal employees" (the "Suspension Announcement").[7]

12. The Suspension Announcement included the following statement:

> 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

[3] Affidavit of Jennifer Little, para 30 ["Little Affidavit"].
[4] Transcript of the Cross Examination of Jennifer Little, at para 1256 ["Little Transcript"].
[5] *Quarantine Act* (S.C. 2005, c. 20), at section 58 ["*Quarantine Act*"].
[6] Government of Canada. Order in Council, *Minimizing the Risk of Exposure to COVID-19 in Canada Order*. Retrieved from https://orders-in-council.canada.ca/attachment.php?attach=42369&lang=en.
[7] Government of Canada. (2022, June 14). *Suspension of the mandatory vaccination requirement for domestic travellers and federally regulated Transportation Workers and Federal Employees*. Retrieved from https://www.canada.ca/en/transport-canada/news/2022/06/suspension-of-the-mandatory-vaccination-requirement-for-domestic-travellers-and-federally-regulated-transportation-workers.html ["Suspension Announcement Website"].

and transport vaccination mandates, and the introduction of vaccination mandates in federally regulated workplaces in the fall, if needed.[8] [Emphasis added]

13. Canada's backgrounder document to the announcement uses the word "suspend" and its derivations seven times.[9] The Travel Vaccine Mandates have not ended as suggested by the Respondent.

14. On June 20, 2022, the Minister of Transportation allowed *Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19 No. 3* to lapse without renewal. There is no statutory restriction on the Minister of Transportation reimposing the restrictions on unvaccinated Canadians' rights.

15. Interim Order No. 68 is currently in force, and the notification requirement about disclosing vaccination status is still in effect.[10]

B. Notice of Application

16. The Notice of Application ("NOA")[11] before the Court seeks judicial review of the Interim Order and subsequent Interim Orders imposing the Travel Vaccine Mandate.

17. The NOA deals with a matter of national importance: whether the Federal Government breached *Charter* obligations by imposing the Travel Vaccine Mandate. This matter should be adjudicated as soon as possible for the benefit of all Canadians and certainly before these suspended restrictions on Canadians' rights are imposed again. The evidence in this proceeding confirms that millions of Canadians' mobility, privacy and other *Charter* rights may have been unlawfully breached by the Federal Government.

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[8] *Ibid.*
[9] *Ibid.*
[10] Transport Canada. (2022, July 8). *Ministerial orders, Interim Orders, directives / directions and response letters*. Transport Canada. Retrieved from https://tc.canada.ca/en/ministerial-orders-interim-orders-directives-directions-response-letters ["Interim Orders"].
[11] Notice of Application, *The Honourable A. Brian Peckford et al v. AGC et al*, Court File No. T-168-22 ["NOA"].

18. Under section 3 of the current Interim Order, travellers flying to Canada must disclose personal medical information, which distinguishes travellers based on vaccination status,[12] and requires unvaccinated Canadians to submit travel, testing, and quarantine plans.[13] Sections 11-17 of the current Interim Order require unvaccinated travellers to provide proof of testing before flying to Canada.

19. Unvaccinated travellers continue to be required to take pre-entry tests and must quarantine for 14 days upon arrival in Canada.[14] Vaccinated travellers, however, are exempt from these requirements.[15]

III. ANALYSIS

A. Legal Test

20. The leading authority on mootness is the Supreme Court of Canada decision *Borowski v. Canada (Attorney General*) ("*Borowski*"):

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly, if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice."[16]

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[12] Canada, G. A. (2022, July 20). *Travel to Canada: Requirements for covid-19 vaccinated travellers*. Travel to Canada: Requirements for COVID-19 vaccinated travellers. Retrieved from https://travel.gc.ca/travel-covid/travel-restrictions/covid-vaccinated-travellers-entering-canada ["Vaccinated Travel Requirements"].
[13] Canada, G. A. (2022, July 19). *Travel to Canada: Testing and quarantine if not qualified as fully vaccinated*. Travel to Canada: Testing and Quarantine if not qualified as fully vaccinated. Retrieved from https://travel.gc.ca/travel-covid/travel-restrictions/flying-canada-checklist/covid-19-testing-travellers-coming-into-canada ["Unvaccinated Travel Requirements"]
[14] *Ibid*.
[15] Vaccinated Travel Requirements, s*upra* note 12.
[16] *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, https://scc-csc.lexum.com/scc-csc/scc-csc/en/421/1/document.do, Borowski v. Canada (Attorney General) - SCC Cases (lexum.com) ["*Borowski*"].

21. *Borowski* established that a legal issue is moot when "a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties."[17]

22. Further, the Supreme Court of Canada in *Borowski* articulated that a two-step analysis be used when considering mootness:

> First it is necessary to determine whether the required tangible and concrete dispute has disappeared, and the issues have become academic.
>
> Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case…I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant."[18]

23. In *R v Smith*[19] [*Smith*], the Supreme Court of Canada provided a concise summary of the factors from *Borowski* that govern a Court's discretion when determining whether to hear an issue that has been determined to be moot:

> *Borowski* identified three principal "underlying rationalia" for the "policy or practice" governing the continuance of moot appeals:
>
> (a) the existence of a truly adversarial context;
>
> (b) the presence of particular circumstances which justify the expenditure of limited judicial resources to resolve moot cases;
>
> (c) the respect shown by the courts to limit themselves to their proper adjudicative role as opposed to making free-standing, legislative-type pronouncements.
>
> The Court indicated that these three "rationales" are not exhaustive, nor is their application a "mechanical" process, but the court must exercise its discretion "judicially ... with due regard for established principles.[20]

[17] *Ibid*, at page 344.
[18] *Ibid* at page 353.
[19] *R v Smith,* 2004 SCC 14, [2004] 1 SCR 385 ["*Smith*"].
[20] *Ibid.* at pages 358 - 363 citing *Borowski*.

B. Argument

1. There Exists a Live Controversy

24. The case of *Borowski* states that the general principle of mootness "applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties [emphasis added]."[21] It is abundantly clear in this case that the rights of the Applicants may be violated in the immediate future, it is thus submitted that the issues raised in the NOA remain a live controversy.

25. The Applicants applied to Federal Court to challenge a specific law based on the preservation of their fundamental freedoms, and the government hopes to justify this legal instrument. This is the controversy that underlies this application, and it remains alive and real to millions of Canadians.

26. The issues of justificatory criteria for the Travel Vaccine Mandate in the first instance are at the very core of the NOA and remain "live controversies" in the NOA.

27. While the Travel Vaccine Mandate has been temporarily suspended, there are other aspects of the Interim Order that are within the scope of the Applicants' NOA that are still in force. These Applicants' NOA claims that the Interim Order violates section 8 *Charter* rights to privacy by forcing the Applicants to disclose private medical information to be able to board an airplane.[22] The current Interim Order pursuant to the *Aeronautics Act* continues to require disclosure of private medical information and has not been suspended.[23]

28. These Applicants' NOA also seeks 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 currently in-force Interim Order.

29. In addition to a finding that the challenged measures are unconstitutional, among other remedies, the NOA seeks "a Declaration prohibiting the Respondents from issuing subsequent orders of a substantially similar or identical nature that prohibit or further restrict individuals

[21] *Borowski*, *supra* note 19, at page 353.
[22] NOA, *supra* note 11.
[23] Interim Order, *supra* note 10.

who are not vaccinated against Covid-19 from boarding aircraft leaving Canadian airports."[24] This remedy sought by the Applicants continues to constitute a live controversy and is not moot.

i. Travel Vaccine Mandate Suspended not Revoked

30. It is the Applicants' submission that the Travel Vaccine Mandate remains a "live controversy" because the Federal Government has repeatedly stated that the travel restrictions have only been "suspended" and government ministers have emphasized they "will not hesitate" to reinstate the Travel Vaccine Mandate.[25]

31. Specifically, on June 14, 2022, the Federal Government announced that the Travel Vaccine Mandate is only "suspended," and expressed that "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 [emphasis added]."[26] Furthermore, no specific metrics or thresholds have been outlined by the Respondent which indicate justificatory criteria for the potential reimposition of these mandates.[27]

32. Furthermore, the suspension of the Travel Vaccine Mandate is distinct and distinguishable from legislation being repealed. Under section 6.41 of the *Aeronautics Act*, interim orders made under the statute cease to exist fourteen days after they are made, unless approved by the Governor in Council within this time period.[28]

33. Under the *Aeronautics Act*, where the Governor in Council approves an interim order, the Minister shall, as soon as possible after the approval, recommend to the Governor in Council

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[24] NOA, *supra* note 11, at para 5, subsection j.
[25] Suspension Announcement Website, *supra*, *Federal Ministers Announce Easing of COVID-19 Vaccine Mandates*. CPAC. (2022, June 14). Retrieved from https://www.cpac.ca/episode?id=3ba76b4a-f9ab-42d9-9d97-7cd0fab2fa98, at minutes 3:30-346, 48:25-49:07, 51:30-52:12 ["Suspension Announcement Video"].
[26] *Ibid*.
[27] *Ibid*. at minutes 46:57-52:12.
[28] *Aeronautics Act*, *supra* note 2, at section 6.41(2).

that a regulation having the same effect as the interim order be made under the *Aeronautics Act*.[29] Where these events occur, an interim order ceases to have effect on the day on which a regulation with the same effect as the interim order comes into force, or where no regulation is made, the interim order ceases to have effect one year after the day on which the interim order is made.[30]

34. Rather than proceed through the Governor-in-Council approval process, the Minister of Transportation has side-stepped the regulation-making process, opting instead to issue 68 Interim Orders.[31] The Minister of Transportation has shown a pattern of consistent renewal and/or replacement regarding these Interim Orders, resulting in the establishment of continuous Covid-related restrictions on mobility and other rights and, in fact, a variation of the Interim Order currently remains in force. Given that the Interim Orders have continuously been re-enacted by the Minister of Transportation or his designate, the Travel Vaccine Mandate can easily be reimplemented at any time, without warning, by the mere signature of the Minister of Transportation.

35. The attitude of Federal Government ministers to announce that that the Travel Vaccine Mandate is not a thing of the past, or academic, but is only "suspended," and that they "will not hesitate" to reinstitute the mandate if they deem fit is a practical reality that leaves these Applicants, as well as millions of other unvaccinated Canadians, waiting in fear as to whether the Federal Government will infringe on their *Charter* rights again and enforce the Travel Vaccine Mandate on a whim, much like the Minister of Transportation did in October of 2021.

36. The parties expended significant resources and committed to taxing timelines in an effort to move this matter expeditiously. Parties requested the earliest court date practical, and a hearing was set for September 2022 at the time the Federal Government made the Suspension Announcement. The Respondents filed the mootness application shortly after. It would be prejudicial to these Applicants to find the matter moot before the matter is heard in court after significant time, resources and finances were expended by all parties and the Court. These Applicants submit that

[29] *Ibid.*, at section 6.41(3).
[30] *Ibid.*
[31] *Ibid.*

a finding of mootness at this stage of the proceedings, considering the circumstances and timing of the mootness application, it would bring the administration of justice into disrepute.

ii. Brief and Recurring Nature of Interim Orders

37. The Supreme Court in *Borowski* also found, "Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly."[32] The orders imposed by the Federal Government are of a brief and recurring nature.

38. The Interim Orders made pursuant to the *Aeronautics Act* are subject to expiry dates and have been subject to consistent updates. As a result, Interim Orders have existed for brief periods of time. Sixty-eight versions of the Interim Order have been introduced during the existence of Covid in Canada.[33] Interim Orders number 43 to 62 included vaccination requirements to board commercial aircrafts.[34]

39. A total of 26 Interim Orders have been imposed from October 29 to July 21, 2022 (the time representing the start of the vaccine mandates, through order number 43, to the time the currently operating order number 68 was established). Though the Travel Vaccine Mandate is not currently enforced, the Federal Government's intention that Travel Vaccine Mandate is merely suspended and that they will not hesitate to reinstitute them is clear. Further, the Federal Government has not identified any specific metrics that will be used to determine if the reimposition of a Travel Vaccine Mandate is warranted.[35]

    There is currently nothing to prevent the Federal Government from putting similar measures in place and given the continuous implementation and updates of the Interim Orders and the constantly changing nature of Covid, these restrictions may continue to evade judicial review if

[32] *Borowski*, *supra* note 19, at page 360.
[33] Interim Order, *supra* note 10.
[34] *Ibid*.
[35] Suspension Announcement Video, *supra* note 25, at minutes 46:57-52:12.

re-implemented. It is pertinent that this Court decides on this constitutionally important issue, particularly given the parties have expended significant time and resources to establish an extensive evidentiary record, as is present in this matter. The amount of time required to build a new evidentiary record may allow these measures to continue to evade judicial review if reimplemented.

iii. No Justification for the Travel Vaccine Mandate and the Suspension Announcement

40. The evidence clearly established those who are vaccinated against Covid can become infected with Covid and transmit Covid when infected.[36]

41. Ms. Little, together with the Respondent's expert witnesses testified that the Omicron variant and its subvariants, has been the dominant variant in Canada since December 2021, and has represented 99.9-100% of Covid variants in Canada since at least early April 2022.[37] The Respondents' witnesses also confirmed that the protection against infection and transmission provided by the two Covid vaccine doses against Omicron is "very low"[38] and dramatically wanes in effectiveness over time and is less then 20% after a second dose[39] and infected vaccinated individuals have been consistently shown to spread the virus at the same rate as unvaccinated individuals.[40]

42. It is these Applicants submission that the Travel Vaccination Mandate makes no adjustments to account for the waning effect of vaccination, and Ms. Little, who played a significant role in constructing and informing the Travel Vaccine Mandate, has admitted that she has not

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[36] Transcript of the Cross Examination of Celia Lourenco at paras 653-655, Little Transcript, *supra* note 4, at paras 262-263, and Transcript of the Cross Examination of Elizabeth Harris at para 148.
[37] Little Affidavit, *supra* note 3, at page 25-26, para 72, Exhibit "X", at page 21, Transcript of the Cross Examination of Jason Kindrachuk, at paras 69-70, and Transcript of the Cross Examination of Tyler Brooks, at paras 271-275.
[38] Little Affidavit, *supra* note 3, pages 24-26, paras 69, 71 and 72, Exhibit "X", at page 21, Exhibit "W", at page 4, Exhibit "V", at page 7.
[39] *Ibid*. pages 25-26, paras 71 and 72, Exhibit "X" at page 21, Exhibit "W" at page 4, Affidavit of Jason Kindrachuk, Exhibit "B" at page 28, figure 19 ["Kindrachuk Affidavit"], and Affidavit of Dawn Bowdish page 7, para vii.
[40] Little Affidavit, *supra* note 3, page 26, para 72, Exhibit "X" at page 12, para 21.

looked at information to identify the date in which individuals travelling in Canada have received their vaccination, despite the fact that this data is available publicly.[41]

43. Despite travel restrictions lifting around the world, Ms. Little acknowledged that the Canadian travel restrictions challenged in this application are "unique in the world in terms of strict vaccine mandate for domestic travel" [42] and "one of the strongest vaccination mandates for travellers in the world" [43] yet no evidence to support these discrepancies were provided. Furthermore, it was established during cross examinations that Canada was the only country in the G7 with domestic vaccination requirements for travel.[44]

44. It is submitted that not only were the Travel Vaccine Mandates unjustified and unconstitutional when the Suspension Announcement was made, but it is submitted they were unjustified and unconstitutional when the NOA was filed. The unreasonable delay and temporary nature of the Suspension Announcement fails to recognize that both the vaccinated and unvaccinated can contract and transmit Covid, and the insignificant difference between vaccinated and unvaccinated Canadians leaves little reason for optimism that comparably unreasonable restrictions will not be imposed in the future without justification or merit.

45. Similarly, the Federal Government does not inspire confidence in rational decision making nor understanding of scientific realities when it continues to discriminate against unvaccinated individuals returning to Canada. The Federal Government has taken the injudicious position of subjecting unvaccinated Canadians to a 14-day quarantine, pre-entry testing, arrival testing, and testing on the 8th day after entry into Canada.[45] Vaccinated individuals, however, are exempt from these requirements.[46] It is our submission that the Federal Government's inconsistent and unjustified position taken against unvaccinated Canadians must be addressed in Court on its merits.

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[41] Little Transcript, *supra* note 4, at para 1450.
[42] Little Affidavit, *supra* note 3, Exhibit "E", at page 12.
[43] *Ibid*. at page 13.
[44] Little Transcript, *supra* note 4, at para 1319.
[45] Unvaccinated Travel Requirements, *supra* note 13.
[46] Vaccinated Travel Requirements, *supra* note 12.

46. The Federal Government was also aware of studies indicating low levels of protection against transmission in the context of Delta,[47] the dominant variant at the time the Travel Vaccine Mandate was implemented.[48] Such scientific evidence, as well as a wealth of other factors established in the record, including the minimal ability of vaccination to prevent the spread of the current Omicron variant,[49] the deleterious effects of the policy, and the lack of scientific evidence provided by the Federal Government, demonstrates a clear lack of justification for the Travel Vaccine Mandate. It is submitted that the Travel Vaccine Mandate is unjustified not only in the context of the Omicron variant, but that it has been unjustified since its inception.

47. It is submitted that the implementation, and subsequent suspension, of the Travel Vaccine Mandate is not supported by the evidence adduced by the Federal Government. It is submitted that the Travel Vaccine Mandate imposed on travellers is a flagrant, severe, and unjustified violation of the *Charter*, and has been since it was invoked. The justification or lack thereof of the challenged measures continues to be a live and important issue.

2. Court Has Discretion to Hear the Case

48. Should this Honourable Court find that there is no live controversy, the second prong of the *Borowski* case applies and these Applicants request that this Court still exercise its discretion in hearing the case.

i. This is a Constitutional Case dealing with Issues of Public Importance

49. As expressed in *Borowski*, "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."[50]

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[47] *Ibid*., at Exhibit "B" at page 9.
[48] *Ibid*., at paras 21-26, Exhibit "B", page 3.
[49] *Ibid*., at paras 69, 71 and 72, Exhibit "X", at page 21, Exhibit "W", at page 4, Exhibit "V", at page 7, Kindrachuk Affidavit, *supra* note 39, Exhibit "B" at page 28, figure 19.
[50] *Borowski*, *supra* note 19, page 361.

50. In *Borowski*, the Supreme Court cited the case of *Re Opposition by Quebec to a Resolution to amend the Constitution* as an example for this basis, where the Supreme Court provided, "While this Court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this Court. In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it, and it accordingly will be answered."[51]

51. Similar comments are echoed in *C (A.L.G) v Prince Edward Island*,[52] by the Prince Edward Island Supreme Court, which held that, "Special considerations apply to the exercise of this discretion where the case is a constitutional challenge. In constitutional cases, the general rule against deciding moot cases usually, but not always, gives way to the exercise of discretion in favour of deciding the case."[53]

52. Canadians' mobility rights, as well as other constitutionally protected rights cited in the NOA are deserving of a high level of protection, yet they have been infringed at a scale and force that is unprecedented in Canadian history. It is in the public interest that the application be heard, so the Respondents and Canadians can understand the boundary between governmental power over Canadians and the Canadians' *Charter* rights.

53. Refusal to hear this application about the Federal Government's unprecedented use of ministerial powers will come at great social and democratic cost and foment constitutional uncertainty which can be avoided by having the court adjudicate this case.

54. Federal Government officials have acknowledged that the travel restrictions challenged in this application are "unique in the world in terms of strict vaccine mandate for domestic travel,"[54] yet no evidence to support these discrepancies were provided. Furthermore, it was established during

[51] *Ibid.*, at pages 361-362.
[52] *A.L.G.C. v. Prince Edward Island (Government of)*, [1998] 51 CRR (2d) 163.
[53] *Ibid.*, at paras 7-8.
[54] Little Affidavit, *supra* note 3, Exhibit "E", at page 13.

cross examinations that Canada was the only country in the G7 with domestic vaccination requirements for travel.[55]

55. Ms. Little, the Director General of Covid Recovery at Transport Canada, had significant involvement in the development of the impugned measure.[56] Ms. Little acknowledged that the Travel Vaccine Mandate prevents the majority of unvaccinated Canadian citizens from travelling,[57] thus impacting millions of Canadians.[58] Ms. Little acknowledged that Canadians are prevented from travelling internationally due to the Travel Vaccine Mandated if they do not qualify for an exemption.[59] These Applicants, along with millions of unvaccinated Canadians, have been prevented from visiting family, travelling for work or pleasure, and other important reasons.[60]

56. The restrictions clearly violate section 6 of the *Charter*, which is pleaded in the application, and is regarded as "among the most cherished rights of citizenship."[61] The Supreme Court of Canada has stated that section 6 *Charter* rights should be given "expansive breadth" which is consistent with the fact that it is "exempt from legislative override in s. 33 of the *Charter*."[62]

57. These Applicants urge this Honourable Court, as a guardian of the Constitution, to hear the issues on their merits because it is submitted that the Respondents' evidence does not justify constitutional infringements of such a grand scale, and with such punishing force, as those imposed by the Federal Government through the challenged order.

58. It is these Applicants' position that a finding of mootness would erode the democratic foundation of our society, and that the allowance of such measures, which recede constitutional rights and freedoms at a frightening scale and should be avoided at all costs.

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[55] Little Transcript, *supra* note 4, at para 1319.
[56] *Ibid*., at para 39, 42, 44-45, 519, and 696-697.
[57] *Ibid*., at paras 1346-1347.
[58] *Ibid*., at para 1256.
[59] *Ibid*., at para 1314.
[60] NOA, *supra* note 11, at paras 24-36.
[61] *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, at para 1.
[62] *Ibid*, at para 29.

ii. The Application Continues to Exist in an Adversarial Context

59. In *Borowski*, the Supreme Court outlined, "The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail."[63]

60. In the case of *Canadian Union of Public Employees (Air Canada Component) v. Air Canada*, the Federal Court of Appeal found the first rationale was met since both sides were "represented by counsel, taking opposing positions."[64] In *R. v. Smith*,[65] the Supreme Court of Canada cited the criminal case of *R. v. Jetté*,[66] in which it found the "major significance" of the decision and the "determination" of the deceased appellant's family supplied the adversarial context required.

61. A full adversarial context continues to exist in the present application. As outlined in paragraphs 2 and 3 above, these Applicants and the Respondent continue to exist in an adversarial context. These Applicants and the Respondent continue to be represented by counsel and have a full record setting out their opposing positions. Both sides have a stake in the outcome, which is of major significance to each party.

62. These Applicants remain committed to proving their constitutional rights have been infringed by the Travel Vaccine Mandate. These Applicants were kept from exercising their most basic constitutional rights, as they were prohibited for several months from freely moving within and leaving Canada. These restrictions prevented these Applicants from participating in matters of great importance, including assisting family members in Canada and overseas, and travelling for work. These Applicants seek answers and justice for the infringement of these fundamental freedoms and aim to prevent a similar scenario from happening in the future.

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[63] *Borowski*, *supra* note 19, at pages 358-359.
[64] *Canadian Union of Public Employees (Air Canada Component) v. Air Canada*, [2021] FCA, at para 10.
[65] *Smith*, supra note 19, at para 47.
[66] *R. c. Jetté*, 1999 141 CCC (3d) 52.

63. The Respondent also continues to have a direct interest in the outcome of the case. The Federal Government imposed restrictions which are unprecedented in a democratic society. The Federal Government has acknowledged that the travel restrictions challenged in this application are "unique in the world in terms of strict vaccine mandate for domestic travel."[67]

64. The Federal Government has a clear and direct interest in the case, in order to prove that their unprecedented, and restrictive mandate is constitutionally justified. The Federal Government's Suspension Announcement clearly shows their willingness to reinstitute the impugned measures at any time, and thus has a strong incentive to avoid a finding of constitutional invalidity, which would impair its ability to reimplement.

65. At the time of the Suspension Announcement, the majority of the cross-examinations in this action were completed and the parties continue to exist in an adversarial context. It is submitted that similar to the decision in *Borowski*, the application has been "fully argued with as much zeal and dedication on both sides as if the matter were not moot."[68]

iii. Judicial Review of the Application Represents an Efficient use of Judicial Resources

66. As per *Borowski*, "The second broad rationale on which the mootness doctrine is based is the concern for judicial economy" … "The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it."[69]The Application at hand presents a compelling unprecedented constitutional issue, and challenges government action which has a significant possibility of recurring and/or evading future judicial review.

67. A strong evidentiary record has already been established, and at the time of the filing of this motion, the Applicants' factual records will have been completed. The heating of this matter has been set for five days commenting October 31, 2022, in the in the proper context and prevent continued legal uncertainty. It is submitted that the hearing of this application represents a worthwhile use of judicial resources.

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[67] Little Affidavit, *supra* note 3, Exhibit "E", at page 13.
[68] *Borowski*, *supra* note 19, at page 363.
[69] *Ibid*, at page 360.

68. In *Borowski* the Supreme Court of Canada found: "The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action."[70] As aforementioned, the government has chosen to emphasize words like "suspended" when describing the current state of the order and has expressed that they "will not hesitate" to bring similar mandates back.

69. The decision of this Court will provide much needed clarification, to the Applicants and the Respondent, on the constitutional permissibility of such restrictive and far-reaching mandates. Considering Covid continues to exist, and the Canadian Government continues to respond to the virus, judicial review of this application will provide much needed clarity on how the Federal Government can proceed with respect to the constitutional rights of millions of Canadians in the context of Covid response.

iv. Future Benefits

70. In *Ontario (Provincial Police) v. Mosher*, the Ontario Court of Appeal stated that a decision on a moot issue may weigh in favour of the use of scarce judicial resources if the decision on the issue "may yield benefits in the future."[71] Since Covid has proven unpredictable, and the government has stated its willingness to reinstitute the same measures as are the subject of this application, it is important to for this Court to make a determination on this issue. Failure to do so would allow the Federal Government to continue to violate these Applicants', and Canadians, constitutional rights at unprecedented levels, without response from the Court.

71. Further, if the Federal Government does in fact reinstitute the restrictions challenged in this application, it is highly likely that the matter will need to be re-litigated. This case is far different from that outlined in *Borowski*, where it was deemed "far from clear that a decision on the merits will obviate the necessity for future repetitious litigation", given the abstractness

[70] *Ibid.*
[71] *Ontario (Provincial Police) v. Mosher*, [2015] ONCA 722, at para 46.

of the question, which was unrelated to any specific legislation or government action.[72] The case at hand challenges a specific law and given the restrictions central to this application drastically impact millions of Canadians, it is likely that a number of applicants will challenge any revival of the restrictions.

72. By hearing this application, of which the factual record is already established, and which is related to a specific law in the continuing context of Covid, the Court will avoid expending unnecessary resources in any future litigation of this issue and provide clarity as to what constitutionally infringing measures are permissible in the context of the Covid virus.

v. The Court is the Correct Forum

73. In *Borowski*, the Supreme Court of Canada stated, "pronouncing judgements in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch."[73] The Supreme Court of Canada went on to say, "In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role."[74]

74. It is submitted that in hearing this case, the Court will be exercising its proper law-making function and will not be entering the realm of the legislative branch. This case is unlike *Borowski*, where the appellant was "requesting a legal opinion on the interpretation of the *Charter* in the absence of legislation or other governmental action which would otherwise bring the *Charter* into play."[75] The appellant in *Borowski* was found to be seeking the answer to an "abstract question" which relates to the *Charter* alone.[76]

75. This application instead focuses on a specific law and its provisions that were imposed by the Federal Government on millions of Canadians. This is not a case of an abstract question about the *Charter*, but rather the constitutional validity of the Travel Vaccine Mandate. These Applicants

[72] *Borowski*, *supra* note 19 at page 364.
[73] *Ibid.*, at page 362.
[74] *Ibid.*, at p. 363.
[75] *Ibid.*, at p. 365.
[76] *Ibid.,* at p. 365.

do not seek the Court to create law, but request that this Honourable Court determine whether a law complies with the *Charter* which is the proper function of the Court.

76. It is submitted that for these reasons, the hearing of this application is within the proper law-making function of the courts.

3. Jurisdictional Argument

77. The NOA also reads at para 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, not aviation safety.

78. In *Apotex Inc. v. Canada (Health)* [*Apotex*],[77] the Federal Court stated:

> Discretionary decisions are constrained by the confines of the enabling legislation and must be exercised in accordance with the rule of law. It is thus *ultra vires* for a Minister to make a decision for a purpose other than for which that power was granted by the legislature (*Roncarelli v Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121 at 140, 143).

79. In the *Apotex* case, the applicants similarly alleged that the Minister's actions were not motivated by a desire to protect the health and safety of Canadians but instead for the purpose of easing political pressure stemming from criticism by media and the House of Commons. In that case as well, Canada similarly tried to claim mootness after it had changed the regulations. The Federal Court found that notwithstanding that the regulations had been changed, the matter on the merits would be heard and that the Minister's actions were *ultra vires* and erred in her exercise of jurisdiction and constituted a manifestation of improper purpose.

80. The Federal Court found at paras 74 and 75 of the *Apotex* decision:

> This case involves a very unique set of circumstances where an underlying decision of the Minister, found to have been made for an improper purpose and carried out

[77] *Apotex Inc v. Canada (Health)*, 2015 FC 1161 at para 96.

> unfairly, has been perpetuated in identical form in a subsequent decision without an evidentiary or lawful basis to do so.
>
> It is the interconnectedness of the decisions, coupled with the dearth of evidence justifying an Import Ban in August of 2015, that makes it both legally and logically unsound to now find that the August 2015 Decision was not also tainted by the improper purpose that led to the quashing of the 2014 Terms and Conditions in the First Judicial Review. For this reason, I would grant the judicial review and declare that the August 2015 Decision is unlawful.[78]

81. These applicants submit that the circumstances of this case are similarly very unique and submit that the Transportation Minister was acting for an improper purpose and carried out an unlawful mandate. These Applicants submit that the Court will find that it was both illegal and illogical to enact and enforce the Travel Vaccine Mandate in the name of aviation safety, which led to the Suspension Announcement. Accordingly, these Applicants request that the hearing on the merits of this application is heard.

IV. CONCLUSION

82. These Applicants submit that the application is not moot.

83. The Federal Government's Suspension Announcement and its willingness to bring back restrictions in the near future demonstrates the hearing of this application continues to be relevant and "live issues" continue to exist in this application.

84. These Applicants ask the Court to hear the application which is focused on non-abstract, specific legal questions about the unprecedented infringement of constitutionally protected rights by the Federal Government.

85. In the alternative, and should the Court find that the application is moot, it is submitted that the Court should exercise its discretion to hear the application. The matter continues to exist in an adversarial context and the complex and timely evidentiary potion of the matter has concluded. Judicial review of the application represents an efficient use of judicial resources, and the

[78] *Apotex Inc. v. Canada (Health)*, 2016 FC 673 at para 74 and 75.

presiding Court can exercise its proper role in the political framework during the hearing of the application.

86. Furthermore, the Federal Government has maintained that the impacts of Covid represent a public health emergency, which justifies impositions on the rights and freedoms of Canadians at an unprecedented level. The Covid pandemic and restrictions have caused much division in Canada.

87. These Applicants have applied to this Court to review the Federal Government's actions, secure their rights and bring clarity and finality to a controversial and divisive topic that has had far reaching impacts throughout all of Canada. It is these Applicants' position that without a hearing on the merits of this matter, in an open and transparent court, it would erode the democratic foundation of our society.

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1.	*A.L.G.C. v. Prince Edward Island (Government of), [1998] PEISCTD*
2.	*Apotex Inc. v. Canada (Health), 2015 FC 1161*
3.	*Apotex Inc. v. Canada (Health), 2016 FC 673*
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5.	*Canadian Union of Public Employees (Air Canada Component) v. Air Canada, [2021]*
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9.	*R v Smith, 2004 SCC 14, [2004] 1 SCR 385*
10.	*USW Local 2008 v. Attorney General of Canada, 2022*
STATUTES AND REGULATIONS	
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