Consolidated Dockets: A-251-22 (lead); A-252-22; A-253-22; A-254-22

FEDERAL COURT OF APPEAL

BETWEEN:

Docket A-251-22 (lead)

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

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

Docket: A-252-22

SHAUN RICKARD AND KARL HARRISON

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

Docket: A-253-22

THE HONOURABLE MAXIME BERNIER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

Docket: A-254-22

NABIL BEN NAOUM

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPELLANTS', THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, AND AEDAN MACDONALD

Allison Kindle Pejovic
Charter Advocates Canada
[redacted]

Counsel for the Appellants,
The Honourable A. Brian Peckford, Leesha Nikkanen,
Ken Baigent, Drew Belobaba, Natalie Grcic and
Aedan MacDonald (A-251-22)

Sam A. Presvelos and Evan A. Presvelos
Presvelos Law LLP
Barristers & Solicitors
[redacted]

Counsel for the Appellants,
Shaun Rickard and Karl Harrison (A-252-22)

Samuel Bachand
LIS s.a.
[redacted]

Counsel for the Appellant,
The Honourable Maxime Bernier (A-253-22)

Nabil Ben Naoum
[redacted]

Self-Represented Appellant (A-254-22)

Attorney General of Canada
Department of Justice Canada
Civil Litigation Section
[redacted]

Per: J. Sanderson Graham, Robert Drummond and Virginie Harvey
[redacted]

Counsel for the Respondent,
Attorney General of Canada

Table of Contents

OVERVIEW

1. Through Application for Judicial Review, the Appellants challenged the constitutionality and overall legality of air vaccine mandates, which were implemented through a series of Interim Orders put in place by Transport Canada. The Interim Orders required full vaccination (2 doses) against Covid-19 in order to board a plane to travel within or depart from Canada.

2. The Appellants respectfully submit that the dismissal of their Application for mootness was an error of law and an abdication of justice. They argue below that one of the most important factors for the mootness motion was the fact that the Respondent publicly threatened to reimpose the air vaccine mandate using strong and clear language. They further argue that the Learned Application Judge mischaracterized the "suspension" of the Interim Orders as being "repealed" and ignored this threat entirely in her analysis of whether she should exercise her discretion to hear the Application as a matter of public interest.

3. The Appellants argue below that this case raises novel issues of law and fact, never raised or adjudicated by any other party in Canada, namely, whether it is constitutional for the federal government to substantially restrict Canadians' ability to travel across our vast country or abroad, and whether the Minister of Transport, by imposing this significant restriction of *Charter* rights and freedoms through Interim Orders ostensibly for a purpose related to public health, exceeded his jurisdiction under the *Aeronautics Act*. Never before have millions of Canadians had their mobility rights trampled to such an extent that they were, in effect, prohibited from leaving Canada to travel overseas unless they agreed to take a novel drug which was still in the clinical trial phase,[1] and which could cause them serious health problems or death.[2]

4. The Appellants respectfully ask this Court to grant their Appeal of the Learned Application Judge's decision to dismiss their Application for mootness because the public interest in having this Application heard and adjudicated is of massive significance for millions of Canadians who were prevented by the Interim Orders from travelling based on their personal medical decisions. A ruling on this issue is critical – unchecked and permitted to evade review, the Respondent may reimpose

---

[1] Affidavit of Celia Lourenco, at para. 146 **[Appeal Book Tab F)i.)21]**; Cross Examination of Dr. Lourenco, at paras. 725-728, 738-746, 799 **[Appeal Book Tab F)i.)62]**

[2] Affidavit of Steven Pelech, Exhibit "B", at para. 12 **[Appeal Book Tab F)i.)38];** Affidavit of Byram Bridle, Exhibit "B", at paras. 38, 39, 44, 49, 56 **[Appeal Book Tab F)i.)37]**; Transcript of Cross Examination of Dr. Peter Liu, June 1, 2022, at para. 89 **[Appeal Book Tab F)i.)60]**

this travel vaccine mandate again in the future, deprived of the Court's crucial guidance on whether its past actions constituted an unjustified violation of Canadians' constitutional rights.

PART I - STATEMENT OF FACTS

A. Interim Orders

5. Transport Canada first enacted 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 Orders under the *Aeronautics Act* could 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. [3]

6. On October 29, 2021, Interim Order No. 43 significantly expanded the aviation restrictions imposing a Covid vaccination mandate requiring two doses of the Pfizer, Moderna or Astra-Zeneca vaccines or one dose of the Johnson & Johnson vaccine in order to board international and domestic flights departing from Canada, with limited exceptions[4] resulting in millions of unvaccinated Canadians being unable to travel by air.[5]

7. 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").[6]

8. 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 and **transport vaccination mandates**, and the introduction of vaccination mandates in federally regulated workplaces **in the fall, if needed**.[7] [Emphasis added]

---

[3] *Aeronautics Act* (R.S.C., 1985, c. A-2), at section 6.41
[4] Affidavit of Jennifer Little, para 30 ["Little Affidavit"] **[Appeal Book Tab F)i)25]**
[5] Transcript of the Cross Examination of Jennifer Little, at para 1131 ["Little Transcript 2"] **[Appeal Book Tab F)i.)68]**
[6] Affidavit of Ryan Jean-Louis, at Exhibit A **[Appeal Book Tab B)i.)17]**
[7] *Ibid.*

9. Canada's backgrounder document to the announcement uses the word "suspend" and its derivations seven times.[8] The travel vaccine mandates were never repealed.

10. 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 Canadians who have chosen not to take the Covid-19 vaccines.

B. Notice of Application

11. The Notice of Application ("NOA")[9] before the Court seeks judicial review of the Interim Orders ("IOs") imposing the travel vaccine mandate.

12. The NOA deals with a matter of national importance: whether the federal government unjustifiably breached *Charter* obligations by imposing the travel vaccine mandate and whether the Minister of Transport has the jurisdiction under the *Aeronautics Act* to make public health orders discriminating against Canadians on the basis of their medical decisions. The evidence in this proceeding indicates that millions of Canadians' mobility, privacy and other *Charter* rights have been unlawfully breached by the federal government.

13. Under the IOs, travellers flying to Canada had to disclose personal medical information, which distinguished travellers based on vaccination status[10] and required unvaccinated Canadians to submit travel, testing, and quarantine plans.[11] The IOs also required unvaccinated travellers to provide proof of testing before flying to Canada.

C. Motion to Dismiss Application for Mootness and Learned Application Judge's Decision

14. As noted above, on June 20, 2022, the IOs that were challenged were suspended and allowed to expire. On June 28, 2022, the Respondent filed a Notice of Motion seeking an Order to strike the Applications for mootness. A five-day judicial review was scheduled to be heard on October 31-November 4, 2022.

---

[8] *Ibid*
[9] Notice of Application, *The Honourable A. Brian Peckford et al v. AGC et al*, Court File No. T-168-22 ["NOA"] **[Appeal Book Tab B)i.]**
[10] Affidavit of Ryan Jean-Louis at Exhibit B **[Appeal Book Tab B)i.)17]**
[11] Affidavit of Ryan Jean-Louis at Exhibit C **[Appeal Book Tab B)i.)17]**

15. Ten days prior to the scheduled hearing of the Application, the Learned Application Judge granted the Respondent's motion, with full reasons issued on October 27, 2022.[12] She found that there was no live controversy between the parties, and the Applications were moot.[13] She further chose not to exercise her discretion to hear the Application due to her concerns about judicial economy.[14]

PART II- POINTS IN ISSUE

1. The Learned Application Judge erred in failing to exercise her discretion to hear the merits of the judicial review application.

2. The Learned Application judge erred in her determination that judicial economy considerations outweighed the important public interest and uncertainty in the law:

   a. The Learned Application Judge erred in failing to recognize the appropriateness of devoting judicial resources to adjudicating inherently temporary matters such as the IOs, and that the IOs were evasive of review;

   b. The Learned Application Judge erred in failing to find that the Minister's threat to re-implement the mandatory vaccine requirement weighed heavily in favour of hearing the application as a matter of public interest; and

   c. The Learned Application Judge erred in failing to find that there was a significant public interest in determining the constitutionality of effectively restricting millions of Canadians from travelling overseas or across Canada.

PART III-SUBMISSIONS

A. Standard of Review

16. The Appellants submit that this Honourable Court ought to apply the correctness standard when reviewing the Learned Application Judge's overall decision with respect to mootness.[15]

---

[12] Reasons for Decision of Associate Chief Justice Gagne, Federal Court of Canada, October 27, 2022 [“Reasons”] **[Appeal Book Tab C]**
[13] *Ibid,* at para. 33
[14] *Ibid*, at para. 47
[15] *Association des juristes d'expression française du Nouveau-Brunswick c. Commissariat aux langues officielles du Nouveau-Brunswick et autre*, 2023 NBCA 7 at para 23, citing *Housen v. Nikolaisen*, 2002 SCC 33 ["Housen"] and *Baron v. Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81

17. The Learned Application Judge's failure to properly complete the three-part analysis under the second branch of the *Borowski* test, as outlined below, and her finding that judicial economy outweighed the public interest considerations in this case, are error of laws subject to the correctness standard. The Supreme Court of Canada recognized that "[m]atters of mixed fact and law lie along a spectrum".[16] Regarding some errors, the legal question can be extracted from the factual question and be subject to the correctness standard as an error of law. This occurs when "an incorrect [legal] standard" is applied or there has been "a failure to consider a required element of a legal test, or similar error in principle."[17]

18. The Learned Application Judge's repeated reference to the Respondent's *suspension* of the IOs as those Orders being "repealed" is an error of fact reviewable under the standard of palpable and overriding error.[18]

B. The Law on Mootness

19. *Borowski v Canada (Attorney General)*[19] is the seminal case on mootness. The Supreme Court of Canada provided a two-step analysis on the issue of mootness, stating that a court first must determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. A case is only moot if it fails to satisfy the "live controversy" test.[20] If there is no live controversy, the court must determine whether it should exercise its discretion to hear a moot case.[21]

20. The Supreme Court of Canada provided three non-exhaustive factors for a court to consider in exercising its discretion to hear a moot case in *Borowski*. As restated in *R v Smith*,[22] the factors are:

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;

---

[16] *Housen,* at paras. 8 and 36
[17] *Ibid*.
[18] *Ibid.*
[19] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 ["*Borowski*"]
[20] *Ibid,* at p. 353
[21] *Ibid,* at p. 344
[22] *R. v. Smith*, 2004 SCC 14

c. Respect shown by the courts to limit themselves to their proper adjudicative role as opposed to making free-standing, legislative-type pronouncements.[23]

C. The Learned Application Judge erred in law failing to exercise her discretion to hear the merits of the judicial review application

21. In *Borowski*, the Supreme Court of Canada wrote about the second branch of the mootness test, which sets out the factors to be considered by a court in assessing whether to exercise discretion to hear a matter despite mootness:

> Since the discretion which is exercised relates to the enforcement of a policy or practice of the Court, it is not surprising that a neat set of criteria does not emerge from the examination of the cases…
> …
> The first rationale for the policy and practice referred to above is that a court's competence to resolve legal issues is rooted in the adversarial 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…
> …
> 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. 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. Similarly, **an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration**…
> …
> The third underlying rational of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework…
> …
> **In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present.** This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.[24] (Emphasis added)

[23] *Ibid*, at para. 39
[24] *Borowski*, at pp. 358-363

22. The Appellants argue that the Learned Application Judge erred in failing to exercise her discretion to hear the Application as all three parts of the second branch of the *Borowski* test have been met. However, a careful read of her decision and analysis of the second branch of the *Borowski* test reveals that the Learned Application Judge focused almost solely on the "judicial economy" factor. As the Appellants argue below, she failed to properly consider the most important facts in the "adversarial context" factor and neglected to consider the third factor about her "judicial role" completely.

The Learned Application Judge erred in law in failing to find that the Minister's threat to re-implement the mandatory vaccine requirement constituted the necessary adversarial context within which she should hear the case

23. The Learned Application Judge acknowledged that an adversarial context exists, but she referred only to the fact that both parties argued the mootness motion and did not undertake any further analysis of this factor.[25] The Appellants argue that the Learned Application Judge erred in her failure to find that the Minister of Transport's threat to reimpose the Covid-19 travel vaccine mandate "if needed" added to the adversarial context and weighed heavily in favour of hearing it.

24. The Learned Application Judge failed to consider this real threat of a reimposition of the travel vaccine mandate in her analysis of the public interest. This is in stark contrast to the judgment of Chief Justice Hinkson of the British Columbia Supreme Court when he was faced with a similar task of adjudicating a mootness argument on a Covid vaccine mandate case. The Chief Public Health Officer did not renew the Covid vaccine mandate Orders at the time the legal challenge was heard but had publicly threatened to reimpose the vaccine mandate again. Justice Hinkson chose to exercise his discretion to hear four cases challenging various legislation that created vaccination requirements in British Columbia.[26]

25. In exercising his discretion, Chief Justice Hinkson found:

> The **Vaccine Passport Regime was discontinued by the respondent** on April 8, 2022. The respondent asserts that I should decline to hear the petition concerning the impugned Orders because it raises no live controversy, merely a hypothetical or abstract question, and that even if the impugned Orders remained extant, there are no adjudicative facts concerning these petitioners before the Court.

[25] Reasons, at para. 34
[26] *Maddock v. British Columbia*, 2022 BCSB 1605 ["*Maddock"*]; Kassian v. British Columbia, 2022 BCSC 1603; *Canadian Society for the Advancement of Science in Public Policy v. British Columbia*, 2022 BCSC 1606 ["*CSAPP*"]; Eliason v. British Columbia, 2022 BCSC 1604

> Even if the petition is moot, a court may exercise its discretion to hear a matter if there is still an adversarial context: Borowski v. Canada (Attorney General), 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 at 358-359.
>
> **The difficulty with the respondent's submission is that they could offer no assurance that the impugned aspects of the impugned Orders would not be reintroduced if the communication and incidence of COVID-19 increased due to the anticipated fall cold and flu season or for any other reason.**
>
> **Given the ongoing risk of COVID-19 outbreaks and the possibility that the impugned Orders will be reinstated, I find that there is still an adversarial context. As a result, I am exercising my discretion to hear the petition, regardless of mootness**.[27] (Emphasis added)

26. In finding difficulty with the respondent's failure to assure the court that the vaccine mandate wouldn't be brought back if the incidence of Covid-19 increased in the fall or for any other reason, Hinkson C.J. considered Dr. Bonnie Henry's statements that she may bring the vaccine mandates back again.[28] He found that to be significant, while the Learned Application Judge, in this case, failed to consider it in her reasons in the second part of the *Borowski* test.

27. In a similar unreported decision which was referenced above, Justice Perrell of the Ontario Superior Court exercised his discretion to hear a Covid-19 vaccine-related case and held:

> As of March 1, 2022, the proof of vaccination requirement of Ont. Reg. 364/20 was no longer being enforced, and the regulation itself was repealed on April 27, 2022…
> …
> In these circumstances, I choose to exercise my discretion to hear the Application. **Given the ongoing risk posed by COVID-19 outbreaks and the possibility that the proof of vaccination orders will be reintroduced, the necessary adversarial context exists to allow the court to make a fully considered decision that may have practical consequences**.[29]

28. The Learned Application Judge erred by failing to properly assess and weigh the threat of reimposition of the mandate within the "adversarial context" factor as part of her role under *Borowski*.

---

[27] *CSAPP*, *at* paras 60-70
[28] *Maddock*, at para. 52
[29] *Harjee v. Ontario*, 2022 ONSC 7033, per Perrell J., unreported, at paras 23-25 (unreported) ["*Harjee"*]

The Learned Application Judge Erred in Law in Her Failure to Consider If The Court Could Limit Itself to Its Proper Adjudicative Function

29. The Learned Application Judge erred in her failure to consider this third part of the second branch of the *Borowski* test. Specifically, she wrote, "Courts **must** look into: …. The need for the Court to be sensitive to its role as the adjudicative branch in our political framework."[30] Yet, while writing that *Borowski* required her to determine whether she would remain in her adjudicative role when hearing this case, she failed to make any determination on that issue whatsoever. As per *Borowski*, she was required to consider the extent to which these three factors were present. By leaving one out of the analysis, her conclusion on "judicial economy" bore greater significance than it otherwise might have if she had properly considered all three factors.

30. The Appellants argue that a hearing on its merits would not take the Court beyond its adjudicative role. The IOs were made pursuant to delegated authority in the *Aeronautics Act.* The Appellants seek declaratory relief that their *Charter* rights were violated, which can only be granted by the court. The Appellants are also asking the Court to make a finding on the *vires* issue, which is a function of the courts, not the legislature. The Court would be acting within its traditional adjudicative role in interpreting *Charter* rights. The Appellants draw the Court's attention to the Supreme Court's comments on the *Charter*-era relationship between our courts and the legislative and executive branches:

> [C]ourts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen. All of this is implied in the power given to the courts under s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982*.
>
> Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.
>
> This mutual respect is in some ways expressed in the provisions of our constitution as shown by the wording of certain of the constitutional rights themselves. For example, s.

[30] Reasons, at para. 34 (Emphasis added)

> 7 of the *Charter* speaks of no denial of the rights therein except in accordance with the principles of fundamental justice, which include the process of law and legislative action. Section 1 and the jurisprudence under it are also important to ensure respect for legislative action and the collective or societal interests represented by legislation. In addition, as will be discussed below, in fashioning a remedy with regard to a *Charter* violation, a court must be mindful of the role of the legislature. Moreover, s. 33, the notwithstanding clause, establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts (see P. Hogg and A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997), 35 Osgoode Hall L.J. 75).
>
> As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see e.g. Hogg and Bushell, supra). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, supra, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.
>
> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the Charter). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.[31]

31. This case illustrates the continuing need for dialogue between the courts and the executive branch on how it may restrict access to air travel on grounds that affect *Charter*-protected rights and freedoms.

The Learned Application Judge Erred in her Finding that A Factual Vacuum Exists in This Case

32. The Learned Application Judge found "…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 pronouncements could prejudice future cases and should be avoided".[32] She cited *Phillips v Nova Scotia Commissioner of Inquiry into the Westray Mine Tragedy*[33] for this proposition. The Appellants submit that she erred in her characterization of the facts of this case as a "vacuum" and in law in her reliance on the *Phillips* case. In *Phillips,* the accused men facing trial elected judge and jury and, at the same time, were compelled to testify at a public inquiry. They

[31] *Vriend v. Alberta*, [1998] 1 SCR 493, at paras. 135-139
[32] Reasons, at para. 28
[33] *Phillips v Nova Scotia Commissioner of Inquiry into the Westray Mine Tragedy*, [1995] 2 SCR 97, at para. 12

challenged the decision to compel them to testify, arguing that their section 7 and 11(d) *Charter* rights would be infringed by the inquiry's publicity and the effect on the jury. By the time the trial had started, the accused elected to be tried by a judge alone, which rendered their *Charter* challenge unnecessary as the anticipated situation which would raise *Charter* issues disappeared.

33. That case is significantly different than the case before the Learned Application Judge. The *Charter* breaches in this case already occurred, and 14,000 pages of evidence, including 15 expert reports and 23 affidavits and weeks of cross-examination transcripts, were before her. There was no factual vacuum which would necessitate a finding that a court should refrain from expressing an opinion on this case, nor do the facts bear any similarity to those in the *Phillips* case.

34. Her conclusion in this regard is an error of law.

D. The Learned Application Judge Erred in her Determination that Judicial Economy Considerations Outweighed the Important Public Interest and Uncertainty in the Law

The Learned Application Judge erred in law in failing to recognize the appropriateness of devoting judicial resources to adjudicating inherently temporary matters such as the IOs, and that the IOs are Evasive of Review

i. Temporary and Recurring Orders Are Evasive of Review

35. In her analysis of "judicial economy," the Learned Application Judge wrote that "[f]ederal 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…"[34] She referred to 13 cases which challenged federal health measures and found, "In that sense, the Interim Orders/Ministerial Orders are not evasive of judicial review,"[35] seemingly because other applicants in Canada had their public health order challenges fully adjudicated. As is noted below, the ability of courts to adjudicate challenges to different public health orders imposing different restrictions, argued on different facts and evidence, does not affect the fact that the IOs are evasive of review.

36. The Appellants argue that the Learned Application Judge erred in law in failing to recognize the importance of using judicial resources to adjudicate matters which involve temporary orders. These IOs have proven to change so quickly that it is nearly impossible for litigants to properly put their legal challenges before the court prior to a change or repeal of the public health order. There

[34] Reasons, at paras. 42, 43
[35] Reasons, at paras. 42, 43

was no delay in this case. The parties exercised appropriate diligence to provide the Court with a superb factual record upon which to adjudicate the *Charter* issue of first impression, particularly in regard to section 6 mobility rights.

37. As noted above, the Supreme Court of Canada in *Borowski* found, "…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."[36] The IOs imposed by the Respondent were of a brief and recurring nature. The IOs made pursuant to the *Aeronautics Act* were subject to expiry dates and have been subject to consistent updates. As a result, the IOs existed for brief periods of time. Sixty-eight versions of the IO have been introduced during the existence of Covid in Canada.[37] A total of 26 IOs were imposed from October 29 to July 21, 2022 (the time representing the start of the Covid vaccine mandates, through order number 43, to the time order number 68 was established).

38. In *McCorkell v Riverview Hospital*, the British Columbia Supreme Court found that "unless the court grapples with a test case, even though it may be moot, the constitutionality of the Act may never be examined."[38]

ii. IOs Raised Novel Issues Not Yet Adjudicated in Canada

39. The Interim Orders are unprecedented and raise novel issues. The impact of the IOs on Canadians' constitutionally protected ability to travel abroad and across the whole country has not been considered properly by a Canadian court. None of the 13 cases cited by the Learned Application Judge in her conclusion that the IOs are not evasive of judicial review has considered whether the IOs violated section 2, 6, 8, and 15 *Charter* rights. Further, none of those cases or any other cases have considered whether the Minister of Transport exceeded his jurisdiction by making public health orders pursuant to his authority under the *Aeronautics Act*, or whether he acted in bad faith, as argued by the Appellants in their NOA. Most of the 13 cases cited by the Application Judge did not relate to Covid vaccine mandates and the examination of the safety and efficacy of the Covid-19 vaccines.

---

[36] *Borowski*, at p. 360
[37] Transport Canada. (2022, July 8). *Ministerial orders, Interim Orders, directives / directions and response letters*. Transport Canada **[Appeal Book Tab H]**
[38] *McCorkell v. Director of Riverview Hospital, 1993 CanLII 1200 (BC SC)* at para. 29

These are novel legal issues which have evaded review. The Learned Application Judge erred in concluding otherwise based on these factors.

40. Expert evidence has been presented to assist the court with these novel issues. Such efforts take considerable time and cannot be completed in the nominal time available before the "rolling orders" expire, adding to the challenge of having these types of cases heard before the government files a mootness motion. The parties spent six weeks in intensive cross-examinations in order to prepare for this very important Application. For example, these Appellants filed four expert reports from scientific and medical experts who raised serious questions about the safety and efficacy of the Covid-19 vaccines, specifically, their effects on the heart (especially in young men), on women's fertility, and risks of death from blood clots. These safety concerns raise novel issues when taking these vaccines is a requirement to exercise *Charter*-protected rights. Further, no Canadian court has determined whether it is constitutional to require Canadians to take a drug which is still in the testing phase in order the leave the country.

41. In the Supreme Court of Canada decision *Doucet-Boudreau v. Nova Scotia (Department of Education)*, the court held:

> As to the concern for conserving scarce judicial resources, this Court has many times noted that **such an expenditure is warranted in cases that raise important issues but are evasive of review** [citations omitted]. The present Appeal raises an important question about the jurisdiction of superior courts to order what may be an effective remedy in some classes of cases. To the extent that the reporting order is effective, it will tend to evade review since parties may rapidly comply with orders before an appeal is heard.[39] (Emphasis added)

42. If this Court dismisses the Appellants' Appeal and accepts the Learned Application Judge's findings on mootness, the Respondent will be insulated from any meaningful judicial review of its actions which affected millions of Canadians' ability to travel across the country and abroad.

43. In *International Brotherhood of Electrical Workers, Local Union 2085 v Winnipeg Builders' Exchange*, the Supreme Court of Canada heard an appeal over an injunction, despite the fact that the construction that the defendants allegedly impeded had already been finished and the injunction had been dissolved.[40] The Court held that it was appropriate to hear this case despite mootness because

[39] *Doucet-Boudreau v. Nova Scotia (Department of Education),* [2003] 3 S.C.R. 3 at para. 20
[40] *In International Brotherhood of Electrical Workers, Local Union 2085 v Winnipeg Builders' Exchange*, [1967] SCR 628

the law at the time was not settled, and it was essentially impossible for a non-moot case to reach the court, given the short duration of an injunction. The Appellants submit that the case at bar is similar. The measures are unprecedented, making the law uncertain for that reason alone. Each order is also of limited duration, making them unlikely to reach the court for a hearing on the merits.

iii. A Statement of Claim for Charter Damages Would Expend Far Greater Judicial Resources Than This Application

44. The Learned Application Judge's answer to the fact that no proceeding in Canada has yet tested the IOs against section 6 of the *Charter* is not to have this Application heard, but for the Appellants to start over with a Statement of Claim for *Charter* damages.[41] The Appellants respectfully submit that such a suggestion is antithetical to the concern for judicial economy. The Application was filed, cross examinations completed, and the parties were ready to proceed to a hearing within 10 months. The Learned Application Judge's finding that the proper way to have the section 6 mobility issue adjudicated is to spend years litigating an action and heading to trial will expend a much greater amount of court time than the five days scheduled for the Application and the time for a written decision.

The Learned Application Judge erred in law in failing to find that the Minister's threat to re-implement the mandatory vaccine requirement weighed heavily in favour of hearing the application as a matter of public interest

45. In addition to the Learned Application Judge's error in failing to place proper weight upon the Minister's threat to reimpose the travel vaccine mandate as evidence of an adversarial context, she also erred in law in failing to consider this threat in her assessment of whether the public interest justified expending judicial resources to hear this case. She made no reference to this threat within her analysis of the second branch of *Borowski*, including her lengthy analysis of "judicial economy." The public interest in proceeding with the five-day hearing and having this matter properly adjudicated with the threat of reimposition of the travel mandate is significant.

46. The Appellants further submit that the Learned Application Judge erred in law in her assessment that "…the Application would have no practical effect on the rights of the Applicants."[42] As per Justice Perrell's decision in *Harjee* discussed above, the practical utility in deciding this case is that the Respondent needs the Court's guidance on its past actions to inform future actions, such as

[41] Reasons, at para. 46
[42] Reasons, at para. 41

whether it can lawfully reimpose the travel vaccine mandates. It will also have precedential value, as cases are cited regularly by judges across Canada in their decision based on different facts as part of our common law legal system. Finally, the Appellants, if successful at a hearing on the merits, could decide whether to bring a claim for *Charter* damages.

The Learned Application Judge erred in law in failing to find that there was a significant public interest in determining the constitutionality of prohibiting millions of Canadians from travelling overseas or across Canada in any practical manner

i. In Constitutional Cases, the General Rule Against Deciding Moot Cases Gives Way to the Exercise of Discretion to Decide The Case

47. The Learned Application Judge wrote: "…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."[43] The Appellants argue that she erred in law in her finding that this argument is "[in]sufficient to justify additional resources being allocated to these files."[44]

48. 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."[45]

49. Even if this Court finds that the Application is moot, the Court still has the discretion to decide whether to grant declaratory relief by proceeding to a hearing on the merits and "a party ought not easily be deprived of a day in court."[46]

50. In *Solosky v The Queen*, the Supreme Court held that:

> In *Pyx Granite Co. Ltd. v. Ministry of Housing and Loc. Govt.*, [citations omitted] Denning L.J. described the declaration in these general terms (p. 571): if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.[47]

---

[43] Reasons, at para. 37
[44] Reasons, at para. 39
[45] *Borowski*, at p. 361
[46] *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137 , at para. 24
[47] *Solosky v The Queen*, [1980] 1 SCR 821

51. In *Borowski*, the Supreme Court cited the case of *Re Opposition by Quebec to a Resolution to amend the Constitution*[48] 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.[49] (Emphasis added)

52. Similar comments are echoed in *C (A.L.G) v Prince Edward Island*,[50] 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."[51]

53. In the *Steelworkers Union, Local 2008 v. Attorney General of Canada*[52] decision, Justice Philips exercised his discretion to hear a Covid-19 vaccine mandate case even though the underlying measures had been discontinued.

54. In *Canadian Civil Liberties Association v Nova Scotia (Attorney General),*[53] the Nova Scotia Court of Appeal exercised its discretion to hear a moot case concerning a *quia timet* injunction the Nova Scotia government had obtained against people protesting certain public health measures. The court held that it was in the interest of justice to hear the issue[54] despite it being moot, in contrast to the lower court's refusal to exercise its discretion.[55] The Court should be sensitive to the nature of emergency orders, as they have had a significant impact on liberty and are created without the usual legislative oversight that ensures transparency.

---

[48] *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793
[49] *Ibid* at p. 806
[50] *A.L.G.C. v. Prince Edward Island (Government of)*, 1998 CanLII 5189 (PE SCTD)
[51] *Ibid,* at paras. 7-8
[52] *Steelworkers Union, Local 2008 v. Attorney General of Canada,* 2022 QCCS 2455 (CanLII)
[53] *Canadian Civil Liberties Association v Nova Scotia (Attorney General)*, 2022 NSCA 64, at paras 200-218.
[54] *Ibid,* at para. 209
[55] *Nova Scotia (Attorney General) v Freedom Nova Scotia,* 2021 NSSC 217, at para. 37

ii. The Most Egregious Restriction on Mobility Rights in Canadian History

55. 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. The practical effect of the IOs was that millions of Canadians were prohibited from leaving Canada and travelling country-wide in a practical manner. It is in the public interest that the application be heard, so the Respondent and Canadians can understand whether the federal government has the power to prevent them from leaving Canada for their failure to take a novel injectable medication. Salient facts for the Application and the public interest is that the required Covid vaccinations have known side effects and adverse events, including death, heart problems, blood clots, Bell's Palsy and more, and are still in clinical trials.[56] The Learned Application Judge erred in law in failing to consider any of these factors in her assessment of the public interest in having this case heard on its merits balanced with the concerns about judicial economy.

56. 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,"[57] yet no evidence to support these discrepancies was provided. Furthermore, it was established during cross-examinations that Canada was the only country in the G7 with domestic vaccination requirements for travel.[58] The Learned Application Judge erred in law in failing to consider any of these factors in her assessment of the public interest value of hearing this case.

57. Ms. Little, the Director General of Covid Recovery at Transport Canada, had significant involvement in the development of the impugned measure.[59] Ms. Little acknowledged that the travel vaccine mandate prevented the majority of unvaccinated Canadian citizens from travelling,[60] thus impacting millions of Canadians.[61] She acknowledged that unvaccinated Canadians were prevented from travelling internationally due to the travel vaccine mandate if they

---

[56] Affidavit of Steven Pelech, Exhibit "B", at para. 12 **[Appeal Book Tab F)i.)38]**, Affidavit of Byram Bridle, Exhibit "B", at paras. 38, 39, 44, 49, 56 **[Appeal Book Tab F)i.)37]**, Affidavit of Celia Lourenco, at para. 146 **[Appeal Book Tab F)i.)21]**, Cross Examination of Dr. Lourenco, at paras. 725-728, 738-746, 799 Exhibit No. 7, No. 8 to the cross-examination of Dr. Lourenco **[Appeal Book Tab F)i.)63]**; Transcript of Cross Examination of Dr. Peter Liu, June 1, 2022, at para. 89 **[Appeal Book Tab F)i.)60]**

[57] Little Affidavit, Exhibit "E", at page 13 **[Appeal Book Tab F)i.)25]**

[58] Transcript of the Cross Examination of Jennifer Little, at para 486 ["Little Transcript 1"] **[Appeal Book Tab F)i.)67]**

[59] *Ibid*., at paras. 39, 42, 44-45, 519, and 696-697

[60] Little Transcript 2, at paras. 1018-1025

[61] *Ibid*, at para. 946

did not qualify for an exemption.[62] These Appellants, along with millions of unvaccinated Canadians, have been prevented from visiting family, travelling for work or pleasure, and other important reasons.[63] The Learned Application Judge erred in law in failing to consider any of these factors in her decision.

E. Conclusion

58. The Appellants submit that their Appeal ought to be granted. The threat of reimposition of the mandate created a practical utility to determining whether declaratory relief was warranted. The Learned Application Judge failed to properly analyze the first and third factors under the second branch of the *Borowski* test and suggested that the Appellants should have brought a Statement of Claim for damages instead of this Application, the consequences of which are antithetical to preserving judicial economy.

59. The *Borowski* factors favour the Application being heard on its merits. An adversarial context exists, as found by the Applications Judge. The measures are evasive of review, they have monumental public importance, and a decision will also have paramount precedential value. The Court will be acting within its proper law-making function by hearing the case.

PART VI - ORDER SOUGHT

60. Based on the foregoing, the Appellants seek an Order setting aside the decision of Associate Chief Justice Gagné dated October 20, 2022, Federal Court File Numbers T-145-22, T-247-22, T-168-22, and T-1991-21, by which she granted the Respondent's motion to strike the Appellants' Application for judicial review.

61. The Appellants further seek an Order that the Application proceed to a hearing on the merits.

[62] *Ibid*, at para. 1131
[63] NOA, at paras. 24-36

62. The Appellants ask this Court to make any other Order that this Honourable Court considers fair and appropriate.

All of which is respectfully submitted this 13th day of April 2023

Allison Kindle Pejovic
Counsel for the Appellants,
The Honourable A. Brian Peckford, Leesha Nikkanen, Ken Baigent, Drew Belobaba, Natalie Grcic and Aedan MacDonald

PART V- TABLE OF AUTHORITIES

Tab	Cases Cited
1	*Association des juristes d'expression française du Nouveau-Brunswick c. Commissariat aux langues officielles du Nouveau-Brunswick et autre*, 2023 NBCA 7
2	*Housen v. Nikolaisen*, 2002 SCC 33
3	*Baron v. Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81
4	*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342
5	*R. v. Smith*, 2004 SCC 14
6	*Maddock v. British Columbia*, 2022 BCSB 1605
7	*Kassian v. British Columbia*, 2022 BCSC 1603
8	*Canadian Society for the Advancement of Science in Public Policy v. British Columbia*, 2022 BCSC 1606
9	*Eliason v. British Columbia*, 2022 BCSC 1604
10	*Harjee v. Ontario*, 2022 ONSC 7033
11	*Vriend v. Alberta*, [1998] 1 SCR 493
12	*Phillips v Nova Scotia Commissioner of Inquiry into the Westray Mine Tragedy*, [1995] 2 SCR 97
13	*McCorkell v. Director of Riverview Hospital*, 1993 CanLII 1200 (BC SC)
14	*Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2003] 3 S.C.R. 3
15	*In International Brotherhood of Electrical Workers, Local Union 2085 v Winnipeg Builders' Exchange*, [1967] SCR 628
16	*Rahman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137
17	*Solosky v The Queen*, [1980] 1 SCR 821
18	*Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793
19	*A.L.G.C. v. Prince Edward Island (Government of)*, 1998 CanLII 5189 (PE SCTD)
20	*Steelworkers Union, Local 2008 v. Attorney General of Canada*, 2022 QCCS 2455 (CanLII)
21	*Canadian Civil Liberties Association v Nova Scotia (Attorney General)*, 2022 NSCA 64
22	*Nova Scotia (Attorney General) v Freedom Nova Scotia*, 2021 NSSC 217
	Acts and Legislation
23	*Aeronautics Act* (R.S.C., 1985, c. A-2)