Federal Court  Cour fédérale

Date: 20220114

Docket: T-1690-21

Citation: 2022 FC 44

Ottawa, Ontario, January 14, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

LUCIEN KHODEIR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] Mr. Khodeir seeks judicial review of the federal government's requirement that all its employees be vaccinated against COVID-19. He asserts that this requirement is unreasonable, because he believes that the virus that causes the disease does not exist.

[2] The Attorney General is asking me to strike Mr. Khodeir's application at the preliminary stage. He says that I should take judicial notice of the existence of SARS-CoV-2, the virus that

causes COVID-19. As a consequence, Mr. Khodeir will be unable to prove the central premise of his application, which is thus bound to fail.

[3] For the reasons that follow, I agree with the Attorney General. The existence of SARS-CoV-2 has become notorious. Courts have repeatedly taken judicial notice of it. Although Mr. Khodeir had the opportunity to file evidence and make submissions, he failed to offer any factual foundation for his belief in the inexistence of SARS-CoV-2. His application must therefore be struck.

I. Procedural Background

[4] Mr. Khodeir brought an application for judicial review of the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* [the Policy], made by the Treasury Board pursuant to sections 7 and 11.1 of the *Financial Administration Act*, RSC 1985, c F-11, and effective October 6, 2021. In a nutshell, the Policy requires all employees of the core public administration to be fully vaccinated against COVID-19 before October 29, 2021, unless there is a medical contraindication or a need for accommodation based on religion or another prohibited ground of discrimination.

[5] Unlike other litigants who have challenged the validity of the Policy, Mr. Khodeir does not invoke his rights guaranteed by the *Canadian Charter of Rights and Freedoms*. Rather, he asserts that the policy is *ultra vires* the *Financial Administration Act*, because it is unreasonable in the administrative law sense of the term. In this regard, his amended application alleges the following:

- The virus, named SARS-CoV-2, is the alleged cause of COVID-19;
- SARS-CoV-2 was never proven to exist according to three experts: two sought by the Applicant and one sought by the Respondent who cited 18 times SARS-CoV-2 in an affidavit of November 14th, 2021, but never referenced a proof of its existence;
- SARS-CoV-2 is the basis of all the COVID-19 vaccines;
- The [Policy] is enforcing COVID-19 vaccinations;
- It is unreasonable to mandate a vaccine to protect against a non-existent pathogen; […].

[6] The Attorney General responded to Mr. Khodeir's application by bringing a motion to strike, pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106. He asserts that Mr. Khodeir's application is bereft of any possibility of success, because the Court can take judicial notice of the existence of SARS-CoV-2. He also asserts that Mr. Khodeir has no standing to bring the application, because he is not an employee of the core public administration and cannot claim public interest standing in the circumstances.

[7] Mr. Khodeir made submissions in response to the Attorney General's motion to strike. He also filed three affidavits in support of his response, and moved for leave to amend his notice of application. The Attorney General did not object to the amendment or to the filing of the affidavits. Accordingly, I will grant Mr. Khodeir leave to amend his notice of application. I have already quoted from the amended application. I will consider the affidavits later in these reasons.

II. The Test for a Motion to Strike

[8] Rule 221(1)(a) provides that a statement of claim that "discloses no reasonable cause of action" may be struck. While this rule applies to actions, a similar principle has been extended to applications for judicial review. Thus, in *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA) at 600 [*David Bull Laboratories*], the Federal Court of Appeal held that it could strike a notice of application for judicial review that is "so clearly improper as to be bereft of any possibility of success"; see also *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paragraphs 47-48, [2014] 2 FCR 557 [*JP Morgan*]; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at paragraphs 32-33.

[9] By way of example, applications for judicial review have been struck where they are premature (*Dugré v Canada (Attorney General)*, 2021 FCA 8), where the Court lacks jurisdiction (*JP Morgan*), where the application obviously lacks legal foundation (*Canada (Attorney General) v Valero Energy Inc*, 2020 FCA 68 [*Valero*]) or where the facts alleged are purely speculative (*Assouline v Canada (Attorney General)*, 2021 FC 458).

[10] A motion to strike is aimed at a defect in the pleadings. For this reason, it is sometimes called a "pleadings motion." According to rule 2, a pleading is "a document in a proceeding in which a claim is initiated, defined, defended or answered." In this case, the pleading is the notice of application. While it defines the claim, a pleading is not evidence. Evidence to support the claim is typically brought at a later stage of the proceedings. Thus, a motion to strike tests the validity of the claim in the abstract, before any evidence is considered.

[11] For this reason, on a motion to strike, the general principle is that the allegations contained in the notice of application must be taken to be true: *JP Morgan,* at paragraph 52. On such a motion, the role of the Court is not to assess the potential evidence nor to predict whether the applicant will succeed in proving the allegations of the notice of application. This is reinforced by a prohibition on admitting evidence on certain categories of motions to strike: rule 221(2).

[12] There are, however, exceptions to these principles.

[13] First, where a pleading refers to supporting documents or evidence, they may be taken into consideration, as if incorporated in the pleading: *JP Morgan*, at paragraph 54.

[14] Second, the rule that allegations must be taken to be true does not extend to facts "manifestly incapable of being proven:" *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paragraph 22, [2011] 3 SCR 45. In *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 455, the Supreme Court noted that

> The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true.

[15] This will also be the case, as we will see below, where allegations are contrary to judicially noticed facts, because judicial notice is conclusive. Such allegations, therefore, are "manifestly incapable of being proven."

III. No Possibility of Success

[16] I accept the Attorney General's invitation to take judicial notice of the existence of the SARS-CoV-2 virus, which causes COVID-19. To explain why, I must begin by outlining the contours of the concept of judicial notice. I then show that the existence of the SARS-CoV-2 virus is beyond reasonable debate and that Mr. Khodeir's submissions to the contrary are without merit.

A. *Judicial Notice*

(1) Definition and Purpose

[17] Courts make decisions based on evidence brought in each particular case. Some facts, however, are so obvious that courts assume their existence and no evidence of them is required. This is called judicial notice: Jean-Claude Royer, *La preuve civile* (6th ed by Catherine Piché, Cowansville, Yvon Blais, 2020) at paragraphs 139-147 [Piché, *La preuve*]; Léo Ducharme, *Précis de la preuve* (6th ed, Montreal, Wilson & Lafleur, 2005) at paragraphs 74-92 [Ducharme, *Précis*]; Sidney N Lederman, Alan W Bryant and Michelle K Fuerst, *Sopinka, Lederman and Bryant: The Law of Evidence in Canada* (5th ed, Toronto, LexisNexis Canada, 2018) at paragraphs 19.16-19.63 [Sopinka, *Law of Evidence*]; David M Paciocco, Palma Paciocco and Lee Stuesser, *The Law of Evidence* (8th ed, Toronto, Irwin Law, 2020) at 573-583 [Paciocco and Stuesser, *Law of Evidence*].

[18] The Supreme Court of Canada provided the following definition and test for judicial notice in *R v Find*, 2001 SCC 32 at paragraph 48, [2001] 1 SCR 863 [*Find*]:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy […].

[19] While the above comments were made in the context of a criminal case, similar principles apply in Quebec civil law. Civil law principles are relevant in the present case because Mr. Khodeir's application was filed at the Montreal registry office, and this Court must apply the laws of evidence in force in the province where the application was filed: *Canada Evidence Act*, RSC 1985, c C-5, s 40. The following provisions of the *Civil Code of Québec* deal with judicial notice:

2806. No proof is required of a matter of which judicial notice shall be taken.	**2806.** Nul n'est tenu de prouver ce dont le tribunal est tenu de prendre connaissance d'office.
2808. Judicial notice shall be taken of any fact that is so generally known that it cannot reasonably be questioned.	**2808.** Le tribunal doit prendre connaissance d'office de tout fait dont la notoriété rend l'existence raisonnablement incontestable.

[20] Judicial notice performs several functions: Danielle Pinard, "La notion traditionnelle de connaissance d'office des faits" (1997) 31 RJT 87 [Pinard, "La notion"]. It fosters efficiency, by ensuring that the bringing of evidence of obvious facts does not bog down the judicial process. It

also promotes public confidence in the administration of justice. Courts would not be trusted if they required litigants to go to the expense of proving notorious facts or if they reached conclusions that are contrary to what is considered beyond reasonable dispute. The Supreme Court of Canada summarized this in *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at paragraph 57, [2004] 3 SCR 381:

> The purpose of judicial notice is not only to dispense with unnecessary proof but to avoid a situation where a court, on the evidence, reaches a factual conclusion which contradicts "readily accessible sources of indisputable accuracy", and which would therefore bring into question the accuracy of the court's own fact-finding processes. A finding on the evidence led by the parties, for example, that the Newfoundland deficit in 1988 was $5 million whereas anyone could ascertain from the public accounts that it was $120 million would create a serious anomaly.

(2) Scope

[21] Thus, whether the matter is envisaged from the perspective of common law or civil law, judicial notice is taken of facts that are beyond reasonable dispute. A conclusion that a fact is beyond reasonable dispute may be based on a finding that the fact is notorious or on verifications in "sources of indisputable accuracy": *Find*, at paragraph 48.

[22] The category of notorious facts includes everyday facts that anyone can personally ascertain. For example, judicial notice will be taken of the fact that when driving on St. Catherine Street in Montreal, one will cross Bleury, Jeanne-Mance and St. Urbain Streets in that order. If one is unaware of this, the consultation of a map will readily provide the answer; see, by way of analogy, *R v Krymowski*, 2005 SCC 7 at paragraph 22, [2005] 1 SCR 101.

[23] Facts may be notorious even where the decision-maker cannot ascertain them personally. For example, in *R v Khawaja*, 2012 SCC 69 at paragraph 99, [2012] 3 SCR 555 [*Khawaja*], the Supreme Court of Canada took judicial notice of the war in Afghanistan, even though it is highly unlikely that its members, like most Canadians, travelled there to witness the hostilities. The existence of the war is nevertheless notorious because over the years, trusted sources of information have repeatedly mentioned it. Thus, reasonable persons would not doubt that there was a war in that distant country.

[24] Based on the same logic, courts have taken judicial notice of facts of a technical or scientific nature. For example, in *Baie-Comeau (Ville de) c D'Astous*, [1992] RJQ 1483 at 1488 (CA) [*D'Astous*], the Quebec Court of Appeal noted that

> [TRANSLATION]
>
> … radar, as an instrument of detection and measurement, is covered by the concept of judicial notice. Its use in air and marine navigation is as widespread as that of the compass. Moreover, all North Americans know from experience that it is also used to measure the speed of motor vehicles. We learned, in high school or in college, that the basic principle of radar is the emission, by a device, of beams of electromagnetic rays that, when they are reflected by an obstacle, return to the emitter. Any dictionary or encyclopedia provides the reader with scientific details. What then was a military secret at the beginning of the last world war has today become an indisputable fact.

[25] Likewise, in *Telus Communications Inc v Vidéotron Ltée*, 2021 FC 1127 at paragraph 5 [*Telus*], I wrote, "Mobile phone technology requires the use of electromagnetic waves of various frequencies." The parties in that case did not bring any evidence regarding what electromagnetic waves are, how they were discovered or exactly how they can be received by a mobile phone.

Nonetheless, the fact that mobile phones use electromagnetic waves is notorious among the general public.

[26] Courts are nevertheless mindful that there is disagreement about some aspects of scientific knowledge. They are careful not to take judicial notice of matters on which science has not reached consensus or which are laden with value judgments: *R v Spence*, 2005 SCC 71 at paragraph 63, [2005] 3 SCR 458 [*Spence*]; *R v Mabior*, 2012 SCC 47 at paragraph 71, [2012] 2 SCR 584; *Quebec (Attorney General) v A*, 2013 SCC 5 at paragraphs 273-274, [2013] 1 SCR 61 [*Quebec v A*].

[27] Courts have also calibrated the test for judicial notice "according to the nature of the issue under consideration": *Spence*, at paragraph 60; see also Paciocco and Stuesser, *Law of Evidence*, at 576-581. They insist on stricter compliance with the above-mentioned test when the fact to be judicially noticed is central to the case: *R v Malmo-Levine*, 2003 SCC 74 at paragraph 28, [2013] 3 SCR 571; *Quebec v A*, at paragraph 274. This is because "the need for reliability and trustworthiness increases directly with the centrality of the 'fact' to the disposition of the controversy": *Spence*, at paragraph 65.

(3) Process and Consequences

[28] In many cases, judicial notice is an implicit process. For example, in the *Telus* case mentioned above, I did not explicitly state that I was taking judicial notice of the use of electromagnetic waves by mobile phones. The parties did not dispute the point and took it for granted.

[29] In other situations, the propriety of taking judicial notice will be debated. One party will argue that a particular fact is not beyond reasonable dispute and that the test for judicial notice is not met. When this happens, both parties may provide submissions and information to help the judge decide whether it is appropriate to take judicial notice.

[30] The effect of judicial notice has been the subject of academic debate. Some writers assert that judicial notice is a rebuttable presumption: Pinard, "La notion"; Piché, *La preuve*, at paragraph 146. According to that view, a party may attempt to prove a fact contrary to judicial notice. The weight of judicial opinion, however, is to the effect that judicial notice is conclusive: *D'Astous*, at 1487-1488; *R v Zundel* (1987), 35 DLR (4th) 338 at 391 (Ont CA), cited with approval in *Spence*, at paragraph 55; see also Paciocco and Stuesser, *Law of Evidence*, at 576; Ducharme, *Précis*, at paragraph 89; Sopinka, *Law of Evidence*, at paragraphs 19.57-19.60. Not only does judicial notice dispense with proof of a fact, it also forecloses an attempt to prove the contrary. As I mentioned above, allowing attempts to disprove what is beyond reasonable dispute would erode trust in the administration of justice.

[31] Those who assert that judicial notice should only be a rebuttable presumption are typically concerned with the fairness of the process. Judicial notice could be a vehicle for imposing commonly held stereotypes, which may in fact be wrong. This concern, however, does not arise where the propriety of taking judicial notice is the subject of adversarial debate. In such a case, the parties have a chance to show that the fact in question is not sufficiently notorious or beyond reasonable dispute to warrant judicial notice.

[32] Having established the principles governing judicial notice, I can now turn to their application to the existence of the SARS-CoV-2 virus.

B. *Application to This Case*

[33] In my view, the existence of the SARS-CoV-2 virus is beyond reasonable dispute and is a matter of judicial notice. I reach this conclusion for three reasons, developed below: the existence of the virus is notorious; other courts have taken judicial notice of it; and Mr. Khodeir's assertions to the contrary do not withstand scrutiny.

[34] I am mindful that taking judicial notice of the existence of the virus is dispositive of Mr. Khodeir's application. In these circumstances, the bar is high for the Court to take judicial notice. Nevertheless, the test is clearly met in this case.

[35] I also wish to emphasize that the Attorney General is asking me to take judicial notice solely of a narrow and basic fact regarding the COVID-19 pandemic, namely, the existence of the virus causing the disease. Of course, knowledge about various aspects of COVID-19 continues to develop, and there is a lively debate about which public health measures are most appropriate to fight the pandemic. In this process, some facts beyond the mere existence of the virus may or may not be sufficiently indisputable or notorious to warrant judicial notice. I am not, however, called upon to set the outer boundaries of judicial notice in relation to the COVID-19 pandemic.

(1) Notoriety

[36] Over the last two years, most people on this planet have been affected in various ways by the COVID-19 pandemic. It has become common knowledge that COVID-19 is caused by a virus called SARS-CoV-2. Numerous trusted sources of information have repeated this fact, to the point that it is now beyond reasonable dispute. There is a lack of debate on this issue in scientific circles.

[37] A fact, however, does not become indisputable by mere repetition. One must consider channels through which the information is conveyed, scrutinized and exposed to criticism, and the fact that these channels operate in a society based on freedom of discussion. This is particularly important in this case because, over the last two years, the COVID-19 pandemic and the public health measures deployed to fight it have been one of the most significant topics of public debate. Scientific knowledge about COVID-19 has developed under intense public scrutiny. The existence of the SARS-CoV-2 virus and the fact that it causes COVID-19 are at the root of the matter. As matters related to the pandemic have been debated so thoroughly, it is unimaginable that any actual scientific debate about these basic facts would have escaped public attention. Moreover, if there was any evidence incompatible with the existence of the virus, one would have expected Mr. Khodeir to provide it to the Court. As we will see later, he utterly failed in this regard.

[38] Like the war in Afghanistan in *Khawaja*, the existence of the virus is notorious even though people cannot see the virus themselves, and have to rely on knowledge from trusted

sources. The average person's lack of precise understanding of the functioning of viruses or methods for their isolation does not prevent the fact that the SARS-CoV-2 virus is the cause of COVID-19 from becoming notorious among the general public. Like the radar in *D'Astous* or the mobile phone in *Telus*, courts can take notice of the basic aspects of scientific or technical phenomena, even though most people do not understand the minute details.

[39] As I find that the existence of SARS-CoV-2 and the fact that it causes COVID-19 are notorious, I need not decide whether they can also be ascertained by reference to sources of indisputable accuracy, nor attempt to set out what those sources would be.

(2) Precedent

[40] On numerous occasions since the beginning of the pandemic, courts in this country have noted the link between the SARS-CoV-2 virus and COVID-19. In a number of cases, expert evidence was adduced. In others, courts took notice of various aspects of the pandemic. These statements made in previous cases may contribute to a finding that judicial notice is warranted: *R v Williams*, [1998] 1 SCR 1128 at paragraph 54.

[41] In some cases, the virus is mentioned without debate. For example, in *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at paragraph 1, the court mentioned "the global impact of the SARS-CoV-2 virus, known more commonly by the infectious and potentially fatal disease it causes, COVID-19." Likewise, in *Spencer v Canada (Attorney General)*, 2021 FC 361 at paragraph 11, my colleague Justice William F. Pentney referred to "the SARS-CoV-2 virus – the virus that causes the potentially severe and life-threatening respiratory disease of COVID-

19." See also *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 219 at paragraphs 53 and 61. In these cases, there does not appear to have been any controversy that SARS-CoV-2 causes COVID-19. It is true that the courts in these cases do not explicitly say whether they received evidence or are taking judicial notice, but the fact that they did not feel the need to make this explicit buttresses my finding that the existence of SARS-CoV-2 is a notorious fact.

[42] In other cases, courts have explicitly taken judicial notice of facts related to the COVID-19 pandemic, including the fact that COVID-19 is caused by the SARS-CoV-2 virus. Thus, in *R v Morgan*, 2020 ONCA 279 at paragraph 8, the Ontario Court of Appeal wrote:

> We do, however, believe that it falls within the accepted bounds of judicial notice for us to take into account the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission.

[43] Courts across the country have reached similar conclusions. In *Manzon v Carruthers*, 2020 ONSC 6511 at paragraph 18, the Ontario Superior Court of Justice took "judicial notice of the fact that COVID-19 is caused by SARS-CoV-2, a communicable and highly contagious virus." In *TRB v KWPB*, 2021 ABQB 997 at paragraph 12, the Alberta Court of Queen's Bench noted that

> Since early 2020, Canadians have been living in the midst of a global pandemic caused by the SARS-CoV-2 virus. I take judicial notice of this fact which is so notorious and indisputable as to not require proof.

[44] In *OMS v EJS*, 2021 SKQB 243 at paragraphs 112-114, the Saskatchewan Court of Queen's Bench did the same, although referring to the "COVID virus." See also *BTK v JNS*,

2020 NBQB 136 at paragraphs 19-22; *R v Pruden*, 2021 ABPC 266 at paragraph 54; *Halton Condominium Corp No 77 v Mitrovic*, 2021 ONSC 2071 at paragraph 17.

[45] Thus, Canadian courts have taken judicial notice of the fact that COVID-19 is caused by the SARS-CoV-2 virus. While these cases are not, strictly speaking, binding on me, they are persuasive authority.

[46] In reviewing these cases, I also noted that there does not appear to be a single instance where a party challenged the existence of the SARS-CoV-2 virus or its link to COVID-19. Mr. Khodeir has not brought any such case to my attention. In fact, he asserts that the denial of the existence of the virus distinguishes his application from all others. The absence of any such challenge only reinforces my finding that the existence of the virus is beyond reasonable dispute.

(3) Mr. Khodeir's Evidence

[47] In response to the Attorney General's motion to strike, Mr. Khodeir brought evidence. While evidence is usually not admissible on a motion to strike, Mr. Khodeir explicitly referred to this evidence in his amended notice of application. Moreover, when arguing about whether it is proper to take judicial notice, parties are entitled to provide the Court with information or evidence showing that the fact in question is or is not beyond reasonable dispute. The Attorney General did not object to the admission of the evidence tendered by Mr. Khodeir. In fact, Mr. Khodeir stated that, in response to the motion to strike, he provided the Court with all the evidence and submissions he intended to file on the merits. I will therefore analyze this evidence to see if it affects my conclusion that the existence of the virus is beyond reasonable dispute.

[48] Mr. Khodeir first provides an affidavit from Dr. Daniel Yoshio Nagase, an emergency physician. At Mr. Khodeir's request, Dr. Nagase studied two documents, excerpts of which are appended to the affidavit.

[49] The first is an article by Drosten and others published on January 23, 2020, in Euro Surveillance, which appears to be a scientific journal. It proposes a diagnostic methodology for identifying the SARS-CoV-2 virus, using a technique known as the PCR test. The paper was published merely two weeks after Chinese authorities published the genome sequence of the virus in various public databases.

[50] The second document appended to Dr. Nagase's affidavit purports to be a review report of the Drosten paper, dated November 2020. Its authors assert that there are major flaws in the Drosten paper and request the Euro Surveillance journal to retract it. Only short excerpts of the report are provided, which describe only one alleged flaw: the fact that the Drosten paper is based on a computerized model of the virus, instead of the actual virus. The authors also note that ten months after the initial publication, Drosten and his colleagues have not validated their methodology using the actual virus. Dr. Nagase does not say whether the review report was accepted for publication anywhere, nor whether the Drosten paper was retracted as a result.

[51] Dr. Nagase concludes his short summary of the two documents by the following sentence: "Perhaps, Drosten could not update the Protocol because SARS-CoV2 did not really exist in nature but in a computer file." I attach no value whatsoever to this statement. It does not follow logically from what precedes it. It is pure speculation, not fact. There is absolutely

nothing in the documents Dr. Nagase refers to suggesting that SARS-CoV-2 does not exist. Dr. Nagase himself carefully refrains from drawing a firm conclusion in this regard, by using the word “perhaps.” In his amended notice of application, Mr. Khodeir misrepresents Dr. Nagase’s evidence when saying that he concluded that SARS-CoV-2 “was never proven to exist.” Dr. Nagase did not state such a conclusion and provides no facts that could support it.

[52] Moreover, if Dr. Nagase’s affidavit is intended to provide an overview of current knowledge regarding the SARS-CoV-2 virus, or even the narrower issue of the validity of the PCR tests, it is sorely lacking. Dr. Nagase merely highlights a November 2020 critique of a paper written in January 2020, at the very beginning of the pandemic. He does not provide any up-to-date information regarding the validation of PCR tests, even if he signed his affidavit a year later. He does not conduct his own search of the literature and does not offer any fulsome literature review. Rather, he confines himself to the two papers to which Mr. Khodeir drew his attention. If Dr. Nagase is intended to be an expert witness, the selective comparison he undertakes and the extremely narrow range of information he provides are fundamentally at odds with the neutrality expected of experts.

[53] Mr. Khodeir also filed an affidavit from Ms. Christine Massey, who describes herself as a biostatistician and purports to testify as an expert, although we know little about her qualifications. Ms. Massey states that she has made access to information requests to 25 “Canadian health and science institutions,” asking for

> all studies or reports in the possession, custody or control of each institution that describe the isolation/purification of SARS-CoV2 directly from a sample taken from a diseased human where the

> patient sample was not first combined with any other source of genetic material.

[54] Ms. Massey states that other persons in various countries made similar requests and forwarded the responses to her. She observes that none of the 138 institutions to whom a request was made was able to provide such records.

[55] I am unable to draw any material conclusions from Ms. Massey's affidavit. The institutions to whom requests were made are not identified. One does not know if they can reasonably be expected to possess the studies or reports in question. I am also not in a position to assess the relevance of the restrictions contained in the description of the records sought. Thus, I do not know whether Ms. Massey's requests were designed for failure or, if not, what to infer from the negative responses.

[56] What is also striking is that Ms. Massey does not herself attempt to draw any conclusions from the results of her access to information requests. Again, Mr. Khodeir's reliance upon her evidence to state that SARS-CoV-2 "was never proven to exist" is a misrepresentation. She says nothing of this kind. In truth, she states no fact that contradicts the existence of SARS-CoV-2.

[57] Lastly, Mr. Khodeir filed his own affidavit. In addition to information about COVID-19 vaccines, he appends an affidavit sworn by Dr. Celia Lourenco of Health Canada in other proceedings in which the validity of the Policy is being challenged. He notes that Dr. Lourenco "cited 18 times SARS-CoV2 but never once referenced a single document which proves its existence." Again, nothing logically flows from this. The existence of SARS-CoV-2 was not an

issue in these other proceedings, so Dr. Lourenco was not required to provide documents on this topic.

[58] Thus, Mr. Khodeir's evidence does not erode the notoriety of the existence of the SARS-CoV-2 virus in any way. What Mr. Khodeir does, with the assistance of his so-called experts, is to look for evidence of the existence of the virus in discrete and narrow places and, finding none, to ask the Court to infer its inexistence. This is irrational: the conclusion simply does not flow from the premise. The absence of evidence in one place does not mean that the evidence does not exist elsewhere and tells nothing about the fact in dispute.

[59] One should not be fooled by Mr. Khodeir's reliance on so-called experts and scientific literature. His affiants have not been qualified as experts and the information they provide in their affidavits does not allow me to consider them as such. The selective citation of a few elements from the scientific literature does not confer scientific value on Mr. Khodeir's contentions.

[60] In fact, Mr. Khodeir's arguments amount to this. He first raises suspicions by alleging that a crucial piece of information is missing, without, however, conducting a thorough search for that information. He then alludes to an explanation that runs against what has become notorious knowledge, without providing any positive evidence of that explanation. Finally, he jumps to the conclusion that the suggested explanation is true and uses it as a factual basis for his application for judicial review.

[61] Such a process has no probative value, scientific or otherwise. Reasonable persons do not recognize this as establishing the veracity of an alleged fact. Put simply, the layering of affidavits from so-called experts and selected documents of dubious scientific value cannot make up for Mr. Khodeir's failure to bring a single fact that contradicts the existence of the SARS-CoV-2 virus.

(4) Summary

[62] In summary, the fact that COVID-19 is caused by a virus called SARS-CoV-2 is so notorious that it is beyond reasonable dispute. Like many other judges across Canada, I am taking judicial notice of this fact. Despite having had the opportunity to present evidence and submissions, Mr. Khodeir failed to put forward any cogent reason for concluding otherwise.

[63] Thus, if Mr. Khodeir's application were allowed to proceed, he would be precluded from attempting to prove that SARS-CoV-2 does not exist, as this would be contrary to a judicially noticed fact. Yet, this allegation is the premise of his whole application. It is the "lynchpin holding the elements of the Application together": *Valero*, at paragraph 29. Mr. Khodeir would be unable to prove this central allegation, although he would have the burden of doing so: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 100. His application would be bound to fail or "bereft of any possibility of success," to borrow the language of the Federal Court of Appeal in *David Bull Laboratories*. It must be struck at this preliminary stage.

[64] In his submissions, Mr. Khodeir compares himself to Galileo, who was persecuted in the 17th century for asserting that the Earth revolves around the Sun, a theory unanimously accepted today. Yet, unlike Mr. Khodeir, Galileo buttressed the heliocentric theory with facts, especially his discovery of Jupiter's moons. In contrast, Mr. Khodeir asks us to believe his assertions regarding the SARS-CoV-2 virus without providing any tangible fact in support. The comparison is unfair to the great Italian scholar. Mr. Khodeir's case has no scientific footing.

IV. Standing

[65] Given the conclusions I reach with respect to judicial notice, it is not necessary to analyze in detail the Attorney General's submissions regarding Mr. Khodeir's lack of standing. I will confine myself to making the following comments.

[66] Mr. Khodeir is not directly affected by the Policy. He is not an employee of the federal government. Rather, in his affidavit, he states that he is an employee of a subsidiary of the Canadian Imperial Bank of Commerce [CIBC]. He lacks the personal standing necessary to bring an application for judicial review.

[67] Relying on *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 1 SCR 524 [*Downtown Eastside*], however, Mr. Khodeir asks the Court to grant him public interest standing. The Attorney General opposes this request because other applicants, who are employees of the federal government and are directly affected by it, have been able to mount judicial challenges to the Policy. The Attorney General's submission has much force. Indeed, this may well be a situation where "plaintiffs with a personal

stake in the outcome of a case should get priority in the allocation of judicial resources": *Downtown Eastside*, at paragraph 27. Nevertheless, I would not go so far as to conclude that Mr. Khodeir's request for public interest standing is bound to fail, so I would not consider his lack of standing as an independent ground for striking his application.

V. Disposition and Costs

[68] For these reasons, the Attorney General's motion to strike Mr. Khodeir's application for judicial review will be granted.

[69] The Attorney General is seeking his costs. Relying on *McEwing v Canada (Attorney General)*, 2013 FC 953, Mr. Khodeir submits that no costs should be awarded against him. The usual rule is that the losing party is condemned to pay the costs of the prevailing party according to the tariff. The Court has discretion to depart from that rule, taking into account all the circumstances of the case. In contrast to *McEwing*, Mr. Khodeir's application is entirely devoid of factual foundation. Thus, I do not think is it appropriate to relieve Mr. Khodeir from a costs award.

ORDER in T-1690-21

THIS COURT ORDERS that:

1. The applicant’s motion to amend his notice of application is granted.

2. The style of cause is amended so that the Attorney General of Canada is the respondent.

3. The respondent’s motion to strike the notice of application is granted.

4. Costs are awarded to the respondent.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1690-21
STYLE OF CAUSE:	LUCIEN KHODEIR v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369

ORDER AND REASONS:	GRAMMOND J.
DATED:	JANUARY 14, 2022

APPEARANCES:

Lucien Khodeir	FOR THE APPLICANT (ON HIS OWN BEHALF)
Mariève Sirois-Vaillancourt Ludovic Sirois Benoît de Champlain	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT