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**FEDERAL COURT
PROPOSED CLASS PROCEEDING**

BETWEEN:

GREGORY HILL, BRENT WARREN and TANYA LEWIS

Plaintiffs

And

**HIS MAJESTY THE KING IN RIGHT OF THE GOVERNMENT OF CANADA and
THE MINISTER OF TRANSPORTATION**

Defendants

MOTION RECORD OF THE DEFENDANTS

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NOTICE OF MOTION

TAKE NOTICE THAT the Defendants will make a motion on a date and time to be determined by the case management judge in accordance with Rule 35(2), for an estimated duration of one day. The motion, brought pursuant to Rule 221 of the *Federal Courts Rules* and the Court’s residual authority, is to strike the Amended Statement of Claim (“**Amended Claim**”), without further opportunity to amend, on the basis that it discloses no reasonable cause of action and is otherwise an abuse of the Court’s process.

THE MOTION IS FOR:

1. An Order granting the defendants’ request to hear the within motion to strike prior to certification of the proposed class proceeding;
2. An Order striking the Amended Claim in its entirety, without further opportunity to amend;
3. In the alternative, if the plaintiffs are able to further amend their claim, an Order that the Further Amended Statement of Claim be served within 45 days of the Order;
4. An Order awarding costs to the defendants; and
5. Such further and other relief as this Honourable Court may deem just and appropriate.

THE GROUNDS FOR THE MOTION ARE:

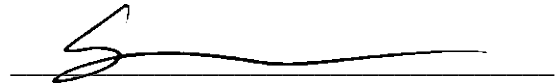
1. In the Amended Claim, the plaintiffs seek to certify a class proceeding on behalf of all employees within the federally regulated aviation industry whose employers disciplined them for failing to disclose their vaccination status or, failing to become vaccinated against COVID-19. The plaintiffs and proposed class members say they were disciplined by their employers due to the Minister of Transport's vaccine mandate. None of the plaintiffs or proposed class members are employees of the federal government.
2. The defendants' motion to strike should proceed prior to certification of the proposed class proceeding. The Amended Claim has obvious and fatal flaws which cannot be cured by amendment to the pleadings. It is in the interests of judicial efficiency and promotes the fair and efficient determination of the proceeding to have the motion to strike heard first.
3. The Amended Claim should be struck for the following reasons:
 - i. It is plain and obvious that the plaintiffs' claims in induced breach of contract, interference with contractual relations, negligence, breach of privacy, and misfeasance in public office are doomed to fail. Each of these tort claims includes an element that the action was taken without legal authority or justification, or without a proper purpose and it is plain and obvious that IO 43 was issued pursuant to a valid legal authority and for a proper purpose;
 - ii. As delegated legislation, IO 43 was a core policy decision and is immune from tort liability given the absence of bad faith and improper purpose;
 - iii. The Amended Claim is in the incorrect forum for addressing terms of the collective agreements governing the unionized plaintiffs' employment. Such claims are governed by the *Canada Labour Code*, which requires that unionized plaintiffs follow the prescribed grievance process;
 - iv. The Amended Claim is devoid of material facts to ground the tort claims, pled as induced breach of contract, interference with contractual relation, negligence, breach of privacy, and misfeasance in public office;

- v. As a challenge to the constitutionality of delegated legislation, the plaintiffs have not pled material facts that would support a finding of government conduct that is clearly wrong, in bad faith or an abuse of power. Per *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13, such acts are necessary to support a claim for damages under section 24(1) of the *Charter of Rights and Freedoms* (the “*Charter*”) when seeking a remedy for unconstitutional laws. The Amended Claim fails to meet the requirements for a *Charter* remedy, a defect that cannot be cured by amendment;
- vi. The Amended Claim fails to plead the essential elements of each of the alleged *Charter* infringements and lacks material facts such that claims of infringement of sections 2(a), 2(d), 7, and 15 of the *Charter* cannot be sustained; and
- vii. It is plain and obvious that any alleged infringements would be justified pursuant to section 1 of the *Charter*. The Amended Claim is doomed to fail as it relitigates issues previously decided, including in *United Steelworkers, Local 2008 v Attorney General of Canada*, 2022 QCCS 2455.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Plaintiffs’ Amended Statement of Claim (Court File No.: T-1081-23);
2. Affidavit of Lisa Redpath, affirmed March 25, 2024; and
3. Such other material as counsel may advise.

Date: April 2, 2024



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FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

(Court Seal)

GREGORY HILL, BRENT WARREN and TANYA LEWIS
Plaintiffs

and

HIS MAJESTY THE KING IN RIGHT OF THE GOVERNMENT OF
CANADA and THE MINISTER OF TRANSPORTATION
Defendants

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the [Federal Courts Rules](#), serve it on the plaintiff's solicitor or, if the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court

WITHIN 30 DAYS after the day on which this statement of claim is served on you, if you are served in Canada or the United States; or

WITHIN 60 DAYS after the day on which this statement of claim is served on you, if you are served outside Canada and the United States.

TEN ADDITIONAL DAYS are provided for the filing and service of the statement of defence if you or a solicitor acting for you serves and files a notice of intention to respond in Form 204.1 prescribed by the [Federal Courts Rules](#).

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

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

April 24, 2023

Issued by:

Address of local office: Pacific Centre
P.O. Box 10065
701 West Georgia Street
Vancouver BC V7Y 1B6

TO: His Majesty The King in Right of the Government of Canada

AND TO: The Minister of Transportation

AND TO: The Attorney General of Canada

CLAIM**RELIEF SOUGHT**

1. The Plaintiffs, Gregory Hill, Brent Warren, and Tanya Lewis, claim on their own behalf and on behalf of a proposed class of employees of federally regulated transportation providers, who have been subjected to the Minister of Transport's Interim Order 43 and as a result have had their employment contracts breached further to inducement by the Order. ("Class" or "Class Members", to be further defined in the Plaintiffs' application for certification):
 - a. An order certifying this action as a class proceeding pursuant to Rules 334.16 and 334.17 of the Federal Court Rules, SOR/98-106;
 - b. An order pursuant to Rules 334.12, 334.16 and 334.17 of the Federal Court Rules appointing the Plaintiffs, or, alternatively, one of the Plaintiffs, as the representative Plaintiff(s) for the Class;
 - c. General damages plus damages equal to the cost of administering the plan of distribution;
 - d. Special damages in an amount to be determined, including but not limited to past or future loss of income, medical expenses and out of pocket expenses;
 - e. Exemplary and punitive damages;
 - f. Damages pursuant to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11, s. 24(1) (the "*Charter*");
 - g. Punitive damages pursuant to the *Charter of Human Rights and Freedoms*, C.Q.L.R. c.C-12, s. 49 and the *Civil Code of Québec*, C.Q.L.R. c. C-1991, s. 1621 (the "*Québec Charter*");
 - h. Damages for inducing breach of contract, interference with contractual relations, and negligence;

- i. General damages for Misfeasance in Public Office;
- j. Punitive damages for Misfeasance in Public Office
- k. A declaration that the Minister of Transport's conduct in issuing Ministerial Order 43 violates the Plaintiffs' and the Class Members' rights to life, liberty and security of the person and is not in accordance with the principles of fundamental justice, contrary to s.7 of the *Charter* and is not demonstrably justifiable under section 1 of the *Charter*;
- l. A declaration that the Minister of Transport's conduct in issuing Ministerial Order 43 violates the Plaintiffs' and the Class Members' rights to equality, contrary to s.15(1) of the *Charter*, and this violation is not demonstrably justifiable under section 1 of the *Charter*;
- m. A declaration that the Minister of Transport's conduct in issuing Ministerial Order 43 violates the Plaintiffs' and the Class Members' rights to freedom of conscience to s.2(a) of the *Charter*, and this violation is not demonstrably justifiable under section 1 of the *Charter*;
- n. A declaration that the Minister of Transport's conduct in issuing Ministerial Order 43 violates the Plaintiffs' and the Class Members' rights to freedom of association to s.2(d) of the *Charter*, and this violation is not demonstrably justifiable under section 1 of the *Charter*;
- o. Pre-judgment and post-judgment interest;
- n. Costs; and
- o. Such further and other relief as this Honourable Court may deem just.

Nature of this Action

2. On October 29, 2021, the Minister of Transport issued Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43, pursuant to subsection 6.41(1) of the Aeronautics Act R.S.C. 1985, c. A-2 (“the Order”).
3. The Order required air carriers to establish and implement a comprehensive or a targeted policy respecting mandatory COVID-19 vaccination, in relation to ‘relevant persons’, which included employees, contractors, and all persons hired. According to the Order, the air carrier must “ensure that while a relevant person is carrying out their duties related to commercial flight operations, no in-person interactions occur between the relevant person and an unvaccinated person who has not been granted an exemption”. It also prohibited unvaccinated persons who have not been granted an exemption from accessing aerodrome property (the “Federal Vaccination Mandate”).
4. The Plaintiffs plead that the Order tortiously induced the breach of the Plaintiffs’ and Class Members’ contractual employment agreements absent justification. Such pleading is further particularized below.
5. The Plaintiffs plead that in issuing the Order, the Minister of Transport committed the tortious conduct of Misfeasance in Public Office towards the Plaintiffs’ and Class Members’, such pleading is further particularized below.
6. The Plaintiffs plead that the Order violated the Plaintiffs’ and Class Members’ rights under ss. 2a, 2d, 7, and 15 of the *Charter* and was not saved by s. 1. Such pleading is further particularized below.

The Parties and the Class

7. The Plaintiff Gregory Hill (“Hill”) is an employee of Air Canada and serves as a pilot in the rank of Captain for the airline. Hill has been an employee of Air Canada since 2006 and maintained an exemplary and unblemished record

until his suspension in 2021. Hill was suspended pursuant to Air Canada's mandatory vaccination policy which was induced by the Order. Hill is a member of the Air Canada Pilots Association ("ACPA") and at all material times his employment was governed by the ACPA-Air Canada collective agreement. Hill is a resident of Ontario.

8. The Plaintiff Tanya Lewis ("Lewis") was an employee of WestJet Airlines Inc. ("WestJet") and served as a flight attendant for the airline. Lewis has been an employee of WestJet since 2011 and maintained an exemplary and unblemished record until her suspension in 2021 and her termination in 2022. Lewis was suspended and terminated pursuant to WestJet's mandatory vaccination policy which was induced by the Order. Lewis was a member of the Canadian Union of Public Employees local 4070 ("CUPE") and at all material times her employment was governed by the CUPE-WestJet collective agreement. Lewis is a resident of Alberta.
9. The Plaintiff Brent Warren ("Warren") is an employee of Air Canada and serves as a station attendant at Vancouver International Airport for the airline. Warren has been an employee of Air Canada since 2005 and maintained an exemplary and unblemished record until his suspension in 2021. Warren was suspended pursuant to Air Canada's mandatory vaccination policy which was induced by the Order. Warren is a member of the International Association of Machinists and Aerospace Workers-District 140 ("IAMAW") and at all material times his employment was governed by the IAMAW-Air Canada collective agreement. Warren is a resident of British Columbia.
10. The Class (to be defined by the Court) is intended to include all employees, contractors, and all persons hired within the federally regulated aviation industry during the Class Period who were subjected to discipline, including but not limited to suspension of employment and termination, pursuant to the Order as a result of failing to disclose their vaccination status or failing to become vaccinated ("Class Members"). The Class Period is October 29,

2021, (when the *Order* came into force) to the date this action is certified as a class proceeding.

11. The Defendant, His Majesty the King ("Canada"), is liable for the acts, omissions, negligence and malfeasance of the employees, agents and management of Transport Canada, pursuant to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c C-50.
12. The Minister of Transport, issued the Order pursuant to subsection 6.41(1) of the *Aeronautics Act* R.S.C. 1985, c. A-2 and is represented in this action by the Attorney General of Canada pursuant to s. 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. 80.

Standing

13. The Plaintiffs and Class Members assert both private and public interest standing to bring this claim.
14. The Plaintiffs and Class Members have private interest standing because they are directly affected by the Minister of Transport's decision to issue the Order and thereby induce the breach of their contractual employment agreements leading to significant financial and ancillary harm.
15. The Plaintiffs and Class Members have private interest standing because they are directly affected by the Misfeasance of the Minister of Transport in issuing the Order and have been subjected to foreseeable ensuing harm as a result of such conduct.
16. The Plaintiffs and Class Members also have public interest standing. They raise a serious justifiable issue of public import respecting the constitutionality of the Minister of Transport's Order which has created, contributed to, and sustained a deprivation of individuals rights guaranteed under the Charter, ss.2a, 2d, 7, and 15.
17. The Plaintiffs and Class Members have a real stake in the Minister of

Transport's conduct and are both directly and genuinely interested in the resolution of this claim.

18. This claim advances a reasonable and effective method of bringing the issues before the Court in all of the relevant circumstances. Many individuals impacted by the conduct of the Minister of Transport and the Order have had their contractual employment agreements breached, were subjected to foreseeable harm caused by Misfeasance in Public Office, and had Charter rights infringed upon and have a lack the resources to bring forward such a claim.

Background

19. On August 13, 2021, the Federal Government announced its intent to require COVID-19 vaccination for employees in the federally regulated air, rail, and marine transportation sectors, and for travelers.
20. On October 6, 2021, Prime Minister Justin Trudeau and Deputy Prime Minister Chrystia Freeland announced that, as of October 30, 2021, the Government of Canada would require employers in the federally regulated air, rail, and marine transportation sectors to establish vaccination policies for their employees.
21. The Federal Government advised that as of October 30, 2021, employers in the federally regulated air and rail, and as of November 1, 2021, marine transportation sectors would be required to establish vaccination policies for their organizations. Specifically, the vaccination requirement of the Federal Vaccination Mandate would apply to:
 - a. airlines and airports, and other organizations who have employees who enter restricted areas of airports, such as concession and hospitality workers;
 - b. federally regulated railways, their rail crew and track employees; and
 - c. marine operators with Canadian vessels that operate with 12 or more

crew.

22. Furthermore, the Federal Government advised that Transport Canada would use its specific regulatory and oversight authorities related to operations of federally regulated air, rail, and marine transportation service providers to ensure that the transportation system and these workplaces were safe through vaccination mandates. Each organization would be required to implement a rigorous policy, which was required to:

- a. Include a provision for employee attestation/declaration of their vaccination status;
- b. Include a description of consequences for employees who do not comply or who falsify information;
- c. Meet standards consistent with the approach taken by the Government of Canada for the Core Public Administration; and
- d. Provide for a procedure for granting an exemption to individuals who have not been fully vaccinated from COVID-19 due to medical contraindication or their sincerely held religious beliefs.

23. The Federal Government advised that after a short phase-in period, each organization would be required to guarantee that employees were fully vaccinated or they would be unable to work.

24. On October 29, 2021, the Minister of Transport issued Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43, pursuant to subsection 6.41(1) of the Aeronautics Act R.S.C. 1985, c. A-2. The Order required air carriers to establish and implement a comprehensive or a targeted policy respecting mandatory COVID-19 vaccination, in relation to ‘relevant persons’, which includes employees, contractors, and all persons hired. According to the Order, the air carrier must “ensure that while a relevant person is carrying out their duties related to commercial flight operations, no in-person interactions occur between the relevant person and an unvaccinated person who has not been granted an exemption”. It also prohibited unvaccinated persons who have not been granted an exemption

from accessing aerodrome property.

25. As a result of these obligations, pursuant to the Federal Vaccination Mandate, organizations which were federally regulated by Transport Canada introduced mandatory vaccination policies which added a new, hitherto not-existing, fundamental term and condition of employment within contractual employment agreements.
26. Employees who did not agree with or adhere to the policies, in compliance with the Order, were disciplined in the form of suspension from employment, termination of employment or both.

Air Canada Mandatory Vaccination Policy

27. On August 25, 2021, in response to the Federal Government's announcement and in anticipation of the Order, Air Canada announced a mandatory Covid-19 Vaccination Policy ("AC Policy"). The AC Policy stated, *inter alia*:

- a. "On August 13, the federal government announced that COVID-19 vaccinations would be mandatory for federal employees and those working in some federally regulated industries, including our own".
- b. "With this in mind, we have carefully thought about what comes next, and decided that we will now require all our employees to be fully vaccinated by a government approved vaccine by October 31st without exception, except under our Duty to Accommodate obligations. Note that you are only considered to be fully vaccinated 14 days after your second dose in a 2-dose series, such as the Pfizer, Moderna or AstraZeneca vaccines, or 14 days after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine".
- c. The government's announced requirements for travelers are expected to go into effect on October 31, and will accordingly apply to employees at that time.
- d. "As of October 31st, employees who have not reported and

documented that they are fully vaccinated will no longer be able to enter any Air Canada workplace.

- e. ...”failure to be fully vaccinated by October 30, 2021 will have consequences up to and including unpaid leave or termination, except for those who qualify for accommodation.

28. On October 30, 2021, Hill was placed on an unpaid leave of absence, effectively a suspension, from Air Canada. At all material times Hill’s employment was governed by the ACPA-Air Canada collective agreement (“ACPA Agreement”).

29. The ACPA Agreement does not contain a term or condition of employment which allows employees to unilaterally be placed on an unpaid leave of absence.

30. The ACPA Agreement does not contain a term or condition of employment which mandates Covid-19 vaccination.

31. Hill pleads that mandating Covid-19 vaccination and placing him on an unpaid leave of absence constituted a breach of the ACPA Agreement.

32. On October 30, 2021, Warren was placed on an unpaid leave of absence, effectively a suspension, from Air Canada. At all material times Warren’s employment was governed by the IAMAW-Air Canada collective agreement (“IAMAW Agreement”).

33. The IAMAW Agreement does not contain a term or condition of employment which allows employees to unilaterally be placed on an unpaid leave of absence.

34. The IAMAW Agreement does not contain a term or condition of employment which mandates Covid-19 vaccination.

35. Warren pleads that mandating Covid-19 vaccination and placing him on an unpaid leave of absence constituted a breach of the ACPA Agreement.

36. On or about June 16, 2022, Air Canada announced the rescindment of the AC Policy stating inter alia:

- f. “In August of 2021, we informed all employees of our vaccination policy, which required all employees, unless being accommodated for religious or medical reasons, to be fully vaccinated in accordance with our health and safety obligations and later as required by Transport Canada’s Interim Order for air and rail travel and for employees in the transportation industry. You were not compliant with that policy and therefore considered unavailable to fulfill your duties and you were placed on an unpaid leave of absence.”
- g. On June 14, 2022, the Government of Canada announced that effective June 20, they will suspend vaccination requirements for domestic and outbound travel and for employees working in the transportation sector.
- h. In light of the state of the pandemic, effective June 20, Air Canada will suspend and review our COVID-19 Vaccination Policy and employees currently on leave based on their vaccination status will return to work.

37. The Plaintiffs’ Hill and Warren plead that in enacting, implementing, enforcing, and rescinding, the AC Policy, Air Canada was acting pursuant to direction from the Minister of Transport and the Order.

WestJet Mandatory Vaccination Policy

38. On October 16, 2021, WestJet issued its Covid-19 Mandatory Vaccination Policy (“WJ Policy”). The WJ Policy stated inter alia:

- i. The Government of Canada announced it required employees in the federally regulated air, rail, and marine transportation sectors to be Vaccinated by a Covid-19 vaccine series by the end of October 2021.
- j. Absent an approved accommodation personnel who do not comply with this Policy and/who are not vaccinated are subject to discipline

up and including termination of employment for cause.

39. On or about October 14, 2021, WestJet sent a Vaccination Requirement Notice to employees stating, *inter alia*:

- k. On August 13, 2021, the Government of Canada announced its intent to require COVID-19 vaccination for employees in the federally regulated air transportation sector.
- l. On October 6, 2021, the Government of Canada confirmed that, as of October 30, 2021, workers in the federally regulated air transportation sector are required to be fully vaccinated.
- m. In compliance with the federal mandate and with our occupational health and safety obligations, WestJet announced on September 8, 2021, that full vaccination against Covid-19 was mandatory for all employees effective October 30, 2021.

40. On March 11, 2022, Lewis's employment with WestJet was terminated by letter stating, *inter alia*:

- n. This letter confirms that due to your inability to fulfill a condition of employment as outlined below, WestJet is terminating your employment with cause effective March 11, 2022
- o. As of October 30, 2021, WestJet's Covid-19 Vaccination Policy requires that all WestJet employees be fully vaccinated against Covid-19 unless they have an approved accommodation. This requirement complies with WestJet's occupational health and safety obligations and our obligations under the Government of Canada's mandate for employers in the air transportation sector. Transport Canada has begun oversight and enforcement measures to ensure federal employers, like WestJet, are compliant with the federal vaccination mandate.

41. Effective June 20, 2022, the Government of Canada suspended the vaccine

requirements for federally regulated employees. WestJet correspondingly suspended the Vaccination Policy on June 27, 2022.

42. At all material times the Plaintiff, Lewis's, employment was governed by the by the CUPE-WestJet collective agreement. ("CUPE Agreement").

43. The Plaintiff, Lewis, pleads that in enacting, implementing, enforcing, and rescinding, the WJ Policy, WestJet was acting pursuant to direction from the Minister of Transport and the Order.

44. The CUPE Agreement does not contain a term or condition of employment which mandates Covid-19 vaccination.

45. Lewis pleads that mandating Covid-19 vaccination and terminating her employment as a consequence on non-compliance was a breach of the CUPE Agreement.

Covid -19 Vaccinations – Preventing Transmission

46. The Policy mandated Covid-19 vaccinations which were approved by Health Canada.

47. Health Canada regulatory approval decisions, product reviews, product monographs, and clinical study data on the Covid-19 vaccines was at all material times available to Treasury Board to inform the development, implementation, and enforcement of the Policy.

48. At the time the Policy was enacted all Health Canada approved COVID-19 vaccinations had filed product monographs which are available to inform the public of the effects of the vaccination. There were six (6) COVID-19 vaccines available to the public in Canada. Listed below is the manufacturer with the name of vaccine in brackets.

- a. Pfizer/BioNTech ("Comirnaty")
- b. Moderna ("Spikevax")
- c. Janssen and Johnson & Johnson ("Jcovden")

- d. AstraZeneca (“Vaxsevia”)
- e. Medicago (“Covifenz”)
- f. Novavax (“Nuvaxovid”)

Each of the COVID-19 vaccines presented above have a Product Monograph.

49. A Product Monograph is a factual, scientific document on a drug product that, devoid of promotional material, describes the properties, claims, indications, and conditions of use for the drug, and that contains any other information that may be required for optimal, safe, and effective use of the drug.
50. The Product Monograph of the Pfizer vaccine, Comirnaty, does not include any information related to the transmission of COVID-19. Prevention of viral transmission is NOT an approved indication for Comirnaty. The word ‘transmission’ or any of its correlates indicating viral conveyance to another person, does not appear in this document and therefore the Plaintiffs plead that the Defendant cannot claim Comirnaty prevents viral transmission of COVID-19 to other people.
51. The Product Monograph of Moderna’s vaccine, Spikevax does not include any information or direction on the transmission of COVID-19 and therefore the Plaintiffs plead that the Defendant cannot claim Spikevax prevents viral transmission of COVID-19 to other people.
52. The Product Monograph of VAXZEVRA™, manufactured by AstraZeneca does not include any information or direction on the transmission of COVID-19 and therefore the Plaintiffs plead that the Defendant cannot claim VAXZEVRA™ prevents viral transmission of COVID-19 to other people.
53. The Product Monograph of JCOVDEN™, manufactured by Janssen, does not include any information or direction on the transmission of COVID-19 and therefore the Plaintiffs plead that the Defendant cannot claim JCOVDEN™ prevents viral transmission of COVID-19 to other people.
54. The Product Monograph of COVIFENZ™, manufactured by Medicago does

not include any information or direction on the transmission of COVID-19 and therefore the Plaintiffs plead that the Defendant cannot claim COVIFENZ™ prevents viral transmission of COVID-19 to other people.

55. The Product Monograph of NUVAXOVID™, manufactured by Novavax does not include any information or direction on the transmission of COVID-19 and therefore the Plaintiffs plead that the Defendant cannot claim NUVAXOVID™ prevents viral transmission of COVID-19 to other people.

Covid-19 Vaccination – Safety and Risk of Adverse Events

56. On or about March 29, 2021, The National Advisory Committee on Immunization (NACI), recommended immediately suspending the use of the AstraZeneca-Oxford COVID-19 vaccine in Canadians under 55.
57. On June 26, 2021, Health Canada updated the product label for the Vaxzevra vaccine manufactured by AstraZeneca. Health Canada acknowledged that potential side effect of blood clots associated with low levels of platelets following immunization.
58. On November 18, 2020, Pfizer-BioNTech released and published updated results of their Phase 3 clinical trials, for the Pfizer and BioNTech Covid-19 vaccination. (“Study 1”).
59. Study 1 showed that of 18,198 individuals in the Vaccination group, 5770 individuals (26.7%) had an adverse reaction.
60. On April 1, 2021, Pfizer-BioNTech released and published updated results of their Phase 3 clinical trials. (“Study 2”).
61. Study 2 showed that of 21,923 individuals in the Vaccination group 5241 individuals (23.9%) had a “related adverse event” and 127 (0.6%) suffered “any serious adverse event”.
62. On or about May 1, 2021, Health Canada announced it was stopping distribution of 300,000 doses of the Johnson & Johnson, Jcovden, vaccine to provinces and territories because the regulator had learned the active

ingredient was made at a Baltimore facility where an inspection raised concerns.

63. On or about May 3, 2021 NACI recommended the Johnson & Johnson, Jcovden, shot not be given to anyone under 30 because of the risk of extremely rare blood clots combined with low platelets, a syndrome dubbed vaccine-induced immune thrombotic thrombocytopenia (VITT).
64. Moderna submitted results of one phase III randomized trial in support of the emergency use authorization for their vaccines for use in adults. The Moderna trial exhibited a 6% higher risk of serious adverse events in vaccinated individuals compared to the placebo group. 136 per 10,000 versus 129 per 10,000 – risk difference 7.1 per cent per 10,000.
65. In the Moderna trial Serious Adverse Events of Interests (“AESI”) showed 87 AESI (57.3 per 10,000) were reported in the vaccine group and 64 (42.2 per 10,000) in the placebo group, resulting in a 36% higher risk of serious AESI’s.
66. The Medicigo Covifenz COVID-19 vaccine was authorized on February 24, 2022, for use in Canada under the *Food and Drug Regulations*, however this vaccine was cancelled by the sponsor on March 31, 2023

Misfeasance in Public Office

67. The Minister of Transport acting under authority of the Aeronautics Act R.S.C. 1985, c. A-2 issued and mandated implementation of the Order. The Plaintiffs and Class Members plead that Minister of Transport acted with reckless indifference or willful blindness in issuing and enforcing the Order including:
 - a. The Minister of Transport had no basis in fact to justify the Order as a measure to prevent transmission of COVID-19. As such the Plaintiffs’ and Class Members plead that in perpetuating the stated objective of the Order as preventing transmission of Covid-19, The

Minister of Transport either reckless or willfully ignored the reality of the vaccine in exercising his authority under the Aeronautics Act R.S.C. 1985, c. A-2, with foreseeable losses to the Plaintiffs' and Class Members.

- b. Known and unknown potential risk of adverse events associated with the Covid-19 vaccination were either recklessly or willfully ignored and omitted by enactment and enforcement of the Order under the Aeronautics Act R.S.C. 1985, c. A-2 with foreseeable losses to the Plaintiffs' and Class Members.
- c. There was no long-term safety data available to the Minister of Transport when enacting and enforcing the Order on mandatory vaccinations and as such the Order created a foreseeable and unreasonable risk of harm to the Plaintiffs' and Class Members.
- d. The Minister of Transport acted in furtherance of political gain and expediency which supplanted the stated objectives of the Order as those objectives were known or should have been known to be unachievable by virtue of the Order.

68. The Plaintiffs' and Class Members plead that as a result of the Minister of Transport's actions in enacting and enforcing the Order on mandatory vaccinations, they suffered significant economic deprivation and emotional trauma and that such harm was foreseeable by the Minister of Transport.

69. The Plaintiffs' and Class Members plead that the Minister of Transport in exercising his statutory authority under the Aeronautics Act R.S.C. 1985, c. A-2 with reckless indifference or willful blindness committed the tort of Misfeasance in Public Office.

Tortious Inducement to Breach Contractual Relations

70. The Plaintiffs' and Class Members have either refused to share their vaccination status or are otherwise unvaccinated and thus did not conform to the Order and were placed on leave without pay, effectively a suspension, and

some were subsequently terminated from employment.

71. The Plaintiffs and Class Members allege that the following actions taken by federally regulated transportation providers (“the Employers”) were in breach of their contractual employment agreements and induced by the Order:

- a. Disclosure of private medical information;
- b. Being placed on a leave without pay; and
- c. Termination of their employment.

72. The Plaintiffs and Class Members state that at all material times, their employment contracts were valid and binding upon their Employers. As their Employers have unlawfully purported to suspend or terminate the Plaintiffs’ and Class Members’ contractual agreements and have refused to pay the sums owing to the Plaintiffs and Class Members, the Employers are in breach of their contractual employment agreements.

73. As Minister of Transport, the Defendant was aware of the existence of the contractual employment agreements when it decided to issue the Order.

74. The Plaintiffs and Class Members allege that the Defendants intended to and caused and/or induced the Employers to breach contractual employment agreements by their actions in relation to: the disclosure of private medical information; imposition of a leave without pay; and/or unlawful termination by ordering the Employers to enforce the Order absent justification. The breaches of contractual employment agreements are therefore a direct result of the unlawful inducement of the breach as herein before particularized and as a result of unlawful interference by the Defendants in the contractual relationship between the Plaintiffs, Class Members and their Employers.

75. The Plaintiffs and Class Members allege that the conduct of the Defendants in inducing the breach of Contract was unjustified and thus unlawful.

76. The Plaintiffs and Class Members allege that as a result of the Defendants’

interference with the Plaintiffs' and Class Members' contractual relationship with the Employers, the Defendants have caused the Plaintiffs and Class Members to suffer damages.

Breach of the *Charter of Rights and Freedoms*

77. The Plaintiffs' and Class Members plead that the Order was issued in bad faith through reckless disregard or willful blindness to the disproportional unsubstantiated impact of the Order, and as a result violated their rights under s.2a, s.2d, s.7, and s.15 of the Charter.

78. The Plaintiffs and Class Members plead that the Order imposes significant and unsubstantiated consequences for exercising their freedom of conscience under s.2a of the Charter, by choosing not to undergo a medical procedure, by prohibiting them from carrying out their duties related to commercial flight operations and prohibiting them from accessing aerodrome property which led to significant economic deprivation and harm.

79. The Plaintiffs' and Class Members plead that the Order constitutes an improper and unjustified imposition by the Minister of Transport of a new term and condition of employment absent collective bargaining, memoranda of agreement, consideration, or consent to their existing and freely negotiated employment agreements and as such violates their protected right under s. 2d of the *Charter*.

80. The Plaintiffs and Class Members plead that the Order was overly board, arbitrary, and grossly disproportionate and the penalty imposed by non-compliance with the Order had a specific coercive and deleterious effect on the Plaintiffs and Class Members by attempting to prevent them from making fundamental personal choices in mandating a medical procedure which, as particularized above, had serious and unknown risks to their health and welfare resulting in a substantive infringement on their rights under s.7 of the Charter.

81. The Plaintiffs and Class Members plead that as a result of the Order their rights under s. 15 of the *Charter* have been infringed upon as they were subject to differential treatment by imposing a burden upon them and punitively withholding the benefits of employment from them in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the Plaintiffs and Class Members are less capable or worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.

82. The Plaintiffs' and Class Members plead the Order violates ss. 2a, 2d, 7, and 15 by infringing on these rights in a manner that does not accord with the principles of fundamental justice. These infringements cannot be justified pursuant to the criteria of s. 1 of the Charter. The infringements cannot be demonstrably justified because they were not minimally impairing and there was no proportionality between the deleterious and salutary effects of the Orders.

83. The Plaintiffs' and Class Members plead that *Charter* damages are a just and appropriate remedy in this case to vindicate rights, deter conduct, and achieve the objective of compensation.

Privacy Rights

84. The Plaintiffs and Class Members plead that in requiring them to disclose private medical information to the Employers the Order intentionally or recklessly or willfully, and without claim of right, intruded upon the Plaintiffs' and Class Members' private affairs; a reasonable person would regard this intrusion as highly offensive and causative of distress, humiliation or anguish.

85. The Plaintiffs and Class Members plead that the Order's intrusion in disclosure of private medical information violates common law and statutory privacy rights pursuant to the *Privacy Act*, R.S.B.C. 1996, c. 373; *Privacy*

Act, C.C.S.M. 1987, c. P125; *Privacy Act*, R.S.S. 1978. c. P-24; *Privacy Act*, R.S.N.L.1990. c. P-22.

Aggravated and Punitive Damages

86. The Plaintiffs and Class Members plead that Defendants, by virtue of the conduct included in this Statement of Claim have inflicted mental and emotional distress by engaging in conduct:

- a. that constitutes conduct that is flagrant and outrageous;
- b. that was calculated to produce harm and produce the consequences that flowed from the Order; and
- c. that resulted in injury to the Plaintiffs and Class members.

87. The Plaintiffs and Class Members plead that the conduct of the Defendants as outlined in this Statement of Claim demonstrates a wanton, high-handed and callous disregard for the interests of the Plaintiffs and Class Members. This conduct merits an award of aggravated and punitive damages.

Remedies

88. The Plaintiffs and Class Members repeat the claims for relief sought set out in paragraph 1 above.

89. The Plaintiffs propose that this action be tried at the City of Vancouver, in the Province of British Columbia.

Umar A. Sheikh

October 11, 2023

SHEIKH LAW
PO Box 24062 Broadmead RPO
Victoria BC V8X 0B2

Umar A. Sheikh
usheikh@sheikhlegal.com
Tel: 778-977-1911

Solicitors for the Plaintiffs

This is the 1st Affidavit
of Lisa Redpath in this case
and was made on March 25, 2024

No. T-1081-23
Vancouver Registry

FEDERAL COURT OF CANADA

PROPOSED CLASS PROCEEDING

BETWEEN :

GREGORY HILL, BRENT WARREN AND TANYA LEWIS

Plaintiffs

and

**HIS MAJESTY THE KING IN RIGHT OF THE GOVERNMENT OF CANADA and
THE MINISTER OF TRANSPORTATION**

Defendants


AFFIDAVIT #1 OF LISA REDPATH

I, Lisa Redpath, of the City of Vancouver, in the Province of British Columbia, AFFIRM THAT:


1. I am a Legal Assistant employed by the Department of Justice, in the City of Vancouver, in the Province of British Columbia and as such have personal knowledge of the matters hereinafter deposed to by me, except where same are stated to be based on information and belief and where so stated I verily believe them to be true.
2. Attached to this affidavit and marked as **Exhibit "A"** are copies of the correspondence to Plaintiffs' counsel dated August 30, 2023, and November 8, 2023, advising of the Defendant's position on this Claim.

- 3. Attached to this affidavit and marked as **Exhibit “B”** is a copy of Interim Order 43, *Repealed – Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43*, Minister of Transport (October 29, 2021).
- 4. Attached to this affidavit and marked as **Exhibit “C”** is a copy of the Air Canada, *COVID-19 Vaccination Policy*, Corporate Safety and Global Human Resources (August 25, 2021), and a copy of the correspondence to Air Canada employees from the Air Canada Vice President and Chief Medical Officer dated August 25, 2021.
- 5. Attached to this affidavit and marked as **Exhibit “D”** is a copy of the WestJet, *COVID-19 Vaccination Policy*, (October 13, 2021).

AFFIRMED BEFORE ME at)
 the City of Vancouver in the)
 Province of)
 British Columbia this 25th day of)
 March, 2024)
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 A Commissioner for Taking
 Affidavits in the Province of
 British Columbia



 Lisa Redpath

SOFIA HIRJI
 Barrister & Solicitor
 Department of Justice
 900 – 840 Howe Street
 Vancouver, BC V6Z 2S9

This is **Exhibit "A"** referred to in the affidavit of Lisa Redpath affirmed before me at Vancouver, British Columbia this 25th day of March, 2024.



A Commissioner for taking
affidavits in British Columbia

SOFIA HIRJI
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Department of Justice
Canada

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Canada

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Email: Shelan.Miller@justice.gc.ca

August 30, 2023

With Prejudice

Our File Number: LEX-500139752

SHEIKH LAW
PO Box 24062
Broadmead RPO
Victoria BC V8X 0B2

Attention: Umar A. Sheikh

Dear Mr. Sheikh:

**Re: Hill, Gregory et al v. Minister of Transportation et al.
FC No. T-1081-23, Vancouver Registry**

You previously asked us to let you know if we plan to bring any pre-certification motions in this proceeding. We have now had an opportunity to review the Statement of Claim (“Claim”) and to consider the causes of action pleaded, so we wanted to provide you with our preliminary position.

In our view, the Claim fails to plead material facts to sustain any of the asserted causes of action. In particular, the Claim lacks material facts to support the torts of inducing breach of contract, interference with contractual relations, negligence, and breach of privacy (both common law and statutory). In some instances the Claim makes bare pleadings (interference with contractual relations, negligence), and in others it is missing material facts (inducing breach of contract, breach of privacy). We are also of the view that the various *Charter* claims are not adequately pleaded and note that in *United Steelworkers, Local 2008 et al v. Attorney General of Canada*, 2022 QCCS 2455 [*United Steelworkers*], paras. 180-252, the Québec Superior Court held that the Minister of Transport’s orders with respect to certain civil aviation requirements due to COVID-19 did not violate any principles of fundamental justice and that any section 7 violation would have been saved by section 1.

More fundamentally, we do not believe that the Claim can be amended to plead any cause of action with a reasonable prospect of success because the impugned ministerial order, *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43* (“Interim Order”) was issued in good faith and for a proper purpose. The courts have found that the Minister of Transport’s interim orders¹ were issued in an effort to reduce the risks associated with COVID-19 to the safety of the transportation system, and in particular to prevent serious forms of the illness

¹ We also note that Interim Orders are temporary in nature and cease to have effect 14 days after their making as set out in subsection 6.41(2) of the *Aeronautics Act*. Interim Order No. 43, made on October 29th 2021, maintained existing provisions of the previous Interim Orders and introduced requirements for non-passengers related to the vaccination mandate, including that specified aerodrome operators, air carriers operating from these aerodromes, and NAVCANADA establish a vaccination policy for their respective organizations. These requirements were maintained through further Interim Orders until they were repealed.

that could disrupt transportation and supply chains, see *United Steelworkers*, paras. 184, 193, 194. As this was a core policy decision based on public policy considerations, the Crown is protected from liability in tort (both statutory and common law) by qualified immunity that can only be defeated by showing the Interim Order was made for an improper purpose or in bad faith, see *R. v. Imperial Tobacco Canada Ltd.* 2011 SCC 42, para. 90. None of the pleaded facts are capable of supporting a finding that the Interim Order was made for an improper purpose or in bad faith.

Furthermore, the Claim is silent on how a duty of care is alleged to arise, but we note that Canada does not owe a duty of care to the plaintiffs, as employees of federally regulated companies, that could ground a claim for negligence.

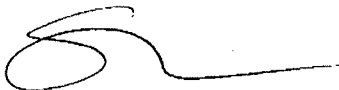
The absence of bad faith or abuse of power is also fatal to the claim for *Charter* damages. This was recently confirmed by the Federal Court in *Yates et al v. HMK*, Docket T-208-23 [*“Yates”*] (see enclosed) where the Court struck pleadings seeking *Charter* declaratory relief and damages for certain now repealed Government of Canada COVID-19 border measures. In finding that the Statement of Claim in *Yates* disclosed no reasonable cause of action, the Court noted, at page 7:

...to show discretionary government action that could ground a remedy under subsection 24(1) of the Charter, the Plaintiffs needed to plead something more than the mere application of the law. In *Mackin v. New Brunswick (Minister of Finance), Rice v. New Brunswick*, [2002] SCC 13 [*Mackin*], the Supreme Court of Canada held that courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional, and that it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Mackin* at paras. 78 and 79; *Crown Trust Co v The Queen in Right of Ontario* (1986), 26 DLR (4th) 41 (Ont Div Ct)) ...

Finally, we note that the plaintiffs are union members and the allegations arise in the context of their employment contracts. In our view, any recourse the plaintiffs may have is governed by the grievance process established by their collective agreements, as required by the *Canada Labour Code*. The Claim is silent on whether the plaintiffs have pursued the available grievance processes, and if so, whether they were successful.

Please advise if the plaintiffs plan to proceed with this action, and if so, whether they will provide an amended statement of claim setting out the material facts to satisfy the criteria for each cause of action, as required by Rule 174 of the *Federal Courts Rules*. If an amended pleading is provided, we will assess the sufficiency of the amended statement of claim upon receipt. If the plaintiffs choose to proceed and the pleadings are not amended, we will assume that is because the deficiencies cannot be cured and we will seek instructions to bring a motion to strike.

Yours truly,



Shelan Miller
Senior Counsel

Enclosure

Federal Court



Cour fédérale

Date: 20230727**Docket: T-208-23****Ottawa, Ontario, July 27, 2023****PRESENT: Madam Justice St-Louis****BETWEEN:****AMANDA YATES, PATRIC LAROCHE, JENNIFER HARRISON, VICTOR
ANDRONACHE, SCOTT BENNETT, MATTHEW LECCESE, DARLENE THOMPSON,
ALEXANDER MACDONALD, MARCEL JANZEN and JOANNE WALSH****Plaintiffs****(responding party)****and****HIS MAJESTY THE KING****Defendant
(moving party)****ORDER**

UPON the Defendant's Motion to the Court in writing under Rules 369, 221 and 298(2)(b) of the *Federal Courts Rules*, SOR/98-106 [the Rules], and under the Court's residual authority, to strike the Statement of Claim [or Claim] without leave to amend on the basis that it discloses no reasonable cause of action;

UPON CONSIDERING that the Defendant's Motion is for:

1. An Order amending the style of cause to name His Majesty the King as sole Defendant;
2. An Order striking the Plaintiffs' Claim in its entirety, without leave to amend;
3. In the alternative, if leave to amend is granted, an Order that the Amended Statement of Claim be served within 45 days of the Order;
4. In the further alternative, if this Motion is dismissed, an Order that the Statement of Defence be served within 45 days of the Order;
5. An Order awarding Costs to His Majesty the King in the amount of \$1,000; and
6. Such further and other relief as this Honourable Court may deem just and appropriate.

UPON CONSIDERING that this Motion to strike takes place in the context of the Plaintiffs' simplified action whereby they seek Charter declaratory relief and damages under subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter] for certain now repealed Government of Canada COVID-19 border measures implemented by way of a series of Orders in Council [OICs] from March 31, 2022 to September 30, 2022;

AND UPON CONSIDERING that the Defendant submits that the style of cause should be modified and that the Plaintiffs' Statement of Claim disclosed no reasonable cause of action and should be struck as:

1. The Claim seeks declaratory relief that this Court cannot grant by way of a simplified action;
2. The Claim seeks a remedy under subsection 24(1) of the Charter; however, it does not plead the necessary material facts to support a damages claim. Rather, on its face, it is clear that the claim is a challenge to the constitutionality of the impugned OICs and the law, generally. Any Charter challenge to the terms of the impugned OICs should properly be framed as a claim seeking a remedy under subsection 52(1) of the *Constitution Act*, 1982. However, relief under subsection 52(1) is generally not available at law, and not made out in this case. Moreover, this Court has found that issues regarding the validity of the OICs are now moot. As such, the claim has no reasonable prospect of success and is doomed to fail;

AND UPON CONSIDERING that the Defendant also submits that the Plaintiffs should not be granted leave to further amend their Statement of Claim as:

1. They have had many opportunities to plead material facts. The Defendant sought particulars necessary to ground a damages claim, but did not receive sufficient material facts in response. Moreover, nine of the ten Plaintiffs have been engaged in litigation involving the same measures and issues since August 2022, and thus have been well-placed to plead material facts if they were available;
2. Insofar as the Plaintiffs are taking issue with the actions of Canada Border Services Agency officers, they are statute-barred by virtue of the limitations

period set out in subsection 106(1) of the *Customs Act*, RSC, 1985, c 1 (2nd Supp);

AND UPON CONSIDERING that in their Motion Record in Response, the Plaintiffs have adduced a draft Amended Statement of Claim that they assert (a) amends the style of cause per the Defendant's suggestion to name His Majesty the King as the Defendant; (b) removes this proceeding from the simplified action rules, in keeping with the Defendant's contention that certain reliefs are not available on a simplified action; (c) provides further amendments to alleviate the Defendant's other concerns raised on this Motion; and (d) increases their claim for monetary damages to an amount exceeding \$50,000;

AND UPON CONSIDERING that in their Amended Statement of Claim, the Plaintiffs claim as follows:

- a) declarations, pursuant to section 24(1) of the Charter, that the impugned measures conduct described above infringed the Plaintiffs' rights and freedoms under sections 7, 8 and 9 of the Charter, where applicable to each of them, in a manner not saved by section 1 of the Charter, and that the Plaintiffs, and each of them, are deserving of such remedy as the Court considers appropriate and just in the circumstances;
- b) an award of damages payable by the Defendant to each of the Plaintiffs in an amount deemed appropriate by this Honourable Court collectively not exceeding \$50,000 pursuant to section 24(1) of the Charter for breach of sections 7, 8 and 9 of the Charter, as applicable;

c) the costs of this proceeding; and

d) such further and other relief this Honourable Court considers just and necessary;

AND UPON CONSIDERING that in their draft Amended Statement of Claim, the Plaintiffs confirm they do not seek (a) any declarations of invalidity under section 52 of the *Constitution Act*, 1982; (b) any declarations that the OICs are *ultra vires* section 58 of the *Quarantine Act*, SC 2005, c 20 and (c) an order pursuant to subsection 18(1) of the *Federal Courts Act*, RSC, 1985, c F-7 and subsection 24(1) of the Charter, in the nature of *certiorari*, quashing the OICs;

AND UPON CONSIDERING that the Plaintiffs submit that by proceeding in this fashion, the Defendant's concerns about the availability of the simplified rules are addressed;

AND UPON CONSIDERING that the Plaintiffs also submit that the claims do not target the Canada Border Service Agency officers and that there is thus no air of reality to the Defendant's assertion that any part of the Plaintiffs' claim is time-barred by operation of section 106 of the *Customs Act* and add that that provision is simply not relevant in this case;

AND UPON CONSIDERING that the Plaintiffs assert that their Amended Statement of Claim discloses a reasonable cause of action against the Defendant in connection with sections 7, 8, 9 and 24(1) of the Charter, and that all of the necessary elements to ground claims and relief under those sections have been pleaded. They add, moreover, that the claim also pleads all of the facts necessary for the Defendant and the Court to understand the specific conduct that the Plaintiffs say violated their Charter rights and warrants an award of Charter damages;

The Plaintiffs add that the Court must consider whether the OICs were arbitrary, overbroad, grossly disproportionate and/or unreasonable as part of its consideration of whether the laws authorizing the conduct complained of in this proceeding were constitutionally suspect, thereby grounding the claims alleged. They assert that this is a necessary step in the Court's analysis and not, as the Defendant submits, a disguised attempt by the Plaintiffs to have the OICs declared unconstitutional;

AND UPON CONSIDERING that for the purposes of this Motion, I will consider the Amended Statement of Claim the Plaintiffs have filed with their Motion Record in Response, which the Defendant has not opposed;

AND UPON CONSIDERING that on a Motion to Strike, the Court must determine whether it is "plain and obvious" that the pleadings, assuming the facts pleaded to be true, disclose no reasonable cause of action. To put it differently, the plaintiff must establish that there is a reasonable prospect of success should the claim be permitted to proceed towards trial. To do so, the plaintiff may rely only upon the statement of claim. Courts have consistently affirmed that to disclose a reasonable cause of action, a claim must show the following three elements (*Bérubé v Canada*, 2009 FC 43 at para 24, aff'd in *Bérubé v Canada*, 2010 FCA 276; *Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5; *Zbarsky v Canada*, 2022 FC 195 at para 13):

- a) it must allege facts that are capable of giving rise to a cause of action (the requirement of Rule 174 of the Rules);
- b) it must disclose the nature of the action which is to be founded on those facts; and

- c) it must indicate the relief sought, which must be of a type that the action could produce and that the Court has jurisdiction to grant;

AND UPON CONSIDERING that in this case, the Plaintiffs' Amended Statement of Claim ultimately suffers from the same fatal deficiencies as their initial Statement of Claim as it fails to detail individualized, discretionary administrative action that would properly ground a remedy under subsection 24(1) of the Charter;

AND UPON CONSIDERING in this regard that to show discretionary government action that could ground a remedy under subsection 24(1) of the Charter, the Plaintiffs needed to plead something more than the mere application of the law. In *Mackin v New Brunswick (Minister of Finance)*, *Rice v New Brunswick*, 2002 SCC 13 [*Mackin*], the Supreme Court of Canada held that the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional, and that it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Mackin* at paras 78 and 79; *Crown Trust Co v The Queen in Right of Ontario* (1986), 26 DLR (4th) 41 (Ont Div Ct));

AND UPON CONSIDERING that the Plaintiffs' confirmed that they are not challenging the constitutionality of the OICs and that their claim is thus directed to the application of said OICs at the border. In any event, the Plaintiffs have not advanced any facts that could meet the *Mackin* threshold as they do not plead more than the application of the law (*Spencer v Canada (Health)*, 2021 FC 621);

AND UPON CONSIDERING that the Defendant has outlined that none of the Plaintiffs' proposed amendments to their Amended Statement of Claim address the specific, individualized "manner" in which the OICs were applied. Rather, they describe border officers merely applying the mandatory rules of general application found in the OICs, i.e., requesting that the Plaintiffs provide their vaccination status through an electronic means, or instructing the Plaintiffs to self-quarantine for 14 days, or both. In this regard, I agree with paragraphs 11 to 16 of the Defendant's submissions in reply;

AND UPON CONSIDERING that I agree this is not an appropriate case for the Court to exercise its discretion to remove the matter from the operation of rules governing simplified actions mainly because, as the Defendant's submits: the Plaintiffs cannot meet the *Mackin* threshold for subsection 24(1) damages. Therefore, in any event, a declaration would serve no practical utility rules and the impugned measures having been repealed, issuing declarations in this case serves no practical utility and is not warranted (see *Yates et al v Attorney General of Canada* (March 16, 2023), Toronto, Federal Court File No: T-1736-22 (Judgment of Associate Judge Trent Horne));

AND UPON CONSIDERING that the Plaintiffs have had the opportunity to set out the material facts necessary to sustain their action (1) in their original Claim, (2) in response to the Defendant's request for particulars, and (3) in their Amended Statement of Claim, but they have failed to do so and the Court assumes that they would have pleaded with more particulars if it had been possible to do so. I will not grant the Plaintiffs leave to amend further.

THIS COURT ORDERS that:

1. The Motion is granted.
2. The Amended Statement of Claim is stricken without leave to amend.
3. The style of cause is amended to name His Majesty the King as the Defendant.
4. Costs of \$1000.00 are awarded to the Defendant.

"Martine St-Louis"

Judge



Department of Justice
Canada

Ministère de la Justice
Canada

Department of Justice
BC Regional Office
900-840 Howe Street
Vancouver, British Columbia
V6Z 2S9

Telephone/ Téléphone: (604) 209-7502
Email: Shelan.Miller@justice.gc.ca

November 8, 2023

With Prejudice

Our File Number: LEX-500139752

SHEIKH LAW
PO Box 24062
Broadmead RPO
Victoria BC V8X 0B2

Attention: Umar A. Sheikh

Dear Mr. Sheikh:

Re: Hill, Gregory et al v. Minister of Transportation et al.
FC No. T-1081-23, Vancouver Registry

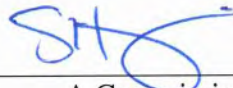
Thank you for your correspondence dated October 11, 2023. We have reviewed the amended claim and remain of the view that it discloses no reasonable cause of action. Many of the issues that we raised in our August 30, 2023 letter have not been addressed and the new claim of misfeasance in public office has not been properly particularized, as required by Rule 181 of the Federal Courts Rules. In addition to other deficiencies, the claim fails to plead that the former Minister engaged in unlawful conduct or had any awareness that his conduct was unlawful. In response to para. 67(d) where the Plaintiffs allege that the Minister acted “in furtherance of political gain and expediency”, we note that in *Trillium Power Wind Corporation v. Ontario (Natural Resources)* 2013 ONCA 683, para. 52, the Court held that “A core policy decision made by the executive based on political considerations or electoral expedience does not, on its own, constitute “bad faith” for the purposes of a tort claim based on misfeasance in public office.”

Regarding the style of cause, in our view the proper defendant is “His Majesty the King”. You have also named the office of the Minister of Transportation. We agree with your statement that the jurisprudence indicates that it is not necessary for an official who is alleged to have committed misfeasance in public office to be named as a party. We also wish to renew our request that the Plaintiffs comply with Rule 206 and provide copies of the documents from the amended claim.

Yours truly,

Shelan Miller
Senior Counsel

This is **Exhibit "B"** referred to in the affidavit of Lisa Redpath affirmed before me at Vancouver, British Columbia this 25th day of March, 2024.



A Commissioner for taking
affidavits in British Columbia

SOFIA HIRJI
Barrister & Solicitor
Department of Justice
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Repealed - Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43

From: Transport Canada

Whereas the annexed *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43* is required to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public;

Whereas the provisions of the annexed Order may be contained in a regulation made pursuant to sections 4.71^a and 4.9^b, paragraphs 7.6(1)(a)^c and (b)^d and section 7.7^e of the *Aeronautics Act*^f;

- ^aS.C. 2004, c. 15, s. 5
- ^bS.C. 2014, c. 39, s. 144
- ^cS.C. 2015, c. 20, s. 12
- ^dS.C. 2004, c. 15, s. 18
- ^eS.C. 2001, c. 29, s. 39
- ^fR.S., c. A-2

And whereas, pursuant to subsection 6.41(1.2)^g of that Act, the Minister of Transport has consulted with the persons and organizations that that Minister considers appropriate in the circumstances before making the annexed Order;

- ^gS.C. 2004, c. 15, s. 11(1)

Therefore, the Minister of Transport, pursuant to subsection 6.41(1)¹⁸ of the *Aeronautics Act*^f, makes the annexed *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43*.

Ottawa, October 29, 2021

Le ministre des Transports,

Omar Alghabra

Minister of Transport

Interpretation

Definitions

- **1 (1)** The following definitions apply in this Interim Order.

aerodrome property

aerodrome property means, in respect of an aerodrome listed in Schedule 2, any air terminal buildings, restricted areas or facilities used for activities related to aircraft operations that are located at the aerodrome. (terrains de l'aérodrome)

aerodrome security personnel

aerodrome security personnel has the same meaning as in section 3 of the *Canadian Aviation Security Regulations, 2012*. (personnel de sûreté de l'aérodrome)

air carrier

air carrier means any person who operates a commercial air service under Subpart 1, 3, 4 or 5 of Part VII of the Regulations. (transporteur aérien)

COVID-19

COVID-19 means the coronavirus disease 2019. (COVID-19)

COVID-19 molecular test

COVID-19 molecular test means a COVID-19 screening or diagnostic test carried out by an accredited laboratory, including a test performed using the method of polymerase chain reaction (PCR) or reverse transcription loop-mediated isothermal amplification (RT-LAMP). (essai moléculaire relatif à la COVID-19)

foreign national

foreign national means a person who is not a Canadian citizen or a permanent resident and includes a stateless person. (étranger)

non-passenger screening checkpoint

non-passenger screening checkpoint has the same meaning as in section 3 of the *Canadian Aviation Security Regulations, 2012*. (point de contrôle des non-passagers)

passenger screening checkpoint

passenger screening checkpoint has the same meaning as in section 3 of the *Canadian Aviation Security Regulations, 2012*. (point de contrôle des passagers)

peace officer

peace officer has the same meaning as in section 3 of the *Canadian Aviation Security Regulations, 2012*. (agent de la paix)

Regulations

Regulations means the *Canadian Aviation Regulations*. (Règlement)

restricted area

restricted area has the same meaning as in section 3 of the *Canadian Aviation Security Regulations, 2012*. (zone réglementée)

screening authority

screening authority means a person responsible for the screening of persons and goods at an aerodrome set out in the schedule to the *CATSA Aerodrome Designation Regulations* or at any other place designated by

the Minister under subsection 6(1.1) of the *Canadian Air Transport²⁰ Security Authority Act*. (administration de contrôle)

screening officer

screening officer, except in section 2, has the same meaning as in section 2 of the *Canadian Air Transport Security Authority Act*. (agent de contrôle)

- Interpretation

(2) Unless the context requires otherwise, all other words and expressions used in this Interim Order have the same meaning as in the Regulations.

- Conflict

(3) In the event of a conflict between this Interim Order and the Regulations or the *Canadian Aviation Security Regulations, 2012*, the Interim Order prevails.

- Definition of *face mask*

(4) For the purposes of this Interim Order, a *face mask* means any mask, including a non-medical mask that meets all of the following requirements:

- (a) it is made of multiple layers of tightly woven materials such as cotton or linen;
- (b) it completely covers a person's nose, mouth and chin without gaping;
- (c) it can be secured to a person's head with ties or ear loops.

- Face masks — lip reading

(5) Despite paragraph (4)(a), the portion of a face mask in front of a wearer's lips may be made of transparent material that permits lip reading if

- (a) the rest of the face mask is made of multiple layers of tightly²¹ woven materials such as cotton or linen; and
- (b) there is a tight seal between the transparent material and the rest of the face mask.

- Definition of *fully vaccinated person*

(6) For the purposes of this Interim Order, a *fully vaccinated person* means a person who completed, at least 14 days before the day on which they access aerodrome property or a location where NAV CANADA provides civil air navigation services, a COVID-19 vaccine dosage regimen if

- (a) in the case of a vaccine dosage regimen that uses a COVID-19 vaccine that is authorized for sale in Canada,
 - (i) the vaccine has been administered to the person in accordance with its labelling, or
 - (ii) the Minister of Health determines, on the recommendation of the Chief Public Health Officer appointed under subsection 6(1) of the *Public Health Agency of Canada Act*, that the regimen is suitable, having regard to the scientific evidence related to the efficacy of that regimen in preventing the introduction or spread of COVID-19 or any other factor relevant to preventing the introduction or spread of COVID-19; or
- (b) in all other cases,
 - (i) the vaccines of the regimen are authorized for sale in Canada or in another jurisdiction, and

(2) A private operator or air carrier operating a flight to Canada departing from any other country must notify every person before the person boards the aircraft for the flight that they may be required, under an order made under section 58 of the *Quarantine Act*, to provide, before boarding the aircraft, to the Minister of Health, a screening officer or a quarantine officer, by the electronic means specified by that Minister, a suitable quarantine plan or, if the person is not required under that order to provide the plan and the evidence, their contact information. The private operator or air carrier must also notify every person that they may be liable to a fine if this requirement applies to them and they fail to comply with it.

- Vaccination

(3) A private operator or air carrier operating a flight to Canada departing from any other country must notify every person before the person boards the aircraft for the flight that they may be required, under an order made under section 58 of the *Quarantine Act*, to provide, before boarding the aircraft or before entering Canada, to the Minister of Health, a screening officer or a quarantine officer, by the electronic means specified by that Minister, information related to their COVID-19 vaccination and evidence of COVID-19 vaccination. The private operator or air carrier must also notify every person that they may be denied permission to board the aircraft and may be liable to a fine if this requirement applies to them and they fail to comply with it.

- False confirmation

(4) A private operator or air carrier operating a flight between two points in Canada or a flight to Canada departing from any other country must notify every person boarding the aircraft for the flight that they

may be liable to a monetary penalty if they provide a confirmation²⁴ referred to in subsection 3(1) that they know to be false or misleading.

- Definitions

(5) The following definitions apply in this section.

quarantine officer

quarantine officer means a person designated as a quarantine officer under subsection 5(2) of the *Quarantine Act*. (agent de quarantaine)

screening officer

screening officer has the same meaning as in section 2 of the *Quarantine Act*. (agent de contrôle)

Confirmation

Federal, provincial and territorial measures

- **3** (1) Before boarding an aircraft for a flight between two points in Canada or a flight to Canada departing from any other country, every person must confirm to the private operator or air carrier operating the flight that they understand that they may be subject to a measure to prevent the spread of COVID-19 taken by the provincial or territorial government with jurisdiction where the destination aerodrome for that flight is located or by the federal government.
- False confirmation
 - (2) A person must not provide a confirmation referred to in subsection (1) that they know to be false or misleading.
- Exception
 - (3) A competent adult may provide a confirmation referred to in subsection (1) on behalf of a person who is not a competent adult.

Prohibition

4 A private operator or air carrier operating a flight between two points in Canada or a flight to Canada departing from any other country must not permit a person to board the aircraft for the flight if the person is a competent adult and does not provide a confirmation that they are required to provide under subsection 3(1).

Foreign Nationals

Prohibition

5 A private operator or air carrier must not permit a foreign national to board an aircraft for a flight that the private operator or air carrier operates to Canada departing from any other country.

Exception

6 Section 5 does not apply to a foreign national who is permitted to enter Canada under an order made under section 58 of the *Quarantine Act*.

Health Check

Non-application

7 Sections 8 to 10 do not apply to either of the following persons:

- (a) a crew member;
- (b) a person who provides a medical certificate certifying that any symptoms referred to in subsection 8(1) that they are exhibiting are not related to COVID-19.

Health check

- **8 (1)** A private operator or air carrier must conduct a health check of every person boarding an aircraft for a flight that the private operator or air carrier operates by asking questions to verify whether they exhibit any of the following symptoms:
 - (a) a fever;
 - (b) a cough;
 - (c) breathing difficulties.
- **Notification**

(2) A private operator or air carrier must notify every person boarding an aircraft for a flight that the private operator or air carrier operates that the person may be denied permission to board the aircraft if

 - (a) they exhibit a fever and a cough or a fever and breathing difficulties, unless they provide a medical certificate certifying that their symptoms are not related to COVID-19;
 - (b) they have, or suspect that they have, COVID-19;
 - (c) they have been denied permission to board an aircraft in the previous 14 days for a medical reason related to COVID-19; or
 - (d) in the case of a flight departing in Canada, they are the subject of a mandatory quarantine order as a result of recent travel or as a result of a local or provincial public health order.
- **Confirmation**

(3) Every person boarding an aircraft for a flight that a private operator or air carrier operates must confirm to the private operator or air carrier that none of the following situations apply to them:

 - (a) the person has, or suspects that they have, COVID-19;

- (b) the person has been denied permission to board an aircraft in the previous 14 days for a medical reason related to COVID-19;
- (c) in the case of a flight departing in Canada, the person is the subject of a mandatory quarantine order as a result of recent travel or as a result of a local or provincial public health order.
- False confirmation — obligation of private operator or air carrier
 - (4) The private operator or air carrier must advise every person that they may be liable to a monetary penalty if they provide answers, with respect to the health check or a confirmation, that they know to be false or misleading.
- False confirmation — obligations of person
 - (5) A person who, under subsections (1) and (3), is subjected to a health check and is required to provide a confirmation must
 - (a) answer all questions; and
 - (b) not provide answers or a confirmation that they know to be false or misleading.
- Exception
 - (6) A competent adult may answer all questions and provide a confirmation on behalf of a person who is not a competent adult and who, under subsections (1) and (3), is subjected to a health check and is required to give a confirmation.
- Observations — private operator or air carrier
 - (7) During the boarding process for a flight that the private operator or air carrier operates, the private operator or air carrier must observe whether any person boarding the aircraft is exhibiting any symptoms referred to in subsection (1).

Prohibition

9 A private operator or air carrier must not permit a person to board an aircraft for a flight that the private operator or air carrier operates if

- (a) the person's answers to the health check questions indicate that they exhibit
 - (i) a fever and cough, or
 - (ii) a fever and breathing difficulties;
- (b) the private operator or air carrier observes that, as the person is boarding, they exhibit
 - (i) a fever and cough, or
 - (ii) a fever and breathing difficulties;
- (c) the person's confirmation under subsection 8(3) indicates that one of the situations described in paragraphs 8(3)(a), (b) or (c) applies to that person; or
- (d) the person is a competent adult and refuses to answer any of the questions asked of them under subsection 8(1) or to give the confirmation under subsection 8(3).

Period of 14 days

10 A person who is not permitted to board an aircraft under section 9 is not permitted to board another aircraft for a period of 14 days after the denial, unless they provide a medical certificate certifying that any symptoms referred to in subsection 8(1) that they are exhibiting are not related to COVID-19.

COVID-19 Molecular Test – Flights to Canada

Application

- **11** (1) Sections 12 to 17 apply to a private operator or air carrier operating a flight to Canada departing from any other country and to every person boarding an aircraft for such a flight.
- Non-application
(2) Sections 12 to 17 do not apply to persons who are not required under an order made under section 58 of the *Quarantine Act* to provide evidence that they received a result for a COVID-19 molecular test.

Notification

12 A private operator or air carrier must notify every person who intends to board an aircraft for a flight that the private operator or air carrier operates that the person may be denied permission to board the aircraft if they are unable to provide evidence that they received a result for a COVID-19 molecular test.

Evidence — result of test

- **13** (1) Before boarding an aircraft for a flight, every person must provide to the private operator or air carrier operating the flight evidence that they received either
 - (a) a negative result for a COVID-19 molecular test that was performed on a specimen collected no more than 72 hours before the aircraft's initial scheduled departure time; or

- (b) a positive result for such a test that was performed on a specimen collected at least 14 days and no more than 180 days before the aircraft's initial scheduled departure time.
- Evidence — location of test
 - (2) For the purposes of subsection (1), the COVID-19 molecular test must have been performed in a country or territory that is not listed in Schedule 1.

Evidence — elements

14 Evidence of a result for a COVID-19 molecular test must include

- (a) the person's name and date of birth;
- (b) the name and civic address of the laboratory that administered the test;
- (c) the date the specimen was collected and the test method used; and
- (d) the test result.

False or misleading evidence

15 A person must not provide evidence of a result for a COVID-19 molecular test that they know to be false or misleading.

Notice to Minister

16 A private operator or air carrier that has reason to believe that a person has provided evidence of a result for a COVID-19 molecular test that is likely to be false or misleading must notify the Minister as soon as feasible of the person's name and contact information and the date and number of the person's flight.

Prohibition

17 A private operator or air carrier must not permit a person to board³¹ an aircraft for a flight that the private operator or air carrier operates if the person does not provide evidence that they received a result for a COVID-19 molecular test in accordance with the requirements set out in section 13.

Vaccination or COVID-19 Molecular Test – Flights Departing from an Aerodrome in Canada

Application

- **17.1** (1) Beginning on October 30, 2021 at 3:00:59 a.m. Eastern daylight time, sections 17.2 to 17.17 apply to all of the following persons:
 - (a) a person boarding an aircraft for a flight that an air carrier operates departing from an aerodrome listed in Schedule 2;
 - (b) a person entering a restricted area at an aerodrome listed in Schedule 2 from a non-restricted area to board an aircraft for a flight that an air carrier operates;
 - (c) an air carrier operating a flight departing from an aerodrome listed in Schedule 2;
 - (d) a screening authority at an aerodrome listed in Schedule 2.
- Non-application
 - (2) Sections 17.2 to 17.17 do not apply to any of the following persons:
 - (a) a child who is less than 12 years and four months of age;
 - (b) a crew member;

- (c) a person who arrives at an aerodrome from any other country on board an aircraft in order to transit to another country and remains in a *sterile transit area*, as defined in section 2 of the *Immigration and Refugee Protection Regulations*, of the aerodrome until they leave Canada;
- (d) a person who arrives at an aerodrome on board an aircraft following the diversion of their flight for a safety-related reason, such as adverse weather or an equipment malfunction, and who boards an aircraft for a flight not more than 24 hours after the arrival time of the diverted flight.

Notification

17.2 An air carrier must notify every person who intends to board an aircraft for a flight that the air carrier operates that they

- (a) are prohibited from boarding the aircraft unless they are a fully vaccinated person, have received a result for a COVID-19 molecular test or are a person referred to in paragraph 17.4(2)(a) or (b);
- (b) will be required to confirm to the air carrier that they are a fully vaccinated person, have received a result for a COVID-19 molecular test or are a person referred to in paragraph 17.4(2)(a) or (b);
- (c) may be required to provide to the air carrier evidence of COVID-19 vaccination demonstrating that they are a fully vaccinated person, evidence that they have received a result for a COVID-19 molecular test or evidence that they are a person referred to in paragraph 17.4(2)(a) or (b);
- (d) may be denied permission to board the aircraft if a requirement referred to in paragraph (b) or (c) applies to them and they fail to comply with it, and, in the case of the requirement referred to in

paragraph (c), may be denied permission to board any other aircraft for a flight departing from Canada for a period of 72 hours after the first denial; and

- (e) may be liable to a monetary penalty if they provide a confirmation referred to in section 17.3 that they know to be false or misleading.

Confirmation

- **17.3** (1) Before boarding an aircraft for a flight, every person must confirm to the air carrier operating the flight that they
 - (a) are a fully vaccinated person;
 - (b) have received a result for a COVID-19 molecular test; or
 - (c) are a person referred to in paragraph 17.4(2)(a) or (b).
- Exception

(2) A competent adult may provide a confirmation referred to in subsection (1) on behalf of a person who is not a competent adult.
- Exception — person less than 16 years of age

(3) Subsection (1) does not apply to a person who is less than 16 years of age and who is travelling alone.

Prohibition — person

- **17.4** (1) A person is prohibited from boarding an aircraft for a flight or entering a restricted area unless
 - (a) they are a fully vaccinated person; or
 - (b) they have received a result for a COVID-19 molecular test.
- Exception

(2) Subsection (1) does not apply to a person who

- (a) is boarding the aircraft for a flight to an aerodrome in Canada³⁴ if the initial scheduled departure time of that flight is not more than 24 hours after the departure time of a flight taken by the person to Canada from any other country; or
- (b) is boarding the aircraft for a flight
 - (i) only to become a crew member on board another aircraft that an air carrier operates under Subpart 1 of Part VII of the Regulations,
 - (ii) after having been a crew member on board an aircraft that an air carrier operates under Subpart 1 of Part VII of the Regulations, or
 - (iii) to participate in mandatory training required by an air carrier that operates a commercial air service under Subpart 1 of Part VII of the Regulations in relation to the operation of an aircraft, if the person will be required to return to work as a crew member.

Request for evidence — air carrier

- **17.5 (1)** Before permitting a certain number of persons, as specified by the Minister and selected on a random basis, to board an aircraft for a flight that the air carrier operates, the air carrier must request that each of those persons provide
 - (a) evidence of COVID-19 vaccination demonstrating that they are a fully vaccinated person;
 - (b) evidence that they have received a result for a COVID-19 molecular test; or
 - (c) evidence that they are a person referred to in paragraph 17.4(2) (a) or (b).

- Person less than 16 years of age

(2) An air carrier must request that every person described in subsection 17.3(3) provide, before they board an aircraft for a flight that the air carrier operates, the evidence referred to in paragraph (1)(a), (b) or (c).

Request for evidence — screening authority

17.6 Before permitting a certain number of persons, as specified by the Minister and selected on a random basis, to enter a restricted area, the screening authority must request that each of those persons, when they present themselves for screening at a passenger screening checkpoint, provide the evidence referred to in paragraph 17.5(1)(a), (b) or (c).

Provision of evidence

17.7 A person must, at the request of an air carrier or a screening authority, provide to the air carrier or screening authority the evidence referred to in paragraph 17.5(1)(a), (b) or (c).

Evidence of vaccination — elements

- **17.8** (1) Evidence of COVID-19 vaccination must be evidence issued by the government or the non-governmental entity that is authorized to issue it in the jurisdiction in which the vaccine was administered and must contain the following information:
 - (a) the name of the person who received the vaccine;
 - (b) the name of the government or of the non-governmental entity;
 - (c) the brand name or any other information that identifies the vaccine that was administered; and

- (d) the dates on which the vaccine was administered or, if the evidence is one document issued for both doses and the document specifies only the date on which the most recent dose was administered, that date.
- Evidence of vaccination — translation
 - (2) The evidence of COVID-19 vaccination must be in English or French and any translation into English or French must be a certified translation.

Evidence of COVID-19 molecular test — result

- **17.9** (1) A result for a COVID-19 molecular test is a result described in paragraph 13(1)(a) or (b).
- Evidence of COVID-19 molecular test — elements
 - (2) Evidence of a result for a COVID-19 molecular test must include the elements set out in paragraphs 14(a) to (d).

Evidence — persons referred to in subsection 17.4(2)

17.10 Evidence that the person is a person referred to in paragraph 17.4(2)(a) or (b) means

- (a) in the case of paragraph 17.4(2)(a), a travel itinerary or boarding pass that confirms that the initial scheduled departure time of the person's flight to an aerodrome in Canada is not more than 24 hours after the departure time of a flight taken by the person to Canada from any other country; and
- (b) in the case of paragraph 17.4(2)(b),
 - (i) a statement from the person that they are a person referred to in paragraph 17.4(2)(b) if they provide a piece of identification issued by the air carrier or if they are in uniform, or

- (ii) a document from the air carrier demonstrating that they are a ³⁷ person referred to in paragraph 17.4(2)(b).

False or misleading confirmation or evidence

17.11 A person must not provide a confirmation or evidence that they know to be false or misleading.

Notice to Minister

17.12 An air carrier or screening authority that has reason to believe that a person has provided a confirmation or evidence that is likely to be false or misleading must notify the Minister of the person's name and contact information and the date and number of the person's flight not more than 72 hours after the provision of the confirmation or evidence.

Prohibition — air carrier

- **17.13** (1) An air carrier must not permit a person to board an aircraft for a flight that the air carrier operates if
 - (a) the person is a competent adult and does not provide a confirmation that they are required to provide under section 17.3; or
 - (b) the person does not provide the evidence they are required to provide under section 17.7.
- Notification to person
 - (2) An air carrier that denies a person permission to board an aircraft under paragraph (1)(b) must notify the person that
 - (a) they are not permitted to board an aircraft for a flight departing from Canada for a period of 72 hours after the denial; and
 - (b) the Minister will be informed of the denial.

Prohibition — screening authority

- **17.14** (1) A screening authority must not permit a person to enter a restricted area if the person does not provide the evidence they are required to provide under section 17.7.
- Notification to person
 - (2) A screening authority that denies a person entry to a restricted area under subsection (1) must notify the person that
 - (a) they are not permitted to enter a restricted area at any aerodrome in Canada for a period of 72 hours after the denial; and
 - (b) the Minister will be informed of the denial.
- Notification to air carrier
 - (3) If a screening authority denies a person entry to a restricted area, the screening authority must notify the air carrier operating the flight that the person has been denied entry and provide the person's name and flight number to the air carrier.
- Air carrier requirements
 - (4) An air carrier that has been notified under subsection (3) must ensure that the person is escorted to a location where they can retrieve their *checked baggage*, as defined in section 3 of the *Canadian Aviation Security Regulations, 2012*, if applicable.

Prohibition — boarding an aircraft

- **17.15** (1) A person who is denied permission to board an aircraft under paragraph 17.13(1)(b) is not permitted to board an aircraft for a flight departing from Canada for a period of 72 hours after the denial.
- Prohibition — entry to restricted area

(2) A person who is denied entry to a restricted area under subsection 17.14(1) is not permitted to enter a restricted area at any aerodrome in Canada for a period of 72 hours after the denial.

Record keeping — air carrier

- **17.16** (1) An air carrier must keep a record of the following information in respect of each instance that a person was denied permission to board an aircraft under paragraph 17.13(1)(b):
 - (a) the person's name, date of birth and contact information, including the person's home address, telephone number and email address;
 - (b) the date and flight number; and
 - (c) the reason why the person was denied permission to board the aircraft.
- Informing Minister

(2) The air carrier must inform the Minister of any record referred to in subsection (1) not more than 72 hours after it is created.
- Retention period

(3) The air carrier must retain a record referred to in subsection (1) for a period of at least 12 months after the date of the flight.
- Ministerial request

(4) The air carrier must make a record referred to in subsection (1) available to the Minister on request.

Record keeping — screening authority

- **17.17** (1) A screening authority must keep a record of the following information in respect of each instance that a person was denied entry to a restricted area under subsection 17.14(1):
 - (a) the person's name;
 - (b) the date and flight number; and
 - (c) the reason why the person was denied entry to the restricted area.
- Informing Minister

(2) The screening authority must inform the Minister of any record referred to in subsection (1) not more than 72 hours after it is created.
- Retention period

(3) The screening authority must retain a record referred to in subsection (1) for a period of at least 12 months after the day on which the record is created.
- Ministerial request

(4) The screening authority must make a record referred to in subsection (1) available to the Minister on request.

[**17.18** to **17.49** reserved]

Policy Respecting Mandatory Vaccination

Application

17.50 Beginning on October 30, 2021 at 3:00:59 a.m. Eastern daylight time, sections 17.51 to 17.55 apply to

- (a) the operator of an aerodrome listed in Schedule 2;

- (b) an air carrier operating a flight departing from an aerodrome listed in Schedule 2, other than an air carrier that operates a commercial air service under Subpart 1 of Part VII of the Regulations; and
- (c) NAV CANADA.

Definition of *relevant person*

- **17.51** (1) For the purposes of sections 17.52 to 17.55, *relevant person* means, in respect of an entity referred to in section 17.50, a person whose duties involve an activity described in subsection (2) and who is
 - (a) an employee of the entity;
 - (b) an employee of the entity's contractor, agent or mandatary;
 - (c) a person hired by the entity to provide a service;
 - (d) the entity's lessee or an employee of the entity's lessee, if the property that is subject to the lease is part of aerodrome property; or
 - (e) a person permitted by the entity to access aerodrome property or, in the case of NAV CANADA, a location where NAV CANADA provides civil air navigation services.
- Activities
 - (2) For the purposes of subsection (1), the activities are
 - (a) conducting or directly supporting activities that are related to commercial flight operations — such as aircraft refuelling services, aircraft maintenance and repair services, baggage handling services, supply services for the operator of an aerodrome, an air carrier or NAV CANADA, runway and taxiway maintenance services or de-icing services — and that take place on aerodrome property or at a location where NAV CANADA provides civil air navigation services;

- (b) interacting in-person on aerodrome property with a person who intends to board an aircraft for a flight;
- (c) engaging in tasks, on aerodrome property or at a location where NAV CANADA provides civil air navigation services, that are intended to reduce the risk of transmission of the virus that causes COVID-19; and
- (d) accessing a restricted area at an aerodrome listed in Schedule 2.

Comprehensive policy — operators of aerodromes

- **17.52** (1) The operator of an aerodrome must establish and implement a comprehensive policy respecting mandatory COVID-19 vaccination in accordance with subsection (2).
- Policy — content
 - (2) The policy must
 - (a) subject to paragraph (b), require that as of November 15, 2021, a person who is 12 years and four months of age or older, other than a person who intends to board an aircraft for a flight, be a fully vaccinated person before accessing aerodrome property;
 - (b) provide for a procedure for granting an exemption to a person referred to in paragraph (a) from the requirement to be a fully vaccinated person if the person
 - (i) has not completed a COVID-19 vaccine dosage regimen due to a medical contraindication or their sincerely held religious beliefs, or
 - (ii) received the first dose of a COVID-19 vaccine dosage regimen before November 15, 2021;

- (c) provide for a procedure for issuing a document to a person who has been granted an exemption referred to in paragraph (b) that confirms the granting of the exemption;
 - (d) provide for a procedure that ensures that a person who has been granted an exemption referred to in paragraph (b) is tested for COVID-19 at least twice every week;
 - (e) provide for a procedure that ensures that a person who receives a positive result for a COVID-19 test, other than a COVID-19 molecular test, under the procedure referred to in paragraph (d) receives a result for a COVID-19 molecular test;
 - (f) provide for a procedure that ensures that a person who receives a positive result for a COVID-19 molecular test under the procedure referred to in paragraph (d) or (e) is prohibited from accessing aerodrome property for a period of 14 days after the result was received or until the person is not exhibiting any of the symptoms referred to in subsection 8(1), whichever is later; and
 - (g) provide for a procedure that ensures that a person referred to in paragraph (f) is exempt from the requirement referred to in paragraph (d) for a period of 180 days after the person received a positive result for a COVID-19 molecular test.
- Medical contraindication

(3) For the purposes of subparagraph (2)(b)(i), the policy must provide that an exemption is to be granted to a person on the basis of a medical contraindication only if the person provides a medical certificate from a medical doctor or nurse practitioner certifying that the person cannot be vaccinated due to a medical condition.
 - *Canadian Human Rights Act*

(4) For the purposes of subparagraph (2)(b)(i), in the case of an employee of the operator of an aerodrome or a person hired by the operator of an aerodrome to provide a service, the policy must provide that an exemption is to be granted to a person on the basis of their sincerely held religious beliefs only if the operator of the aerodrome is obligated to accommodate them on the basis of this ground under the *Canadian Human Rights Act* by providing such an exemption.

- Applicable legislation

(5) For the purposes of subparagraph (2)(b)(i), in the following cases, the policy must provide that an exemption is to be granted to a person on the basis of their sincerely held religious beliefs only if they would be entitled to such an exemption as an accommodation on the basis of this ground under applicable legislation:

- (a) in the case of an employee of the operator of an aerodrome's contractor, agent or mandatary; and
- (b) in the case of an employee of the operator of an aerodrome's lessee, if the property that is subject to the lease is part of aerodrome property.

Comprehensive policy — air carriers and NAV CANADA

17.53 Section 17.54 does not apply to an air carrier or NAV CANADA if that entity

- (a) establishes and implements a comprehensive policy respecting mandatory COVID-19 vaccination in accordance with paragraphs 17.54(2)(a) to (g) and subsections 17.54(3) to (5); and
- (b) has procedures in place to ensure that while a relevant person is carrying out their duties related to commercial flight operations, no in-person interactions occur between the relevant person and an

unvaccinated person who has not been granted an exemption referred to in paragraph 17.54(2)(b) and who is

- (i) an employee of the entity,
- (ii) an employee of the entity's contractor, agent or mandatary,
- (iii) a person hired by the entity to provide a service, or
- (iv) the entity's lessee or an employee of the entity's lessee, if the property that is subject to the lease is part of aerodrome property.

Targeted policy — air carriers and NAV CANADA

- **17.54** (1) An air carrier or NAV CANADA must establish and implement a targeted policy respecting mandatory COVID-19 vaccination in accordance with subsection (2).
- Policy — content
 - (2) The policy must
 - (a) subject to paragraph (b), require that as of November 15, 2021, a relevant person be a fully vaccinated person before accessing aerodrome property or, in the case of NAV CANADA, a location where NAV CANADA provides civil air navigation services;
 - (b) provide for a procedure for granting an exemption to a relevant person from the requirement to be a fully vaccinated person if the relevant person
 - (i) has not completed a COVID-19 vaccine dosage regimen due to a medical contraindication or their sincerely held religious beliefs, or
 - (ii) received the first dose of a COVID-19 vaccine dosage regimen before November 15, 2021;

- (c) provide for a procedure for issuing a document to a relevant person who has been granted an exemption referred to in paragraph (b) that confirms the granting of the exemption;
- (d) provide for a procedure that ensures that a relevant person who has been granted an exemption referred to in paragraph (b) is tested for COVID-19 at least twice every week;
- (e) provide for a procedure that ensures that a relevant person who receives a positive result for a COVID-19 test, other than a COVID-19 molecular test, under the procedure referred to in paragraph (d) receives a result for a COVID-19 molecular test;
- (f) provide for a procedure that ensures that a relevant person who receives a positive result for a COVID-19 molecular test under the procedure referred to in paragraph (d) or (e) is prohibited from accessing aerodrome property for a period of 14 days after the result was received or until the relevant person is not exhibiting any of the symptoms referred to in subsection 8(1), whichever is later;
- (g) provide for a procedure that ensures that a relevant person referred to in paragraph (f) is exempt from the requirement referred to in paragraph (d) for a period of 180 days after the relevant person received a positive result for a COVID-19 molecular test;
- (h) set out procedures for reducing the risk that a relevant person will be exposed to the virus that causes COVID-19 due to an in-person interaction occurring on aerodrome property or at a location where NAV CANADA provides civil air navigation services with an unvaccinated person who has not been granted an exemption under paragraph (b) and who is a person referred to in subparagraph 17.53(b)(i), (ii), (iii) or (iv), which may include protocols related to

- (i) the vaccination of persons, other than relevant persons, who⁴⁷ access aerodrome property or a location where NAV CANADA provides civil air navigation services,
 - (ii) physical distancing and the wearing of face masks, and
 - (iii) reducing the frequency and duration of in-person interactions;
- (i) establish a procedure for collecting the following information with respect to an in-person interaction related to commercial flight operations between a relevant person and a person referred to in subparagraph 17.53(b)(i), (ii), (iii) or (iv) who is unvaccinated and has not been granted an exemption under paragraph (b) or whose vaccination status is unknown:
 - (i) the time, date and location of the interaction, and
 - (ii) contact information for the relevant person and the other person;
 - (j) establish a procedure for recording the following information and submitting it to the Minister on request:
 - (i) the number of relevant persons who are subject to the entity's policy,
 - (ii) the number of relevant persons who require access to a restricted area,
 - (iii) the number of relevant persons who
 - (A) are fully vaccinated persons,
 - (B) have received the first dose of a COVID-19 vaccine dosage regimen, and

- (C) are unvaccinated persons,
- (iv) the number of hours during which relevant persons were unable to fulfill their duties related to commercial flight operations due to COVID-19,
- (v) the number of relevant persons who have been granted an exemption referred to in paragraph (b), the reason for granting the exemption and a confirmation that the relevant persons have submitted evidence of COVID-19 tests in accordance with the requirements referred to in paragraphs (d) and (e),
- (vi) the number of relevant persons who refuse to comply with a requirement referred to in paragraph (a), (d), (e) or (f),
- (vii) the number of relevant persons who were denied entry to a restricted area because of a refusal to comply with a requirement referred to in paragraph (a), (d), (e) or (f),
- (viii) the number of persons referred to in subparagraphs 17.53(b) (i) to (iv) who are unvaccinated and who have not been granted an exemption under paragraph (b), or whose vaccination status is unknown, who have an in-person interaction related to commercial flight operations with a relevant person and a description of any procedures implemented to reduce the risk that a relevant person will be exposed to the virus that causes COVID-19 due to such an interaction, and
- (ix) the number of instances in which the air carrier or NAV Canada is made aware that a person with respect to whom information was collected under paragraph (i) received a positive result for a COVID-19 test, the number of relevant persons tested

for COVID-19 as a result of this information, the results of those tests and a description of any impacts on commercial flight operations; and

- (k) require the air carrier or NAV CANADA, as applicable, to keep the information referred to in paragraph (j) for a period of at least 12 months after the date that the information was recorded.

- Medical contraindication

(3) For the purposes of subparagraph (2)(b)(i), the policy must provide that an exemption is to be granted to a relevant person on the basis of a medical contraindication only if the relevant person provides a medical certificate from a medical doctor or nurse practitioner certifying that the relevant person cannot be vaccinated due to a medical condition.

- *Canadian Human Rights Act*

(4) For the purposes of subparagraph (2)(b)(i), in the case of an employee of an entity or a person hired by an entity to provide a service, the policy must provide that an exemption is to be granted to a relevant person on the basis of their sincerely held religious beliefs only if the entity is obligated to accommodate the relevant person on the basis of this ground under the *Canadian Human Rights Act* by providing such an exemption.

- Applicable legislation

(5) For the purposes of subparagraph (2)(b)(i), in the following cases, the policy must provide that an exemption is to be granted to a relevant person on the basis of their sincerely held religious beliefs only if they would be entitled to such an exemption as an accommodation on the basis of this ground under applicable legislation:

- (a) in the case of an employee of an entity's contractor, agent or mandatary; and
- (b) in the case of an employee of an entity's lessee, if the property that is subject to the lease is part of aerodrome property.

Ministerial request — policy

- **17.55** (1) The operator of an aerodrome, an air carrier or NAV CANADA must make a copy of the policy referred to in section 17.52, 17.53 or 17.54, as applicable, available to the Minister on request.
- Ministerial request — implementation
(2) The operator of an aerodrome, an air carrier or NAV CANADA must make information related to the implementation of the policy referred to in section 17.52, 17.53 or 17.54, as applicable, available to the Minister on request.

Face Masks

Non-application

- **18** (1) Sections 19 to 24 do not apply to any of the following persons:
 - (a) a child who is less than two years of age;
 - (b) a child who is at least two years of age but less than six years of age who is unable to tolerate wearing a face mask;
 - (c) a person who provides a medical certificate certifying that they are unable to wear a face mask for a medical reason;
 - (d) a person who is unconscious;
 - (e) a person who is unable to remove their face mask without assistance;

- (f) a crew member;
- (g) a gate agent.
- Face mask readily available

(2) An adult responsible for a child who is at least two years of age but less than six years of age must ensure that a face mask is readily available to the child before boarding an aircraft for a flight.

- Wearing of face mask

(3) An adult responsible for a child must ensure that the child wears a face mask when wearing one is required under section 21 and complies with any instructions given by a gate agent under section 22 if the child

- (a) is at least two years of age but less than six years of age and is able to tolerate wearing a face mask; or
- (b) is at least six years of age.

Notification

19 A private operator or air carrier must notify every person who intends to board an aircraft for a flight that the private operator or air carrier operates that the person must

- (a) be in possession of a face mask before boarding;
- (b) wear the face mask at all times during the boarding process, during the flight and from the moment the doors of the aircraft are opened until the person enters the air terminal building; and
- (c) comply with any instructions given by a gate agent or a crew member with respect to wearing a face mask.

Obligation to possess face mask

20 Every person who is at least six years of age must be in possession of a face mask before boarding an aircraft for a flight.

Wearing of face mask — persons

- **21** (1) Subject to subsections (2) and (3), a private operator or air carrier must require a person to wear a face mask at all times during the boarding process and during a flight that the private operator or air carrier operates.

- Exceptions — person

(2) Subsection (1) does not apply

- (a) when the safety of the person could be endangered by wearing a face mask;
- (b) when the person is drinking or eating, unless a crew member instructs the person to wear a face mask;
- (c) when the person is taking oral medications;
- (d) when a gate agent or a crew member authorizes the removal of the face mask to address unforeseen circumstances or the person's special needs; or
- (e) when a gate agent, a member of the aerodrome security personnel or a crew member authorizes the removal of the face mask to verify the person's identity.

- Exceptions — flight deck

(3) Subsection (1) does not apply to any of the following persons when they are on the flight deck:

- (a) a Department of Transport air carrier inspector;

- (b) an inspector of the civil aviation authority of the state where the aircraft is registered;
- (c) an employee of the private operator or air carrier who is not a crew member and who is performing their duties;
- (d) a pilot, flight engineer or flight attendant employed by a wholly owned subsidiary or a code share partner of the air carrier;
- (e) a person who has expertise related to the aircraft, its equipment or its crew members and who is required to be on the flight deck to provide a service to the private operator or air carrier.

Compliance

22 A person must comply with any instructions given by a gate agent, a member of the aerodrome security personnel or a crew member with respect to wearing a face mask.

Prohibition — private operator or air carrier

23 A private operator or air carrier must not permit a person to board an aircraft for a flight that the private operator or air carrier operates if

- (a) the person is not in possession of a face mask; or
- (b) the person refuses to comply with an instruction given by a gate agent or a crew member with respect to wearing a face mask.

Refusal to comply

- **24** (1) If, during a flight that a private operator or air carrier operates, a person refuses to comply with an instruction given by a crew member with respect to wearing a face mask, the private operator or air carrier must
 - (a) keep a record of

- (i) the date and flight number,
- (ii) the person's name, date of birth and contact information, including the person's home address, telephone number and email address,
- (iii) the person's seat number, and
- (iv) the circumstances related to the refusal to comply; and
- (b) inform the Minister as soon as feasible of any record created under paragraph (a).
- Retention period

(2) The private operator or air carrier must retain a record referred to in paragraph (1)(a) for a period of at least 12 months after the date of the flight.

- Ministerial request

(3) The private operator or air carrier must make a record referred to in paragraph (1)(a) available to the Minister on request.

Wearing of face mask — crew member

- **25** (1) Subject to subsections (2) and (3), a private operator or air carrier must require a crew member to wear a face mask at all times during the boarding process and during a flight that the private operator or air carrier operates.
- Exceptions — crew member
 - (2) Subsection (1) does not apply
 - (a) when the safety of the crew member could be endangered by wearing a face mask;

- (b) when the wearing of a face mask by the crew member could interfere with operational requirements or the safety of the flight; or
- (c) when the crew member is drinking, eating or taking oral medications.
- Exception — flight deck
 - (3) Subsection (1) does not apply to a crew member who is a flight crew member when they are on the flight deck.

Wearing of face mask — gate agent

- **26** (1) Subject to subsections (2) and (3), a private operator or air carrier must require a gate agent to wear a face mask during the boarding process for a flight that the private operator or air carrier operates.
- Exceptions
 - (2) Subsection (1) does not apply
 - (a) when the safety of the gate agent could be endangered by wearing a face mask; or
 - (b) when the gate agent is drinking, eating or taking oral medications.
 - Exception — physical barrier
 - (3) During the boarding process, subsection (1) does not apply to a gate agent if the gate agent is separated from any other person by a physical barrier that allows the gate agent and the other person to interact and reduces the risk of exposure to COVID-19.

Deplaning

Non-application

- **27** (1) Section 28 does not apply to any of the following persons:
 - (a) a child who is less than two years of age;
 - (b) a child who is at least two years of age but less than six years of age who is unable to tolerate wearing a face mask;
 - (c) a person who provides a medical certificate certifying that they are unable to wear a face mask for a medical reason;
 - (d) a person who is unconscious;
 - (e) a person who is unable to remove their face mask without assistance;
 - (f) a person who is on a flight that originates in Canada and is destined to another country.
- Wearing of face mask
 - (2) An adult responsible for a child must ensure that the child wears a face mask when wearing one is required under section 28 if the child
 - (a) is at least two years of age but less than six years of age and is able to tolerate wearing a face mask; or
 - (b) is at least six years of age.

Wearing of face mask — person

28 A person who is on board an aircraft must wear a face mask at all times from the moment the doors of the aircraft are opened until the person enters the air terminal building, including by a passenger loading bridge.

Screening Authority

Non-application

- **29** (1) Sections 30 to 33 do not apply to any of the following persons:
 - (a) a child who is less than two years of age;
 - (b) a child who is at least two years of age but less than six years of age who is unable to tolerate wearing a face mask;
 - (c) a person who provides a medical certificate certifying that they are unable to wear a face mask for a medical reason;
 - (d) a person who is unconscious;
 - (e) a person who is unable to remove their face mask without assistance;
 - (f) a member of emergency response provider personnel who is responding to an emergency;
 - (g) a peace officer who is responding to an emergency.
- Wearing of face mask

(2) An adult responsible for a child must ensure that the child wears a face mask when wearing one is required under subsection 30(2) and removes it when required by a screening officer to do so under subsection 30(3) if the child

- (a) is at least two years of age but less than six years of age and is able to tolerate wearing a face mask; or
- (b) is at least six years of age.

Requirement — passenger screening checkpoint

- **30** (1) A screening authority must notify a person who is subject to screening at a passenger screening checkpoint that they must wear a face mask at all times during screening.

- Wearing of face mask — person

(2) Subject to subsection (3), a person who is the subject of screening referred to in subsection (1) must wear a face mask at all times during screening.

- Requirement to remove face mask

(3) A person who is required by a screening officer to remove their face mask during screening must do so.

- Wearing of face mask — screening officer

(4) A screening officer must wear a face mask at a passenger screening checkpoint when conducting the screening of a person if, during the screening, the screening officer is two metres or less from the person being screened.

Requirement — non-passenger screening checkpoint

- **31** (1) A person who presents themselves at a non-passenger screening checkpoint to enter into a restricted area must wear a face mask at all times.

- Wearing of face mask — screening officer

(2) Subject to subsection (3), a screening officer must wear a face mask at all times at a non-passenger screening checkpoint.

- Exceptions

(3) Subsection (2) does not apply

- (a) when the safety of the screening officer could be endangered by wearing a face mask; or
- (b) when the screening officer is drinking, eating or taking oral medications.

Exception — physical barrier

32 Sections 30 and 31 do not apply to a person, including a screening officer, if the person is two metres or less from another person and both persons are separated by a physical barrier that allows them to interact and reduces the risk of exposure to COVID-19.

Prohibition — passenger screening checkpoint

- **33** (1) A screening authority must not permit a person who has been notified to wear a face mask and refuses to do so to pass beyond a passenger screening checkpoint into a restricted area.
- Prohibition — non-passenger screening checkpoint
(2) A screening authority must not permit a person who refuses to wear a face mask to pass beyond a non-passenger screening checkpoint into a restricted area.

Designated Provisions

Designation

- **34** (1) The provisions of this Interim Order set out in column 1 of Schedule 3 are designated as provisions the contravention of which may be dealt with under and in accordance with the procedure set out in sections 7.7 to 8.2 of the Act.
- Maximum amounts
(2) The amounts set out in column 2 of Schedule 3 are the maximum amounts of the penalty payable in respect of a contravention of the designated provisions set out in column 1.
- Notice

(3) A notice referred to in subsection 7.7(1) of the Act must be in writing and must specify

- (a) the particulars of the alleged contravention;
- (b) that the person on whom the notice is served or to whom it is sent has the option of paying the amount specified in the notice or filing with the Tribunal a request for a review of the alleged contravention or the amount of the penalty;
- (c) that payment of the amount specified in the notice will be accepted by the Minister in satisfaction of the amount of the penalty for the alleged contravention and that no further proceedings under Part I of the Act will be taken against the person on whom the notice in respect of that contravention is served or to whom it is sent;
- (d) that the person on whom the notice is served or to whom it is sent will be provided with an opportunity consistent with procedural fairness and natural justice to present evidence before the Tribunal and make representations in relation to the alleged contravention if the person files a request for a review with the Tribunal; and
- (e) that the person on whom the notice is served or to whom it is sent will be considered to have committed the contravention set out in the notice if they fail to pay the amount specified in the notice and fail to file a request for a review with the Tribunal within the prescribed period.

Repeal

35 The *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 42*, made on October 19, 2021, is repealed.

SCHEDULE 1(Subsection 13(2))

Countries and Territories

Item	Name
1	India
2	Morocco

SCHEDULE 2(Subsections 1(1) and 17.1(1) and paragraphs 17.50(a) and (b) and 17.51(2) (d))

Aerodromes

Name	ICAO Location Indicator
Abbotsford International	CYXX
Alma	CYTF
Bagotville	CYBG
Baie-Comeau	CYBC
Bathurst	CZBF
Brandon Municipal	CYBR
Calgary International	CYYC
Campbell River	CYBL
Castlegar (West Kootenay Regional)	CYCG
Charlo	CYCL

Name	ICAO Location Indicator
Charlottetown	CYYG
Chibougamau/Chapais	CYMT
Churchill Falls	CZUM
Comox	CYQQ
Cranbrook (Canadian Rockies International)	CYXC
Dawson Creek	CYDQ
Deer Lake	CYDF
Edmonton International	CYEG
Fort McMurray	CYMM
Fort St. John	CYXJ
Fredericton International	CYFC
Gander International	CYQX
Gaspé	CYGP
Goose Bay	CYYR
Grande Prairie	CYQU
Greater Moncton International	CYQM
Halifax (Robert L. Stanfield International)	CYHZ
Hamilton (John C. Munro International)	CYHM
Îles-de-la-Madeleine	CYGR

Name	ICAO Location Indicator
Iqaluit	CYFB
Kamloops	CYKA
Kelowna	CYLW
Kingston	CYBK
Kitchener/Waterloo Regional	CYKF
La Grande Rivière	CYGL
Lethbridge	CYQL
Lloydminster	CYLL
London	CYXU
Lourdes-de-Blanc-Sablon	CYBX
Medicine Hat	CYXH
Mont-Joli	CYYY
Montréal (Montréal — Pierre Elliott Trudeau International)	CYUL
Nanaimo	CYCD
North Bay	CYB
Ottawa (Macdonald-Cartier International)	CYOW
Penticton	CYF
Prince Albert (Glass Field)	CYPA
Prince George	CYXS

Name	ICAO Location Indicator
Prince Rupert	CYPR
Québec (Jean Lesage International)	CYQB
Quesnel	CYQZ
Red Deer Regional	CYQF
Regina International	CYQR
Rivière-Rouge/Mont-Tremblant International	CYFJ
Rouyn-Noranda	CYUY
Saint John	CYSJ
Sarnia (Chris Hadfield)	CYZR
Saskatoon (John G. Diefenbaker International)	CYXE
Sault Ste. Marie	CYAM
Sept-Îles	CYZV
Smithers	CYYD
St. Anthony	CYAY
St. John's International	CYYT
Stephenville	CYJT
Sudbury	CYSB
Sydney (J.A. Douglas McCurdy)	CYQY
Terrace	CYXT

Name	ICAO Location Indicator
Thompson	CYTH
Thunder Bay	CYQT
Timmins (Victor M. Power)	CYTS
Toronto (Billy Bishop Toronto City)	CYTZ
Toronto (Lester B. Pearson International)	CYYZ
Toronto/Buttonville Municipal	CYKZ
Val-d'Or	CYVO
Vancouver International	CYVR
Victoria International	CYYJ
Wabush	CYWK
Whitehorse (Erik Nielsen International)	CYXY
Williams Lake	CYWL
Windsor	CYQG
Winnipeg (James Armstrong Richardson International)	CYWG
Yellowknife	CYZF

SCHEDULE 3(Subsections 34(1) and

(2)) Designated Provisions

Column 1 Designated Provision	Column 2 Maximum Amount of Penalty (\$)	
	Individual	Corporation
Subsection 2(1)	5,000	25,000
Subsection 2(2)	5,000	25,000
Subsection 2(3)	5,000	25,000
Subsection 2(4)	5,000	25,000
Subsection 3(1)	5,000	
Subsection 3(2)	5,000	
Section 4	5,000	25,000
Section 5	5,000	25,000
Subsection 8(1)	5,000	25,000
Subsection 8(2)	5,000	25,000
Subsection 8(3)	5,000	
Subsection 8(4)	5,000	25,000
Subsection 8(5)	5,000	
Subsection 8(7)	5,000	25,000
Section 9	5,000	25,000
Section 10	5,000	

Column 1	Column 2	
	Maximum Amount of Penalty (\$)	
Designated Provision	Individual	Corporation
Section 12	5,000	25,000
Subsection 13(1)	5,000	
Section 15	5,000	
Section 16	5,000	25,000
Section 17	5,000	25,000
Section 17.2		25,000
Subsection 17.3(1)	5,000	
Subsection 17.4(1)	5,000	
Subsection 17.5(1)		25,000
Subsection 17.5(2)		25,000
Section 17.6		25,000
Section 17.7	5,000	
Section 17.11	5,000	
Section 17.12		25,000
Subsection 17.13(1)		25,000
Subsection 17.13(2)		25,000
Subsection 17.14(1)		25,000
Subsection 17.14(2)		25,000

Column 1	Column 2	
	Maximum Amount of Penalty (\$)	
Designated Provision	Individual	Corporation
Subsection 17.14(3)		25,000
Subsection 17.14(4)		25,000
Subsection 17.15(1)	5,000	
Subsection 17.15(2)	5,000	
Subsection 17.16(1)		25,000
Subsection 17.16(2)		25,000
Subsection 17.16(3)		25,000
Subsection 17.16(4)		25,000
Subsection 17.17(1)		25,000
Subsection 17.17(2)		25,000
Subsection 17.17(3)		25,000
Subsection 17.17(4)		25,000
Section 17.52		25,000
Section 17.54		25,000
Subsection 17.55(1)		25,000
Subsection 17.55(2)		25,000
Subsection 18(2)	5,000	
Subsection 18(3)	5,000	

Column 1	Column 2	
	Maximum Amount of Penalty (\$)	
Designated Provision	Individual	Corporation
Section 19	5,000	25,000
Section 20	5,000	
Subsection 21(1)	5,000	25,000
Section 22	5,000	
Section 23	5,000	25,000
Subsection 24(1)	5,000	25,000
Subsection 24(2)	5,000	25,000
Subsection 24(3)	5,000	25,000
Subsection 25(1)	5,000	25,000
Subsection 26(1)	5,000	25,000
Subsection 27(2)	5,000	
Section 28	5,000	
Subsection 29(2)	5,000	
Subsection 30(1)		25,000
Subsection 30(2)	5,000	
Subsection 30(3)	5,000	
Subsection 30(4)	5,000	
Subsection 31(1)	5,000	

Column 1 Designated Provision	Column 2 Maximum Amount of Penalty (\$)	
	Individual	Corporation
Subsection 31(2)	5,000	
Subsection 33(1)		25,000
Subsection 33(2)		25,000

Date modified:

2021-10-29

This is **Exhibit "C"** referred to in the affidavit of Lisa Redpath affirmed before me at Vancouver, British Columbia this 25th day of March, 2024.



A Commissioner for taking
affidavits in British Columbia

SOFIA HIRJI
Barrister & Solicitor
Department of Justice
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

COVID-19 VACCINATION

Revised date: March 23, 2022

Issued by: Corporate Safety & Global Human Resources
Policy owner: Corporate Safety

Background and Purpose

In accordance with our commitment to Safety First, Always, Air Canada takes a multi-layered approach to ensure that all employees work in a safe and healthy environment. Air Canada has an obligation to ensure a safe workplace for all employees, which includes addressing infectious diseases such as COVID-19. Each employee plays a vital role in keeping their co-workers safe, including by helping prevent the spread of the COVID-19 virus in our workplace.

To discharge its obligation to ensure a safe workplace, and having reviewed the medical and scientific evidence regarding COVID-19 vaccines, Air Canada requires all employees to be inoculated against the virus with the full dosage of a COVID-19 vaccine which is approved by the government where the employee regularly resides. Failure to be fully vaccinated will have the consequences described below.

In addition, Air Canada also requires its third party service providers, suppliers, business partners, contractors, agents, mandataries, consultants, lessees, and employees of all these parties, as well as visitors (a "Third Party" or collectively, "Third Parties") who will access, or may be required to access any Air Canada workplace or any aerodrome properties subject to Transport Canada's Orders regarding COVID-19 vaccination, to be inoculated against the virus with the full dosage of a COVID-19 vaccine. Please refer to the [COVID-19 Vaccination Policy for Third Parties](#) which is applicable to those Third Parties.

Scope

This Policy applies to all Air Canada employees.

- It does not change or reduce employees' obligations contained in other Company policies or guidelines, or in their applicable collective agreement.
- It may be supplemented by location specific rules for employees based outside of Canada, in accordance with local laws.
- It does not replace or reduce branch-specific COVID-19 biosafety measures.

The COVID-19 Vaccination Policy for Third Parties is applicable to all Third Parties.

Policy Statement

Air Canada is committed to providing a safe and healthy environment so that all employees are free from the negative effects of COVID-19 in the workplace. This Policy sets out both employee and employer obligations.

The Policy is a component of our overall Safety First, Always Flight Path behaviour, and is intended to help fulfill our obligation to the continued health and safety of our employees and our customers. All employees share responsibility for their personal well-being and the well-being of the colleagues, customers and stakeholders they interact with.

Air Canada requires all employees to get fully vaccinated as well as to report their vaccination status and document proof of vaccination in Air Canada's Vaccination Reporting Tool. In doing so, employees are aligning with our safety culture and Air Canada's Flight Path promise to treat our customers and each other with Care and Class.

In arriving at our decision to adopt this policy, we have weighed the options and taken many factors into account such as the following:

- Safety First, Always - our core value, means our priority is the safety and wellbeing of our people, customers, and other stakeholders
- Our leadership in embracing health measures in response to the COVID-19 pandemic
- Our science-based conclusion that the most effective currently available means to protect our people from COVID-19 and increasingly contagious variants is for them to be fully vaccinated. Simply put, preventing the disease is better than detecting it after the fact
- The widespread availability of government-approved vaccines in Canada and the increasing availability of vaccines in the other locations where Air Canada employees fulfill their duties,
- Individuals' rights to raise substantiated religious and medical exemptions as contemplated in our Duty to Accommodate obligations

Guidelines

In order to ensure compliance with this policy, Air Canada requires all employees and Third Parties to be fully vaccinated.

To be considered "fully vaccinated", two conditions must be met:

- (1) employees and Third Parties must have received the full series of an approved COVID-19 vaccine or a combination of accepted vaccines (in Canada, those vaccines are: Pfizer, Moderna, AstraZeneca, Janssen); and
- (2) 14 days must have passed since their second dose (or in the case of the Janssen vaccine, 14 days have passed since the only dose).

U.S. and international employees are considered to be fully vaccinated if they have had a full course of a vaccine approved by the government in the country where they regularly reside and 14 days have passed since their second dose (or since their first dose if only one is required for their vaccination type).

Note: All employees travelling, including crew and those returning to Canada after layoff or leave or business or leisure travel, must be able to meet the vaccination requirements of the country they are travelling to.

Employees vaccinated with vaccines not approved by the Canadian government may be subject to different entry and quarantine requirements than those who are. Employees are encouraged to consult the applicable government requirements before travelling to ensure they are available to work when scheduled.

When planning to receive their COVID-19 vaccine, employees should be mindful of limiting impacts to operational commitments and are to adhere to all branch protocols and procedures.

As Air Canada is not distributing or manufacturing vaccines, employees remain solely responsible to ensure they are vaccinated with an approved vaccine of their choice and to address any health concerns they may have with a medical professional. Accordingly, Air Canada is not liable for side effects of the COVID-19 vaccines, however, in instances where an employee has an adverse reaction to a vaccine and is unable to report to work, regular sick policies would apply and further accommodation measures, if needed, can be discussed with their manager. Employees are encouraged to consult their doctor and public health authorities in case of side effects.

Even if you are fully vaccinated, you must still comply with Company-wide and branch specific workplace biosafety measures. All employees are required to consult and adhere to obligations contained in their respective branch policies and guidelines which may contain additional COVID-19 requirements.

This policy may be supplemented by location specific rules for employees based outside of Canada, in accordance with local laws.

For additional guidelines applicable to Third Parties, please see the [COVID-19 Vaccination Policy for Third Parties](#).

Requirements

All employees must have reported their vaccination status via our Vaccination Status Reporting Tool located on Aeronet. The personal information (such as first name, last name, employee ID, answers to the Reporting Tool, and proof of vaccination) is collected and used to ensure that you are in compliance with this policy and as applicable, federal and foreign laws. To ensure compliance and manage the employment relationship, employees' managers and their managers may have access to this personal information. Employees who have received at least one vaccination or have been fully vaccinated must also ensure that their proof of vaccination has been uploaded.

Employees who fail to be fully vaccinated, to have so reported in the Vaccination Status Reporting Tool and to have uploaded proof of vaccination will be considered unvaccinated and to be in non-compliance with this policy (see below).

Employees hired after this policy comes into force must be fully vaccinated and have recorded and provided their proof of vaccination before commencing work for Air Canada or must have been accommodated by way of the Duty to Accommodate process.

Exceptions

Employees with medical, religious, or other reasons based on prohibited grounds of discrimination which prevent them from being vaccinated can apply for accommodation in accordance with Air Canada's Duty to Accommodate obligations and existing policies and procedures.

Forms and further instructions on requesting such accommodation are available on the Aeronet under [Duty to Accommodate](#). Requests for accommodation and the supporting information submitted, such as medical information or religious information, will be handled confidentially and securely and processed promptly, by Occupational Health Services for medical information, and by Human Resources and the employee's manager

for non-medical information. As in all accommodation requests, the requesting employee, and their union, if applicable, must cooperate with Air Canada in that process. Until Air Canada directs otherwise, employees requesting accommodation do not need to be vaccinated or record their status via our Vaccination Status Reporting Tool.

Employees accommodated for reasons which are temporary in nature must be fully vaccinated, have recorded their vaccination status via our Vaccination Status Reporting Tool and uploaded their proof of vaccination 14 days before the arrangements to accommodate them expire.

Employees (other than crew members) on leave or layoff when this policy comes into force must be fully vaccinated, have recorded their vaccination status via our Vaccination Status Reporting Tool and uploaded their proof of vaccination 14 days before returning to active duty, though they may record their status and upload their proof of vaccination earlier. To provide operational visibility efficiencies, crew members who are on leave or layoff must be fully vaccinated, have recorded their vaccination status and uploaded their proof of vaccination prior to the deadline for them to exercise their recall rights or bid for training and/or a block.

Non-Compliance with this Policy

Unless they qualify for an accommodation exception to this Policy, as described above, employees who (a) are not fully vaccinated, (b) have not recorded their status via our Vaccination Status Reporting Tool or (c) have not uploaded proof of vaccination will be:

- (i) considered non-vaccinated;
- (ii) prohibited from entering any Air Canada workplace;
- (iii) considered unavailable to fulfill their duties;

Note: this includes employees who usually work from home or who as of the date this policy comes into force are working from home.

- (iv) **placed on unpaid leave without benefits for six months (April 30th), after which period their continuing employment relationship with Air Canada will be reassessed;**
- (v) ineligible for business or personal travel privileges.

However, until November 1, 2022, an employee who is placed on unpaid leave and later chooses to comply with the requirements (a), (b), and (c) in the preceding paragraph, will be allowed to return to active duty subject to the Company's operational needs and constraints (for example, completing required training).

Additionally, we have amended our travel policy for all forms of employee travel (business and leisure) to include fully vaccinated status as an eligibility requirement. Employees should consult our travel policies for more information.

Employees submitting false or misleading information or documents pursuant to this policy may be subject to discipline, up to and including discharge without further notice.

Authorities

Corporate Safety
Global Human Resources

Policy Review

This Policy will be reviewed and updated as required.

Related Policies

[Air Canada's Safety Policy](#)
[Air Canada's Safety and Security Reporting Policy](#)
[Air Canada Employee Privacy Policy](#)
[Protection of Personal Medical Information - Canada](#)
[HR Policy - COVID-19 Vaccination Policy for Third Parties](#)

Mandatory Vaccination for all Employees / Vaccination obligatoire pour tous les employés

Corporate Safety <corporate_safety@aircanada.ca>

Wed 8/25/2021 10:24 AM

📎 2 attachments (327 KB)

FAQ – Mandatory vaccination.pdf; FAQ – Vaccination Obligatoire.pdf;

LA VERSION FRANÇAISE SUIT CI-DESSOUS

Aug. 25 2021



Dear colleagues,

On August 13, the federal government announced that COVID-19 vaccinations would be mandatory for federal employees and those working in some federally regulated industries, including our own.

Many of you have been wondering what this announcement means for Air Canada employees. While some specific details still need to be clarified, the purpose and intent of the government directive is clear, and given our operational requirements to plan in advance, it is imperative we now move forward.

Vaccination Requirement

As you know, protecting our employees and our customers from harm and keeping them safe has been at the core of everything we do and our highest priority throughout our history. You have seen that demonstrated throughout the entire pandemic as we led our industry in implementing science-based protections and health measures

With this in mind, we have carefully thought about what comes next, and decided that we will now require all our employees to be fully vaccinated by a government approved vaccine by October 31st without exception, except under our Duty to Accommodate obligations. Note that you are only considered to be fully vaccinated 14 days after your second dose in a 2-dose series, such as the Pfizer, Moderna or AstraZeneca vaccines, or 14 days after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine.

Additionally, as of today, any person wishing to join Air Canada as a new employee must be fully vaccinated as of October 31st to be

eligible for employment with us.

In arriving at our decision, we have weighed the options and taken many factors into account such as the following:

- Safety First, Always - our core value, means our priority is the safety and wellbeing of our people, customers, and other stakeholders
- Our leadership in embracing health measures in response to the COVID pandemic
- Our science-based conclusion that the most effective currently available means to protect our people from COVID and increasingly contagious variants is for them to be fully vaccinated. Simply put, preventing the disease, is better than detecting it after the fact
- The widespread availability of vaccines in Canada (and their upcoming final approvals from health agencies)
- Announcements by the Government of Canada and other authorities throughout Canada to require full vaccination by October 31
- Individuals' rights to raise substantiated religious and medical exemptions as contemplated in our Duty to Accommodate obligations

Timelines

For our operations to transition seamlessly by October 31st, **we require that all employees report their vaccination status via our [vaccination status reporting tool](#) no later than September 8.**

Employees who have received at least one vaccination or have been fully vaccinated must also ensure that their proof of vaccination has been uploaded by this date. If you have already reported your status but not uploaded your proof of vaccination, please go back into the [reporting tool](#) and do so prior to September 8. Employees who have not reported their status and uploaded their proof of vaccination by that date will automatically be recorded as unvaccinated.

Additionally, in line with government directive, we are amending our travel policy for all forms of employee travel (business and leisure) to include fully vaccinated status as an eligibility requirement as of October 31st. **As a result, employees who are not fully vaccinated and/or have not reported their vaccination status with documentation will no longer be eligible for their travel privileges after that date.**

Also as of October 31st, employees who have not reported and documented that they are fully vaccinated will no longer be able to enter any Air Canada workplace.

Employees who have not been already vaccinated must obtain their first vaccination by September 8 and their second within the 14-day post vaccination period completed before October 30th (if a second vaccination is required based on your vaccination type). Proof of full vaccination must be recorded in our [vaccination status reporting tool](#), also by October 30th.

Many of you may wonder if our decision might change based on the results of the upcoming federal elections. To be clear, Air Canada has made this decision based on our commitment to keep our employees and customers safe and the science is clear that the very best way to do that is to ensure that everyone is fully vaccinated on the timeline we have set out.

The announced government mandate has been one factor among many, but we will implement our decision and our timeline no matter the outcome of the election.

—

Who is affected?

We know not all of us have contact with members of the public or other employees. However, we are making this a One Team approach – all management and all front line and other employees, beginning at the top. Our entire Board of Directors and executive team is fully vaccinated and have reported their status. We have asked our senior management team to follow suit immediately if they have not already done so.

Our top priority is to prevent harm and keep each other safe. No matter what our role, all of us at some time will come into contact with colleagues or customers, even if infrequently, so exceptions will not be made just because it is possible to work from home or employees in some roles rarely interact with others.

—

Operational visibility

It is critically important to the planning of our operation that we have key information on a timely basis as we transition towards October 31st. This will include those who are unvaccinated, their identities and locations, and how that may affect our operation as we plan for any resulting gaps or absences. Our announcement today will affect crew scheduling (which is bid in advance) and staffing in some other areas, so we need this information without delay. Your vaccination information will be treated with the same confidentiality and security as any other health information collected by the company.

—

Employee travel and other consequences of non-compliance

The government's announced requirements for travellers are expected to go into effect on October 31, and will accordingly apply

to employees at that time.

We sincerely hope that everyone understands that vaccination of all employees is vital to our collective safety and has chosen or will choose to be vaccinated if they are able. **However, failure to be fully vaccinated by October 30, 2021 will have consequences up to and including unpaid leave or termination, except for those who qualify for accommodation.**

—

Conclusion

In 1976, the province of Ontario became the first province in Canada to make wearing seatbelts mandatory. At that time, there was a great deal of opposition based on the ability to exercise personal freedoms and the beliefs by some that in certain instances seatbelts caused grave injury. But the science and the studies said that the risk of injury from seatbelts was far outweighed by the benefits of wearing them. Over time, the rest of the provinces agreed that the safety of the collective outweighed the personal choices of individuals and implemented their own mandatory seatbelt laws. Today seatbelts are mandatory everywhere in Canada, the United States and in most other parts of the world. We have all come to accept that it's the right choice and we live in a safer world because of it. The parallels are obvious.

We believe in science-based decisions. We want to make sure you have as much information as possible to understand how we got here, and why we think this is right for all of us. We have included a preliminary FAQ with this document which we hope answers most of the questions you may have. Please send any other questions or comments to horizons@aircanada.ca, and we will update the FAQs as we learn more.

Ensuring we are all vaccinated will protect the health and safety of our friends, our families and our colleagues, and inspire confidence in each other and in our customers. It's part of how we move forward in our response to the pandemic and bring our business back, and it's something we must all do together.

Sincerely,

Samuel Elfassy
Vice President Safety

Dr Jim Chung
Chief Medical Officer

25 août 2021

Chers collègues,

Le 13 août, le gouvernement fédéral a annoncé que la vaccination contre la COVID-19 serait obligatoire pour les employés de la fonction publique fédérale et les travailleurs de secteurs réglementés par le gouvernement fédéral, dont le nôtre.

Beaucoup d'entre vous se demandent ce que cette annonce signifie pour les employés d'Air Canada. Bien qu'il reste quelques détails à clarifier, l'objectif et l'intention derrière cette directive gouvernementale sont clairs, et comme nos activités exigent une planification à l'avance, nous devons impérativement aller de l'avant.

—

Exigences en matière de vaccination

Comme vous le savez, la protection et la sécurité de nos employés et de nos clients sont au cœur de toutes nos activités et ont toujours constitué notre priorité absolue au fil de notre histoire. Vous avez pu le constater tout au long de la pandémie, car nous avons été des précurseurs dans notre secteur en adoptant des mesures de protection et de santé fondées sur la science.

Dans cet esprit, nous avons soigneusement réfléchi à la suite des événements et avons décidé d'exiger que tous nos employés soient entièrement vaccinés avec un vaccin approuvé par le gouvernement d'ici le 31 octobre, sans exception, sauf en ce qui a trait à notre obligation de tenir compte de la situation des employés. Prenez note que vous êtes considéré comme entièrement vacciné uniquement 14 jours après votre deuxième dose, pour les vaccins qui sont administrés en deux doses comme Pfizer, Moderna ou AstraZeneca, ou 14 jours après un vaccin à dose unique, comme pour le vaccin Janssen de Johnson & Johnson.

De plus, à compter d'aujourd'hui, tout nouveau candidat pour un emploi à Air Canada doit être entièrement vacciné au 31 octobre pour être admissible à l'embauche.

Pour en arriver à cette décision, nous avons évalué les options et pris en compte de nombreux facteurs, dont les suivants :

- Le principe « Priorité à la sécurité, toujours », notre valeur fondamentale, qui signifie que nous donnons la priorité à la sécurité et au bien-être de nos employés, de nos clients et des autres parties prenantes.
- Notre leadership dans l'adoption de mesures sanitaires en réponse à la pandémie de COVID-19.
- La conclusion fondée sur la science selon laquelle le moyen le plus efficace actuellement disponible pour protéger nos gens contre la COVID-19 et ses variants de plus en plus contagieux est d'être entièrement vacciné. En d'autres termes, il vaut mieux prévenir la maladie que de la détecter après coup.

- La disponibilité généralisée des vaccins au Canada (et leur approbation définitive prochaine par les agences de santé).
- Les annonces faites par le gouvernement du Canada et d'autres autorités dans tout le pays pour exiger une vaccination complète avant le 31 octobre.
- Le droit des personnes à invoquer des exemptions religieuses et médicales justifiées, comme le prévoit notre obligation de tenir compte de la situation des employés.

Échéanciers

Pour assurer une transition sans rupture de nos activités d'ici le 31 octobre, **nous demandons à tous les employés de déclarer leur statut de vaccination au moyen de notre [outil de déclaration du statut de vaccination](#) au plus tard le 8 septembre.**

Les employés qui ont reçu au moins une dose de vaccin ou qui ont été entièrement vaccinés doivent également s'assurer que leur preuve de vaccination a été téléversée à cette date. Si vous avez déjà déclaré votre statut, mais n'avez pas téléversé votre preuve de vaccination, veuillez retourner dans l'[outil de déclaration du statut de vaccination](#) et le faire avant le 8 septembre. Les employés qui n'ont pas déclaré leur statut et téléversé leur preuve de vaccination à cette date seront automatiquement enregistrés comme étant non vaccinés.

De plus, en accord avec la directive gouvernementale, nous modifions notre politique de voyage, et ce, pour tous les types de voyages des employés (que ce soit à des fins récréatives ou professionnelles) pour y ajouter un critère d'admissibilité qui exige qu'ils soient entièrement vaccinés au 31 octobre. **Par conséquent, les employés qui n'ont pas reçu tous leurs vaccins ou qui n'ont pas déclaré et documenté leur statut de vaccination ne seront plus admissibles aux facilités de transport après cette date.**

Aussi, au 31 octobre, les employés qui n'ont pas déclaré et documenté un statut de vaccination complète ne seront plus admis dans aucun lieu de travail d'Air Canada.

Les employés qui n'ont pas encore été vaccinés doivent obtenir leur première dose d'ici le 8 septembre et leur deuxième avant le 30 octobre, en tenant compte de la période de 14 jours suivant l'administration du vaccin (si une deuxième dose est requise, selon le type de vaccin reçu). La preuve de la vaccination complète doit également être enregistrée dans notre [outil de déclaration du statut de vaccination](#) d'ici le 30 octobre.

Beaucoup d'entre vous se demandent peut-être si notre décision pourrait changer en fonction des résultats des prochaines élections fédérales. Nous tenons à préciser qu'Air Canada a pris cette décision en fonction de son engagement à assurer la sécurité de ses employés et de ses clients, et les données scientifiques montrent clairement

que la meilleure façon d'y parvenir est de s'assurer que tout le monde est entièrement vacciné dans les délais que nous avons fixés.

L'exigence annoncée par le gouvernement a été un facteur parmi tant d'autres, et nous donnerons suite à notre décision et respecterons notre échéancier, quels que soient les résultats des élections.

—

Qui est touché par cette annonce?

Nous ne sommes pas tous en contact avec des membres du public ou d'autres employés. Cependant, nous adoptons une approche d'équipe unie, ce qui comprend tous les membres de la direction et tous les employés de première ligne et autres, en commençant par la haute direction. Tous les membres du Conseil d'administration et tous les hauts dirigeants sont entièrement vaccinés et ont déclaré leur statut. Nous avons demandé aux cadres supérieurs de suivre leur exemple immédiatement, si ce n'est pas déjà fait.

Notre priorité absolue est de protéger les gens et d'assurer leur sécurité. Quel que soit notre rôle, nous serons tous, à un moment ou à un autre, en contact avec des collègues ou des clients, même si ce n'est que rarement. Nous ne ferons donc pas d'exception pour ceux qui peuvent travailler à domicile ou qui n'ont que de rares interactions avec d'autres personnes.

—

Répercussions sur nos activités

Il est essentiel pour la planification de nos activités que nous disposions de renseignements clés en temps utile en vue de la transition vers le 31 octobre. Nous devons notamment connaître le nombre de personnes non vaccinées, leur identité et leur emplacement, pour pouvoir évaluer les répercussions sur nos activités et remédier aux lacunes ou aux absences. L'annonce d'aujourd'hui aura une incidence sur l'affectation des équipages (les programmes de vols étant demandés à l'avance) et sur la dotation en personnel dans d'autres secteurs, de sorte que nous avons besoin de ces renseignements sans délai. Les renseignements relatifs à votre vaccination seront traités avec le même caractère confidentiel et la même sécurité que tout autre renseignement sur la santé recueilli par la Société.

—

Facilités de transport et autres conséquences en cas de non-conformité

Les exigences annoncées par le gouvernement pour les voyageurs devraient entrer en vigueur le 31 octobre. Elles s'appliqueront donc aux employés à ce moment.

Nous espérons sincèrement que vous comprenez tous que la vaccination de tous les employés est vitale pour notre sécurité

collective et que vous avez tous choisi de vous faire vacciner si vous le pouvez. **Cependant, le fait de ne pas être entièrement vacciné d'ici le 30 octobre 2021 aura des conséquences pouvant aller jusqu'au congé non rémunéré ou à la cessation d'emploi, sauf pour les personnes qui ont droit à un accommodement.**

Conclusion

En 1976, la province de l'Ontario est devenue la première province canadienne à rendre obligatoire le port de la ceinture de sécurité. Il y a eu alors une forte opposition fondée sur le droit à la liberté de chacun et sur la croyance de certains que les ceintures de sécurité causaient des blessures graves dans certains cas. Mais la science et les études ont démontré que le risque de blessure lié au port de la ceinture de sécurité était largement compensé par les avantages qu'il procure. Avec le temps, les autres provinces ont convenu que la sécurité de la collectivité l'emportait sur les choix individuels, et elles ont mis en œuvre leurs propres lois sur le port obligatoire de la ceinture de sécurité. Aujourd'hui, le port de la ceinture de sécurité est obligatoire partout au Canada, aux États-Unis et dans la plupart des autres régions du monde. Nous avons tous fini par accepter que ce choix est le bon, et nous vivons dans un monde plus sécuritaire grâce à ce changement. Les parallèles sont évidents.

Nous croyons aux décisions fondées sur la science. Nous voulons vous donner autant de renseignements que possible pour que vous puissiez comprendre notre cheminement, et les raisons pour lesquelles nous pensons que nous bénéficierons tous de ce choix. Nous avons joint à ce document une FAQ préliminaire qui, nous l'espérons, répond à la plupart des questions que vous pourriez vous poser. Veuillez envoyer toute autre question ou tout autre commentaire à horizons@aircanada.ca. Nous mettrons à jour la FAQ au fur et à mesure des développements.

En veillant à ce que nous soyons tous vaccinés, nous protégerons la santé et la sécurité de nos amis, de nos familles et de nos collègues, et nous nous sentirons davantage en confiance les uns envers les autres et envers nos clients. Cela fait partie de notre réponse à la pandémie et de la reprise de nos activités, et nous devons le faire tous ensemble.

Sincères salutations,

Samuel Elfassy
Vice-président – Sécurité

D^r Jim Chung
Médecin en chef

This is **Exhibit "D"** referred to in the affidavit of Lisa Redpath affirmed before me at Vancouver, British Columbia this 25th day of March, 2024.



A Commissioner for taking
affidavits in British Columbia

SOFIA HIRJI
Barrister & Solicitor
Department of Justice
900 - 840 Howe Street
Vancouver, BC V6Z 2S9



COVID-19 Vaccination Policy

INFORMATION CLASSIFICATION NOTICE

The information included in this document is classified as Westjet Internal. Do not release this document into the public domain; it is intended for use internally at Westjet only.

1.0 POLICY

1.1 Background

On March 11, 2020, the World Health Organization declared COVID-19 circulating worldwide a pandemic. Since that time, variants of the virus have continued to circulate, including the current dominance of the Delta variant with increased transmissibility and disease severity compared with previous COVID-19 virus strains.

COVID-19 is an acute respiratory illness capable of causing severe acute respiratory syndrome by the coronavirus (SARS-CoV-2). It may be characterized by fever, cough, shortness of breath, blood clotting, and other symptoms. The risk of severe disease increases with age and in those with underlying medical conditions. However, severe infection can occur in any individual regardless of age or health status. Asymptomatic infection may also occur.

To date, Vaccination, in combination with public health measures, continue to work to reduce disease spread and severe outcomes regardless of the variant circulating in the community. Evidence continues to demonstrate that a complete a series of Health Canada approved COVID-19 Vaccines provides substantial protection against hospitalization and the severe outcomes associated with the virus.

1.2 Overview

WestJet, an Alberta Partnership (the "Company") is committed to providing a safe environment for employees, contractors, guests, and members of the general public who interact with the Company, and will not tolerate any unacceptable risks to employees, contractors, guests, or the general public. In accordance with legislative requirements as well as local, national, and international public health and industry standards, the Company and its employees share a responsibility to adhere to all reasonable precautions to protect against COVID-19. Vaccination is a key element in the protection of employees, contractors, and guests from the hazard of infection with COVID-19.

The purpose of this COVID-19 Vaccination Policy (this "Policy") is to outline the expectations and requirements of employees with respect to COVID-19 and Vaccination.

This Policy applies to all Company employees (active or inactive, including those on furlough), including new hires, trainees, and students ("Personnel").

The Company's contractors shall also be required to implement the requirements of this Policy with respect to any of their own personnel who are providing services to the Company.

1.3 Review of this Policy

This Policy will be reviewed and updated on the following schedule and triggers:

- An annual review
- Changes directed or recommended by the World Health Organization and Health Canada ("Health Authorities")
- If there is a change that compromises the effectiveness of Vaccination

1.4 Legislation and Regulation

The Government of Canada announced it requires employees in the federally regulated air, rail, and marine transportation sectors to be Vaccinated with a COVID-19 Vaccine series by the end of October 2021.

This Policy is aligned with the Company's duty under the *Canada Labour Code* and the *Canada Occupational Health and Safety Regulations* to take every reasonable precaution to protect its workers and the responsibility to assess the workplace for risks, including that of COVID-19 transmission.

This Policy is applied in accordance with the *Canadian Human Rights Act*, Part II of the *Canada Labour Code*, and the *Personal Information Protection and Electronic Documents Act*.

2.0 MANDATORY VACCINATION

2.1 Requirements

- Effective October 31, 2021, Personnel are required to be Vaccinated with a COVID-19 Vaccine series, subject to accommodations as outlined below.
- To be considered Vaccinated, Personnel must receive a full series of a Health Canada approved COVID-19 Vaccination.
- Personnel must indicate their Vaccination status to the Company in an approved method. Personnel are expected to submit a truthful response and will be governed by the Code of Business Conduct. Any false claims of being Vaccinated will be subject to discipline up to and including termination of employment for cause, as per the Company's Code of Business Conduct.
- Personnel are required to submit proof of Vaccination upon request of the Company. Failure to provide appropriate documentation as outlined in the Procedure would be a violation of this Policy.
 - For Personnel Vaccinated in Canada, acceptable documentation includes copies of their records of Vaccination from the provincial authorities in the province where the Vaccination was administered. Links to provincial health authorities can be accessed through the [Government of Canada website](#).
 - For Personnel Vaccinated outside of Canada, acceptable documentation can include Vaccination receipts or letters from physicians, hospitals, or government agencies that include the date the Vaccine was received, the name of the Vaccine and the number of valid doses that were received.
- Personnel are expected to maintain their Vaccinated status on an ongoing basis as recommended by Health Authorities.
- Personnel who are hired after October 31, 2021 must be Vaccinated before starting work.

2.2 Accommodations

The Company will accommodate Personnel pursuant to the *Canadian Human Rights Act* and in accordance with the Company's Accommodation Policy and Procedure.

2.3 Booster Doses

Health Authorities may recommend Booster Doses of the COVID-19 Vaccine to all individuals. If such recommendations are issued and Booster Doses are recommended for the Vaccine schedule of all adult age groups, Personnel will be expected to receive Booster Doses on the Health Authority-recommended schedule. Upon request, Personnel must prove to the Company that they have maintained their Vaccinated status by submitting confirmation of receiving the recommended Booster Dose within thirty (30) calendar days of the Booster Dose being due, subject to the availability of the Booster Dose.

2.4 Non-Compliance

Absent an approved accommodation, Personnel who do not comply with this Policy and/or who are not Vaccinated are subject to discipline up to and including termination of employment for cause.

Personnel with questions regarding the benefits, risks, and precautions for Vaccines are encouraged to speak with their healthcare professional.

2.5 Confidentiality

The Company will maintain Vaccination disclosure information, including documentation verifying receipt of a Vaccination series approved by Health Canada in accordance with privacy legislation. This information will only be used to the extent necessary for implementation of this Policy, for administering health and safety protocols, and infection and prevention control measures in the workplace.

DEFINITIONS AND ABBREVIATIONS

TERM	DEFINITION
Booster Dose(s)	Another dose of a Vaccine that is given to someone who built enough protection after Vaccination, but then that protection decreased over time
COVID-19	The infectious disease caused by SARS-CoV-2, a highly contagious virus.
Health Canada	The Federal department responsible for helping Canadians maintain and improve their health, under the guidance of the Minister of Health.
Not Vaccinated	An individual who has not received any or all recommended doses of a Vaccine recommended or required to produce an immune response to COVID-19.
Vaccine(s)	A Vaccine approved by Health Canada for use in Canada in relation to COVID-19.
Vaccinated	An individual who has received all Health Canada-recommended doses of a Vaccine recommended or required to produce an immune response to COVID-19 and has completed 14-day period after the last dose.
Vaccination	The administration of a Vaccine(s) to protect individuals from COVID-19. It may include the administration of one or more doses of Vaccine.
World Health Organization	A United Nations agency that directs and coordinates the world’s response to health emergencies.

AFFECTED POLICIES AND ENABLED PROCEDURES

This section outlines policies and procedures that are linked to this Policy for governance purposes. When amendments are made to this Policy, the following documents should be reviewed to ensure alignment exists.

POLICIES	PROCEDURES
Accommodation Policy and Procedure	
Code of Business Conduct	

AMENDMENT STATUS

REVISION	DATE	REVISION SUMMARY
000	16OCT2021	Initial issue of this Policy

ACCOUNTABILITY

This section outlines which people, positions, or teams are responsible and accountable for this Policy, according to the RACI model. The RACI model is a tool that is used to identify the roles and responsibilities of the people involved in a policy, process or standard.

RACI means:

Responsible: The person(s) or position(s) responsible for the administration of this Policy.

Accountable: The person/position accountable for the ownership of this Policy and its compliance.

Consulted: The person(s) or position(s) who has information and/or capability required to implement this Policy.

Informed: The person(s) or position(s) who must be notified of the results of any changes to this Policy, but who are not consulted during the change process.

It also includes which people, positions, and teams must be consulted when revising this Policy, and who must be informed when this Policy changes.

Person Responsible: Chief Medical Officer

Person Accountable: Chief Safety, Health and Environment Officer

People / Team(s) Consulted: Legal, EVP - People & Culture, Safety, Security & Quality, People Delivery, Disability Management, OHS Committee, Policy & Governance

People Informed of this Policy: All Employees

APPROVALS

As the person responsible for this Policy, my signature below indicates this Policy is accurate and meets the requirements of the Company.

Tammy McKnight

October 12, 2021

Dr. Tammy McKnight
Chief Medical Officer

Date

As the person accountable for this Policy, my signature below indicates my review, acceptance, and approval of this Policy for use and dissemination to the Company.

Robert Antoniuk

October 13, 2021

Robert Antoniuk
Chief Group Safety, Health & Environment Officer

Date

POLICY ADOPTION

This Policy has been adopted in its entirety by WestJet Encore Ltd.

My signature below indicates the acceptance and adoption of this Policy for use and dissemination to WestJet Encore Ltd.

Lisa Davis

October 13, 2021

Lisa Davis
VP & General Manager

Date

**FEDERAL COURT
PROPOSED CLASS PROCEEDING**

BETWEEN:

GREGORY HILL, BRENT WARREN and TANYA LEWIS

Plaintiffs

And

**HIS MAJESTY THE KING IN RIGHT OF THE GOVERNMENT OF CANADA and
THE MINISTER OF TRANSPORTATION**

Defendants

WRITTEN REPRESENTATIONS OF THE DEFENDANTS

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OVERVIEW

1. The defendants seek an order striking the Amended Statement of Claim¹ without further opportunity to amend, as it does not disclose a reasonable cause of action and is an abuse of process. Given the obvious and fatal flaws in the plaintiffs' case, hearing this motion to strike early will promote the fair and efficient determination of the proceeding. It is also consistent with the goals of class proceedings, in particular judicial economy, to have this motion determined separately, and in advance of certification.

2. The plaintiffs seek to certify a class proceeding on behalf of all employees within the federally regulated aviation industry, whose employers disciplined them for failing to disclose their vaccination status or, failing to become vaccinated against COVID-19. The plaintiffs say they were disciplined by their employers due to the Minister of Transport's vaccine mandate. None of the plaintiffs are employees of the federal government.

3. The plaintiffs' claims arise from policies introduced by their employers and not from the Minister of Transport's vaccine mandate, which did not prescribe any disciplinary requirements. Any disciplinary action taken against the plaintiffs was taken by their employers pursuant to their employers' policies.

4. Furthermore, the vaccine mandate was a core policy decision, immune from tort liability absent demonstrated bad faith or improper purpose. In *United Steelworkers*, the Québec Superior Court upheld the legal authority and justification for the Minister's vaccine mandate, on the ground that it was intended to reduce the risks associated with COVID-19 for the safety of the federally regulated transportation system, and more particularly, to prevent serious forms of illness that could cause absenteeism problems that could disrupt transportation and the supply chain for basic necessities.²

5. The *Charter* claims are also doomed to fail. The Amended Claim is a challenge to a *law*, rather than to *government conduct* in relation to each plaintiff. The plaintiffs seek a remedy under section 24(1) of the *Charter*; however, they do not plead the necessary material facts to support a

¹Amended Statement of Claim, dated October 11, 2023, Motion Record Tab 2 [**Amended Claim**].

² *United Steelworkers, Local 2008 v Attorney General of Canada*, 2022 QCCS 2455 [*United Steelworkers*] at para 207.

claim for *Charter* damages. The Crown is immune from liability for *Charter* damages based on a law absent conduct that is clearly wrong, in bad faith, or an abuse of process, which the plaintiffs do not plead.³

6. In addition, to the extent that the plaintiffs' claim arises from the interpretation, application, administration, or alleged contravention of their respective collective agreements, their claims are governed by the *Canada Labour Code*,⁴ which requires unionized plaintiffs to follow the prescribed grievance process. This proceeding is in the incorrect forum for addressing terms of the collective agreements governing the unionized plaintiffs' employment.⁵

7. The Amended Claim is fatally flawed and cannot be cured by further amendment because the defects are insurmountable given the nature of the claims being advanced. The defendants previously notified the plaintiffs of their concerns that the pleadings fail to disclose a reasonable cause of action and fail to plead material facts to sustain the allegations of wrongdoing. The plaintiffs have amended their pleading but the Amended Claim only reinforces that these fundamental defects cannot be fixed through amendment.⁶ The plaintiffs' claim should be struck without further opportunity to amend.

³ *Vancouver (City) v Ward*, 2010 SCC 27 at para 39 [*Ward*]; *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 at para 78 [*Mackin*].

⁴ *Canada Labour Code*, RSC, 1985, c L-2 [*Canada Labour Code*].

⁵ The named plaintiffs are, or were, all unionized employees, but the proposed class, as described, would include individuals who are not unionized.

⁶ Exhibit A to the Affidavit of Lisa Redpath, affirmed March 25, 2024 [**Affidavit of Lisa Redpath**], Motion Record Tab 3. All exhibits to the Affidavit of Lisa Redpath are documents referred to in the Amended Claim. Documents referred to in the pleadings are incorporated by reference and will be considered part of the pleading if they are central enough to the claim to form an essential element or integral part of the claim itself or its factual matrix: *Jensen v Samsung Electronics Co. Ltd.*, 2023 FCA 89 at para 52. A party may file an affidavit merely appending the document, nothing more, for the assistance of the Court: *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 54.

PART I – STATEMENT OF FACTS

A. THE NOW-REPEALED INTERIM ORDERS

8. Between October 30, 2021, and June 20, 2022, in response to the significant and evolving direct and indirect risk to aviation safety and the safety of the public caused by the introduction and spread of COVID-19 in Canada, the Minister of Transport (“**Minister**”) issued a series of interim orders (“**IOs**”) implementing and maintaining a vaccination mandate for the air transport sector pursuant to section 6.41(1) of the *Aeronautics Act*.⁷

9. The first such IO introducing requirements related to the vaccination mandate in the air transport sector came into effect on October 30, 2021.⁸ This IO was repealed and replaced every 14 days with subsequent IOs of a similar name that maintained essentially the same provisions, at least with regard to the requirements for COVID-19 vaccination.⁹ The Amended Claim impugns only one IO: Interim Order 43, which was in effect between October 30, 2021 and November 10, 2021 (“**IO 43**”).¹⁰

10. Amongst other things, IO 43 provided that effective October 30, 2021, specified aerodrome operators and air carriers operating from these aerodromes, were required to establish and implement a comprehensive policy respecting mandatory COVID-19 vaccination, whereby non-passengers who accessed aerodrome property had to be vaccinated against COVID-19, subject to exemptions for medical contraindication or sincerely held religious beliefs.¹¹

11. The last IO maintaining the vaccination mandate for non-passengers has expired and since June 20, 2022, there have been no similar IOs in effect. Since June 20, 2022, all forms of federal vaccine mandates for the aviation industry have been repealed.¹²

⁷ *Aeronautics Act*, RSC 1985, c A-2 [*Aeronautics Act*]; Amended Claim at para 2.

⁸ Exhibit B to the Affidavit of Lisa Redpath, Motion Record Tab 3 [**IO 43**]; Amended Claim at para 2.

⁹ *United Steelworkers* at para 62.

¹⁰ Amended Claim at para 2.

¹¹ Amended Claim at para 3; IO 43 at ss 17.50-17.55, Exhibit B to the Affidavit of Lisa Redpath, Motion Record Tab 3.

¹² *United Steelworkers* at para 64.

B. AIR CARRIERS' COVID-19 VACCINATION POLICIES

12. On August 25, 2021, Air Canada announced that it was introducing a *COVID-19 Vaccination Policy* requiring that, subject to certain exceptions, all employees would have to be fully vaccinated by October 31, 2021 (the “**Air Canada Policy**”). The Air Canada *Policy* notes that:

In arriving at our decision to adopt this policy, we have weighed the options and taken many factors into account such as the following:

- Safety First, Always – our core value, means our priority is the safety and wellbeing of our people, customers, and other stakeholders;
- Our leadership in embracing health measures in response to the COVID-19 pandemic;
- Our science-based conclusion that the most effective currently available means to protect our people from COVID-19 and increasingly contagious variants is for them to be fully vaccinated. Simply put, preventing the disease is better than detecting it after the fact;
- The widespread availability of government-approved vaccines in Canada and the increasing availability of vaccines in the other locations where Air Canada employees fulfill their duties; and
- Individuals’ right to raise substantiated religious and medical exemptions as contemplated in our Duty to Accommodate obligations.¹³

13. Under the Air Canada *Policy*, employees who, unless they qualified for an exemption, were not vaccinated or failed to provide proof of vaccination were prohibited from entering any Air Canada workplace and placed on unpaid leave without benefits for 6 months, after which period their continuing employment relationship with Air Canada would be reassessed.¹⁴

14. WestJet introduced a *COVID-19 Vaccination Policy* dated October 13, 2021 (the “**WestJet Policy**”). The WestJet *Policy* provided that it was being implemented in accordance with “legislative requirements as well as local, national, and international public health and industry standards” and the company and its employees shared “responsibility to adhere to all reasonable

¹³ Air Canada *COVID-19 Vaccination Policy* at page 2, Exhibit C to the Affidavit of Lisa Redpath, Motion Record Tab 3.

¹⁴ Air Canada *COVID-19 Vaccination Policy* at page 4, Exhibit C to the Affidavit of Lisa Redpath, Motion Record Tab 3.

precautions to protect against COVID-19”.¹⁵ The *WestJet Policy* further noted that it was aligned with WestJet’s duties under the *Canada Labour Code* and the *Canada Occupational Health and Safety Regulations* to take every reasonable precaution to protect its workers and to assess the workplace for risks, including that of COVID-19 transmission.¹⁶

15. Under the *WestJet Policy*, personnel were required to be vaccinated, subject to accommodations pursuant to the *Canadian Human Rights Act* and in accordance with WestJet’s accommodation policy and procedure. Personnel who failed to comply with the *WestJet Policy* were subject to discipline up to and including termination of employment for cause.

PART II – ISSUES

16. This Court should strike the Amended Claim without further opportunity to amend.

PART III – SUBMISSIONS

A. THE MOTION TO STRIKE SHOULD BE DECIDED FIRST

17. The defendants acknowledge that a certification motion should generally be the first procedural motion heard in a proposed class proceeding.¹⁷ However, the Court has discretion to hear a motion prior to certification and should do so in this case.¹⁸ Launching a proposed class action is a matter of great seriousness that potentially affects many class members’ rights and the liabilities and interests of defendants. Plaintiffs should properly plead their action before coming to the Court to have it certified.¹⁹

18. This Court adopted a list of factors to consider when deciding whether to allow a motion to strike to be brought prior to certification which includes whether the motion will dispose of the whole proceeding or substantially narrow the issues and whether it is in the interests of economy

¹⁵ *WestJet COVID-19 Vaccination Policy* at page 1, Exhibit D to the Affidavit of Lisa Redpath, Motion Record Tab 3.

¹⁶ *WestJet COVID-19 Vaccination Policy* at page 1, Exhibit D to the Affidavit of Lisa Redpath, Motion Record Tab 3.

¹⁷ *Moore v Canada (AG)*, 2022 FC 824 at para 14 [*Moore*].

¹⁸ *Berenguer v WOW Air ehf*, 2019 FC 407 at para 20 [*Berenguer*].

¹⁹ *Kahnapace v Canada (Attorney General)*, 2023 FC 32 at para 117 [*Kahnapace*].

and judicial efficiency.²⁰ These factors mirror key objectives of class proceedings, namely judicial economy and access to justice.²¹

19. In *Berenguer*, this Court found that because the certification test incorporates the requirement that the pleading disclose a reasonable cause of action, a party seeking to strike a claim prior to certification should “establish that it would be in the interests of economy and judicial efficiency to bifurcate the certification issues.”²² The strike motion should precede the certification motion where there is an “obvious, fatal flaw striking at the root of this Court’s power to entertain the proceeding”.²³ In such cases, this Court has heard motions to strike prior to certification motions.²⁴

20. The current claim has “obvious” and “fatal flaws”, and it would be in the interests of economy and judicial efficiency, and efficiency, and would promote the fair and efficient determination of the proceeding, to hear the motion to strike first. The Amended Claim is doomed to fail and is an abuse of process because basic elements of the causes of action advanced cannot be made out. Striking a claim that is doomed to fail promotes judicial economy. Additionally, it is more efficient to strike the claim prior to certification to avoid preparation of lengthy affidavits and argument on the merits of a class proceeding.²⁵ Even if the motion to strike is only partially successful, it will narrow the issues on certification, contributing to the just, most efficient, and least expensive determination of the motion.

21. Likewise, it would not benefit the proposed class members to pursue a claim that is doomed to fail. It is not unfair to the class members to strike the claim at this stage because the flaws with the claim are not particular to the facts advanced by the proposed representative plaintiffs but relate to the nature of the underlying claims being advanced. Striking the claim at this stage would provide clarity for all parties involved.

²⁰ *Moore* at para 17 citing to *Berenguer* at paras 20-21. These factors were also adopted in *Gottfriedson v Canada*, 2013 FC 1213.

²¹ *Hollick v Toronto (City)*, 2001 SCC 68 at para 15; *Condon v Canada*, 2015 FCA 159 at para 10.

²² *Berenguer* at para 23.

²³ *Berenguer* at para 25.

²⁴ See for example, *Gottfriedson v Canada*, 2013 FC 1213 and *Momi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1484.

²⁵ See for example, *United Steelworkers* at paras 38-40 where the Court commented on the voluminous evidence submitted by the parties.

B. THE LAW ON A MOTION TO STRIKE

22. Rule 221(1) lists the grounds on which the Court may strike a statement of claim.

23. Under Rule 221(1)(a), the test is whether it is plain and obvious, assuming the facts pled to be true, that each claim discloses no reasonable cause of action.²⁶ To disclose a reasonable cause of action, a claim must: (1) allege facts that are capable of giving rise to a cause of action; (2) disclose the nature of the action which is to be founded on those facts; and (3) indicate the relief sought, which must be of a type that the action could produce and that the Court has the jurisdiction to grant.²⁷ If a claim has no reasonable prospect of success it should be struck.²⁸ The same test applies whether the action in question seeks a private law remedy such as tort damages or a public law remedy such as a remedy under the *Charter*.²⁹

24. The requirement to plead adequate material facts is embodied in the *Federal Courts Rules* and is mandatory.³⁰ A plaintiff must plead material facts in sufficient detail to support the claim and the relief sought.³¹ The pleading must tell the defendant who, when, where, how and what gave rise to its liability.³² Pleadings that make bald allegations of fact or mere conclusory statements of law fail to perform their role in identifying the issues.³³

25. While material facts set out in a claim must be taken as true for the purpose of Rule 221(1)(a), allegations based on assumptions and speculation need not be taken as true.³⁴ Where

²⁶ *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 14 [*Atlantic Lottery*].

²⁷ *Kakuev v Canada*, 2022 FC 1721 at para 12; *Bérubé v Canada*, 2009 FC 43 at para 24, aff'd 2010 FCA 276; *Zbarsky v Canada*, 2022 FC 195 at para 13 [*Zbarsky*].

²⁸ *Atlantic Lottery* at para 14; *Albert et al v Canada Post Corp et al*, 2024 FC 420 at para 11 [*Albert*].

²⁹ *Zbarsky* at para 12; *Khodeir v Canada (Attorney General)*, 2022 FC 44 at paras 8-9 [*Khodeir*].

³⁰ *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 20 [*Mancuso*]; *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*], Rule 174.

³¹ *Mancuso* at para 16.

³² *Mancuso* at para 19.

³³ *Mancuso* at para 17.

³⁴ *Bouchard v Canada*, 2016 FC 983 at para 17.

allegations are contrary to judicially noticed facts, such allegations, are “manifestly incapable of being proven.”³⁵

26. Under Rule 221(1)(c), a claim may be struck if it is scandalous, vexatious, or frivolous. In considering a motion to strike on these grounds, the Court is required to consider the merits of the claim.³⁶ A claim may be vexatious if a plaintiff brings an action to determine an issue which has already been determined by a court of competent jurisdiction,³⁷ where it is obvious that an action cannot succeed, or if no reasonable person can reasonably expect to obtain relief.³⁸ Failure to plead material facts also renders a pleading vexatious.³⁹

27. Where a claim discloses no reasonable cause of action and is otherwise defective under Rule 221(1)(c), it may also represent an abuse of process under Rule 221(1)(f).⁴⁰ Making bald, conclusory allegations of bad faith without any evidentiary foundation is also an abuse of process within the meaning of Rule 221(1)(f).⁴¹

C. TORT CLAIMS MUST FAIL

28. The pleaded tort claims disclose no reasonable cause of action. It is plain and obvious that IO 43 was issued pursuant to valid legal authority and therefore a fundamental element of each cause of action cannot be made out and is doomed to fail. IO 43 is also a core policy decision and therefore immune from tort liability except on the narrow grounds of bad faith or improper purpose. Additionally, the Amended Claim improperly seeks to circumvent the prescribed grievance process and therefore is an abuse of process. Finally, the plaintiffs have baldly pled the elements of each cause of action and have not identified material facts capable of substantiating the pleaded torts.

³⁵ *Khodeir* at para 15.

³⁶ *Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 20 [*Oleynik*]; *Blackshear v Canada*, 2013 FC 590 at para 12.

³⁷ *Fitzpatrick v Codiac Regional RCMP Force, District 12*, 2022 FC 841 at para 14 [*Fitzpatrick*]; *Lawyers’ Professional Indemnity Co v Coote*, 2013 FC 643 at para 25, aff’d 2014 FCA 98 [*Coote*]; *R v Mennes*, 2004 FC 1731 at para 77 [*Mennes*].

³⁸ *Fitzpatrick* at para 14; *Coote* at para 25; *Mennes* at para 77.

³⁹ *Albert* at para 40.

⁴⁰ *Oleynik* at para 22.

⁴¹ *Albert* at para 14.

1) There is No Cause of Action Available in Tort

(a) Legal Authority

29. Each of the tort claims includes an element that the impugned action was taken without legal authority or justification, or without a proper purpose. IO 43 was issued pursuant to a valid legal authority and for a proper purpose and as such each of the alleged tort causes of action are doomed to fail.

30. The IOs were issued pursuant to section 6.41(1) of the *Aeronautics Act*, RSC 1985, c A-2, which provides:

6.41 (1) The Minister may make an interim order that contains any provision that may be contained in a regulation made under this Part
(a) to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public;

31. The Minister had the authority under section 6.41(1) to issue an interim order, which is not disputed.⁴² The Minister's authority to issue the IOs has not been challenged in other claims.⁴³

32. The objective of IO 43 was considered by the Québec Superior Court in the *United Steelworkers* decision and the objective accepted by the Court in that case demonstrates that IO 43 was issued pursuant to the Minister's authority under section 6.42(1). *United Steelworkers* was a constitutional challenge brought by unions, companies, and employees within the federal transportation sector, challenging the Minister's vaccine mandates, which were implemented either directly or through mandatory vaccination policies that businesses subject to federal jurisdiction adopted for their employees. The impugned orders included IO 43, the IO at issue in this case, issued under section 6.41(1) of the *Aeronautics Act*.⁴⁴ The applicants challenged the vaccination mandates under section 7 of the *Charter*.

33. In conducting the principles of fundamental justice analysis, the Court accepted that the objective of the vaccine mandates was broader than just preventing the transmission of COVID-19. The Court accepted that the objective also included the goals of reducing the risks linked to

⁴² Amended Claim at paras 2 & 24, Motion Record Tab 2.

⁴³ *United Steelworkers* at para 47.

⁴⁴ *United Steelworkers* at para 44 and Annex.

COVID-19 for the safety of the federally regulated transportation system, and more particularly, to prevent serious forms of illness that could cause absenteeism problems that could disrupt transportation and the supply chain for basic necessities.⁴⁵ The *Charter* analysis in *United Steelworkers* demonstrates that the objective of the IOs align with the authority granted to the Minister to issue interim orders under section 6.41(1) of the *Aeronautics Act* to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public.

(b) Core Policy Immunity

34. As delegated legislation, the IOs are core policy decisions and immune from liability in tort, including negligence. They can only be challenged on the grounds of irrationality or bad faith. Where it is plain and obvious that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort.⁴⁶

35. Core policy decisions of the legislative and executive branches are shielded from tort liability as long as they are not irrational or made in bad faith.⁴⁷ Core policy government decisions are those based on public policy considerations, such as economic, social, and political factors.⁴⁸ The Supreme Court of Canada has cautioned that if courts were to weigh in on core policy decisions, they would be second-guessing the decisions of democratically elected government officials and simply substituting their own opinions.⁴⁹

36. Core policy decisions are immune from tort liability, including negligence, because each branch of government has a core institutional role and competency that must be protected from interference by the other branches.⁵⁰ While legislation may make the Crown subject to liability as though it were a person, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions.⁵¹

⁴⁵ *United Steelworkers* at paras 184, 193, 194 & 207.

⁴⁶ *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 91 [*Imperial Tobacco*].

⁴⁷ *Hinse v Attorney General (Canada)*, 2015 SCC 35 at para 36 [*Hinse*]; *Imperial Tobacco* at para 74; *Nelson (City) v Marchi*, 2021 SCC 41 at para 67 [*Nelson*].

⁴⁸ *Imperial Tobacco* at para 90, *Canada (Attorney General) v Nasogaluak*, 2023 FCA 61 at para 32 [*Nasogaluak*] citing to *Nelson* at para 44 (internal citations omitted).

⁴⁹ *Nasogaluak* at para 32 citing to *Nelson* at para 44 (internal citations omitted).

⁵⁰ *Nelson* at paras 3 & 67.

⁵¹ *Nelson* at para 14 citing to *Just v British Columbia*, [1989] 2 SCR 1228 at p 1239.

37. Public policy decisions involve choices that only governments make, such as decisions taken at the highest level of government to adopt a course of action based on health policy or other social and economic considerations.⁵²

38. There are four factors that help in assessing the nature of a government's decision: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria.⁵³ However, none of these factors are determinative alone and courts must assess all the circumstances.⁵⁴ The underlying rationale — protecting the legislative and executive branch's core institutional roles and competencies necessary for the separation of powers — serves as an overarching guiding principle for how to weigh the factors in the analysis.⁵⁵

39. In this case, and based on an analysis of these factors, IO 43 is a core policy decision.

40. Under the first factor, interim orders made under section 6.41(1) of the *Aeronautics Act* are a form of delegated legislation.⁵⁶ In issuing IO 43, the Minister was not acting as a public servant working in an administrative or operational capacity but was issuing delegated legislation based on a policy decision with broad application to address a public health and safety crisis.⁵⁷ Subjecting this policy decision to tort or negligence liability would have a chilling effect on good governance.⁵⁸

41. Under the second factor, IO 43 was issued as part of a whole of government response to the global pandemic. IO 43 implemented the Federal Government's policy, communicated by Prime Minister Justin Trudeau and Deputy Prime Minister Chrystia Freeland, that employers in the federally regulated air, rail and marine transportation sectors would be required to establish vaccination policies for their organizations.⁵⁹ As part of the process, the Minister sought the advice of the Public Health Agency of Canada, other government departments, and international

⁵² *Nelson* at para 39.

⁵³ *Nelson* para 68.

⁵⁴ *Nelson* at para 66.

⁵⁵ *Nelson* para 68.

⁵⁶ *United Steelworkers* at paras 74 & 77.

⁵⁷ *Hinse* at para 35.

⁵⁸ *Nelson* at para 62.

⁵⁹ Amended Claim at paras 19-23.

organizations such as the World Health Organization and the International Civil Aviation Organization.⁶⁰

42. The third factor addresses the difference between government decisions concerning budgetary allotments for departments or government agencies (which are policy decisions) and day-to-day budgetary decisions made by individual employees that do not raise separation of powers concerns.⁶¹ In this case, the implementation of a whole of government vaccination policy is not a routine decision that falls within the purview of individual employees; rather, it is a ministerial exercise of power as part of a whole of government response to a global pandemic, which engages separation of powers concerns.

43. Under the fourth factor, the Minister consulted on this policy, and acted with the assistance of the Public Health Agency of Canada to support the implementation and maintenance of various health measures related to COVID-19, which included COVID-19 testing and assessing vaccine and mask effectiveness, in order to tailor the measures to the particular needs of the aviation sector.⁶² The more a government decision weighs competing interests and makes value judgments, the more likely separation of powers will be engaged because the Court would be substituting its own value judgment.⁶³ Here, the Minister was required to balance and weigh numerous interests and make value judgments. This is reflected in the language of IO 43 and its provision of exemptions from the vaccination mandate.

44. Other decisions regarding vaccines have been found to be core policy decisions. For example, in *Abudu*, the Ontario Superior Court determined that the Crowns' decisions with respect to their response to the 2009 H1N1 pandemic health risk "were identifiable policy decisions and cannot therefore ground an action in tort".⁶⁴ In that case, the Federal Minister of Health had issued an interim order respecting the sale and distribution of the H1N1 vaccine. The Court stated:

The H1N1 public vaccination program was a national strategy developed to address the threat of a pandemic. Urgent action was taken in the face of a decided threat to public health. An interim order was made. The interim order highlights the high level policy decisions that were made by the Federal Government in addressing the

⁶⁰ *United Steelworkers* at para 232.

⁶¹ *Nelson* at para 64.

⁶² *United Steelworkers* at paras 232 & 234.

⁶³ *Nelson* at para 65.

⁶⁴ *Abudu v Ledesma-Cadhit et al*, 2014 ONSC 5726 at para 5 [*Abudu*].

pandemic. In my view, these are core policy decisions as defined by the Supreme Court in *Imperial Tobacco* and are not actionable in tort: *Imperial Tobacco* at para. 95.⁶⁵

45. In *Benrouayene*, the Québec Superior Court found that it was premature and not clear that the Minister of Transport's interim order suspending direct flights from Morocco to Canada in August 2021 due to the COVID-19 pandemic was subject to qualified immunity.⁶⁶ However, that case is distinguishable. The claim in *Benrouayene* challenged the way in which that interim order was enacted and implemented, and the Court found this was a challenge to the operation or procedure of implementing the policy, rather than to the actual policy decision itself.⁶⁷ In this case, the challenge is not one of procedural fairness in terms of how the policy was implemented, but is rather a challenge directly to the policy itself.

46. As IO 43 is a true policy decision, all allegations in the Amended Claim which seek to impose liability in tort, including in negligence, should be struck.⁶⁸ The only challenge that could be advanced against the IOs is an allegation that they were made irrationally or in bad faith, which has not been and cannot be properly pled in this case.

(c) *Unionized Plaintiffs Required to Follow the Prescribed Grievance Process*

47. The plaintiffs seek damages, claiming they were subject to adverse action by their federally regulated employers, including disciplinary measures such as suspension and termination, induced by IO 43. This claim arises out of plaintiffs' and the proposed class members' employment with federally regulated businesses in the aviation industry, and not the federal government. For the plaintiffs, who are or were members of certified trade unions and are therefore bound by a collective agreement, the Amended Claim improperly seeks to circumvent the prescribed grievance process.⁶⁹ This is an abuse of process and merits striking the claim in accordance with Rule 221(1)(f).

⁶⁵ *Abudu* at para 161.

⁶⁶ *Benrouayene v Attorney General of Canada*, 2023 QCCS 144 at para 35 [*Benrouayene*].

⁶⁷ *Benrouayene* at para 35.

⁶⁸ In particular, the following paragraphs in the Amended Claim allege tort liability and should be struck: paras 1(h), 1(i), 1(j), 4, 5, 15, 18, 67-76, 84 & 85.

⁶⁹ *Weber v Ontario Hydro*, [1995] 2 SCR 929 at paras 67 & 76. See also, *Albert* at paras 59-61. Some of the members of the proposed class may not be unionized employees; however, each of the named plaintiffs is, or was, a union member.

48. The Amended Claim alleges that, in response to the IOs, a term was introduced into the collective agreements of unionized plaintiffs by their employers, requiring COVID-19 vaccination. Those who did not comply were subject to disciplinary measures.⁷⁰

49. Notably, IO 43 did not specify what measures employers should take with employees who refused to be vaccinated and did not qualify for an exemption.⁷¹ Decisions to take disciplinary measures against employees, including suspension and termination, were decisions by the respective employers and not actions taken by Canada.

50. The factual basis of this aspect of the Amended Claim is grounded in rights and obligations under the relevant collective agreements, making this an employment dispute.⁷² The federal government is not the plaintiffs' employer nor are the defendants party to the collective agreements governing the unionized plaintiffs' employment.

51. As employees in certified trade unions working in federally regulated businesses in the aviation industry, the plaintiffs' collective agreements and Part I of the *Canada Labour Code*⁷³ provide a complete code governing the resolution of disputes arising out of those collective agreements. This is the regime to be followed in the case of differences between employees and employers with respect to the interpretation, application, administration, or alleged contravention of a collective agreement. Final settlement of these disputes are to be settled by an arbitrator.⁷⁴

52. Air Canada and WestJet both introduced COVID-19 vaccination policies. It does not appear from the jurisprudence that the plaintiffs' unions have filed a policy grievance with respect to each employers' mandatory vaccination policy.⁷⁵ It was open to the various federally regulated businesses to determine what kind of consequences to implement in their COVID-19 vaccination

⁷⁰ Amended Claim at paras 24-26.

⁷¹ IO 43, Exhibit B to the Affidavit of Lisa Redpath, Motion Record Tab 3.

⁷² This is consistent with the approach taken in *United Steelworkers* where the Court noted that most of the parties agreed on the exclusive jurisdiction of the grievance adjudicators (see *United Steelworkers* at para 57).

⁷³ *Canada Labour Code*, ss 57-66.

⁷⁴ *Canada Labour Code*, ss 57(1) and 58(1).

⁷⁵ *Perrin v Canadian Union of Public Employees*, 2023 FCA 104 at para 2; *Watson v Canadian Union of Public Employees*, 2023 FCA 48 at para 6. The jurisprudence shows that some individual grievances on this subject matter have been considered, reinforcing the availability of the grievance regime (see *Watson v CUPE*, 2022 CIRB 1002 at para 28).

policies. Any issue employees have with the policies their employers chose to implement, and their unions chose not to grieve, can be subject to a complaint against the union pursuant to section 97 of the *Canada Labour Code*.⁷⁶

53. Incorporating claims involving unionized plaintiffs into the Amended Claim impermissibly attempts to circumvent the grievance regime and should be struck pursuant to Rule 221(1)(f) as an abuse of process.

2) The Material Facts Do Not Support a Cause of Action in Tort

54. Even if a cause of action were available in tort, the plaintiffs' claims cannot succeed. The plaintiffs have not pled material facts to ground a claim in tort. What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered.⁷⁷ Pleadings that make bald allegations of fact or mere conclusory statements of law fail to perform their role in identifying the issues.⁷⁸ In this case, the plaintiffs merely recite the elements of each cause of action without substantiating their claims with material facts.

(a) Induced Breach of Contract

55. The plaintiffs' claim for inducing breach of contract discloses no reasonable cause of action and is bound to fail because Canada has not engaged in conduct which resulted in any breach of contract and implementing the IOs was justified.

56. To establish the tort of inducing breach of contract, the plaintiffs must prove: knowledge of the contract; an intention to bring about a breach of the contract, conduct which results in the breach; damages to the plaintiff; and, the lack of anything that might justify what the defendant did.⁷⁹

57. The plaintiffs have not pled material facts to support an underlying breach of contract. The plaintiffs do not have individual employment contracts but are subject to their respective collective agreements. The Amended Claim does not point to any contractual provision that has been breached, or any decision by an arbitration board or the Canada Industrial Relations Board

⁷⁶ *Canada Labour Code*, s 97.

⁷⁷ *Mancuso* at para 19.

⁷⁸ *Araya v Canada (Attorney General)*, 2023 FC 1688 at para 65 citing to *Mancuso* at paras 16-17.

⁷⁹ *Canada Steamship Lines Inc v Elliot*, 2006 FC 609 at para 23 [*Steamship*].

supporting their allegation of breach of contract. Indeed, there is no suggestion that a grievance has been brought in relation to Air Canada and WestJet's COVID-19 vaccination policies.

58. The policies introduced by WestJet and Air Canada that led to the plaintiffs' discipline for failure to provide proof of vaccination, or failure to vaccinate, were introduced for a variety of reasons, not just IO 43. The decisions to introduce the policies were also influenced by WestJet and Air Canada's own policies and independent safety analyses.⁸⁰

59. Even if IO 43 were interpreted to have "ordered" federally regulated transportation providers, such as WestJet and Air Canada, to adopt their COVID-19 vaccination policies, as alleged, there was justification.⁸¹ The plaintiffs bare pleading of "unjustified and thus unlawful" conduct is inadequate to support a reasonable cause of action. There are no material facts to support their claim of inducing breach of contract.

(b) Interference with Contractual Relations

60. Similarly, the claim for damages for interference with contractual relations discloses no reasonable cause of action.⁸²

61. The tort of interference with contractual relations is broader than the tort of inducing breach of contract. The requisite elements of the tort are: an intention to injure the plaintiff; interference with another's method of gaining his or her business by illegal means; and economic loss caused thereby.⁸³

62. The plaintiffs have not pled the material facts for a claim of interference with contractual relations. In particular, they have not pled that Canada had an intention to injure them or that Canada used illegal means to interfere with their business. The pleading simply contains a bare pleading of interference with contractual relations.⁸⁴

⁸⁰ Air Canada *COVID-19 Vaccination Policy*, Exhibit C to the Affidavit of Lisa Redpath, Motion Record Tab 3; WestJet *COVID-19 Vaccination Policy*, Exhibit D to the Affidavit of Lisa Redpath, Motion Record Tab 3.

⁸¹ While in the *Charter* context, the Court's justification analysis in *United Steelworkers* at para 251 demonstrates that the IOs were justified.

⁸² Amended Claim at paras 1(h) & 76.

⁸³ *Steamship* at para 23.

⁸⁴ Amended Claim at para 76.

63. Even if the plaintiffs were to amend their pleadings, their claims for interference with contractual relations are bound to fail because they do not, and cannot, plead that the IOs were illegal. In fact, the Amended Claim acknowledges that IO 43 was made pursuant to section 6.41(1) of the *Aeronautics Act*, which permits the Minister to make an interim order “to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public”.⁸⁵

(c) Negligence

64. The Amended Claim does not plead the necessary material facts to support a claim in negligence. It contains a bare pleading of damages for negligence without pleading the necessary facts and law to support a cause of action in negligence.⁸⁶

65. To plead negligence, the plaintiffs must plead material facts to support the existence of a duty of care owed by the defendants to the plaintiffs, a breach of that duty, and damages that flow from the breach of duty.⁸⁷

66. The Amended Claim does not plead any facts to establish that the defendants owed a duty of care to the plaintiffs, or that they breached such a duty resulting in damages.

67. At paragraph 11 of the Amended Claim, the plaintiffs plead the provisions of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c C-50 and say that Canada is “liable for the acts, omissions, negligence and malfeasance of the employees, agents and management of Transport Canada”, but they fail to plead any facts to support the existence of a duty of care and a breach of that duty.

68. Furthermore, the plaintiffs cannot amend their pleading to plead the material facts establishing a private law duty of care. The discretionary powers created by the *Aeronautics Act* are to be exercised by the Minister in the public interest. A similar situation was considered in the context of Ontario’s response to the West Nile Virus in *Eliopoulos*.⁸⁸ The Ontario Court of Appeal examined Ontario’s statutory duties under the *Health Protection and Promotion Act* and the broad

⁸⁵ Amended Claim at para 2.

⁸⁶ Amended Claim at para 1(h).

⁸⁷ *Kahnapace* at para 126 citing to *Canada (Attorney General) v Jost*, 2020 FCA 212 at para 61.

⁸⁸ *Eliopoulos Estate v Ontario (Minister of Health and Long-Term Care)*, [2006] OJ No 4400 [*Eliopoulos*], leave to appeal dismissed, 2007 CanLII 19108 (SCC).

discretion it conferred to the Minister of Health. The Court found that the discretionary powers created by the statute were to be exercised, if the Minister of Health chose, in the general public interest.⁸⁹ The Court remarked: “I fail to see how it could be possible to convert any of the Minister’s public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals.”⁹⁰ A similar scheme exists under the *Aeronautics Act* and accordingly, this is not just a failure to plead the requisite material facts, but a situation where clearly no private law duty of care exists.

(d) Privacy

69. The plaintiffs have not pled the requisite material facts to sustain a cause of action in privacy at either the common law or pursuant to a statute.

70. The common law tort of intrusion upon seclusion and the provincial statutory torts each apply essentially the same test. The common law test requires: the defendant’s conduct must be intentional, which includes reckless conduct; the defendant must have invaded, without lawful justification, the plaintiff’s private affairs or concerns; and, a reasonable person would regard the invasion as highly offensive causing distress, humiliation, or anguish.⁹¹

71. While the Minister’s decision to issue IO 43 was intentional (making out the first element of the cause of action), there was no invasion of privacy by Canada and any collection of personal information was justified and legally authorized. Accordingly, the plaintiffs have not pled the material facts to establish the elements of a claim in privacy.

(e) Misfeasance in Public Office

72. The Amended Claim adds the tort of misfeasance in public office. This claim is also bound to fail. There is no basis to establish that the Minister implemented IO 43 for an improper purpose or that he was motivated by bad faith.

⁸⁹ *Eliopoulos* at para 17.

⁹⁰ *Eliopoulos* at para 17.

⁹¹ *Jones v Tsige*, 2012 ONCA 32 at para 71. See also, *Privacy Act*, [RSBC 1996, c 373](#), s 1; *Privacy Act*, [CCSM 1987, c P125](#), s 2(1); *Privacy Act*, [RSS 1978, c P-24](#), s 2; *Privacy Act*, [RSNL 1990, c P-22](#), s 3.

73. Misfeasance in public office is an intentional tort that is directed at the conduct of public officers (here the Minister) in the exercise of their duties. The elements of the claim are: deliberate, unlawful conduct in the exercise of public functions; awareness that the conduct is unlawful and likely to injure the plaintiff; harm; a legal causal link between the tortious conduct and the harm suffered; and an injury that is compensable in tort law.⁹²

74. The plaintiff must establish that the public officer acted in a way that was deliberately and knowingly inconsistent with the obligations of their office.⁹³ Additionally, there is a subjective mental element to the tort of misfeasance in public office whereby the defendant must have been subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct.⁹⁴

75. The plaintiffs have failed to plead how the Minister deliberately engaged in conduct that he knew to be inconsistent with the obligations of his office. Although the plaintiffs allege that the Minister ignored the reality of the vaccines and the known and unknown potential for adverse events associated with the vaccine⁹⁵ they provide no material facts to support these bare and conclusory allegations of reckless conduct. Furthermore, these allegations are contrary to the findings in *United Steelworkers* that the vaccine mandate was implemented for a proper purpose.

D. THE CHARTER CLAIMS MUST FAIL

76. There are no separate rules of pleadings for *Charter* cases.⁹⁶ A plaintiff who seeks to raise a *Charter* claim must plead each of the constituent elements of the legal tests for determining whether there has been a *Charter* violation and must plead sufficient material facts to satisfy the criteria applicable to the provision in question.⁹⁷ This is no mere technicality, “rather, it is essential to the proper presentation of *Charter* issues”.⁹⁸ Material facts must be pled to support *Charter* claims no less than any other type of claim on which an action rests.⁹⁹ Bald, conclusory statements

⁹² *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 32 [*Odhavi*].

⁹³ *Odhavi* at paras 25, 28, & 29.

⁹⁴ *Odhavji* at para 38.

⁹⁵ Amended Claim at paras 67(a) & (b).

⁹⁶ *Mancuso* at para 21; *Albert* at para 17.

⁹⁷ *Mancuso* at para 21; *Zbarsky* at para 17.

⁹⁸ *Mancuso* at para 21 citing to *Mackay v Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 SCR 357 at p 361 [*Mackay*].

⁹⁹ *Zbarsky* at para 37 citing to *Mancuso* at paras 22-24.

are insufficient.¹⁰⁰ Allowing *Charter* litigation to proceed when a pleading lacks the requisite material facts risks trivializing the *Charter*.¹⁰¹

77. According to this Court's recent decision in *Albert*, this failing is particularly acute given the host of appellate jurisprudence from across Canada that has dismissed actions and applications alleging *Charter* and other violations stemming from the public health response to the pandemic. In the face of the extensive body of jurisprudence, it was incumbent upon the plaintiffs to plead material facts that would meet the legal test and would distinguish their case from the litany of unsuccessful applications and actions.¹⁰² In particular, the plaintiffs have not distinguished their section 7 case from *United Steelworkers* which engages the same issues.

1) Relief is Not Available Under the *Charter* section 24(1)

78. The pleadings allege numerous *Charter* breaches and seek *Charter* damages. However, regardless of the substantive *Charter* claims pled, there is no *Charter* remedy available to the plaintiffs.

79. Two provisions govern remedies for *Charter* violations: section 24(1) of the *Charter* and section 52(1) of the *Constitution Act, 1982*. Each serves a different remedial purpose. Section 24(1) provides a case-by-case remedy for unconstitutional acts of government agents operating under lawful schemes whose constitutionality is not challenged. It can be invoked only by a party alleging a violation of that party's own constitutional rights. Section 52(1) of the *Constitution Act, 1982*, by contrast, provides a remedy for laws that violate *Charter* rights either in purpose or in effect. It provides that laws that are inconsistent with the *Charter* are of no force and effect to the extent of the inconsistency.¹⁰³

80. Therefore, remedies for *unconstitutional actions* are properly grounded in section 24(1) of the *Charter* and remedies for *unconstitutional laws*, in section 52(1) of the *Constitution Act, 1982*.¹⁰⁴ In very limited circumstances, damages may be awarded for harms suffered as a result of

¹⁰⁰ *Zbarsky* at para 37 citing to *Amos v Canada*, 2017 FCA 213 at para 33.

¹⁰¹ *Zbarsky* at para 37 citing to *Mackay* at pp 361-362.

¹⁰² *Albert* at paras 43-45.

¹⁰³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 52(1) [*Constitution Act, 1982*].

¹⁰⁴ *R v 974649 Ontario Inc*, 2001 SCC 81 at para 14; *R v Ferguson*, 2008 SCC 6 at paras 35 & 61.

a law subsequently declared unconstitutional. In *Mackin*, the Supreme Court of Canada held, “absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional.”¹⁰⁵

81. The Amended Claim is a challenge to the constitutionality of IO 43, which is a law as the IOs are “delegated” legislation.¹⁰⁶ Any *Charter* challenge to the terms of the impugned IOs should properly be framed as a claim seeking a remedy under section 52(1) of the *Constitution Act, 1982*.¹⁰⁷ However, relief under section 52(1) is not pled and, in any event, would be moot because the IOs are no longer in effect.

82. The Amended Claim does not plead material facts related to specific government conduct and *Charter* violations necessary to ground a section 24(1) claim. There is no assertion that the impugned conduct under IO 43 was clearly wrong or an abuse of power. The plaintiffs make a bare allegation of “bad faith through reckless disregard or willful blindness to the disproportional unsubstantiated impact” of IO 43,¹⁰⁸ but fail to set out any supporting material facts.

83. A claim that, in substance, challenges the constitutionality of delegated legislation, here IO 43,¹⁰⁹ and seeks damages, must meet the *Mackin* threshold. It is plain and obvious that the qualified immunity threshold set out in *Mackin* has not been met in this case.

84. On June 20, 2022, the last IO was repealed in response to the evolving epidemiologic situation of the pandemic. The IOs have never been declared invalid by any court. Indeed, in

¹⁰⁵ *Mackin* at para 78; see also *Ward* at para 39 [*Ward*]. In *Canada (Attorney General) v Power*, SCC Case No. 40241 [*Power*], the Supreme Court of Canada is considering whether *Mackin* should be clarified, specifically whether the immunity should be absolute, or strengthened, for primary legislation. However, the proposition the defendants rely on *Mackin* for in this proceeding is not in issue in *Power*.

¹⁰⁶ *United Steelworkers* at paras 74 & 77.

¹⁰⁷ *Constitution Act, 1982*, s 52(1).

¹⁰⁸ Amended Claim at para 77.

¹⁰⁹ *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at paras 25 & 39; *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at paras 87-90.

United Steelworkers, the Québec Superior Court found that the IOs did not violate section 7, and that even if there was a violation, the IOs were justified under section 1 of the *Charter*.¹¹⁰

2) Amended Claim Lacks Material Facts on *Charter* Infringements

85. In addition to failing to meet the requirements for a *Charter* remedy, the Amended Claim fails to satisfy the essential elements of the alleged *Charter* infringements.

(a) Section 2(a)

86. The plaintiffs' claim that the issuance of IO 43 violated their freedom of conscience as protected by section 2(a) of the *Charter* fails to disclose a reasonable cause of action. The plaintiffs allege that by prohibiting them from accessing aerodrome property and carrying out their employment duties in relation to commercial flight operations, IO 43 imposed significant consequences on their choice not to undergo a medical procedure, and in doing so, infringed upon their section 2(a) rights.¹¹¹

87. The purpose of the protection for freedom of conscience granted under section 2(a) of the *Charter* is to prevent interference with profoundly held personal beliefs¹¹² and to ensure that no one is forced to act in a way that is contrary to their beliefs or conscience.¹¹³ Profoundly held personal beliefs are those that govern the perception of oneself, humankind, and nature,¹¹⁴ and are conscientiously held and grounded in secular morality.¹¹⁵

88. To engage section 2(a) freedom of conscience rights, a claimant must demonstrate: (1) a sincerely held belief or practice that has a nexus with conscience; and (2) interference, in a manner

¹¹⁰ *United Steelworkers* at paras 213 & 251-2.

¹¹¹ Amended Claim at para 78.

¹¹² *R v Edwards Books and Art Ltd.* [1986] 2 SCR 713 at p 759 [*Edwards*].

¹¹³ *Maurice v Canada (Attorney General)*, 2002 FCT 69 at para 10 [*Maurice*] citing *R v Big M Drug Mart Ltd.* [1985] 1 SCR 295.

¹¹⁴ *Roach v Canada (Minister of state for Multiculturalism and Citizenship)* (1994), 113 DLR 4th 67 (FCA) [*Roach*] at p 427 citing *Edwards* at p 759.

¹¹⁵ *R v Morgentaler*, [1988] 1 SCR 30 at p 179.

that is not trivial or insubstantial, with the claimant's ability to act in accordance with that belief or practice.¹¹⁶

89. Here, the plaintiffs' claim fails to establish the first requirement of the section 2(a) test. The plaintiffs do not allege that their objections to vaccination against COVID-19 offend their strongly held moral ideas of right and wrong or relate to any notion of secular morality. Instead, the plaintiffs claim that there was insufficient data to establish that the authorized vaccines would prevent the transmission of COVID-19,¹¹⁷ and that inadequate attention was given to adverse events or reactions occurring after administration of the vaccines.¹¹⁸ In effect, the plaintiffs are claiming that their particular views on the efficacy and safety of the relevant vaccines should be protected as matters of conscience. The plaintiffs' differing views on the adequacy of the vaccines are not matters of conscience and lack the requisite profound moral dimension or connection to a larger system of beliefs to engage section 2(a) protections.¹¹⁹

90. Absent a moral basis for their opposition to IO 43, the plaintiffs' objections are more analogous to lifestyle choices than matters of conscience.¹²⁰ In *R v. Schmidt*, the Ontario Court of Appeal held that constitutional protection cannot be afforded to all activities that individuals may choose to define as central to their lifestyles and that extending constitutional protection to any and all such lifestyle choices would make society ungovernable.¹²¹

(b) Section 2(d)

91. The plaintiffs' claim that IO 43 violated section 2(d) of the *Charter* fails to disclose a reasonable cause of action. The Amended Claim alleges that in enacting IO 43, the Minister unilaterally added a fundamental term and condition of employment to the plaintiffs' collective agreements, absent collective bargaining, and that this violated the plaintiffs' section 2(d) rights.¹²²

¹¹⁶ *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 86 citing the test developed in *Syndicat Northcrest v Amselem*, 2004 SCC 47 at paras 56-9; see also *Roach* at p 427 and *Affleck v The Attorney General of Ontario*, 2021 ONSC 1108 at para 40 [*Affleck*].

¹¹⁷ Amended Claim at paras 48-55.

¹¹⁸ Amended Claim at paras 56-66.

¹¹⁹ *Affleck* at paras 40-46.

¹²⁰ *Affleck* at paras 41-50.

¹²¹ *R v Schmidt*, 2014 ONCA 188 at para 40.

¹²² *Amended Claim* at para 79.

Even accepting this allegation as true for the purpose of this application, this is not a violation of section 2(d).

92. Section 2(d) of the *Charter* protects freedom of association and the collective action of individuals in pursuit of their common goals. Section 2(d) functions to protect: the right to join with others and form associations; the right to join with others in the pursuit of other constitutional rights; and the right to join with others to meet on more equal terms the power and strength of other groups or entities.¹²³ In the collective bargaining context, section 2(d) only protects against substantial interference with the *process* of collective bargaining and does not protect substantive outcomes.¹²⁴

93. “Substantial interference” requires conduct that is intended to, or has the effect of, seriously undermining the activity of workers engaging in the collective bargaining process. The interference must be so substantial that “it interferes not only with the attainment of the union members’ objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiation with the employer”.¹²⁵ Acts of bad faith or unilateral nullification of negotiated terms without meaningful discussion or consultation may significantly undermine the process of collective bargaining.¹²⁶

94. The question in each case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been significantly and adversely impacted.¹²⁷

95. Determining whether a government measure affecting the protected process of collective bargaining amounts to a substantial interference involves two inquiries: (1) the first inquiry is into the importance of the matter to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert; and (2) the second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.¹²⁸

¹²³ *Mounted Police Association of Ontario v. Canada*, 2015 SCC 1 at para 66 [*Mounted Police*].

¹²⁴ *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 90 & 91 [*Health Services*]; *Mounted Police* at paras 71-72.

¹²⁵ *Health Services* at para 91.

¹²⁶ *Health Services* at para 92.

¹²⁷ *Health Services* at para 92.

¹²⁸ *Health Services* at para 93.

96. The Amended Claim does not allege that IO 43 resulted in a substantial interference with collective bargaining. Likewise, the plaintiffs do not plead that IO 43 touched on a matter that was important to the process of collective bargaining or otherwise disrupted the balance of power between employees and employer necessary to ensure the meaningful pursuit of workplace goals, so as to “substantially interfere” with meaningful collective bargaining.

97. Even if the pleadings were amended, the plaintiffs would have no basis in fact on which to advance these allegations. IO 43 did not override an explicitly bargained term of a collective agreement and did not impact the capacity of the union members to come together and pursue collective goals. IO 43 was in force for 2 weeks, and the subsequent IOs maintaining the impugned measures were collectively in place for less than a year.

98. In addition, the Amended Claim fails to allege how IO 43 impacted the collective right to good faith negotiation and consultation. The facts pled do not assert that IO 43 was issued in bad faith or without prior consultation, and this cannot be proven in fact. Both the Court in *United Steelworkers* and the preamble to IO 43 recognize that the Minister held consultations before implementing the IOs.¹²⁹

(c) Section 7

99. The Amended Claim fails to plead a reasonable cause of action for a section 7 infringement because it does not plead the deprivation of a protected interest. Furthermore, in *United Steelworkers*, the Québec Superior Court found that the IOs were compliant with the principles of fundamental justice.¹³⁰ The same finding is inevitable in this case and the plaintiffs have not distinguished their case from *United Steelworkers*.

100. To make out a section 7 *Charter* claim, the plaintiffs must identify a government law or action which resulted in a risk to their life, liberty, or security of the person, and that contravenes a specific principle of fundamental justice.¹³¹

¹²⁹ *United Steelworkers* at paras 232 & 234; IO 43, preamble, Exhibit B to the Affidavit of Lisa Redpath, Motion Record Tab 3.

¹³⁰ *United Steelworkers* at paras 180-213.

¹³¹ *Ewert v Canada*, 2018 SCC 30 at para 68.

101. The plaintiffs must identify the principle of fundamental justice on which they intend to rely, “that requirement being ‘the real control over the scope and operation of section 7’”.¹³²

102. In this case, the plaintiffs have not alleged the deprivation of any protected interest. They have also failed to explain how the principles of fundamental justice have been contravened. Instead, they baldly plead that IO 43 “was overly board [*sic*], arbitrary and grossly disproportionate”,¹³³ without pleading how IO 43 was inconsistent with the principles of fundamental justice.

103. The direct connection between IO 43 and the prevention of more serious forms of illness that could have impacted the safety of the federally regulated transportation system is obvious. The Amended Claim fails to identify any conduct captured by the IOs that is unrelated to its purpose, or that causes effects that are not related to the objective. Requiring employers to ensure that all employees who are able to be vaccinated are vaccinated is directly related to the objective of the IOs.

104. In terms of whether IO 43 was grossly disproportionate, the Amended Claim fails to identify any effects of the IOs which are disproportionate to the objective of protecting the safety of the federally regulated transportation system.

105. In *United Steelworkers*, the Québec Superior Court found that although the impugned provisions engaged the liberty and security of the person in its psychological dimension, the measures respected the principles of fundamental justice, and were therefore consistent with section 7.¹³⁴

(d) Section 15

106. The Amended Claim also fails to adequately plead a reasonable cause of action for breach of section 15 of the *Charter*.

107. Section 15 of the *Charter* provides that every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination, and in particular,

¹³² *Prentice v Canada (FCA)*, 2005 FCA 395 at para 45, citing to *Chaoulli v Québec (Attorney General)*, 2005 SCC 35.

¹³³ Amended Claim at para 80.

¹³⁴ *United Steelworkers* at paras 155-213.

without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental and physical disability. A reasonable cause of action pursuant to section 15(1) of the *Charter* requires the plaintiffs to plead that the impugned law or state action: (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.¹³⁵

108. The plaintiffs have not pled any distinction on enumerated or analogous grounds based on immutable or constructively immutable characteristics, to support their section 15 claim. They also have not pled any material facts to demonstrate the distinction effected by IO 43 has the effect of reinforcing, perpetuating, or exacerbating a disadvantage faced by a protected group.¹³⁶

109. Instead, the Amended Claim simply alleges that IO 43 “has the effect of perpetuating or promoting the view that the plaintiffs and Class Members are less capable or worthy of recognition or value as human beings or manner of Canadian society, equally deserving of concern, respect and consideration”.¹³⁷ The Amended Claim fails to specify how this relates to a protected ground under section 15, why or how this view is perpetuated by IO 43, or why or how this view is discriminatory within the meaning of section 15.

3) Any *Charter* infringement would be justified

110. Even if the Court were to find a *Charter* violation, any infringement would be justified pursuant to section 1 of the *Charter*. In *United Steelworkers*, though the Québec Superior Court found there was no violation of section 7, it still examined section 1 and determined that the IOs were justified, as being a reasonable limit in the context of a free and democratic society.¹³⁸ The findings in *United Steelworkers* are highly persuasive.

111. In *United Steelworkers*, given the context of the COVID-19 pandemic and the government’s reason for issuing the IO, the Court found “the objective of ensuring transportation safety was urgent and real.”¹³⁹ The Court held that there is “a rational connection between the

¹³⁵ *R v Sharma*, 2022 SCC 39 at para 28.

¹³⁶ Amended Claim at para 81.

¹³⁷ Amended Claim at para 81.

¹³⁸ *United Steelworkers* at paras 251-2.

¹³⁹ *United Steelworkers* at para 227.

objective and the challenged measure.”¹⁴⁰ The Court further found that “vaccination as such is a public health measure which serves the public interest”¹⁴¹ and that “vaccination has enabled the Canadian transportation system to be more resilient”.¹⁴²

112. The plaintiffs make a bare pleading that the alleged infringements of sections 2(a), 2(d), 7 and 15 cannot be justified pursuant to the criteria of section 1 of the *Charter* because these infringements “were not minimally impairing and there was no proportionality between the deleterious and salutary effects” of IO 43.¹⁴³ However, the pleading speaks only to whether the vaccines prevent viral transmission,¹⁴⁴ and not to the broader objective of reducing the risks linked to COVID-19 for the safety of the federally regulated transportation system, and more particularly, to prevent serious forms of illness that could cause absenteeism problems that could disrupt transportation and the supply chain for basic necessities.¹⁴⁵

113. This is the broader objective identified in *United Steelworkers*, which should inform the justification analysis in this case. Given the failure to plead material facts to support their justification claim, and the findings in *United Steelworkers*, the Amended Claim does not disclose any reasonable *Charter* claims, is doomed to fail, and seeks to re-litigate issues already decided by the Québec Superior Court.

E. FURTHER AMENDMENTS SHOULD NOT BE PERMITTED

114. A motion to strike may be granted with or without leave to amend. While amendments may be permitted to accommodate inadequacies attributable to drafting,¹⁴⁶ when the defect cannot be cured by amendment, leave to amend should not be granted.¹⁴⁷

115. The plaintiffs should not be permitted to amend their claim because the defects in pleadings cannot be cured by amendment. The defendants have identified the defects in the pleadings to the

¹⁴⁰ *United Steelworkers* at para 230; see also *Ben Naoum v AGC*, 2022 FC 1463 at para 45 and *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232 at paras 69-77.

¹⁴¹ *United Steelworkers* at para 247; see also *Neri v Canada*, 2021 FC 1443 at paras 73-74.

¹⁴² *United Steelworkers* at para 250.

¹⁴³ Amended Claim at para 82.

¹⁴⁴ Amended Claim at paras 46-55.

¹⁴⁵ *United Steelworkers* at paras 184, 193, 194 & 207.

¹⁴⁶ *Nasogaluak* at para 19.

¹⁴⁷ *Simon v Canada*, 2011 FCA 6 at para 8.

plaintiffs,¹⁴⁸ who, despite having had opportunity to remedy the factual deficiencies and having filed an Amended Claim, have failed to cure the inadequacies. These are not merely drafting deficiencies, but rather demonstrate that the causes of action advanced are not available.

116. In these circumstances, it can only be assumed that if the plaintiffs could plead with more particularity, they would have done so.


117. In *Al Omani*, the Court held “adequate pleadings are required up front; adequate material facts are mandatorily required.”¹⁴⁹ Courts have refused permission to amend where plaintiffs have had months to amend deficient pleadings, noting that it can only be “assum[ed] that if the Plaintiff had more particulars than were provided, the Claim would have been amended. For that reason, I see no useful purpose in granting leave to amend at this point in time.”¹⁵⁰

PART IV – ORDERS SOUGHT

1. An Order striking the claim, in its entirety, without further opportunity to amend;
2. In the alternative, if leave for further amendments is granted, an Order that the Further Amended Statement of Claim be served within 45 days of the Order; and,
3. Costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: April 2, 2024



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¹⁴⁸ Exhibit A to the Affidavit of Lisa Redpath, Motion Record Tab 3.

¹⁴⁹ *Al Omani v Canada*, 2017 FC 786 at para 24.

¹⁵⁰ *McCreight v AGC*, 2012 ONSC 1983 at para 107.