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Court File No. T-2536-23

FEDERAL COURT

SHAUN RICKARD and KARL HARRISON

Plaintiffs

and

**HIS MAJESTY THE KING, THE MINISTER OF TRANSPORTATION, and the
ATTORNEY GENERAL OF CANADA**

Defendants

PLAINTIFFS' RESPONDING MOTION RECORD

October 4, 2024

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FEDERAL COURT

BETWEEN:

SHAUN RICKARD and KARL HARRISON

Plaintiffs

and

**HIS MAJESTY THE KING, THE MINISTER OF TRANSPORTATION, and the
ATTORNEY GENERAL OF CANADA**

Defendants

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1.	Plaintiffs' Responding Written Representations dated October 4, 2024

TAB 1

FEDERAL COURT

BETWEEN:

SHAUN RICKARD and KARL HARRISON

Plaintiffs

and

**HIS MAJESTY THE KING, THE MINISTER OF TRANSPORTATION, and the
ATTORNEY GENERAL OF CANADA**

Defendants

WRITTEN REPRESENTATIONS OF THE PLAINTIFFS/RESPONDING PARTIES

October 4, 2024

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PART I - OVERVIEW

1. The Plaintiffs commenced this proceeding seeking *Charter* damages against the Federal Government in response to Covid-19 travel measures which breached their Section 6, 7, 12 and 15 *Charter* rights and freedoms.
2. These travel measures, which prohibited unvaccinated Canadians from accessing federally regulated transportation systems, was truly unprecedented. Never before in Canadian history has the federal government denied transportation services to Canadians on the basis of their vaccination status or any other medical treatment for that matter. Put differently, the Government has never required a medical procedure as a pre-condition for transportation. To this end, the use and exercise of Ministerial Order pursuant to the *Aeronautics Act*, RSC, 1985, c. A-2, and *Railway Safety Act*, RSC, 1985, c. 32 (4th Supp.), to advance the government's public health agenda, was truly precedent-setting. Broadly, the Ministerial Orders were called *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19* and *Order under Section 32.01 of the Railway Safety Act due to Covid-19* (hereinafter the "**Vaccine Travel Mandate**").
3. This proceeding is not the first time the Plaintiffs have argued that the impugned Ministerial Orders violated their *Charter* rights.
4. As the Attorney General is aware, in 2021, the Plaintiffs commenced an Application before this Court to strike the impugned Ministerial Orders on the basis that they were unconstitutional.

5. Notably, at that time, the Attorney General never took the position that the *Charter* claims advanced in that Application lacked any reasonable prospect of success. To the contrary, the Attorney General vigorously defended such claims, producing extensive affidavit evidence and the parties participated in cross-examinations spanning almost two months.
6. The Attorney General's sudden change in position in response to this action, is disingenuous and an attempt to delay a meritorious claim that has been founded on a comprehensive and vigorously tested evidentiary record.
7. Generally, the Defendants' arguments are misleading, taken out of context, dismissive and strategically shift focus to confuse the underlying allegations and conduct complained of by these Plaintiffs.
8. The relief sought on this motion is extreme and any deficiencies which this Honourable Court may find, can readily be cured with the proposed, minor amendments to the pleadings.
9. To deny these Plaintiffs their day in court would be unjust in the circumstances of this matter and the constitutionally important issues raised by the Government's Covid-19 travel ban.

PART II - KEY FACTS

10. The Plaintiffs were unable to access and use federally regulated transportation because of the impugned Ministerial Orders. As such, from November 30, 2021, to June 20, 2022, the Plaintiffs were, effectively, unable to leave Canada.
11. On a motion to strike, the allegations contained in the pleadings are accepted as proved.¹ The allegations are not frivolous and vexatious – they arise from and reflect over a year of evidence that emerged from a prior application brought by Mr. Rickard and Mr. Harrison, which was dismissed² as moot when the Government suddenly revoked the Vaccine Travel Mandates before the constitutional challenge could be heard.
12. In this proceeding, the Plaintiffs allege that the Federal Government maintained the Vaccine Travel Mandates despite incomplete and, in fact, disconfirming evidence as to the necessity and efficacy of the Covid-19 vaccination mandates.
13. A brief overview of the claims advanced in the Amended Statement of Claim are helpful to consider whether the Plaintiffs' have a reasonable cause of action for *Charter* damages against the Federal Government. Below is a highlight of some of the most central allegations:
 - a. The Plaintiffs were unable to travel back to the U.K. during the time in which the Vaccine Travel Mandates were in force;
 - b. The Vaccine Travel Mandates forced the Plaintiffs in deciding between respecting their dignity, independence and personal autonomy, or their ability to travel;
 - c. The Vaccine Travel Mandate was never recommended by Public Health Agency of Canada;

¹ *Canada (A.G.) v. Inuit Tapirisat of Can.*, [1980] 2 S.C.R. 735.

² *Ben Naoum v. Canada (Attorney General)*, 2022 FC 1463 (CanLII).

- d. The Federal Government consistently neglected to consider suitable alternatives to the Vaccine Travel Mandate;
- e. The Federal Government failed to conduct any analysis as to the risk and risk profile of Covid-19 in the context of transportation;
- f. The Federal Government failed to investigate and evaluate the Covid-19 vaccine's effectiveness in preventing the transmission of Covid-19;
- g. The Federal Government failed to establish any framework or criteria for decision-making with respect to extending the Vaccine Travel Mandates;
- h. The Federal Government ignored and trivialized evidence as to the ineffectiveness of the Covid-19 vaccine for reducing or stopping the transmission of the Covid-19 virus;
- i. The Federal Government withheld information that the risk of vaccination was still unknown, despite publicly declaring the vaccines to be safe.

PART III - ISSUES

14. The issues to be determined on this motion are:

- a. whether it is plain and obvious that Plaintiffs' claims do not disclose a reasonable cause of action; and,
- b. whether the proposed amendments to the Amended Statement of Claim, or any other amendments as may be necessary, should be permitted, as of right or by Court Order.

PART IV - LAW & ARGUMENT

Motion to Strike is Draconian Relief and the Defendants Must Satisfy a High Onus

15. The Defendants must satisfy a high threshold to strike the Plaintiffs' claim.³
16. The Federal Court has consistently held that it must be “plain and obvious that the pleadings disclose no reasonable cause of action, or that the claim has no reasonable prospect of success”.⁴
17. The Supreme Court of Canada in *Hunt v. Carey Canada Ltd.* held that the moving party has a heavy onus and the discretion to strike out pleadings should be exercised only in plain and obvious cases where the court is satisfied, beyond doubt, that the allegation cannot be supported and is certain to fail at trial because it contains a radical defect.
18. In *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.*, the Federal Court described a motion to strike as a “draconian measure” which should only be taken in the “clearest of cases”.⁵ According to the Federal Court at paragraph 33 of that decision:

Striking a pleading is a draconian measure. A statement of claim should not be struck on the ground that it is vexatious, frivolous or an abuse of the process of the Court, unless the plaintiff's claim is **“so clearly futile that is not the slight chance of succeeding”**. [Emphasis Added.]

19. It is also well – established that, on a motion to strike, the facts alleged in a Statement of Claim are presumed and taken to be true:

It is also trite law that on a motion to strike pleadings, all facts alleged must be taken as established and presumed to be true. The claim should be read generously and denied only where it is plain and obvious it cannot succeed.⁶

³ *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 17

⁴ *La Rose v Canada*, 2020 FC 1008 at para. 16.

⁵ *Apotex Inc v Syntex Pharmaceuticals International Ltd.*, 2005 FC 1310 [per Blanchard J] at paras 31-33

⁶ *La Freightlift Private Limited v. Entrepot DMS Warehouse Inc. et al.*, 2011 FC 280 (CanLII) at para. 16.

20. In *Oleynik v. Canada (Attorney General)*, the Federal Court identified the following factors to assess whether a pleading discloses a reasonable cause of action:

- (a) The facts alleged are capable of giving rise to a cause of action;
- (b) It must disclose the nature of the action which is to be founded on those facts;
- (c) Indicate the relief sought, which must be a type (of relief) that the action could produce and the Court has jurisdiction to grant.⁷

Novel Claims are not a Basis to Strike a Proceeding

21. Importantly, the fact that a Plaintiff may advance novel claims is not a basis for striking a pleading on an interlocutory motion. To the contrary, the Supreme Court of Canada has held that a pleading must be read in a manner that permits a novel but arguable claim to proceed to trial.⁸

22. In *Paradis Honey Ltd. v. Canada*, the Federal Court of Appeal held that “a novel claim should not be struck just because it is novel”.⁹ In that decision, the Court considered whether public authorities could be liable where negligence was alleged. As Justice Stratas explained:

it was not plain and obvious that the claim for negligence and bad faith would fail. this finding was sufficient to allow the appeal. However, because the allegations in the appellants’ claim, taken as true, could trigger an award of administrative law remedies, or more generally public law remedies, the question of whether a monetary award based on public law principles could be one of those remedies was considered.

⁷ *Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5.

⁸ *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 19.

⁹ *Paradis Honey Ltd. v. Canada* 2015 FCA 89 (CanLII) at para. 116.

Leave to Amend Should be Permitted if Necessary

23. If this Honourable Court agrees with the Defendants position regarding the inadequacies of the Amended Statement of Claim, the Plaintiffs should be permitted to amend their Amended Statement of Claim to cure whatever deficiencies found by this Honourable Court.
24. The Federal Court held in *Al Omani v. Canada*, striking a pleading without leave to amend is a power that must be exercised with caution. If a pleading shows a scintilla of a cause of action, it will not be struck out where it can be cured by amendment.¹⁰
25. This approach has been consistently adopted by the Federal Courts, including the Federal Court of Appeal, on motions to strike.¹¹
26. A Court may only deny leave to amend a pleading where it is plain and obvious that the action cannot succeed – even with the amendment(s).
27. Put differently, the defect must be incapable of being cured by an amendment.
28. As a starting point, the Plaintiffs maintain that pursuant to *Rule 200*, permission to further amend their Amended Statement of Claim is not required because the Defendants have not yet defended the Amended Statement of Claim.
29. In the alternative, the proposed amendments should be accepted by this Court. As this Court previously held, decisions on amendments should be driven by simple fairness, common sense and the interest that justice be done.¹²

¹⁰ *Al Omani v Canada*, 2017 FC 786 at para 14 At para. 35. See also: *Haida Tourism Partnerships D.B.A. West Coast Resorts v. The Administrator of the Ship-Source Oil Pollution Fund* 2023 FC 1746 (CanLII).

¹¹ *Collins v. Canada*, 2011 FCA 140 (CanLII) at paras. 25 and 26, citing *Simon v. Canada*, 2011 FCA 6 at para. 8.

¹² *Enercorp Sand Solutions Inc. v. Specialized Desanders Inc.*, 2018 FCA 215 (CanLII) at para. 28.

30. Amendments should be allowed to determine the real questions in controversy¹³ even where it pleads new causes of action where it is based on substantially the same facts previously alleged.¹⁴

Courts have the Jurisdiction to Grant Relief Sought by the Plaintiffs in this Action

31. The Supreme Court of Canada recently affirmed that the state could face damages for enacting laws that violate the *Charter*.

32. In *Canada (Attorney General) v. Power*,¹⁵ the Supreme Court of Canada rejected the notion of “absolute immunity” which would “protect the government from any claim for damages for any unconstitutional legislation, no matter how egregious”.

33. The Supreme Court of Canada neatly summarized the law on *Charter* damages against the state:

We disagree. The state is not entitled to an absolute immunity from liability for damages when it enacts unconstitutional legislation that infringes *Charter rights*. Rather, as this Court held in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, the state enjoys a limited immunity in the exercise of its law-making power. **Accordingly, damages may be awarded under s. 24(1) for the enactment of legislation that breaches a *Charter* right.** However, the defence of immunity will be available to the state unless it is established that the law was clearly unconstitutional, or that its enactment was in bad faith or an abuse of power. This is a high threshold. But it is not insurmountable.¹⁶ [Emphasis Added.]

34. The *Powers* decision is not the first time the Supreme Court of Canada considered monetary awards in response to a *Charter* breach. Over a decade ago, in *Vancouver (City) v. Ward*¹⁷, the Supreme Court of Canada considered and awarded damages as a remedy in recognition of the respondent’s *Charter* right that was breached.¹⁸

¹³ *Canderel Ltd. v. Canada (C.A.)*, 1993 CanLII 2990 (FCA).

¹⁴ *Davydiuk v. Internet Archive Canada*, 2016 FC 1313 (CanLII) at para. 23

¹⁵ *Canada (Attorney General) v. Power*, 2024 SCC 26 (CanLII).

¹⁶ *Canada (Attorney General) v. Power*, 2024 SCC 26 (CanLII) at para. 4.

¹⁷ *Vancouver (City) v. Ward*, 2010, SCC 27 (CanLII).

¹⁸ *Vancouver (City) v. Ward*, 2010, SCC 27 (CanLII) at para. 5.

The Travel Mandates *Prima Facie* Breached the Plaintiffs' Section 6 *Charter* Rights

35. There is no dispute that the Plaintiffs were unable to leave Canada for the entire time that the Ministerial Orders were in effect.

36. The Defendants attack this *Charter* claim by stating that (a) the Plaintiffs only identified themselves as “individuals” residing in British Columbia and Ontario respectively and (b) it is unclear whether the Plaintiffs are relying on Section 6(2) of the *Charter*.

37. With respect to the first argument, Rule 181(1) of the *Federal Court Rules* permit a motion for “better particulars of any allegation” in a pleading. Respectfully, this would be the more appropriate (and proportionate) recourse, rather than striking an entire pleading for want of action or standing. However, this too would be unnecessary since the Plaintiffs would readily confirm their status with the Defendants – if the Defendants’ counsel had bothered to make this inquiry, which they did not.

38. With respect to the Defendants’ second argument, which is a reflection of their confusion rather than argument, the Amended Statement of Claim is clear that the focus is Section 6(1) and not Section 6(2) of the *Charter*:

...By making vaccination a precondition to of travel, the Plaintiffs were unable to board an airplane to leave Canada and fly to the United Kingdom. As such, the Plaintiffs’ international movement was restricted such that it was not realistically possible for the Plaintiffs to leave Canada for Europe or elsewhere, considering the modern realities of travel.¹⁹

39. Notably absent from the Defendants’ submission is any analysis of the Section 6(1) mobility right. Section 6(1) is a core democratic right which has been described as “among the most cherished rights of citizenship”.²⁰

¹⁹ Amended Statement of Claim at paragraph 24.

²⁰ *Divito v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para. 1.

40. Personal mobilities is “fundamental to nationhood” and “the freedom guaranteed in Section 6 embodies a concern for the preservation of the basic dignity of the individual”.²¹

41. Like the right to vote, the framers of the *Charter* signaled the special importance of mobility rights “not only by its broad, untrammelled language, but by exempting it from legislative override under s. 33’s notwithstanding clause.”²² Any intrusions on this core democratic right are to be reviewed on the basis of a stringent justification standard.²³ For these reasons, Section 6 mobility rights must be interpreted purposively, broadly, and liberally.²⁴ As Justice Estey observed in one of the earliest cases to address mobility rights:

In a constitutional document relating to personal rights and freedoms, the expression “Mobility Rights” **must mean rights of the persons to move about, within and outside the national boundaries.**²⁵ [Emphasis added.]

42. The broad nature of Section 6 mobility rights was recognized in the context of the Covid-19 pandemic. In *Taylor v Newfoundland and Labrador*²⁶, Justice Burrage of the Newfoundland and Labrador Supreme Court did a comprehensive review of Section 6 mobility rights before concluding the provincial government prima facie infringed those rights when it denied access to a non-resident trying to attend her mother’s funeral during the pandemic. Burrage J. held that “the rights protected in s. 6 are...

²¹ *Canadian Egg Marketing Agency v. Richardson*, 1997 CanLII 17020 (SCC) at para. 60.

²² *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519 at para. 11.

²³ *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519 at para. 14.

²⁴ *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (CanLII) at para. 206, citing *R. v. Big M Drug Mart Ltd.*, 1985 (CanLII) 69 at pg. 344. See also: *Sauvé v Canada (Chief Electoral Officer)*, 2001 SCC 68 at para. 11.

²⁵ *Skapinker v. Law Society of Upper Canada*, [1984] 1 S.C.R. 357 (S.C.C.) at page 13. See also: *Cotroni c. Centre de Prévention de Montréal*, [1989] 1 S.C.R. 1469 (S.C.C.) at para. 73.

²⁶ *Taylor v Newfoundland and Labrador*, 2020 NLSC 125.

positive rights of mobility,”²⁷ such that the right to “remain in” Canada, necessarily embodies a positive right to travel within Canada:

If we accept, as we must, that s. 6(1) protects the citizen’s choice to remain in Canada (*Cotroni, Sriskandarajah*), we must also recognize that such choices are not made in a factual vacuum. The right to remain in Canada must, of necessity, include the right to choose where in Canada one wishes to be from time to time. By the express language of s. 6 our citizens’ options are not limited to a part of Canada, or to the province of one’s immediate residence, but to all of Canada. We may ask rhetorically, how is the citizen to exercise this right without the ability to traverse provincial and territorial boundaries?²⁸

43. It is not an answer to say that there was no infringement because the Plaintiffs could, technically, still move within Canada, just by foot, bicycle or motor vehicle.
44. The Government may not render the Plaintiffs’ mobility rights “practically ineffective and essentially illusory”²⁹ by depriving them of access to the most practical, effective, and traditional modes of cross-country and international transport.
45. The Supreme Court of Canada in *Khadr v. Canada (Attorney General)* confirmed Section 6 gives to citizens the right to enter, remain in and leave Canada and that the “right to leave Canada is a hollow right if it cannot be exercised in a meaningful way due to the actions of the Canadian government directed against an individual or group of individual citizens”.³⁰

²⁷ *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at para. 345.

²⁸ *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at para. 348.

²⁹ *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at para. 351.

³⁰ *Khadr v. Canada (Attorney General)* (F.C.), 2006 FC 727 (CanLII) at paras. 62 and 63.

Travel Ban Mandates Infringed Basic Mobility Rights

46. The *International Convention on Civil and Political Rights* (“**ICCPR**”) guarantees humans basic mobility rights to human beings.

47. Article 12 of the ICCPR states that “everyone shall be free to leave any country, including his own”. Canada is a state party to the ICCPR and ratified this Convention. Previous Courts have recognized that Article 12 of the ICCPR was the inspiration for Section 6(1) of the *Charter*.³¹

48. The Federal Court in *Divito v. Canada (Public Safety and Emergency Preparedness)* held that “a treaty to which Canada is a signatory, the ICCPR is binding”.³²

49. The Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargain Assn. v. British Columbia*, observed, “the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified”.³³

50. In a similar vein, the Supreme Court of Canada in *Quebec (Attorney General) v. 9147-0732 Quebec Inc.*, recognised that case law has tied the “presumption of conformity to the language of Canada’s international obligations or commitments”.³⁴

51. The Federal Court in *Sahakyan v. Canada (Minister of Citizenship and Immigration)* also recognized a “right to leave”:

Permanent residence, as does citizenship, carries with it its privileges, one being the right to leave Canada in the knowledge that one is entitled to return, provided of course residency requirements are maintained.³⁵

³¹ *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (CanLII), at para. 24.

³² *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (CanLII), at para. 25.

³³ *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), at para. 70.

³⁴ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 (CanLII), at para. 33.

³⁵ *Sahakyan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1542 (CanLII), at para. 38.

52. This recognition makes sense; not only because it is recognized at international law, but also because the *right to enter* Canada, which is also conferred pursuant to Section 19(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, would be a meaningless and illusory right if there was no right to leave Canada.

The Travel Mandates Compromised the Plaintiffs' Section 7 Charter Rights by Forcing a Constitutional Trade-Off

53. The Defendants concede that Section 7 of the *Charter* protects fundamental personal choices³⁶ and for good reason since the Supreme Court of Canada has recognized that Section 7 protects “inherently private choices” that go to the “core of what it means to enjoy individual dignity and independence”.³⁷

54. The Supreme Court of Canada has similarly established that Section 7 protects decisions respecting personal autonomy.³⁸ As the Supreme Court explained:

The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that “liberty” is engaged where state compulsions or prohibitions **affect important and fundamental life choices**. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare, supra*); to produce documents or testify (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425); and not to loiter in particular areas (*R. v. Heywood*, 1994 CanLII 34 (SCC), [1994] 3 S.C.R. 761). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, at para. 80, La Forest J., with whom L'Heureux-Dubé, Gonthier and McLachlin JJ. agreed, **emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the Charter as a whole and that it protects an individual's personal autonomy:**

. . . liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.³⁹ [Emphasis Added.]

³⁶ Defendants' Written Representations at paragraph 31.

³⁷ *Justice Counsel v. Canada (Attorney General)*, [2017] 2 S.C.R. 456 at paragraph 49.

³⁸ *Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 SCR 307 at para. 49. See also: *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844, at para. 66,

³⁹ *Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 SCR 307 at para. 49.

55. The Federal Court in *Fisher v. Canada (Attorney General)*⁴⁰ relied on the Supreme Court's decision of *Blencoe v. British Columbia (Human Rights)* in adopting a broad and purposive interpretation to an individual's liberty interest:

An individual's liberty interest is engaged whenever a law prevents a person from **making fundamental personal choices**. The interest protected by section 7 of the Charter must be **broadly interpreted** in consideration of the principles underlying the Charter as a whole and **the need to protect personal autonomy** (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] at paragraph 49). Liberty necessarily includes the notions of human dignity, personal autonomy, privacy and choice in decisions regarding an individual's fundamental being (*Blencoe* at paragraphs 50-53).⁴¹ [Emphasis Added.]

56. The decision to undergo a medical procedure, in this instance, vaccination developed in response to a novel virus, is an inherently personal decision. The decision whether to get vaccination impinges upon personal autonomy, privacy and dignity in deciding what, if anything, the Plaintiffs wish to inoculate into their bodies.

57. Contrary to the Defendants' arguments, the Plaintiffs are not alleging that the Ministerial Orders underlying the Vaccine Travel Mandate physically forced them into vaccination.⁴² Nor are the Plaintiffs asking this Court to expand Section 7 liberty interest to include mobility rights.⁴³ Respectfully, these arguments fundamentally fail to grasp the claims being advanced in this proceeding.

58. However, the Ministerial Orders did coerce the Plaintiffs into making a constitutional trade-off which, the Plaintiffs maintain, violated their Section 7 liberty interest. Specifically, the Plaintiffs were forced to decide between protecting their bodily integrity and autonomy in refusing vaccination (a liberty interest protected by Section 7 of the *Charter*) or exercising their Section 6 mobility right – they could not achieve

⁴⁰ *Fisher v. Canada (Attorney General)*, 2013 FC 1108 (CanLII).

⁴¹ *Fisher v. Canada (Attorney General)*, 2013 FC 1108 (CanLII) at para. 22.

⁴² Defendants' Written Representations at paragraph 30.

⁴³ Defendants' Written Representations at paragraphs 34 and 35.

both. In the case of Mr. Rickard, his choice to refuse vaccination meant that he was denied his right to leave Canada under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and under the *ICCPR*.

59. Put differently, the Plaintiffs could not exercise their mobility rights unless they compromised their Section 7 liberty interest by accepting vaccination – notwithstanding that the Plaintiffs did not wish to be vaccinated.

60. There was no scenario in which the Plaintiffs could have exercised and enjoyed both of their Section 7 and their respective mobility rights. The Ministerial Orders created a direct, inescapable constitutional trade-off which should not be permissible in a free and democratic society.

61. The Section 7 liberty interest is meaningless if the Government can, effectively, force Canadians into making constitutional trade – offs. This is especially the case given that Courts have recognized there is no hierarchy to *Charter* rights and freedoms.⁴⁴

62. Asking Canadians to forfeit one right or freedom in order to enjoy another right or freedom undermines the spirit of the *Charter* and dignity of the individual. Having to decide which right a Canadian wish to protect over another sets a very dangerous precedent in Canada's constitutional democracy.

⁴⁴ *Dagenais v. Canadian Broadcasting Corp.* 1994 CanLII 39 (SCC) at p. 877.

The Travel Mandates Violated the Plaintiffs' Section 15 *Charter* Rights by Withholding a Right or Benefit based on their Vaccination Status

63. The Ministerial Orders effectively established a two-tiers of Canadians for the purpose of transportation: those were vaccinated and those who remain unvaccinated.
64. Based on the vaccination status of a Canadian, the Government decided that one class of the Canadians, the vaccinated, could access and benefit from federally regulated transportation, while the other class of Canadians, the “unvaccinated”, would be denied access to and use of federally regulated transportation.
65. The object of Section 15 has been described by the Supreme Court of Canada as promoting an equality that entails the promotion of a society where “all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration”.⁴⁵
66. The Defendants maintain that Section 15 *Charter* argument has no prospect of success because vaccination status is not an “analogous ground”.⁴⁶
67. Respectfully, the Plaintiffs disagree. Analogous grounds describe personal characteristics that are either immutable (i.e. cannot be changed) or constructively immutable (i.e. changeable only at an unacceptable cost to personal identity).⁴⁷
68. Courts have outlined a two-step approach for assessing a Section 15 *Charter* claim:⁴⁸ first, whether an impugned law or state action creates a distinction based on enumerated or *analogous* grounds “on its face or in its impact” and, second, imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating

⁴⁵ *R. v. Kapp*, [2008] 2 S.C.R. 483 at paragraph 15. See also: *Quebec (A.G.) v. A*, [2013] 1 S.C.R. 61 at paragraph 417.

⁴⁶ Written Representations of the Defendants at paragraphs 37, 39, 40 and 41.

⁴⁷ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) at para. 13.

⁴⁸ *R v. Sharma*, 2022 SCC 39 (CanLII) at para. 28.

or exacerbating a disadvantage.⁴⁹ A claimant must also establish that the law or action, in its impact, creates or contributes to a disproportionate impact on the claimant group, relative to others (in this instance, vaccinated Canadians who could travel due to their vaccine status).⁵⁰

69. In *Withler v. Canada (Attorney General)*, the Supreme Court of Canada observed that “it is conceivable that a group that has not historically experienced disadvantage may find itself subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group”.⁵¹

70. The Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian and Northern Affairs)* considered the framework to establish and recognize an “analogous” ground for the purpose of Section 15 of the Charter. In that decision, the Supreme Court of Canada noted that a commonality for possibly analogous grounds of discrimination is that they are not made on merit but on the basis of a personal characteristic and, therefore, the thrust of identification of analogous grounds is to reveal grounds based on characteristics people cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.⁵²

71. At the analogous grounds stage of analysis, the Court must consider whether differential treatment of those defined by a characteristic or combination of traits has the *potential* to violate human dignity.⁵³

⁴⁹ *R v. Sharma*, 2022 SCC 39 (CanLII) at para. 28.

⁵⁰ *R v. McKee*, 2024 ONSC 4934 (CanLII) para. 238.

⁵¹ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 36.

⁵² *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) at para. 13

⁵³ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) at para. 59.

72. It is notable that our Courts have expanded “analogous grounds” to include characteristics which, arguably, are not inherently immutable such as *non-citizenship*; *marital status*; and *sexual orientation*.⁵⁴

73. The Defendants rely on a decision by the Court of Appeal of Alberta⁵⁵ which rejected vaccination status as an analogous ground for discrimination. Respectfully, this decision is not binding upon the Federal Court and the matter has not finally been decided by the Supreme Court of Canada.

74. Moreover, and with the greatest respect, the reasoning in this decision is not unimpeachable. Summarily describing a “choice” to get vaccinated as a “just that – a choice” is circular reasoning. Similarly, characterizing the decision to get vaccinated as “fluid” and, therefore, subject to change as a basis not to recognize vaccination status as an analogous ground could equally be said of marital status, sexual orientation and non-citizenship (all of which have been recognized as analogous grounds by the Court).

75. The Plaintiffs fundamentally dispute the contention that the decision to be vaccinated – which is a medical procedural that, once performed, cannot be undone – comes at a minimal or no cost to personal identity. Certainly, that sentiment was rejected by millions of Canadians who refused to be vaccinated against Covid-19 and is especially rejected by these Plaintiffs who view the right to decide on personal medical treatment - particularly being inoculated with a vaccine - as sacrosanct.

⁵⁴ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 33.

⁵⁵ *Lewis v. Alberta Health Services*, 2022 ABCA 359.

76. The decision in *Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology*⁵⁶ is distinguishable; first, that matter was heard on its merits; second, and relatedly, the Court made findings that the applicants “fell well short of showing that they cannot be safely vaccinated, or that the act of doing so would tear asunder...deeply held beliefs”.⁵⁷
77. The Court also found that the applicants had only “minimal investigation of the relevant science” with respect to vaccination. Again, this same conclusion cannot be drawn in this case on an early motion to strike – especially a case which will have a robust evidentiary foundation spanning over a year.
78. The decision by Justice of the Peace V. Fisher-Grant in *R. v. Lauterpacht*⁵⁸ relies upon and adopts the Court of Appeal of Alberta which rejected vaccination status as an analogous ground. Of particular note is the fact that his Worship found “no evidence was called to demonstrate the disproportionate impact they claim to have suffered, nor have the applicants provided any evidence regarding their status.”⁵⁹

⁵⁶ *Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology*, 2022 ONSC 5111.

⁵⁷ *Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology*, 2022 ONSC 5111 at para. 94.

⁵⁸ *R. v. Lauterpacht*, 2023 ONCJ 51 (CanLII).

⁵⁹ *R. v. Lauterpacht*, 2023 ONCJ 51 (CanLII) at para. 86.

Consequences of the Travel Mandates Amounted to Cruel and Unusual Punishment

79. Both Plaintiffs exercised their Section 7 liberty rights – which applies to “everyone” – by refusing to accept a vaccine in their body. As a direct consequence of this inherently personal decision, both Plaintiffs were penalized by being denied their fundamental right of mobility to leave their country and visit another country, namely the United Kingdom, where Mr. Rickard and Mr. Harrison hold citizenship. The attendant consequence for the benign exercise of their Section 7 liberty right amounts to cruel and unusual punishment under Section 12 of the *Charter* which protects against “any cruel and unusual treatment or punishment.”.

80. Section 12 of the *Charter* contemplates “cruel and unusual” treatment or punishment. The Plaintiffs maintain that being denied the right to leave Canada for refusing a vaccination is cruel and unusual treatment.

81. The Supreme Court of Canada in *Quebec (Attorney General) v. 9147-0732 Quebec inc.* held that the purpose of Section 13 is to protect “human dignity and respect the inherent worth of individuals”.⁶⁰

82. The Supreme Court has not, to date, formulated a general definition for “treatment”.

83. However, in *Chiarelli v. Canada (Minister of Employment & Immigration)*, the Supreme Court of Canada noted the broad dictionary definition of treatment as “a process or manner of behaving towards or dealing with a person or thing”.⁶¹ It is instructive that the Supreme Court of Canada has found detention for non-punitive reasons qualifies as a “treatment” under Section 12 of the *Charter*.⁶²

⁶⁰ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 (CanLII), at para. 51.

⁶¹ *Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711 at paragraph 29

⁶² *Immigration and Refugee Protection Act (Charkaoui v. Canada (Citizenship and Immigration))*, [2007] 1 S.C.R. 350 at paragraphs 95-98)

84. The “cruel and unusual” component of Section 12 entails at least two prongs of protection. First, it may consider the severity of a particular treatment in light of the circumstances. Second, the Court may focus on the method or inherent nature of the treatment. It prohibits a “narrow class” of treatments that are inherently cruel and unusual because they are “degrading or dehumanizing” and “intrinsically incompatible with human dignity.”⁶³ According to the Supreme Court of Canada in *R v. Bissonnette*, such measures “will always be grossly disproportionate” and, therefore, contrary to Section 12 of the Charter.⁶⁴ Fundamentally, however, the phrase “cruel and unusual treatment or punishment” should be considered together as a “compendious expression of a normal” which must be given meaning “in the context of contemporary Canadian society”.⁶⁵

85. The Ontario Court of Appeal held that “cruel and unusual” treatment amounts to treatment that is “grossly disproportionate to what would have been appropriate”.⁶⁶ This calls for a two-stage approach; first, establishing a benchmark level of treatment under normal or appropriate conditions; second, assessing the extent of departure from that benchmark.⁶⁷ The Superior Court of Justice in *Francis v. Ontario*, outlined several indicia in determining whether there has been a breach of Section 12 of the Charter:

In determining whether there has been a breach of section 12 of the *Charter*, the court must consider whether the treatment goes beyond what is necessary to achieve a legislative aim, whether there are adequate alternatives, whether the treatment is arbitrary and whether it has a value or a social purpose. Other considerations include whether the treatment is unacceptable to a large segment of the population, whether it accords with public standards of decency or propriety,

⁶³ *R. v. Bissonnette*, 2022 SCC 23 (CanLII) at paras. 6, 60, 64 and 68.

⁶⁴ *R. v. Bissonnette*, 2022 SCC 23 (CanLII) at paras. 68 and 111.

⁶⁵ *Re Moore and The Queen*, 1984 CanLII 2132 (ON SC).

⁶⁶ *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 (CanLII) at para. 10.

⁶⁷ *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 (CanLII) At para. 10. See also: *Tanase v. The College of Dental Hygienists of Ontario*, 2019 ONSC 5153 (CanLII) at para. 64 where this approach was adopted.

whether it shocks the general conscience and whether it is unusually severe and hence degrading to human dignity and worth.⁶⁸

86. The Ontario Court of Appeal in *Canadian Civil Liberties Association v. Canada* clarified that a determination of whether treatment is cruel and unusual requires a focus on the *effect* of the conduct in question.⁶⁹ The fact that there may be legitimate reasons for the punishment is beyond the point. As the Supreme Court of Canada stated: “a punishment is or is not cruel and unusual irrespective of why the violation has taken place”.⁷⁰

PART V - ORDER REQUESTED

87. For the reasons outlined herein, the Plaintiffs respectfully request that:

- a. The Defendants’ motion to strike the claim be dismissed, with costs;
- b. If necessary, leave to amend the Amended Statement of Claim; and,
- c. Such further and other relief as this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th day of October 2024

Sam Presvelos

Sam A. Presvelos, counsel for the
Plaintiffs/Responding Parties

⁶⁸ *Francis v. Ontario*, 2020 ONSC 1644 (CanLII), at para. 330.

⁶⁹ *Canadian Civil Liberties Association v. Canada*, 2019, ONCA 243 (CanLII) at paras. 91 and 92.

⁷⁰ *R. v. Smith*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, [1987] S.C.J. No. 36, at p. 1077.

**PART “VI” –
APPENDIX “A” - LIST OF AUTHORITIES**

1. *Al Omani v Canada*, 2017 FC 786.
2. *Apotex Inc v Syntex Pharmaceuticals International Ltd*, 2005 FC 1310.
3. *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19.
4. *Ben Naoum v. Canada (Attorney General)*, 2022 FC 1463 (CanLII).
5. *Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 SCR 307.
6. *Canada (A.G.) v. Inuit Tapirisat of Can.*, [1980] 2 S.C.R. 735.
7. *Canada (Attorney General) v. Power*, 2024 SCC 26 (CanLII).
8. *Canadian Civil Liberties Association v. Canada*, 2019, ONCA 243 (CanLII).
9. *Canadian Egg Marketing Agency v. Richardson*, 1997 CanLII 17020 (SCC).
10. *Canderel Ltd. v. Canada (C.A.)*, 1993 CanLII 2990 (FCA).
11. *Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711.
12. *Collins v. Canada*, 2011 FCA 140 (CanLII).
13. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC).
14. *Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology*, 2022 ONSC 5111.
15. *Cotroni c. Centre de Prévention de Montréal*, [1989] 1 S.C.R. 1469 (S.C.C.).
16. *Dagenais v. Canadian Broadcasting Corp.* 1994 CanLII 39 (SCC).
17. *Davydiuk v. Internet Archive Canada*, 2016 FC 1313 (CanLII)
18. *Divito v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47.
19. *Enercorp Sand Solutions Inc. v. Specialized Desanders Inc.*, 2018 FCA 215 (CanLII).
20. *Fisher v. Canada (Attorney General)*, 2013 FC 1108 (CanLII).
21. *Francis v. Ontario*, 2020 ONSC 1644 (CanLII).
22. *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844.
23. *Haida Tourism Partnerships D.B.A. West Coast Resorts v. The Administrator of the Ship-Source Oil Pollution Fund* 2023 FC 1746 (CanLII).
24. *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII).

25. *Immigration and Refugee Protection Act (Charkaoui v. Canada (Citizenship and Immigration))*, [2007] 1 S.C.R. 350.
26. *Justice Counsel v. Canada (Attorney General)*, [2017] 2 S.C.R. 456.
27. *Khadr v. Canada (Attorney General)* (F.C.), 2006 FC 727 (CanLII).
28. *La Freightlift Private Limited v. Entrepot DMS Warehouse Inc. et al.*, 2011 FC 280 (CanLII).
29. *La Rose v Canada*, 2020 FC 1008.
30. *Lewis v. Alberta Health Services*, 2022 ABCA 359.
31. *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 (CanLII).
32. *Oleynik v Canada (Attorney General)*, 2014 FC 896.
33. *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (CanLII).
34. *Paradis Honey Ltd. v. Canada* 2015 FCA 89 (CanLII).
35. *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 (CanLII).
36. *R. v. Bissonnette*, 2022 SCC 23 (CanLII).
37. *R. v Imperial Tobacco Canada Ltd*, 2011 SCC 42.
38. *R. v. Kapp*, [2008] 2 S.C.R. 483.
39. *R. v. Lauterpacht*, 2023 ONCJ 51 (CanLII).
40. *R v. McKee*, 2024 ONSC 4934 (CanLII).
41. *R v. Sharma*, 2022 SCC 39 (CanLII).
42. *R. v. Smith*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, [1987] S.C.J. No. 36.
43. *Re Moore and The Queen*, 1984 CanLII 2132 (ON SC).
44. *Sahakyan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1542 (CanLII).
45. *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519.
46. *Simon v. Canada*, 2011 FCA 6 (CanLII).
47. *Skapinker v. Law Society of Upper Canada*, [1984] 1 S.C.R. 357 (S.C.C.).
48. *Taylor v Newfoundland and Labrador*, 2020 NLSC 125.
49. *Tanase v. The College of Dental Hygienists of Ontario*, 2019 ONSC 5153 (CanLII).
50. *Vancouver (City) v. Ward*, 2010, SCC 27 (CanLII).
51. *Withler v. Canada (Attorney General)*, 2011 SCC 12.

**APPENDIX “B” –
STATUTES, REGULATIONS, RULES**

**Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982,
being Schedule B to the Canada Act 1982 (UK), 1982, c 11 a.**

Mobility of citizens

6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 12 - Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Federal Courts Rules (SOR/98-106)

Amendments with leave

75 (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

Rule 181

Further and better particulars

(2) On motion, the Court may order a party to serve and file further and better particulars of any allegation in its pleading

Amendment as of right

200 Notwithstanding rules 75 and 76, a party may, without leave, amend any of its pleadings at any time before another party has pleaded thereto or on the filing of the written consent of the other parties.

SHAUN RICKARD and KARL HARRISON
Plaintiffs

and

HIS MAJESTY THE KING, et al.
Defendants

Court File No T-2536-23

FEDERAL COURT

Proceeding Commenced at Toronto

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