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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

**RESPONDING MOTION RECORD OF THE DEFENDANTS
(IN RESPONSE TO PLAINTIFFS' MOTION TO AMEND)**

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**HIS MAJESTY THE KING, THE MINISTER OF TRANSPORTATION, and the
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**WRITTEN REPRESENTATIONS OF THE DEFENDANTS
(IN RESPONSE TO PLAINTIFFS' MOTION TO AMEND)**

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OVERVIEW

1. The Plaintiffs have brought a motion to file a Further Amended Statement of Claim, which adds additional causes of action alleging that COVID-19 “vaccine mandates” caused them damages by violating their rights under s 12 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”),¹ s 19(2) of the *Immigration and Refugee Protection Act* (“*IRPA*”) and the *International Covenant on Civil and Political Rights* [“*ICCPR*”].
2. This motion, filed after the Defendant’s (“**Canada**”) motion to strike, is improper. While a draft amended statement of claim (or further amended statement of claim, as in this case) can be helpful to demonstrate how the Plaintiffs might cure defects in their pleadings, the Plaintiffs may not amend during the motion. The Plaintiff’s Further Amended Statement of Claim should therefore only be considered as informational.
3. In any case, even if the Plaintiffs can move to amend, neither of the Plaintiffs’ additional causes of action give rise to a viable cause of action. The “vaccine mandates” are not treatments or punishments to which the Plaintiffs were subjected. As a result, there is no engagement of s. 12 of the *Charter*. Further, an alleged violation of the *IRPA* does not give rise to a cause of action for *Charter* damages. In any event, there is no allegation in any of the Plaintiffs’ three statements of claim that either of them was ever denied entry to Canada, being the statutory right provided by s. 19(2) of the *IRPA*. Finally, while one Plaintiff alleges that his rights under the *ICCPR* were violated, this is not domestic law and does not support an action.

¹ October 4, 2024, Further Amended Statement of Claim (“**FASOC**”), **Tab 2, Motion Record of the Plaintiffs** (“**PMR**”), p 10.

PART I – STATEMENT OF FACTS

A. The Plaintiffs' Further Amended Statement of Claim

4. On July 31, 2024, Associate Judge Horne issued a direction setting a timetable for a motion to strike brought by the Attorney General of Canada on behalf of the Defendants. Pursuant to this direction, the Attorney General of Canada served and filed its Motion Record on September 4, 2024.

5. On October 4, 2024, pursuant to the direction, the Plaintiffs filed a Responding Motion Record, which contained their Responding Written Representations.²

6. The same day, the Plaintiffs also filed a Moving Motion Record, seeking an order permitting the filing of a Further Amended Statement of Claim. This motion record attached as an appendix a Further Amended Statement of Claim (“**Further Amended Statement of Claim**”). This is the third statement of claim delivered by the Plaintiffs.³

7. Some of the Further Amended Statement of Claim appears to attempt to remedy deficiencies identified in the Defendants' Motion Record by providing additional details not previously pled, such as identifying what orders respecting railroads the Plaintiffs allege caused them harm.⁴ The Further Amended Statement of Claim also pleads certain details which were missing in both the original Statement of Claim and the Amended Statement of Claim. Significantly, it pleads that the Plaintiff Mr. Rickard was not a Canadian citizen at the material times when he alleges his s. 6(1) rights were engaged.⁵

² Plaintiffs' Responding Motion Record, **Table of Contents, Responding Motion Record, p 2.**

³ FASOC, **Tab 2, PMR, p 10**

⁴ See for example paras 17-22, FASOC, **Tab 2, PMR, p 15-17.**

⁵ FASOC at para 3, **Tab 2, PMR, p 12.**

8. However, in their Further Amended Statement of Claim, the Plaintiffs add three additional causes of action which had not been pled in either the Statement of Claim or the Amended Statement of Claim. These are discussed below.

i. New claim alleging breach of s. 12 of the Charter

9. First, the Plaintiffs allege that vaccine mandates violated their s. 12 rights not to be subjected to cruel and unusual treatment or punishment. Specifically, the Plaintiffs allege that being denied access to use federally regulated transportation to leave Canada and visit the United Kingdom is cruel and unusual punishment because it is “degrading and dehumanizing and grossly disproportionate to what would have been appropriate in the circumstances”.⁶ This allegation was not present in either of the Statement of Claim or Amended Statement of Claim.

ii. New claims alleging breaches of s 19(2) of the IRPA and Article 12 of the ICCPR

10. Secondly, the Plaintiff Mr. Rickard identifies himself as a Permanent Resident at the time of the relevant events. Under the heading “Vaccine Mandate’s Impact on the Plaintiffs’ Section 6, 7, 12 and 15 Charter Rights”, he pleads that his rights under s. 19(2) of the *IRPA* were breached because he alleges he was unable to leave Canada to visit the United Kingdom.⁷

11. Third, Mr. Rickard also alleges that his rights under article 12 of the *ICCPR* have been breached.⁸ The Plaintiffs indicate that because Canada is a party to the *ICCPR*, it therefore must be “observed and upheld” by Canadian courts.⁹ However, the Plaintiffs do not identify any domestic instrument which supports a cause of action for damages based on the *ICCPR*.

⁶ FASOC, para 39, **Tab 2, PMR, p 20-21.**

⁷ FASOC, para 28, **Tab 2, PMR, p 18.**

⁸ FASOC, para 28, **Tab 2, PMR, p 18.** The Plaintiffs refer to this as the “International Convention on Civil and Political Rights”.

⁹ FASOC, para 28, **Tab 2, PMR, p 18.**

PART II – POINTS IN ISSUE

12. Canada’s position on issues before the Court on this motion are:

- a. The Court should not accept the Further Amended Statement of Claim as a motion to amend, but may consider it to determine whether the issues with the Amended Statement of Claim can be cured by further amendment;
- b. Alternatively, even if amendment could be allowed, the s. 12 *Charter* claim and *IRPA* and *ICCPR* allegations of the Plaintiffs’ Further Amended Statement of Claim should be refused for failing to give rise to a reasonable cause of action.

PART III – SUBMISSIONS

A. The Further Amended Statement of Claim should only be considered for the purposes of determining whether amendments could cure the Amended Statement of Claim

13. The Federal Court and Court of Appeal have consistently held that while a plaintiff can deliver an amended statement of claim to set out how problems in a pleading can be overcome, a plaintiff cannot amend the claim after the defendant has moved to strike it.¹⁰ As the Court explained in *Viiv Healthcare Company v Gilead Sciences Canada, Inc.*: “[A]s a general rule, once a notice of motion is filed, any act done afterwards which affects the rights of the moving party will be ignored by the Court.”¹¹

14. In this matter, the Plaintiffs are improperly attempting to amend their claim after the Defendants have filed a motion to strike that claim. Rather than filing a draft Further Amended

¹⁰ *Paradis Honey Ltd v Canada (Attorney General)*, [2015 FCA 89](#) at [paras 79-80](#). See also *Besse v Canada (Public Safety and Emergency Preparedness)*, [2020 FC 1003](#) at [paras 39-41](#).

¹¹ *Viiv Healthcare Company v Gilead Sciences Canada, Inc.*, [2020 FC 11](#), at [para 26](#).

Statement of Claim in their responding record, the Plaintiffs have filed a Notice of Motion which explicitly asks to be permitted to file a Further Amended Statement of Claim.¹² This is not permissible.

15. Despite the inappropriate filing of this Further Amended Statement of Claim, the Defendants submit it may be useful for this Court to consider this document for the purposes of considering whether the Plaintiffs could cure their Amended Statement of Claim through further amendments. For example, the Defendants' motion materials identified that the Plaintiffs did not plead they were citizens, which is necessary to allege a breach of s. 6(1) of the *Charter*. The Further Amended Statement of Claim confirms that Mr. Rickard was not a Canadian Citizen at the time of the Vaccine Mandates, and therefore that s. 6(1) of the *Charter* has no application to him.¹³ In this way, the Further Amended SOC makes clear that Mr. Rickard's s. 6(1) *Charter* claim simply cannot be cured by any amendment.

16. Although the Further Amended Statement of Claim could be useful to consider the possibility of amendments to cure the ss. 6, 7, and 15 claims, the Further Amended Statement of Claim also attempts to introduce new causes of action related to s 12, the *IRPA*, and the *ICCPR*. These causes of action are not in the Statement of Claim or Amended Statement of Claim

17. These new causes of action are not responsive to the Defendants' motion to strike and should not be considered. They do not propose "cures" to defects in the existing causes of action—they are entirely new causes of action that should be ignored by the Court.

¹² Notice of Motion, **Tab 1, PMR, p 4.**

¹³ FASOC, para 3, **Tab 2, PMR, p 12.**

B. Alternatively, the proposed addition of the *Charter* s. 12, *IRPA* and *ICCPR* allegations in the Further Amended Statement of Claim should be refused

18. Even if this Court could allow the Plaintiffs to amend their Amended Statement of Claim to add new causes of action during a motion to strike, it should not do so here because these proposed new amendments do not disclose a viable cause of action.

i. The Plaintiffs have not pleaded the necessary elements of s. 12

19. The Plaintiffs s 12 claim does not provide a reasonable cause of action because the “vaccine mandate” is not “treatment” for the purposes of s. 12.

20. The Plaintiffs allege that the result of the vaccine mandates was that they were unable to visit the United Kingdom.¹⁴ However, imposing conditions on someone’s ability to travel is not “treatment” for the purposes of s. 12.

21. In *Rodriguez v British Columbia (Attorney General)*, Justice Sopinka, writing for the majority, explained that while treatment under s. 12 could include contexts other than a penal or quasi-penal nature, “a mere prohibition by the state on certain action, without more, cannot constitute "treatment" under s. 12.”¹⁵

22. This reasoning is binding here. The Plaintiffs’ alleged inability to fly to the United Kingdom is, at its most generous interpretation, a prohibition by the state on a certain action when certain conditions are not met. The fact that the Plaintiffs allege that this prohibition is “degrading and dehumanizing” does not assist them.¹⁶ As Justice Sopinka explained:

¹⁴ FASOC, para 29, **Tab 2, PMR, p 29.**

¹⁵ *Rodriguez v British Columbia (Attorney General)*, [1993 CanLII 75 \(SCC\)](#), [1993] 3 SCR 519 at 611-612 [*Rodriguez*].

¹⁶ FASOC, paras 39-40, **Tab 2, PMR, p 20-21.**

The fact that, because of the personal situation in which she finds herself, a particular prohibition impacts upon her in a manner which causes her suffering does not subject her to "treatment" at the hands of the state.

23. Further, and as already submitted in the Defendants' Written Representations regarding s. 7,¹⁷ mobility rights are protected under s. 6 of the *Charter*. The Supreme Court of Canada has held that where a particular claim fits squarely within a specific right or guarantee under the *Charter*, that is the analytical framework that should be brought to bear on the claim notwithstanding that a more general protection may also exist under the auspice of a different *Charter* right.¹⁸ The Plaintiffs should not be permitted to avoid the specific contours and internal limits of the s. 6 guarantee by framing the restrictions on their mobility as a matter of "treatment".

ii. The Plaintiffs' IRPA and ICCPR Claims do not disclose a reasonable cause of action

24. The Plaintiffs' allegations that Mr. Rickard's rights under s. 19(2) of the *IRPA* were breached do not support a cause of action because the *IRPA* does not provide for an action to be brought. There is no cause of action or free-standing right to civil damages just because a statutory provision was allegedly breached.¹⁹

25. Unlike the *Charter*, the *IRPA* does not provide a statutory right to damages. The concept of *Charter* damages comes from s. 24(1) of the *Charter*, which explains that courts may provide remedies for anyone whose rights or freedoms guaranteed by the *Charter* were infringed or denied. A similar section does not appear in the *IRPA*. If Mr. Rickard had

¹⁷ Written Representations of the Defendant at paras 33-34, **September 4, 2024, Motion Record of the Defendant, Tab 3, p 33-34**

¹⁸ *R v Généreux*, [1992] 1 SCR 259 at 310; *R v Pearson*, [1992] 3 SCR 665 at 688.

¹⁹ *The Queen (Can) v Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC)

considered that his right under s 19(2) was ever violated, he could have sought judicial review of the relevant officer's decision.

26. Further, *even if* the *IRPA* provided a statutory right to damages, the Plaintiff Mr. Rickard has not pleaded any facts which indicate that his right was breached. S. 19(2) of the *IRPA* provides that:

(2) An officer shall allow a permanent resident to enter Canada if satisfied following an examination on their entry that they have that status.

27. The Further Amended Statement of Claim does not allege that Mr. Rickard was ever refused entry to Canada on examination by an officer.

28. The Plaintiff Mr. Rickard also alleges that his rights under the *ICCPR* were violated. However, there is also no cause of action for alleged violations of an international instrument unless it is provided through Canadian domestic law. As the Supreme Court of Canada explained:

Unless a treaty provision expresses a rule of customary international law or a peremptory norm, **that provision will only be binding in Canadian law if it is given effect through Canada's domestic law-making process**,²⁰

29. Further, outside of a bald allegation that the *ICCPR* has been violated, the Plaintiff Mr. Rickard fails to plead any specific details as to what provision was violated, and under what domestic Canadian legal provision the Plaintiffs are entitled to seek a remedy. This does not disclose a reasonable cause of action.

²⁰ *Kazemi Estate v Islamic Republic of Iran*, [2014 SCC 62](#) at [para 149](#). See also *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, [2020 FCA 100](#) at [paras 80-82](#), *aff'd* [2022 SCC 30](#).

PART IV – ORDER SOUGHT

30. The Defendants seek an Order:

- a. Dismissing the Plaintiffs' motion to amend the Amended Statement of Claim;
- b. Costs; and
- c. Such further and other relief as this Honourable Court may permit.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25TH DAY OF OCTOBER,
2024**



James Schneider and Zachary Lanys
Counsel for the Defendant, the
Attorney General of Canada

PART V – LIST OF AUTHORITIES

1. *Besse v Canada (Public Safety and Emergency Preparedness)*, [2020 FC 1003](#)
2. *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, [2020 FCA 100](#) at [paras 80-82](#), *aff'd* [2022 SCC 30](#).
3. *Kazemi Estate v Islamic Republic of Iran*, [2014 SCC 62](#)
4. *Paradis Honey Ltd v Canada (Attorney General)*, [2015 FCA 89](#)
5. *Rodriguez v British Columbia (Attorney General)*, [1993 CanLII 75 \(SCC\)](#), [1993] 3 SCR 519
6. *R v Généreux*, [\[1992\] 1 SCR 259](#)
7. *R v Pearson*, [\[1992\] 3 SCR 665](#)
8. *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, [2020 SCC 100](#)
9. *The Queen (Can.) v Saskatchewan Wheat Pool*, [1983 CanLII 21 \(SCC\)](#)
10. *Viiv Healthcare Company v Gilead Sciences Canada, Inc.*, [2020 FC 11](#)

APPENDIX A – STATUTES AND REGULATIONS

1. *Immigration and Refugee Protection Act*, SC 2001, c 27
2. *Canadian Charter of Rights and Freedoms*, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 6(1).

| <i>Immigration and Refugee Protection Act, SC 2001, c 27</i> | |
|---|--|
| Rule 221(1)(a) | |
| <p>Right of entry of permanent residents</p> <p>(2) An officer shall allow a permanent resident to enter Canada if satisfied following an examination on their entry that they have that status.</p> | <p>Droit d’entrer : résident permanent</p> <p>(2) L’agent laisse entrer au Canada le résident permanent sur preuve, à la suite d’un contrôle fait à son arrivée, qu’il a ce statut.</p> |
| <i>Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK),</i> | |
| <p>Treatment or punishment</p> <p>12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.</p> | <p>Cruauté</p> <p>12 Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.</p> |