Court File No. T-2536-23

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

PLAINTIFFS' MOTION RECORD

January 8, 2025

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Court File No. T-2536-23

FEDERAL COURT

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TAB 1

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Defendants

NOTICE OF MOTION

TAKE NOTICE THAT the Plaintiffs, Shaun Rickard and Karl Harrison, will make a motion to the Federal Court on a date to be determined by the Administrator, at 180 Queen Street West, Toronto, Ontario.

THE MOTION IS FOR:

1. An Order, pursuant to Rule 51 of the *Federal Court Rules,* appealing the Order of Associate Judge Trent Horne made on November 28, 2024, striking aspects of the Plaintiff's Statement of Claim pertaining to Section 7 and Section 12 of the *Canadian Charter of Rights and Freedoms* without leave to amend;

2. An Order permitting the Plaintiffs Section 7 and Section 12 *Charter* claims to proceed;
3. Costs of this motion; and,
4. Such further and other relief as counsel may advise and this Honourable Court deem just.

THE GROUNDS FOR THE MOTION ARE:

Background

1. The Plaintiffs commenced an action against the named Defendants alleging that the vaccination requirement, which was temporarily implemented during the Covid-19 pandemic, violated their Section 6, 7, 12, and 15 *Charter* rights and freedoms.
2. Specifically, the Plaintiffs challenged the constitutionality of Ministerial Orders, made by the Minister of Transportation, which were implemented (and renewed) pursuant to the *Aeronautics Act* (RSC 1985, c A-2) and the *Railway Safety Act* (RSC, 1985, c 32 (4th Supp)) (collectively, the "**Ministerial Orders**") that prevented the Plaintiffs from traveling out of Canada unless they agreed to receive a Covid-19 vaccine.
3. The impugned Ministerial Orders were known as "Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19".
4. The Plaintiffs' claim is for *Charter* damages, the availability of which was recently confirmed by the Supreme Court of Canada.

Defendants' Motion to Strike and Associate Justice Horne's Order

5. The Defendants subsequently brought a motion to strike all the Plaintiffs' causes of actions save and except for Section 6(1) as it pertained to Mr. Karl Harrison.
6. The Plaintiffs objected to the sweeping relief sought on the Defendants' motion to strike most of their pleading.
7. The Defendants' motion to strike was heard by Associate Justice Trent Horne on November 18, 2024.

8. On November 28, 2024, AJ Horne released his Order and Reasons, pursuant to which the Court made the following Orders:
    a. The Plaintiffs' claim that the Ministerial Orders breached their Section 7 and 12 *Charter* rights were dismissed without leave to amend as failing to disclose a cause of action;
    b. Mr. Rickard's claim that his rights under Section 6(1) of the *Charter* were dismissed without leave to amend;
    c. The Plaintiffs serve a fresh as amended Statement of Claim within 30 days of the date of the Order; and,
    d. Costs of the motion payable by the Plaintiffs in the amount of $2,700.

<u>The Plaintiffs' Grounds of Appeal of AJ Horne's Order</u>

9. The Plaintiffs seek to appeal those aspects of AJ Horne's Order which dismiss the Section 7 and 12 *Charter* claim as failing to disclose a reasonable cause of action.
10. With respect to their Section 7 *Charter* claim, the Plaintiffs maintain that:
    a. AJ Horne erred, in law, by failing to address the Plaintiffs' argument with respect to Section 7 of the *Charter*. Instead, his Honour re-framed the argument to focus individually on Section 6(1) and Section 7, even though the Plaintiffs cautioned against this in their written submissions to the Court;
    b. AJ Horne failed to consider whether forcing Canadians to decide between competing *Charter* rights could, in and of itself, ever engage the Section 7 liberty interest and to provide reasons if it could not.

c. The Plaintiffs plead that they advanced was a novel argument, in response to an unprecedented constitutional trade – off, which deserved judicial consideration in accordance with the well-established principles applicable on motions to strike.

11. With respect to the Section 12 *Charter* claim, the Plaintiffs maintain the following:

a. AJ Horne erred in law or mixed fact/law by dismissing the Plaintiffs' *Charter* claim on the basis of the Supreme Court of Canada's decision in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519, which jurisprudence was not analogous or comparable to the Plaintiffs' circumstances and is not a definitive nor authoritative decision on the contours of Section 12 of the *Charter* as it pertains to the term "treatment".

b. AJ Horne erred in law by failing to consider that "treatment" under Section 12 of the *Charter* does not have a judicially fixed meaning and, further, by failing to consider whether it could apply to the Plaintiffs' circumstances such that the material facts, as plead, could disclose a cause of action under Section 12 of the *Charter*;

c. AJ Horne erred in fact or fact and law by finding that there was no "state control" over the Plaintiffs with respect to the Ministerial Orders such that Section 12 of the *Charter* would be engaged and, further, that the Plaintiffs were not subject to some "state administration" by virtue of the interim Ministerial Orders made by the Minister of Transportation (which measures had not previously existed in Canadian history), notwithstanding the fact that the Ministerial Orders directly prescribed new and unprecedented

requirements of federally – regulated transportation and pursuant to which a segregated class of Canadians – those unvaccinated – were differentially treated. In fact, AJ Horne did not, at all, engage in analysis as to how (and whether) the term "treatment" might apply to these Plaintiffs in the context of Section 12.

12. The Plaintiffs maintain that the proposed appeal, which challenges the constitutionality of unprecedented Ministerial Orders, engages a novel Government / public health measure, which has unique and important constitutional considerations and implications that remain unsettled and which should not be dismissed on an early motion to strike.

THE FOLLOWING STATUORY PROVISIONS APPLY:

13. *Federal Courts Act*, RSC, 1985, c F-7, as amended;
14. *Federal Court Rules*, SOR/98-106, Rules 51, 55, 56 and 362.
15. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982;
16. Such further and other grounds as counsel may advise and this Hourable Court accept.

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

17. Order and reasons of Associate Justice Trent Horne dated November 28, 2024;
18. The Amended Statement of Claim;
19. The written representations of both parties before AJ Horne; and,

20. Such further and other documents as counsel may advise and this Honourable Court may permit.

January 8, 2025

Sam Presvelos

Sam A. Presvelos

TO: ATTORNEY GENERAL OF CANADA
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Counsel for the Defendants, His Majesty the King, the Minister of Transportation, and the Attorney General of Canada

SHAUN RICKARD ET AL.
Plaintiffs

HIS MAJESTY THE KING ET AL.
Defendants

Court File No.: T-2536-23

FEDERAL COURT

Proceeding Commenced at Toronto

NOTICE OF MOTION

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TAB 2

Court File No. T-2536-23

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

AFFIDAVIT OF EVAN PRESVELOS

I, Evan Presvelos, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. My name is Evan Presvelos. I am a lawyer with Presvelos Law LLP, counsel for the Plaintiffs in this action.
2. The Plaintiffs commenced an action for *Charter* damages on account of Ministerial Orders implemented in 2021 and 2022 which prevented them from accessing federally regulated transportation. These Ministerial Orders were known as *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19*. Attached hereto as **Exhibit "A"** is a true copy of the Amended Statement of Claim.
3. On September 4, 2024, the Defendants brought a motion to strike the Plaintiffs' claim as failing to disclose a reasonable cause of action. Attached hereto as **Exhibit "B"** is a true copy of the Defendants' Motion Record dated September 4, 2024.

4. On October 4, 2024, the Plaintiffs served a Responding Motion Record and brought a cross-motion for a further amended Statement of Claim. Attached hereto as **Exhibit "C"** is a true copy of the Plaintiffs' Responding Motion Record dated October 4, 2024, and attached hereto as **Exhibit "D"** is a true copy of the Plaintiffs' Cross-Motion Record dated October 4, 2024.
5. The parties' motions were heard by Associate Judge Trent Horne on November 18, 2024.
6. On November 28, 2024, AJ Horne released his Order and Reasons. Attached hereto as **Exhibit "E"** is a true copy AJ Horne's Order and Reasons dated November 28, 2024.
7. To date, the Defendants have not defended the claim.
8. I swear this affidavit in support of the Plaintiffs' Motion to Appeal the Order of AJ Horne and for no other or improper purpose.

Sworn before me
by videoconference
at the City of Toronto,
in the Province of Ontario, this
8th day of January 2025 in
accordance with O.Reg 431/20,
Administering Oath or Declaration Remotely

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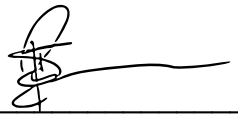

SAM A. PRESVELOS

EVAN PRESVELOS

This is **Exhibit "A"** referred to in the Affidavit of Evan Presvelos sworn January 8, 2025

Commissioner for Taking Affidavits

SAM A. PRESVELOS

Court File No. T-2536-23

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

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. 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.

June 3, 2024

Issued by:_____

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AMENDED CLAIM

1. The Plaintiffs claim the following:

    a. Constitutional damages pursuant to Section 24(1) of the *Canadian Charter of Rights and Freedoms* (the "**Charter**"), in the amount of $1,000,000, exclusive of interest and costs, for breach of the Plaintiffs' Section 6, 7 and 15 rights and freedoms as guaranteed by the *Charter* as a result of government decision-making and ~~action~~ conduct that was rooted in negligence, bad faith and willfully blind to the ~~lack~~ absence of scientific evidence or disconfirming scientific evidence regarding the role, and, in particular, the unknown efficacy, of Covid-19 vaccination in reducing the risk of Covid-19 transmission and infection within the transportation sector;

    b. Costs of this action in accordance with the *Federal Court Rules*, SOR/98-106; and,

    c. Such further and other relief as counsel may advise and this Honorable Court deem just.

The Parties

2. The Plaintiff, Shaun Rickard, is an individual residing in Pickering, Ontario. At all material times, Mr. Rickard did not receive~~d~~ one of Canada's authorized Covid-19 vaccines.

3. The Plaintiff, Karl Harrison, is an individual residing in Vancouver, British Columbia. At all material times, Mr. Harrison did not receive one of Canada's authorized Covid-19 vaccines.

4. The Attorney General is named as a Defendant as ~~this claim~~ the impugned conduct directly involves governmental decisions and actions made and implemented by the Federal Minister of Transportation and the bureaucracy that supports this Ministry.

The Vaccine Travel Mandate's Impact on the Plaintiffs

5. At the time of the pandemic, Mr. Rickard had an ailing father who lived in Southampton, Hampshire, England. Mr. Rickard's father, now deceased, was suffering from advanced Alzheimer's. Mr. Rickard would visit his father as often as he could to comfort him and spend time together.
6. Similarly, Mr. Harrison's mother, aged 90 years old, lives alone in Blackpool, England. Mr. Harrison and his mother share a very close relationship and Mr. Harrison makes a point of visiting his mother multiple times a year.
7. Additionally, Mr. Harrison operates several businesses out of England, including a travel company, MagicBreaks. Through his business ventures, Mr. Harrison employs around 150 people in London. The nature of these businesses is such that he frequently travels to the UK, Ireland, Spain and other European countries for meetings with senior management and commercial partners.

The Prime Minister's Campaign Promise to Implement a Vaccine Mandate in the 2021 General Elections

8. In August 2021, during the Canadian general election, Prime Minister Justin Trudeau made a campaign pledge that if re-elected he would mandate that Canadians must be vaccinated against Covid-19 in order to board a plane, train or boat, that is for all federally – regulated transportation services. ~~Indeed,~~ T~~t~~his campaign pledge formed an official part of the Liberal Government's re-election platform, *Forward for Everyone*.
9. The federal election was held on September 20, 2021, and Mr. Trudeau was re-elected as Canada's Prime Minister.

Mandatory Vaccination Formally Announced by the Prime Minister

10. Shortly after being re-elected as Prime Minister, on October 6, 2021, the Canadian Government announced it will require mandatory vaccination against Covid-19 for all travelers (a) departing from Canadian airports (b) boarding VIA and Rocky Mountaineer trains and (c) using federally regulated marine transportation (the "**Vaccine Mandates**").

11. The Canadian Government introduced these unprecedented Vaccine Mandates under the pretext that vaccination would help to both limit the risk of spreading Covid-19 and prevent and mitigate against future Covid-19 outbreaks, however no scientific evidence was provided to support that mandatory vaccination was, in fact, required to keep Canadians safe within the transportation system.

12. The Vaccine Mandates allowed Canadian travelers until November 30th, 2021, to comply with its requirements in order to access federally – regulated transportation services (i.e. to ensure that they had sufficient time to receive ~~a~~ the prescribed Covid-19 ~~vaccine~~ vaccination regiment).

Implementation of the Vaccine Mandate through Interim Ministerial Orders

13. The Vaccine Mandates were implemented through a perpetual series of Interim Ministerial Orders ("**Vaccine MO**") that were made pursuant to the *Aeronautics Act* (R.S.C., 1985, c. A-2) and the *Railway Safety Act* (R.S.C., 1985, c. 32 (4th Supp.)). The Vaccine MO's were renewed repeatedly between November 2021 until they were suspended in June 2022.

14. Specifically, the Minister of Transportation relied on Section 4.71 (Aviation security regulations), 4.9 (Regulations respecting aeronautics) and 6.41(1) (Interim orders) of the *Aeronautics Act* as well as Section 4(4), 32.01 and 36 of the *Railway Safety Act* to enact and renew the Vaccine ~~Mandates~~ MOs.

15. Section 4.71 of the *Aeronautics Act* deals with Aviation Security Regulations. It confers powers to implement regulations affecting the safety of air travel. Section 4.71(1), (2) provides as follows:

> Aviation security regulations
> 4.71 (1) The Governor in Council may make regulations respecting aviation security.
> Contents of regulations
> (2) Without limiting the generality of subsection (1), regulations may be made under that subsection (a) respecting the safety of the public, passengers, crew members, aircraft and aerodromes and other aviation facilities;

16. Section 4.91(2) provides as follows:

> Order must relate to safety
> (2) The Minister may make an order under subsection (1) only if the Minister is of the opinion that the order is necessary for aviation safety or the safety of the public.

17. Section 6.41(1) of the *Aeronautics Act* concerns Interim Orders that may be made by the Minister. Its provides, in part, as follows:

> Interim orders
> 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;

18. The *Railway Safety Act* also contains several provisions intended to protect public safety in this mode of transport. Section 4(4) of the *Act* provides as follows:

> Safe railway operations, etc.
> (4) In determining, for the purposes of this Act, whether railway operations are safe railway operations, or whether an act or thing constitutes a threat to safe railway operations or enhances the safety of railway operations, regard shall be had not only to the safety of persons and property transported by railways but also to the safety of other persons and other property.

18. Section 32.01 of the *Railway Safety Act* enables the Minister to make Orders where there is a "threat to safe railway operations":

> Order — safe railway operations

> 32.01 If the Minister considers it necessary in the interests of safe railway operations, the Minister may, by order sent to a company, road authority or municipality, require the company, road authority or municipality to stop any activity that might constitute a threat to safe railway operations or to follow the procedures or take the corrective measures specified in the order, including constructing, altering, operating or maintaining a railway work.

19. Section 36(1) of the *Railway Safety Act* provides the Minister with the power to require a company to provide information necessary for Orders made under the *Act*:

> Power to require information
> 36 (1) The Minister may order that a company provide, in the specified form and within the specified period, information or documents that he or she considers necessary for the purposes of ensuring compliance with this Act and with the regulations, rules, orders, standards and emergency directives made under this Act.

20. The Plaintiffs plead, and the fact is, that the Minister of Transportation has never before used these or other provisions within the above referenced legislation to require a medical procedure as a pre-condition to accessing federally regulated transportation services. Put differently, the Vaccine Mandates were truly unprecedented in Canadian history.
21. The first Vaccine MO, with respect to aviation, was implemented on October 30, 2022, officially titled, "Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19". These Vaccine MOs were renewed by the Minister for a total of 79 times, until they were finally suspended on June 20, 2022.
22. In repealing the (most recent) Vaccine MO, the Minister declared that the "Interim Order is no longer required to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public". No particular evidence was provided to substantiate this significant change in government policy that justified the sudden suspension of the Vaccine MO's.

~~The impugned MOs were enacted between October 2021 until June 20, 2022, after which the impugned MOs were suddenly "suspended".~~

Vaccine Mandate's Impact on the Plaintiffs' Section 6, 7, and 15 *Charter* Rights

23. The Vaccine Mandates, as implemented and renewed through the Vaccine MOs, violated several of the Plaintiffs' rights under the *Charter*, in a manner that was not demonstrably justifiable.

24. The Vaccine Mandates, as implemented through the Vaccine MOs, violated the Plaintiffs' Section 6 *Charter* Mobility Rights. By making vaccination a precondition 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.

25. The Vaccine Mandates, as implemented through the Vaccine MOs, violated the Plaintiff's Section 7 right to liberty. By forcing these Plaintiffs to choose between undertaking an irreversible medical treatment as a precondition for any travel beyond Canada and within Canada, through federally regulated transportation, the Plaintiffs' decision-making concerning their personal autonomy was compromised undermining their dignity and independence as human beings in a democratic society and their independence.

26. The Plaintiffs further plead that their violation of Section 7 liberty rights was not in accordance with the principles of fundamental justice as the Vaccine Mandates were arbitrary and grossly disproportionate for reasons identified hereafter.

27. The Vaccine Mandates, as implemented through the Vaccines MOs, also violated Section 15 of the Charter which guarantees equality rights under Canadian law.

~~28. As a result of Vaccine Mandates, the Plaintiffs were unable to travel within Canada or outside of Canada until June 20, 2022 using federally-regulated transportation.~~

~~29. During this time, both Plaintiffs were confronted with an option to either receive an irreversible medical treatment, against their will and conscience, or forego any travel beyond Canada or within Canada using federally-regulated transportation.~~

30. The Plaintiffs plead that, on its face, the Vaccine MOs were discriminatory by segregating Canadians, including these Plaintiffs into identifiable categories of the "vaccinated" and "unvaccinated". This distinction was discriminatory as it prejudiced the rights of these Plaintiffs to access and make use of federally regulated transportation services putting them at a disadvantage and withholding a benefit that was available to vaccinated Canadians. Consequently, this perpetuated an unsubstantiated and prejudicial stereotype that unvaccinated Canadians, like these Plaintiffs, posed some higher risk of Covid-19 transmission or infection within the transportation system.

31. As a result of their personal medical choice to forego vaccination against Covid-19, the Plaintiffs were effectively identified as belonging to a new, segregated class of Canadians who could not travel by plane or train. Consequently, for a period of seven (7) months, the Plaintiffs could not visit their respective parents, who reside in the United Kingdom, and who are both in poor health and aging. Additionally, Mr. Harrison could not travel to the UK to attend to his businesses.

~~**The Canadian Government knew the Vaccine Mandate, which is a Prima Facie *Charter* Breach, had no Empirical Scientific or Epidemiological Basis**~~

The Canadian Government's Vaccine Mandate was Grossly Negligent and Implemented in Bad Faith

32. The Plaintiffs plead that the Vaccine Mandates were not implemented to protect public safety in the transportation system, but rather ~~implemented~~ to fulfil the Prime Minister's political pledge that was expressly made during the general election period – and formally incorporated into the campaign platform of the Liberal Party as a wedge issue at the time of the 2021 general election.
33. The Plaintiffs plead that the Vaccine Mandate, as a piece of policy, was unsupported by any cognizant scientific basis. Further, it was not recommended by Public Health Agency of Canada or by Health Canada.
34. ~~Alternatively~~, Additionally, the Plaintiffs plead that the Federal Government restricted Canadians' access and use of the federally regulated transportation sector in order to enhance its own, desired public health objective of achieving mass vaccination among Canadians while being willfully blind or without any due regard as to: (a) the efficacy (or lack thereof) of this policy and (b) suitable alternatives that would not require Canadians to effectively undergo ~~an effectively compelled~~ what is still an experimental medical procedure, namely vaccination.
35. The Plaintiffs further plead that the decision, implementation and continuation of the Vaccine Mandates was made in a manner that was clearly wrong, grossly negligent and rooted in bad faith.

36. In particular, the Minister of Transportation and the Public Health Agency of Canada failed and neglected to:

a. Conduct any investigation, study, review, or analysis as to the risk and risk profile that Covid-19 specifically presented to the transportation sector, including having regard to (a) existing protective measures in place against Covid-19 during the relevant time period and (b) risk of Covid-19 transmission within the transportation system (i.e. airports, airplanes etc.) despite the obvious relevance this information would have in implementing a mandatory vaccine policy;

b. Implement any ~~system, whatsoever,~~ mechanism by which to monitor and review the effectiveness of Covid-19 vaccination within the transportation sector on an on-going basis, or at all during the time in which the Vaccine Mandates were in place~~d~~ and renewed on a periodic basis;

c. Investigate and ~~E~~evaluate the vaccine's purported protection against Covid-19 transmission;

d. Investigate, ~~E~~evaluate and consider the protection against infection and transmission of Covid-19 that was afforded by alternative, Non-Pharmaceutical Interventions, including masking, negative PCR testing as well as natural immunity;

e. Establish a cogent, intelligible and transparent method of analyzing the unique risk of infection and transmission for different Covid-19 variants during the time period that the Vaccine Mandates were ~~maintained~~ implemented and renewed;

f. Establish *any* framework or criteria for decision-making with respect to extending the ~~Vaccine Mandates~~ Vaccine MOs for such time as it was in force and effect;

g. Consider, study, monitor and understand the anticipated effects of the proposed Vaccine Mandates within a broader, epidemiological context to assess the risk of Covid-19 transmission and/or an outbreak of Covid-19 within the transportation sector as compared to the same risk within the community, generally.

h. Ignored or trivialized the medical/scientific evidence as to the ineffectiveness (and therefore the utility and appropriateness) of the Covid-19 vaccines, namely waning immunity, on reducing or stopping the transmission of Covid-19.

37. Furthermore, the Plaintiffs state that the Public Health Agency of Canada never recommended or advised to the Minister of Transportation and Transport Canada to implement a vaccine mandate for travel. In fact, in the weeks and days leading to the Government's announcement of the Vaccine Mandate, members within the Government were actively seeking a public health *justification* to support ~~their~~ the political decision to implement a ~~the~~ Vaccine Mandate.

~~38. The Plaintiffs also state that t~~The Government was willfully blind, reckless, ~~or~~ and acted in bad faith in developing the scope of the Vaccine Mandate, for those reasons listed in paragraph 36 ~~19(a).~~ ~~In fact, the team within the Ministry of Transportation that was responsible for its policy development and implementation did not even include a medical doctor or an epidemiologist who might have advised as to the initial and continued scientific justification, or lack thereof, for various aspects of the Vaccine Mandates.~~

39. In fact, the Plaintiffs plead that the Government had multiple opportunity to assess and evaluate the efficacy of the Vaccine Mandates each time the Vaccine MO's were renewed, but failed to do so in order to aggressively promote an agenda to achieve mass vaccination among Canadians despite no demonstrable evidence that this would improve public safety within the transportation system or more broadly within the local community.

40. Similarly, the Canadian Government was grossly negligent, willfully blind ~~or~~ and acted in bad faith in maintaining the Vaccine Mandate despite ~~knowing~~ having scientific evidence that the Covid-19 vaccine provided imperfect and time – limited protection against infection from Covid-19 and despite having little to no scientific certainty as to the vaccine's impact on the transmission of Covid-19 between infected and non-infected individuals, especially in different settings within the transportation system.

41. The Government acted in bad faith by withholding information that the risk of vaccination were still unknown, yet publicly declaring them to be "safe".

42. The Government acted in bad faith by neglecting to conduct periodic studies of vaccination efficacy and effectiveness (particularly within the transportation system) before it renewed each Vaccine MO.

43. In light of the foregoing, the Canadian Government, including the Minister of Transportation and the individuals involved with developing and implementing the Vaccine Mandates acted in a manner that was negligent and willfully blind with respect to relevant scientific and epidemiological facts and data known to them at that time. Accordingly, the decision to both enact the several impugned MOs and maintain these MOs until June 20, 2022, was an act of bad faith by the Defendant.

The Vaccine Mandates were not Justified by Section 1 of the *Charter*

44. The Plaintiffs plead that the *Charter* – infringing Vaccine Mandate is not saved by Section 1 of the Charter.

45. The Vaccine Mandates, as implemented through the Vaccine MOs do not meet the proportionality requirement under the Oakes test. The Plaintiffs plead those alternative measures – including, but not limited to, masking and recognizing natural immunity – would equally serve the Government's stated objective of protect public safety within the transportation system. The singular requirement for vaccination to access transportation services was a grossly disproportionate and unnecessary means to meet the Government's stated objective.

46. The Plaintiffs plead that the Vaccine Mandates also lacked a rational connection to the Government's objective; the Government lacked the scientific evidence that Covid-19 vaccination meaningfully reduced the risk of transmitting Covid-19 in a transportation contact. Put differently, there was no causal link between Covid-19 vaccination and a reduction in the onward transmission of Covid-19.

47. The Plaintiffs plead that the Vaccine Mandates, as implemented through the Vaccine MOs, offended the "minimal impairment" requirement. The Government had alternative and equally effective measures to ensure public safety against Covid-19 within the transportation context, which it ignored. There were, in fact, less right-impairing means of achieving their objective in a real and substantial matter, including by recognizing natural immunity to Covid-19 infections and implementing non-pharmacological intervention such as testing, masking, and temperature checks all of which were, inexplicably, deemed inadequate.

48. The Plaintiffs plead the Government fundamentally failed to carefully tailor the Vaccine Mandates to its objectives and significantly and unnecessarily impaired the rights of these Plaintiffs beyond what was reasonably necessary having regard to the know science at the time concerning both the Covid-19 vaccines and the Covid-19 virus. Indeed, the Government showed a complete disregard in assessing credible alternatives to vaccinations that would minimally (or not at all) impair *Charter* rights while achieving reasonable safety within the transportation sector.

Section 24(1) *Charter* Damages are Just and Appropriate in the Circumstances

49. The Plaintiffs state that, in light of the foregoing, the manner in which the Defendant introduced and maintained the Vaccine Mandates through repeatedly renewing the Vaccine MOs notwithstanding the lack of scientific justification for doing so at each renewal, amounts to a clear disregard for the *Charter* rights and freedoms of these Plaintiffs and, indeed, of all Canadians.

50. The Government's strategic disregard for (a) disconfirming scientific evidence challenging the efficacy of Covid-19 vaccination together with the known waning efficacy of vaccination (b) lack of recommendation from public health about the need for vaccination as a pre-condition for travel (c) its own admission that the risks of the Covid-19 vaccination were yet unknown and little understood and (d) lack of intelligible criteria against which the decision to continue to discontinue the Vaccine MOs could be made and (e) the absence of any scientific studies that considered the efficacy of Covid-19 vaccine against each Covid-19 variant, highlight the fact that the decision to implement and maintain the Vaccine MOs was made in bad faith and in a grossly negligent manner.

51. Furthermore, the *Charter* – infringing Vaccine Mandates diminished public faith in the efficacy of the *Charter's* protection of fundamental rights and freedoms.

52. In light of the foregoing, an award of constitutional damages pursuant to Section 24(1) of the *Charter* is functionally justified in the circumstances. In particular, such an award would:

    a. compensate the Plaintiffs for their humiliation, indignity and inability to travel, at all, using federally regulated transportation in order to visit their ailing parents;

    b. vindicate their *Charter* rights and freedoms that were breached; and,

    c. deter similar, unjustifiable and politically-motivated policies which prima facie breach the *Charter* rights and freedoms of Canadians.

53. The Plaintiff proposes that this action be tried at Ottawa, Ontario.

~~**November 28, 2023**~~

June 3, 2024

Sam A. Presvelos
Counsel for the Plaintiffs

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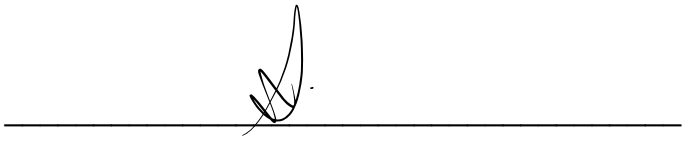
SOR/2021-150, s. 12

This is **Exhibit "B"** referred to in the Affidavit of Evan Presvelos sworn January 8, 2025



Commissioner for Taking Affidavits

SAM A. PRESVELOS

Court File No.: T-2536-23

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

MOTION RECORD OF THE DEFENDANTS/MOVING PARTY

September 4, 2024

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National Litigation Sector
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Per: Zachary Lanys
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Counsel for the Defendants, His Majesty the King, the Minister of Transportation, and the Attorney General of Canada

TO: **The Administrator**
Federal Court of Canada
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Toronto, ON
M5V 3L6

AND TO: **Presvelos Law LLP**
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Toronto, ON M5H 3L5

Sam A. Presvelos
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Counsel for the Plaintiffs

Court File No.: T-2536-23

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

MOTION RECORD INDEX

TAB 1

Court File No.: T-2536-23

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

NOTICE OF MOTION

TAKE NOTICE THAT the Defendants, His Majesty the King, the Minister of Transportation, and the Attorney General of Canada (the "Defendants") will make a motion to the Federal Court on a date to be determined by the Case Management Judge, Associate Judge Trent Horne, at 180 Queen Street West, Toronto, Ontario. The expected duration of the motion is three hours.

THE MOTION IS FOR:

1. An order striking the Amended Statement of Claim (the "Claim") in its entirety, without leave to amend, with the exception of leave to amend for the aspects of the Claim related to air travel and section 6 of the *Charter of Rights and Freedoms* (*"Charter*");

2. Costs of this motion;

3. An order providing the Defendants with 60 days to deliver a Statement of Defence from the date of the service of a further amended Statement of Claim, or alternatively, the date that this motion is dismissed;

4. An order amending the title of proceedings to remove as defendants the Minister of Transportation and the Attorney General of Canada; and

5. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. This Court should strike the Amended Statement of Claim on the basis that it discloses no reasonable cause of action. The Plaintiffs have not pleaded the necessary elements of the *Charter* claims which they allege.

A. Background

2. The Plaintiffs have served an Amended Statement of Claim which challenges the constitutionality of the proof of vaccination requirement for federally regulated transportation during a portion of the COVID-19 pandemic. The Plaintiffs allege that the Defendants breached their sections 6, 7 and 15 rights under the *Charter*.

3. Specifically, the Plaintiffs allege that interim Ministerial Orders made under the *Aeronautics Act* (RSC 1985, c A-2) and *Railway Safety Act* (RSC, 1985, c 32 (4th Supp)) (the "Ministerial Orders") breached their *Charter* rights. The Plaintiffs seek *Charter* damages under subsection 24(1) of the *Charter* with respect to damages allegedly caused by these Orders.

B. Section 6 of the *Charter*

4. The Plaintiffs allege that the Ministerial Orders violate their section 6 rights. However, they have not pleaded the necessary elements of a section 6 claim for two distinct reasons.

i. The Plaintiffs have not pleaded that they are Canadian citizens

5. Firstly, the Plaintiffs allege that the Ministerial Orders restricted their international movement because they were unable to board airplanes to leave Canada and fly to the United Kingdom during the material time. This allegation is a reference to subsection 6(1) of the *Charter*.

6. However, subsection 6(1) expressly provides that "every **citizen of Canada** has the right to enter in, remain in, and leave Canada".

7. In the Amended Statement of Claim, the Plaintiffs do not identify themselves as Canadian citizens.

8. The Plaintiffs have failed to plead the necessary elements of a section 6(1) claim and have not disclosed a reasonable cause of action with respect to section 6(1).

ii. The Applicants have no cause of action regarding rail transport

9. Second, the Plaintiffs allege that the Ministerial Orders related to rail transport violate section 6 of the *Charter*. They do not identify if this violation relates to subsection 6(1) or 6(2) of the *Charter*.

10. In the Amended Statement of Claim, the Plaintiffs do not plead that the Ministerial Orders related to rail transport had any impact on them.

11. The Plaintiffs have failed to plead the necessary elements of either a section 6(1) or (2) claim in relation to rail transport and have not disclosed a reasonable cause of action with respect to section 6.

C. Section 7 of the *Charter*

12. The Plaintiffs allege that the Ministerial Orders violate their section 7 rights to liberty by forcing them to choose between vaccination and travel beyond Canada through federally regulated transportation. They allege that this compromised their decision-making in a way which undermines their dignity and independence.

13. The liberty interest under section 7 of the *Charter* does not confer protection for the ability to travel by federally regulated means of transportation. Further, a Ministerial Order which requires an individual to make a choice does not undermine the liberty interest. The Plaintiffs plead that they were not vaccinated, demonstrating that they had the ability to make a choice.

14. The Plaintiffs have failed to plead the necessary elements of a section 7 claim and do not disclose a reasonable cause of action with respect to section 7.

D. Section 15 of the *Charter*

15. The Plaintiffs allege that they were discriminated against on the basis of their vaccination status, which they allege violated section 15 of the *Charter*.

16. However, "vaccination status" is not an enumerated or analogous ground under section 15 of the *Charter*. It is a personal choice and not an immutable personal characteristic. It is not contrary to section 15 of the *Charter* for individuals to be treated differently based on their choice whether or not to be vaccinated.

17. As a result, the Plaintiffs have failed to plead the necessary elements of a cause of action with respect to section 15 and do not disclose a reasonable cause of action with respect to section 15.

E. <u>Leave to amend should not be granted, except with regards to section 6 regarding air transport</u>

18. Leave to amend is generally granted where the defects in the claim are curable by amendments.

19. Leave to amend should only be granted in this case with regards to the Plaintiff's failure to plead whether they are citizens. If the Plaintiffs are Canadian citizens, this aspect of the claim could be cured by amendment.

20. However, all other aspects of the claim cannot be cured by amendment. In the case of rail transportation, the Plaintiffs do not appear to have any interaction with rail. In the cases of section 7 and 15, the Plaintiffs claims are legally untenable and cannot be cured.

THE FOLLOWING STATUTORY PROVISIONS will be relied on:

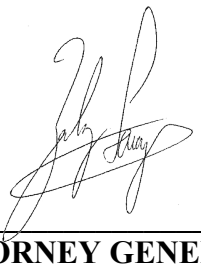
1. *Federal Courts Act*, RSC, 1985, c F-7, as amended, s. 18.1, 48(1) and Schedule.
2. *Federal Courts Rules*, SOR/98-106, rules 221, 359, 385.
3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24).
4. Such further and other statutory provisions as counsel may advise and this Honourable Court may permit.

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

1. The Amended Statement of Claim; and

2. Such further and other documents as counsel may advise and this Honourable Court may permit.

July 02, 2024



ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Ontario Regional Office
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Counsel for the Defendants, His Majesty the King, the Minister of Transportation, and the Attorney General of Canada

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Sam A. Presvelos

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Counsel for the Plaintiffs

TAB 2

Court File No. T-2536-23

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

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. 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.

June 3, 2024

Issued by:_____

Federal Court of Canada
180 Queen Street West
Toronto, Ontario
M5V 1Z4

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Fax: 613-954-1920
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AND TO: **Department of Justice Canada**
Ontario Regional Office
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Fax: 416-954-8982
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AMENDED CLAIM

1. The Plaintiffs claim the following:

    a. Constitutional damages pursuant to Section 24(1) of the *Canadian Charter of Rights and Freedoms* (the "**Charter**"), in the amount of $1,000,000, exclusive of interest and costs, for breach of the Plaintiffs' Section 6, 7 and 15 rights and freedoms as guaranteed by the *Charter* as a result of government decision-making and ~~action~~ conduct that was rooted in negligence, bad faith and willfully blind to the ~~lack~~ absence of scientific evidence or disconfirming scientific evidence regarding the role, and, in particular, the unknown efficacy, of Covid-19 vaccination in reducing the risk of Covid-19 transmission and infection within the transportation sector;

    b. Costs of this action in accordance with the *Federal Court Rules*, SOR/98-106; and,

    c. Such further and other relief as counsel may advise and this Honorable Court deem just.

The Parties

2. The Plaintiff, Shaun Rickard, is an individual residing in Pickering, Ontario. At all material times, Mr. Rickard did not receive~~d~~ one of Canada's authorized Covid-19 vaccines.

3. The Plaintiff, Karl Harrison, is an individual residing in Vancouver, British Columbia. At all material times, Mr. Harrison did not receive one of Canada's authorized Covid-19 vaccines.

4. The Attorney General is named as a Defendant as ~~this claim~~ the impugned conduct directly involves governmental decisions and actions made and implemented by the Federal Minister of Transportation and the bureaucracy that supports this Ministry.

The Vaccine Travel Mandate's Impact on the Plaintiffs

5. At the time of the pandemic, Mr. Rickard had an ailing father who lived in Southampton, Hampshire, England. Mr. Rickard's father, now deceased, was suffering from advanced Alzheimer's. Mr. Rickard would visit his father as often as he could to comfort him and spend time together.
6. Similarly, Mr. Harrison's mother, aged 90 years old, lives alone in Blackpool, England. Mr. Harrison and his mother share a very close relationship and Mr. Harrison makes a point of visiting his mother multiple times a year.
7. Additionally, Mr. Harrison operates several businesses out of England, including a travel company, MagicBreaks. Through his business ventures, Mr. Harrison employs around 150 people in London. The nature of these businesses is such that he frequently travels to the UK, Ireland, Spain and other European countries for meetings with senior management and commercial partners.

The Prime Minister's Campaign Promise to Implement a Vaccine Mandate in the 2021 General Elections

8. In August 2021, during the Canadian general election, Prime Minister Justin Trudeau made a campaign pledge that if re-elected he would mandate that Canadians must be vaccinated against Covid-19 in order to board a plane, train or boat, that is for all federally – regulated transportation services. ~~Indeed,~~ T~~t~~his campaign pledge formed an official part of the Liberal Government's re-election platform, *Forward for Everyone*.
9. The federal election was held on September 20, 2021, and Mr. Trudeau was re-elected as Canada's Prime Minister.

Mandatory Vaccination Formally Announced by the Prime Minister

10. Shortly after being re-elected as Prime Minister, on October 6, 2021, the Canadian Government announced it will require mandatory vaccination against Covid-19 for all travelers (a) departing from Canadian airports (b) boarding VIA and Rocky Mountaineer trains and (c) using federally regulated marine transportation (the "**Vaccine Mandates**").

11. The Canadian Government introduced these unprecedented Vaccine Mandates under the pretext that vaccination would help to both limit the risk of spreading Covid-19 and prevent and mitigate against future Covid-19 outbreaks, however no scientific evidence was provided to support that mandatory vaccination was, in fact, required to keep Canadians safe within the transportation system.

12. The Vaccine Mandates allowed Canadian travelers until November 30th, 2021, to comply with its requirements in order to access federally – regulated transportation services (i.e. to ensure that they had sufficient time to receive ~~a~~ the prescribed Covid-19 ~~vaccine~~ vaccination regiment).

Implementation of the Vaccine Mandate through Interim Ministerial Orders

13. The Vaccine Mandates were implemented through a perpetual series of Interim Ministerial Orders ("**Vaccine MO**") that were made pursuant to the *Aeronautics Act* (R.S.C., 1985, c. A-2) and the *Railway Safety Act* (R.S.C., 1985, c. 32 (4th Supp.)). The Vaccine MO's were renewed repeatedly between November 2021 until they were suspended in June 2022.

14. Specifically, the Minister of Transportation relied on Section 4.71 (Aviation security regulations), 4.9 (Regulations respecting aeronautics) and 6.41(1) (Interim orders) of the *Aeronautics Act* as well as Section 4(4), 32.01 and 36 of the *Railway Safety Act* to enact and renew the Vaccine ~~Mandates~~ MOs.

15. Section 4.71 of the *Aeronautics Act* deals with Aviation Security Regulations. It confers powers to implement regulations affecting the safety of air travel. Section 4.71(1), (2) provides as follows:

> Aviation security regulations
> 4.71 (1) The Governor in Council may make regulations respecting aviation security.
> Contents of regulations
> (2) Without limiting the generality of subsection (1), regulations may be made under that subsection (a) respecting the safety of the public, passengers, crew members, aircraft and aerodromes and other aviation facilities;

16. Section 4.91(2) provides as follows:

> Order must relate to safety
> (2) The Minister may make an order under subsection (1) only if the Minister is of the opinion that the order is necessary for aviation safety or the safety of the public.

17. Section 6.41(1) of the *Aeronautics Act* concerns Interim Orders that may be made by the Minister. Its provides, in part, as follows:

> Interim orders
> 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;

18. The *Railway Safety Act* also contains several provisions intended to protect public safety in this mode of transport. Section 4(4) of the *Act* provides as follows:

> Safe railway operations, etc.
> (4) In determining, for the purposes of this Act, whether railway operations are safe railway operations, or whether an act or thing constitutes a threat to safe railway operations or enhances the safety of railway operations, regard shall be had not only to the safety of persons and property transported by railways but also to the safety of other persons and other property.

18. Section 32.01 of the *Railway Safety Act* enables the Minister to make Orders where there is a "threat to safe railway operations":

> Order — safe railway operations

> 32.01 If the Minister considers it necessary in the interests of safe railway operations, the Minister may, by order sent to a company, road authority or municipality, require the company, road authority or municipality to stop any activity that might constitute a threat to safe railway operations or to follow the procedures or take the corrective measures specified in the order, including constructing, altering, operating or maintaining a railway work.

19. Section 36(1) of the *Railway Safety Act* provides the Minister with the power to require a company to provide information necessary for Orders made under the *Act*:

> Power to require information
> 36 (1) The Minister may order that a company provide, in the specified form and within the specified period, information or documents that he or she considers necessary for the purposes of ensuring compliance with this Act and with the regulations, rules, orders, standards and emergency directives made under this Act.

20. The Plaintiffs plead, and the fact is, that the Minister of Transportation has never before used these or other provisions within the above referenced legislation to require a medical procedure as a pre-condition to accessing federally regulated transportation services. Put differently, the Vaccine Mandates were truly unprecedented in Canadian history.
21. The first Vaccine MO, with respect to aviation, was implemented on October 30, 2022, officially titled, "Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19". These Vaccine MOs were renewed by the Minister for a total of 79 times, until they were finally suspended on June 20, 2022.
22. In repealing the (most recent) Vaccine MO, the Minister declared that the "Interim Order is no longer required to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public". No particular evidence was provided to substantiate this significant change in government policy that justified the sudden suspension of the Vaccine MO's.

~~The impugned MOs were enacted between October 2021 until June 20, 2022, after which the impugned MOs were suddenly "suspended".~~

Vaccine Mandate's Impact on the Plaintiffs' Section 6, 7, and 15 *Charter* Rights

23. The Vaccine Mandates, as implemented and renewed through the Vaccine MOs, violated several of the Plaintiffs' rights under the *Charter*, in a manner that was not demonstrably justifiable.

24. The Vaccine Mandates, as implemented through the Vaccine MOs, violated the Plaintiffs' Section 6 *Charter* Mobility Rights. By making vaccination a precondition 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.

25. The Vaccine Mandates, as implemented through the Vaccine MOs, violated the Plaintiff's Section 7 right to liberty. By forcing these Plaintiffs to choose between undertaking an irreversible medical treatment as a precondition for any travel beyond Canada and within Canada, through federally regulated transportation, the Plaintiffs' decision-making concerning their personal autonomy was compromised undermining their dignity and independence as human beings in a democratic society and their independence.

26. The Plaintiffs further plead that their violation of Section 7 liberty rights was not in accordance with the principles of fundamental justice as the Vaccine Mandates were arbitrary and grossly disproportionate for reasons identified hereafter.

27. The Vaccine Mandates, as implemented through the Vaccines MOs, also violated Section 15 of the Charter which guarantees equality rights under Canadian law.

~~28. As a result of Vaccine Mandates, the Plaintiffs were unable to travel within Canada or outside of Canada until June 20, 2022 using federally-regulated transportation.~~

~~29. During this time, both Plaintiffs were confronted with an option to either receive an irreversible medical treatment, against their will and conscience, or forego any travel beyond Canada or within Canada using federally-regulated transportation.~~

30. The Plaintiffs plead that, on its face, the Vaccine MOs were discriminatory by segregating Canadians, including these Plaintiffs into identifiable categories of the "vaccinated" and "unvaccinated". This distinction was discriminatory as it prejudiced the rights of these Plaintiffs to access and make use of federally regulated transportation services putting them at a disadvantage and withholding a benefit that was available to vaccinated Canadians. Consequently, this perpetuated an unsubstantiated and prejudicial stereotype that unvaccinated Canadians, like these Plaintiffs, posed some higher risk of Covid-19 transmission or infection within the transportation system.

31. As a result of their personal medical choice to forego vaccination against Covid-19, the Plaintiffs were effectively identified as belonging to a new, segregated class of Canadians who could not travel by plane or train. Consequently, for a period of seven (7) months, the Plaintiffs could not visit their respective parents, who reside in the United Kingdom, and who are both in poor health and aging. Additionally, Mr. Harrison could not travel to the UK to attend to his businesses.

~~**The Canadian Government knew the Vaccine Mandate, which is a Prima Facie *Charter* Breach, had no Empirical Scientific or Epidemiological Basis**~~

The Canadian Government's Vaccine Mandate was Grossly Negligent and Implemented in Bad Faith

32. The Plaintiffs plead that the Vaccine Mandates were not implemented to protect public safety in the transportation system, but rather ~~implemented~~ to fulfil the Prime Minister's political pledge that was expressly made during the general election period – and formally incorporated into the campaign platform of the Liberal Party as a wedge issue at the time of the 2021 general election.
33. The Plaintiffs plead that the Vaccine Mandate, as a piece of policy, was unsupported by any cognizant scientific basis. Further, it was not recommended by Public Health Agency of Canada or by Health Canada.
34. ~~Alternatively~~, Additionally, the Plaintiffs plead that the Federal Government restricted Canadians' access and use of the federally regulated transportation sector in order to enhance its own, desired public health objective of achieving mass vaccination among Canadians while being willfully blind or without any due regard as to: (a) the efficacy (or lack thereof) of this policy and (b) suitable alternatives that would not require Canadians to effectively undergo ~~an effectively compelled~~ what is still an experimental medical procedure, namely vaccination.
35. The Plaintiffs further plead that the decision, implementation and continuation of the Vaccine Mandates was made in a manner that was clearly wrong, grossly negligent and rooted in bad faith.

36. In particular, the Minister of Transportation and the Public Health Agency of Canada failed and neglected to:

    a. Conduct any investigation, study, review, or analysis as to the risk and risk profile that Covid-19 specifically presented to the transportation sector, including having regard to (a) existing protective measures in place against Covid-19 during the relevant time period and (b) risk of Covid-19 transmission within the transportation system (i.e. airports, airplanes etc.) despite the obvious relevance this information would have in implementing a mandatory vaccine policy;

    b. Implement any ~~system, whatsoever,~~ mechanism by which to monitor and review the effectiveness of Covid-19 vaccination within the transportation sector on an on-going basis, or at all during the time in which the Vaccine Mandates were in place~~d~~ and renewed on a periodic basis;

    c. Investigate and ~~E~~evaluate the vaccine's purported protection against Covid-19 transmission;

    d. Investigate, ~~E~~evaluate and consider the protection against infection and transmission of Covid-19 that was afforded by alternative, Non-Pharmaceutical Interventions, including masking, negative PCR testing as well as natural immunity;

    e. Establish a cogent, intelligible and transparent method of analyzing the unique risk of infection and transmission for different Covid-19 variants during the time period that the Vaccine Mandates were ~~maintained~~ implemented and renewed;

    f. Establish *any* framework or criteria for decision-making with respect to extending the ~~Vaccine Mandates~~ Vaccine MOs for such time as it was in force and effect;

g. Consider, study, monitor and understand the anticipated effects of the proposed Vaccine Mandates within a broader, epidemiological context to assess the risk of Covid-19 transmission and/or an outbreak of Covid-19 within the transportation sector as compared to the same risk within the community, generally.

h. Ignored or trivialized the medical/scientific evidence as to the ineffectiveness (and therefore the utility and appropriateness) of the Covid-19 vaccines, namely waning immunity, on reducing or stopping the transmission of Covid-19.

37. Furthermore, the Plaintiffs state that the Public Health Agency of Canada never recommended or advised to the Minister of Transportation and Transport Canada to implement a vaccine mandate for travel. In fact, in the weeks and days leading to the Government's announcement of the Vaccine Mandate, members within the Government were actively seeking a public health *justification* to support ~~their~~ the political decision to implement a ~~the~~ Vaccine Mandate.

~~38. The Plaintiffs also state that t~~The Government was willfully blind, reckless, ~~or~~ and acted in bad faith in developing the scope of the Vaccine Mandate, for those reasons listed in paragraph 36 ~~19(a).~~ ~~In fact, the team within the Ministry of Transportation that was responsible for its policy development and implementation did not even include a medical doctor or an epidemiologist who might have advised as to the initial and continued scientific justification, or lack thereof, for various aspects of the Vaccine Mandates.~~

39. In fact, the Plaintiffs plead that the Government had multiple opportunity to assess and evaluate the efficacy of the Vaccine Mandates each time the Vaccine MO's were renewed, but failed to do so in order to aggressively promote an agenda to achieve mass vaccination among Canadians despite no demonstrable evidence that this would improve public safety within the transportation system or more broadly within the local community.

40. Similarly, the Canadian Government was grossly negligent, willfully blind ~~or~~ and acted in bad faith in maintaining the Vaccine Mandate despite ~~knowing~~ having scientific evidence that the Covid-19 vaccine provided imperfect and time – limited protection against infection from Covid-19 and despite having little to no scientific certainty as to the vaccine's impact on the transmission of Covid-19 between infected and non-infected individuals, especially in different settings within the transportation system.
41. The Government acted in bad faith by withholding information that the risk of vaccination were still unknown, yet publicly declaring them to be "safe".
42. The Government acted in bad faith by neglecting to conduct periodic studies of vaccination efficacy and effectiveness (particularly within the transportation system) before it renewed each Vaccine MO.
43. In light of the foregoing, the Canadian Government, including the Minister of Transportation and the individuals involved with developing and implementing the Vaccine Mandates acted in a manner that was negligent and willfully blind with respect to relevant scientific and epidemiological facts and data known to them at that time. Accordingly, the decision to both enact the several impugned MOs and maintain these MOs until June 20, 2022, was an act of bad faith by the Defendant.

The Vaccine Mandates were not Justified by Section 1 of the *Charter*

44. The Plaintiffs plead that the *Charter* – infringing Vaccine Mandate is not saved by Section 1 of the Charter.

45. The Vaccine Mandates, as implemented through the Vaccine MOs do not meet the proportionality requirement under the Oakes test. The Plaintiffs plead those alternative measures – including, but not limited to, masking and recognizing natural immunity – would equally serve the Government's stated objective of protect public safety within the transportation system. The singular requirement for vaccination to access transportation services was a grossly disproportionate and unnecessary means to meet the Government's stated objective.

46. The Plaintiffs plead that the Vaccine Mandates also lacked a rational connection to the Government's objective; the Government lacked the scientific evidence that Covid-19 vaccination meaningfully reduced the risk of transmitting Covid-19 in a transportation contact. Put differently, there was no causal link between Covid-19 vaccination and a reduction in the onward transmission of Covid-19.

47. The Plaintiffs plead that the Vaccine Mandates, as implemented through the Vaccine MOs, offended the "minimal impairment" requirement. The Government had alternative and equally effective measures to ensure public safety against Covid-19 within the transportation context, which it ignored. There were, in fact, less right-impairing means of achieving their objective in a real and substantial matter, including by recognizing natural immunity to Covid-19 infections and implementing non-pharmacological intervention such as testing, masking, and temperature checks all of which were, inexplicably, deemed inadequate.

48. The Plaintiffs plead the Government fundamentally failed to carefully tailor the Vaccine Mandates to its objectives and significantly and unnecessarily impaired the rights of these Plaintiffs beyond what was reasonably necessary having regard to the know science at the time concerning both the Covid-19 vaccines and the Covid-19 virus. Indeed, the Government showed a complete disregard in assessing credible alternatives to vaccinations that would minimally (or not at all) impair *Charter* rights while achieving reasonable safety within the transportation sector.

Section 24(1) *Charter* Damages are Just and Appropriate in the Circumstances

49. The Plaintiffs state that, in light of the foregoing, the manner in which the Defendant introduced and maintained the Vaccine Mandates through repeatedly renewing the Vaccine MOs notwithstanding the lack of scientific justification for doing so at each renewal, amounts to a clear disregard for the *Charter* rights and freedoms of these Plaintiffs and, indeed, of all Canadians.

50. The Government's strategic disregard for (a) disconfirming scientific evidence challenging the efficacy of Covid-19 vaccination together with the known waning efficacy of vaccination (b) lack of recommendation from public health about the need for vaccination as a pre-condition for travel (c) its own admission that the risks of the Covid-19 vaccination were yet unknown and little understood and (d) lack of intelligible criteria against which the decision to continue to discontinue the Vaccine MOs could be made and (e) the absence of any scientific studies that considered the efficacy of Covid-19 vaccine against each Covid-19 variant, highlight the fact that the decision to implement and maintain the Vaccine MOs was made in bad faith and in a grossly negligent manner.

51. Furthermore, the *Charter* – infringing Vaccine Mandates diminished public faith in the efficacy of the *Charter's* protection of fundamental rights and freedoms.

52. In light of the foregoing, an award of constitutional damages pursuant to Section 24(1) of the *Charter* is functionally justified in the circumstances. In particular, such an award would:

    a. compensate the Plaintiffs for their humiliation, indignity and inability to travel, at all, using federally regulated transportation in order to visit their ailing parents;

    b. vindicate their *Charter* rights and freedoms that were breached; and,

    c. deter similar, unjustifiable and politically-motivated policies which prima facie breach the *Charter* rights and freedoms of Canadians.

53. The Plaintiff proposes that this action be tried at Ottawa, Ontario.

~~**November 28, 2023**~~

June 3, 2024

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SOR/2021-150, s. 12

TAB 3

Court file No.: T-2536-23

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 DEFENDANT / MOVING PARTY

Attorney General of Canada

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Counsel for the Defendants

OVERVIEW

1. The Plaintiffs' Amended Statement of Claim alleges that COVID-19 "vaccine mandates" caused them damages by violating their rights under sections 6, 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("**Charter**").[1] The Plaintiffs allege that the harms were caused by Ministerial Orders made by the Minister of Transportation requiring vaccination against COVID-19 in order to access federally regulated modes of transportation during a portion of the COVID-19 pandemic.

2. The Amended Statement of Claim should be struck for failing to disclose any cause of action. Regarding section 6, the alleged impacts on the Plaintiffs relate to their inability to board a plane to leave Canada, however, the Plaintiffs have not identified themselves as Canadian citizens at the relevant times for the purposes of subsection 6(1). They have not pleaded any limits on any rights protected under subsection 6(2). Regarding section 7, the Plaintiffs, who ultimately chose not to be vaccinated, fail to demonstrate how the Ministerial Orders impact their liberty. To the extent the Plaintiff's section 7 claim is just a repetition of section 6, this is also inappropriate. Regarding section 15, a person's vaccination status is not an enumerated or analogous ground and cannot support a claim under this section.

3. Leave to amend should not be granted for the majority of these claims because they cannot be cured. The sections 7 and 15 claims are based on principles which are legally untenable. The only exception is the Plaintiff's subsection 6(1) *Charter* claim, which could potentially proceed if the Plaintiffs plead that they were Canadian citizens at the relevant times.

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[1] June 3, 2024, Amended Statement of Claim ("**ASOC**"), **Tab 2, Motion Record of the Defendant** ("**DMR**"), **p 10.**

PART I – STATEMENT OF FACTS

A. The Plaintiff's Amended Statement of Claim

4. The Plaintiffs together seek $1,000,000 in damages pursuant to section 24(1) of the *Charter* for alleged breaches of their sections 6, 7 and 15 rights. The Plaintiffs allege that the damages were caused by Ministerial Orders related to air and rail transport.

i. The Ministerial Orders

5. The Plaintiffs allege that two types of Ministerial Orders made by the Minister of Transportation caused them their harms: orders made under the *Aeronautics Act*, and orders made under the *Railway Safety Act*.[2]

6. Regarding the *Aeronautics Act*, the Plaintiffs identify that the first Ministerial Order was implemented on October 30, 2021[3] and it was renewed until finally being suspended on June 20, 2022.[4] The Amended Statement of Claim indicates that this Ministerial Order implemented a requirement for travellers departing from Canadian airports to be vaccinated against COVID-19.[5] The Amended Statement of Claim does not identify how these Ministerial Orders were structured and whether they contained any exceptions.

7. The Plaintiffs do not identify any specific Ministerial Orders made under the *Railway Safety Act*. The Amended Statement of Claim suggests that these orders would have required mandatory vaccination for boarding VIA and Rocky Mountaineer Trains.[6]

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[2] ASOC at para 13, **Tab 2**, **DMR, p 12.**
[3] The Plaintiffs write October 30, 2022, in the ASOC but this is presumably a typo. ASOC at para 21, **Tab 2**, **DMR, p 14.**
[4] ASOC at para 21, **Tab 2**, **DMR, p 14.**
[5] ASOC at paras 10, 12, 13 and 21, **Tab 2**, **DMR, pp 12, 14.**
[6] ASOC at para 10, **Tab 2**, **DMR, p 12.**

ii. The Plaintiffs

8. The Plaintiffs identify themselves as "individuals" residing in Pickering, Ontario and Vancouver, British Columbia, respectively.[7] Neither Plaintiff pleads that they are a Canadian citizen or were a Canadian citizen at the material times the impugned Ministerial Orders were in effect.

9. The Plaintiffs both plead that they have parents in the United Kingdom they frequently visit. The Plaintiff Mr. Harrison also indicates that he frequently travels to the United Kingdom and other countries in Europe for business.[8]

10. The Plaintiffs plead that, notwithstanding the Ministerial Orders, they chose not to receive a COVID-19 Vaccination.[9] As a result, for seven months they did not travel to visit their parents, and Mr. Harrison did not travel to operate his business.[10]

iii. The Alleged Charter Damages

11. The Plaintiffs claim that the Minister's Orders violate their *Charter* rights in a manner which cannot be demonstrably justified.[11]

12. Regarding section 6, the Plaintiffs have not specified whether they are alleging a violation of rights protected under subsections 6(1) or 6(2) of the *Charter*. However, the alleged impacts and alleged violation of their section 6 mobility rights exclusively relate to international travel. Specifically, the Plaintiffs allege that the Ministerial Orders violate their mobility rights because by making vaccination a precondition of travel, they were unable to fly to the United

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[7] ASOC at para 2-3, **Tab 2**, **DMR, p 10.**
[8] ASOC at para 5-7, **Tab 2**, **DMR, p 11.**
[9] ASOC at para 2-3, **Tab 2**, **DMR, p 10.**
[10] ASOC at para 31, **Tab 2**, **DMR, p 16.**
[11] ASOC at para 2-3, **Tab 2**, **DMR, p 10.**

Kingdom. The Plaintiffs allege that the effect of this was a restriction on their international movement because of the modern realities of travel. The Plaintiffs do not mention rail travel.[12]

13. Regarding section 7, the Plaintiffs allege that the Ministerial Order violate their rights to liberty by forcing them to choose between vaccination and travel beyond Canada. The Plaintiffs allege this choice undermined their dignity and independence.[13]

14. Regarding section 15, the Plaintiffs allege that the Ministerial Orders are discriminatory because they segregate Canadians into the "vaccinated" and "unvaccinated" and discriminates against the unvaccinated in their ability to access transportation.[14]

B. Procedural History

15. The Plaintiffs originally commenced an application challenging vaccine requirements for rail and air travel in the matter T-1991-21. This matter was dismissed by the Federal Court on the basis of mootness, which decision was upheld by the Federal Court of Appeal.[15]

16. The Plaintiffs then commenced this action on November 29, 2023.[16] The Plaintiffs subsequently amended their statement of claim on June 3, 2024, to particularize their allegations as to how the Ministerial Orders impact their *Charter* rights.[17]

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[12] ASOC at para 5-7, 24, 31, **Tab 2**, **DMR, p 15.**
[13] ASOC at para 25, **Tab 2**, **DMR, p 15.**
[14] ASOC at para 27, 30, **Tab 2**, **DMR, pp 15,16.**
[15] *Ben Naoum v Canada (Attorney General*), 2022 FC 1463, aff'd *Peckford v Canada (Attorney General)*, 2023 FCA 219, applications leave to appeal by the other applicants to the SCC refused, 41100, 41081, 41082. Note that the Plaintiffs in this matter appealed to the FCA, but they did not seek leave to appeal to the SCC.
[16] ASOC at para 53, **Tab 2**, **DMR p 23.**
[17] ASOC at paras 23-30, **Tab 2**, **DMR pp 15-16.**

PART II – POINTS IN ISSUE

17. The issues before the Court on this motion are:

a. The Plaintiffs' Amended Statement of Claim should be struck; and,

b. Leave to further amend should not be granted, except with regard to the section 6 claim.

PART III – SUBMISSIONS

A. The Plaintiff's Amended Statement of Claim should be struck

i. The Test to Strike

18. Rule 221 of the *Federal Courts Rules* allows a defendant to move to strike out some or all of a claim if it discloses no reasonable cause of action.[18] The power to strike out a claim is a "valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial."[19]

19. The test on a motion to strike is whether it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action.[20] A claim discloses no reasonable cause of action and ought to be struck where it has no reasonable prospect of success.[21] The facts pleaded are assumed true unless they are manifestly incapable of being proven or patently ridiculous.[22] The claimant must allege all the facts necessary to prove a

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[18] *Federal Courts Rules*, SOR/98-106 at s 221(1)(a) [*Rules*].
[19] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 19 [*Imperial Tobacco*].
[20] *Imperial Tobacco* at para 17; *Canada v Harris*, 2020 FCA 124 at para 23 [*Harris*].
[21] *Imperial Tobacco* at para 17.
[22] *Imperial Tobacco* at para 22; *Edell v Canada*, 2010 FCA 26 at para 5.

claim recognized at law; if a necessary element of the claim is missing, the pleading will be struck.[23]

20. The standard requirements of pleadings are not relaxed simply because a *Charter* claim is involved.[24] A rights claimant must plead sufficient material facts to satisfy the criteria applicable to each *Charter* right in question.[25]

ii. ***The Plaintiffs have not pleaded the necessary elements of section 6***

21. The Plaintiffs have alleged that the Ministerial Orders violate their section 6 rights, without specifying the s. 6 subsection on which they are relying. Regardless, the allegation that the Ministerial Orders violate their section 6 rights is deficiently pleaded for both subsections 6(1) and 6(2) of the *Charter*. Given that the mobility rights impacts alleged by the Plaintiffs relate exclusively to international travel—that they were unable to board an airplane "to leave" Canada[26]—the Plaintiffs appear to be relying on subsection 6(1). However, the Plaintiffs do not plead that they are Canadian citizens, or that they were Canadian citizens at all material times. The Plaintiffs have not pleaded any impacts or restrictions on their rights under subsection 6(2). The Amended Statement of Claim also fails to disclose any cause of action regarding rail transport.

22. Subsection 6(1) of the *Charter* provides that Canadian citizens have the right to enter, remain in, and leave Canada.[27] Canadian citizenship is a necessary condition to making a

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[23] *Mahoney v Canada*, 2020 FC 975 at para 27 [*Mahoney*].
[24] *La Rose v Canada,* 2023 FCA 241 at para 132.
[25] *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 21.
[26] ASOC at para 24, **Tab 2**, **DMR p 15.**
[27] *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) [*Charter*]; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 18.

Charter claim pursuant to this provision.[28] Subsection 6(1) is concerned with international movement, and its central purpose is to prevent exile and banishment by constitutionalizing the right to enter, remain, and leave Canada for Canadian citizens.[29]

23. Subsection 6(2) of the *Charter* relates to interprovincial mobility rights. It provides that Canadian citizens and permanent residents have the right "to move to and take up residence in any province", and "to pursue the gaining of a livelihood in any province".[30] The Plaintiffs have not pleaded any limit on their interprovincial mobility rights.

a. The Plaintiffs do not identify as Canadian citizens

24. The Plaintiffs allege that the Ministerial Orders restricted their international movement because they were unable to board airplanes to leave Canada to fly to the United Kingdom and visit their parents and, in Mr. Harrison's case, to run his business.

25. Nowhere in the Amended Statement of Claim do the Plaintiffs plead that they are Canadian citizens. Rather, the Plaintiffs simply identify themselves as "individuals" residing in Pickering and Vancouver, respectively.[31]

26. Subsection 6(1) of the *Charter* only provides the right to enter, remain in, and leave Canada to Canadian citizens. Therefore, the Amended Statement of Claim as currently pleaded is fundamentally flawed and ought to be struck.

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[28] *Canada (Minister of Employment and Immigration) v Chiarelli*, 1992 CanLII 87 (SCC) at paras 26 and 32.
[29] *United States of America v Cotroni*, 1989 CanLII 106 (SCC); *Canada v Boloh 1(a)*, 2023 FCA 120 at para 36.
[30] *Charter* at s 6(2).
[31] ASOC at paras 2-3, **Tab 2**, **DMR, p 10.**

b. The Amended Statement of Claim fails to disclose a cause of action for rail transport

27. The Plaintiffs allege that the Ministerial Orders related to rail transport violate section 6 of the *Charter*.[32] However, the Plaintiffs fail to plead any material facts relating to how their decision to forego vaccination caused them damages by impacting their ability to travel by rail. It is, of course, impossible to travel from Pickering or Vancouver to the United Kingdom or other parts of Europe by rail. However, the Plaintiff's inability to travel to these overseas destinations are the only material facts pleaded by the Plaintiffs in respect of their section 6 allegation.

28. In any event, the Ministerial Orders related to rail would not have precluded the Plaintiffs from exercising their interprovincial mobility rights notwithstanding their decision to not be vaccinated—the Plaintiffs were free to move within Canada by car, since automobiles are not federally-regulated transportation covered by the Ministerial Orders.

29. Therefore, it is unclear how the Ministerial Orders in respect of rail had any impact on the Plaintiffs whatsoever, and certainly not in a manner that infringed their *Charter* rights. The Amended Statement of Claim fails to plead the elements necessary to satisfy section 6 of the *Charter*, and as such fail to disclose a reasonable cause of action in relation to rail.

iii. The Plaintiffs' section 7 claim fails to disclose a reasonable a cause of action

30. The Plaintiff's pleadings regarding section 7 of the *Charter* are also deficient and ought to be struck. Requiring the Plaintiffs to choose between vaccination and air travel does not engage the Plaintiff's "liberty" interests. To the contrary, the Plaintiffs had a choice, and they exercised

[32] Note that the Plaintiffs do not identify any Ministerial Orders, ASOC at para 10, **Tab 2**, **DMR, p 12.**

their right. Courts have consistently held that even where a mandate makes individuals to choose between vaccination and something else, they are not being forced to become vaccinated.[33]

31. Section 7 protects a right, in certain cases, to make fundamental personal choices. As explained by the Supreme Court of Canada in *Blencoe*:

> Although an individual has the right to make fundamental personal choices free from state interference, **such personal autonomy is not synonymous with unconstrained freedom. In the circumstances of this case, the state has not prevented the respondent from making any "fundamental personal choices".** The interests sought to be protected in this case do not in my opinion fall within the "liberty" interest protected by s. 7.[34]

32. The Plaintiffs claim that the Ministerial Orders "forced" them to choose between vaccination and travel by air, which they submit undermined their dignity and independence.[35] However, this allegation cannot support a section 7 claim because as the Plaintiffs' own pleadings demonstrate, the Plaintiffs remained at all times free to make their own decisions about vaccination and, indeed, chose not to be vaccinated. The fact that the Plaintiffs may have faced consequences in terms of their ability to travel by air does not amount to coercion and is insufficient to trigger the section 7 rights to liberty.

33. Instead, what was at stake for the Plaintiffs was not forcible vaccination, but rather the consequences of their own choice to remain unvaccinated. Indeed, what the Plaintiffs are

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[33] *Wojdan v Canada (Attorney General)*, 2021 FC 1341 at paras 35-36 (aff'd 2022 FCA 120), *Amalgamated Transit Union, Local 113 v Toronto Transit Commission*, 2021 ONSC 7658 at para 77, *Neri v Canada*, 2021 FC 1443 at para 59.
[34] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII)
[35] ASOC at para 25, **Tab 2**, **DMR, p 15.**

fundamentally alleging is that they had a right to choose not to be vaccinated *and* to travel by air. This argument is just a duplicate of an argument for mobility rights.

34. Mobility rights are not protected under section 7 but under section 6. To expand section 7 to include additional mobility rights would be to rewrite the *Charter* and undermine the specific design of section 6. The same conclusion was reached by this Court in *Khadr v Canada (Attorney General)* when considering section 6 and 7:

> The ability to travel where and when one wants outside Canada does not strike at that basic value of individual dignity and independence. **I say this because the matter of choice to leave Canada is enshrined in section 6 of the Charter**. If one provision of the Charter covers a specific freedom, other sections of the Charter should not be presumed to cover the same freedom. There is a presumption against redundancies in legislation.[36]

35. The Plaintiffs' section 7 argument does not give rise to a reasonable cause of action, and ought to be struck.

iv. The Plaintiffs' section 15 claim fails to disclose a reasonable cause of action

36. The Plaintiffs identify vaccination status as the ground upon which they were allegedly discriminated against. Specifically, the Plaintiffs plead that Ministerial Orders violate section 15 because they segregate Canadians into categories as "vaccinated" and "unvaccinated".[37]

37. The Plaintiffs receiving different treatment because of their vaccination status does not engage section 15 of the *Charter*. Vaccination status is not an enumerated ground or an analogous ground under section 15 of the *Charter*. As a result, the Plaintiffs' claims regarding section 15 of the *Charter* disclose no reasonable cause of action and ought to be struck.

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[36] *Khadr v Canada (Attorney General)*, 2006 FC 727 at para 75.
[37] ASOC at paras 27-30, **Tab 2**, **DMR, pp 15-16.**

38. Vaccination status is not an enumerated ground under the *Charter*. Subsection 15(1) of the *Charter* enumerates race, national or ethnic origin, colour, religion, sex, age or mental or physical disability as grounds which engage section 15. Vaccination status is not one of these.

39. Vaccination status is also not an analogous ground under the *Charter*. As explained by the Supreme Court of Canada in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, analogous grounds are those similar to the enumerated grounds that would "often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity."[38]

40. Vaccination status is not an immutable characteristic or one which is constructively immutable. It is a choice. As explained by the Court of Appeal of Alberta:

> [the Appellant's] COVID-19 vaccination status is not who she is. **It is not an immutable personal characteristic, nor is it one that is changeable only at unacceptable cost to personal identit**y. Her choice not to get vaccinated against COVID-19 is just that – a choice. And while the decision whether to get a COVID-19 vaccine is personal, it remains fluid, made at a moment in time, based on available information and often in response to specific circumstances and influences. **The decision can change, and often does, all with minimal or no cost to personal identity**.[39]

41. This same reasoning—that vaccination status is not immutable and therefore does not engage section 15 of the *Charter*—has also been expressed by the Ontario Superior Court and Ontario Court of Justice.[40] These cases are persuasive and this reasoning should be followed

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

[39] *Lewis v Alberta Health Services*, 2022 ABCA 359 at para 62-70.

[40] See *Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology*, 2022 ONSC 5111 at paras 91-95 and *R v Lauterpacht*, 2023 ONCJ 51 at paras 85-89.

by this Court. The allegations relating to section 15 should be struck as they do not disclose a cause of action.

B. LEAVE TO FURTHER AMEND SHOULD NOT BE GRANTED, EXCEPT FOR THE SECTION 6 CLAIM AS RELATED TO AIR TRAVEL

42. To be struck without leave to amend, the defect in an Amended Statement of Claim must be one that cannot be cured by amendment.[41]

v. Most of the Plaintiff's Amended Statement of Claim cannot be cured

43. The Plaintiffs' claims based on section 6 and inability to travel by rail transport, section 7, and section 15 cannot be cured because they are grounded in fundamentally flawed legal arguments and lack of any factual foundation.

44. With respect to section 6 and rail transport, there is no allegation in the Plaintiffs' Amended Statement of Claim that they were affected by any Ministerial Orders regarding rail transport. Additionally, even if they were, there is no basis upon which to find that a right to rail transport is protected under either subsection of section 6. There are other means for persons to move between provinces other than rail.

45. With respect to section 7, the Plaintiffs' claim is ultimately about attempting to find mobility rights in section 7. Given that this would serve to re-write the *Charter*, there is no amendment which would cure this claim.

46. With respect to section 15, because vaccination status is not an enumerated or analogous ground, there is no amendment which could cure this issue.

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[41] *Simon v Canada*, 2011 FCA 6 at para 8.

vi. Limited leave to amend can be granted for section 6

47. The Defendants dispute that there was any limitation on the Plaintiffs' section 6(1) rights and dispute that section 6 provides any right to air travel. Indeed, the Federal Court of Appeal has noted that there "is reason to doubt" whether it does so.[42] However, unlike the *Charter* claims noted above, there is no conclusive case law on this issue.

48. If the Plaintiffs were to amend their claims to identify that the Plaintiffs were Canadian citizens at the relevant times of the Ministerial Orders, and therefore captured within section 6(1) of the *Charter*, such an amendment could cure this aspect of the pleadings.

PART IV – ORDER SOUGHT

49. The Defendants seek an Order:

a. Striking the Amended Statement of Claim in its entirety, with no leave to amend except with regards to the subsection 6(1) claim as it relates to air travel;

b. Costs; and

c. Such further and other relief as this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4TH DAY OF SEPTEMBER, 2024

James Schneider and Zachary Lanys
Counsel for the Defendants/Moving Party, the Attorney General of Canada

[42] *Singh Brar v Canada (Public Safety and Emergency Preparedness)*, 2024 FCA 114 at para 11.

PART V – LIST OF AUTHORITIES

1. *Amalgamated Transit Union, Local 113 v Toronto Transit Commission*, 2021 ONSC 7658

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

3. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII)

4. *Canada v Boloh 1(a)*, 2023 FCA 120

5. *Canada (Minister of Employment and Immigration) v Chiarelli*, 1992 CanLII 87 (SCC)

6. *Canada v Harris*, 2020 FCA 124

7. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC)

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

9. *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47

10. *Edell v Canada*, 2010 FCA 26

11. *Khadr v Canada (Attorney General)*, 2006 FC 727

12. *La Rose v Canada,* 2023 FCA 241

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

14. *Mahoney v Canada*, 2020 FC 975

15. *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227

16. *Neri v Canada*, 2021 FC 1443

17. *Peckford v Canada (Attorney General)*, 2023 FCA 219

18. *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42

19. *R v Lauterpacht*, 2023 ONCJ 51

20. *Simon v Canada*, 2011 FCA 6

21. *Singh Brar v Canada (Public Safety and Emergency Preparedness)*, 2024 FCA 114

22. *United States of America v Cotroni*, 1989 CanLII 106 (SCC)

23. *Wojdan v Canada (Attorney General)*, 2021 FC 1341, (aff'd 2022 FCA 120)

APPENDIX A – STATUTES AND REGULATIONS

1. *Federal Courts Rules*, SOR/98-106, s 221(1)(a).

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).

***Federal Courts Rules*, SOR/98-106**	
Rule 221(1)(a)	
Motion to strike 221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it (a) discloses no reasonable cause of action or defence, as the case may be,	**Requête en radiation** 221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas : a) qu'il ne révèle aucune cause d'action ou de défense valable;
***Canadian Charter of Rights and Freedoms*, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK),**	
Mobility of citizens 6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada. **Rights to move and gain livelihood** (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province.	**Liberté de circulation** 6 (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir. **Liberté d'établissement** (2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit : a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province; b) de gagner leur vie dans toute province.

Limitation	**Restriction**
(3) The rights specified in subsection (2) are subject to (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.	(3) Les droits mentionnés au paragraphe (2) sont subordonnés : a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle; b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.
Affirmative action programs	**Programmes de promotion sociale**
(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.	(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale.
Legal Rights **Life, liberty and security of person**	**Vie, liberté et sécurité**
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.	**7** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
Equality before and under law and equal protection and benefit of law	**Égalité devant la loi, égalité de bénéfice et protection égale de la loi**
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.	15 (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
Affirmative action programs	**Programmes de promotion sociale**
(2) Subsection (1) does not preclude any law, program or activity that has as its object the	(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités

amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

This is **Exhibit "C"** referred to in the Affidavit of Evan Presvelos sworn January 8, 2025

Commissioner for Taking Affidavits

SAM A. PRESVELOS

Court File No. T-2536-23

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

PLAINTIFFS' RESPONDING MOTION RECORD

October 4, 2024

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Court File No. T-2536-23

FEDERAL COURT

BETWEEN:

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Defendants

INDEX

TAB 1

Court File No. T-2536-23

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 unprecedent. 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 dismissed[2] 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;

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[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]

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[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]

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[10] *Al Omani v Canada*, 2017 FC 786 at para 14At 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 controversy[13] 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]

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[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]

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[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, untrammeled 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…

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[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 tight 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]

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[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]

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[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 choices[36] 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.]

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[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 cocerce 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

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[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. 27and 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 <u>they are not made on merit</u> but on the basis of a personal characteristic and, therefore, the thrust of identification of analogous grounds is to reveal grounds based on characteristics <u>people cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law</u>.[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]

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[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 Alberta[55] 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.

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[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]

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[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 of 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]

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[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,

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[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, with- out 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

PLAINTIFFS' WRITTEN REPRESENTATIONS

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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

PLAINTIFFS' RESPONDING MOTION RECORD

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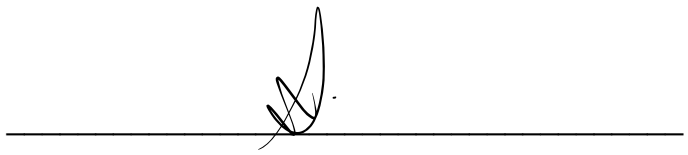
Shaun Rickard and Karl Harrison

This is **Exhibit "D"** referred to in the Affidavit of Evan Presvelos sworn January 8, 2025



Commissioner for Taking Affidavits

SAM A. PRESVELOS

Court File No. T-2536-23

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

MOTION RECORD OF THE PLAINTIFFS/MOVING PARTIES

October 4, 2024

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Court File No. T-2536-23

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

INDEX

TAB 1

Court File No. T-2536-23

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

NOTICE OF MOTION

TAKE NOTICE THAT the Plaintiffs will make a motion to the Federal Court on November 18, 2024, before Associate Judge Trent Horne, at 180 Queen Street West, Toronto, Ontario.

The expected duration of the motion is three hours.

THE MOTION IS FOR:

1. An Order permitting the filing of the Further Amended Statement of Claim, in the form of Appendix "A" to this Notice of Motion;
2. An Order permitting such further amendments as may be required;
3. Costs of this motion; and,
4. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. On November 29, 2023, the Plaintiffs commenced an action seeking *Charter* damages in response to Ministerial Orders made under the *Aeronautics Act* (RSC 1985, c. A-2) and the *Railway Safety Act* (RSC, 1985, c. 32 (4th Supp) which

prevented them from leaving Canada and visiting the United Kingdom where both Plaintiffs also hold citizenship.

2. On June 5, 2024, the Plaintiffs delivered an Amended Statement of Claim.
3. The Defendants subsequently brought a motion to strike on the basis that "the Plaintiffs have not plead the necessary elements of the *Charter* claims which they allege".
4. The proposed further amendments: (a) advances an additional *Charter* breach on substantially the same underlying facts and (b) better clarifies the basis upon which the claims are brought without materially changing the nature of the claim or the substratum of the litigation between the parties.

THE FOLLOWING STATUTORY PROVISIONS will be relied upon:

1. *Federal Courts Act*, RSC, 1985, c F-7, as amended;
2. *Federal Court Rules*, SOR/98-106, Rules 75, 200 and 201;
3. *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, s. 91(24); and,
4. Such further and other provisions as counsel may advise.

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

1. The Further Amended Statement of Claim; and,
2. Such further and other documents as counsel may advise and this Honourable Court may permit.

October 4, 2024

Sam Presvelos
_____

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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

NOTICE OF MOTION

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Lawyers for the Plaintiffs,
Shaun Rickard and Karl Harrison

TAB 2

APPENDIX “A”

Court File No. T-2536-23

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

FURTHER AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. 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.

October 4, 2024

Issued by:_____

Federal Court of Canada
180 Queen Street West
Toronto, Ontario
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FURTHER AMENDED CLAIM

1. The Plaintiffs claim the following:

    a. Constitutional damages pursuant to Section 24(1) of the *Canadian Charter of Rights and Freedoms* (the "**Charter**"), in the amount of $1,000,000, exclusive of interest and costs, for breach of the Plaintiffs' Section 6, 7, 12 and 15 rights and freedoms as guaranteed by the *Charter* as a result of government decision-making and ~~action~~ conduct that was rooted in negligence, bad faith and willfully blind to the ~~lack~~ absence of scientific evidence or disconfirming scientific evidence regarding the role, and, in particular, the unknown efficacy, of Covid-19 vaccination in reducing the risk of Covid-19 transmission and infection within the transportation sector or more broadly in the community;

    b. Costs of this action in accordance with the *Federal Court Rules*, SOR/98-106; and,

    c. Such further and other relief as counsel may advise and this Honorable Court deem just.

The Parties

2. The Plaintiff, Shaun Rickard, is an individual residing in Pickering, Ontario. Mr. Rickard is currently a Canadian citizen.

3. At all material times, Mr. Rickard was a Permanent Resident in Canada since 1999 and was in the process of obtaining his Canadian citizenship. Mr. Rickard did not receive~~d~~ one of Canada's authorized Covid-19 vaccines due to his deeply held beliefs about his right to control what he puts into his body; his right to make informed medical decisions concerning medical procedures; and his concern regarding the yet unknown safety profile of the Covid-19 vaccines

in a context where the evidence and science concerning the Covid-19 vaccines was still emerging, being studied and investigated.

4. The Plaintiff, Karl Harrison, is an individual and Canadian citizen residing in Vancouver, British Columbia. At all material times, Mr. Harrison did not receive one of Canada's authorized Covid-19 vaccines due to his deeply held beliefs about his right to control what he puts into his body; his right to make informed medical decisions concerning medical procedures; and his concern regarding the yet unknown safety profile of the Covid-19 vaccines in a context where the evidence and science concerning the Covid-19 vaccines was still emerging, being studied and investigated.
5. Both Mr. Rickard and Mr. Harrison hold dual citizenship with Canada and the United Kingdom, where they were both born.
6. The Attorney General is named as a Defendant as ~~this claim~~ the impugned conduct directly involves governmental decisions and actions made and implemented by the Federal Minister of Transportation and the bureaucracy that supports this Ministry.

The Vaccine Travel Mandate's Impact on the Plaintiffs

7. At the time of the pandemic, Mr. Rickard had an ailing father who lived in Southampton, Hampshire, England. Mr. Rickard's father, now deceased, was suffering from advanced Alzheimer's. Mr. Rickard would visit his father as often as he could to comfort him and spend time together in anticipation of his imminent passing.
8. Similarly, Mr. Harrison's mother, aged 90 years old, lives alone in Blackpool, England. Mr. Harrison and his mother share a very close relationship and Mr. Harrison makes a point of visiting his mother multiple times a year and helps care for her, when visiting.

9. Additionally, Mr. Harrison operates several businesses out of England, including a travel company, MagicBreaks. Through his business ventures, Mr. Harrison employs around 150 people in London. The nature of these businesses is such that he frequently travels to the UK, Ireland, Spain and other European countries for meetings with senior management and commercial partners.

The Prime Minister's Campaign Promise to Implement a Vaccine Mandate in the 2021 General Elections

10. In August 2021, during the Canadian general election, Prime Minister Justin Trudeau made a campaign pledge that if re-elected he would mandate that Canadians must be vaccinated against Covid-19 in order to board a plane, train or boat, that is for all federally – regulated transportation services. ~~Indeed,~~ T~~t~~his campaign pledge formed an official part of the Liberal Government's re-election platform, *Forward for Everyone*.

11. The federal election was held on September 20, 2021, and Mr. Trudeau was re-elected as Canada's Prime Minister.

Mandatory Vaccination Formally Announced by the Prime Minister

12. Shortly after being re-elected as Prime Minister, on October 6, 2021, the Canadian Government announced it will require mandatory vaccination against Covid-19 for all travelers (a) departing from Canadian airports (b) boarding VIA and Rocky Mountaineer trains and (c) using federally regulated marine transportation (the "**Vaccine Mandates**").

13. The Canadian Government introduced these unprecedented Vaccine Mandates under the pretext that vaccination would help to both limit the risk of spreading Covid-19 and prevent and mitigate against future Covid-19 outbreaks, however no scientific evidence was provided

to support that mandatory vaccination was, in fact, required to keep Canadians safe within the transportation system.

14. The Vaccine Mandates allowed Canadian travelers until November 30th, 2021, to comply with its requirements in order to access federally – regulated transportation services (i.e. to ensure that they had sufficient time to receive ~~a~~ the prescribed Covid-19 ~~vaccine~~ vaccination regiment).

Implementation of the Vaccine Mandate through Interim Ministerial Orders

15. The Vaccine Mandates were implemented through a perpetual series of Interim Ministerial Orders ("**Vaccine MO**") that were made pursuant to the *Aeronautics Act* (R.S.C., 1985, c. A-2) and the *Railway Safety Act* (R.S.C., 1985, c. 32 (4th Supp.)). The Vaccine MO's were renewed repeatedly between November 2021 until they were suspended in June 2022.

16. Specifically, the Minister of Transportation relied on Section 4.71 (Aviation security regulations), 4.9 (Regulations respecting aeronautics) and 6.41(1) (Interim orders) of the *Aeronautics Act* as well as Section 4(4), 32.01 and 36 of the *Railway Safety Act* to enact and renew the Vaccine ~~Mandates~~ MOs.

17. The Plaintiffs plead, and the fact is, that neither of these legislations have been previously used to enforce or promote public health measures and objectives.

18. Section 4.71 of the *Aeronautics Act* deals with Aviation Security Regulations. It confers powers to implement regulations affecting the safety of air travel. Section 4.71(1), (2) provides as follows:

> Aviation security regulations
> 4.71 (1) The Governor in Council may make regulations respecting aviation security.
> Contents of regulations
> (2) Without limiting the generality of subsection (1), regulations may be made under that subsection (a) respecting the safety of the public, passengers, crew members, aircraft and aerodromes and other aviation facilities;

19. Section 4.91(2) provides as follows:

> Order must relate to safety
> (2) The Minister may make an order under subsection (1) only if the Minister is of the opinion that the order is necessary for aviation safety or the safety of the public.

20. Section 6.41(1) of the *Aeronautics Act* concerns Interim Orders that may be made by the Minister. Its provides, in part, as follows:

> Interim orders
> 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;

21. The *Railway Safety Act* also contains several provisions intended to protect public safety in this mode of transport. Section 4(4) of the *Act* provides as follows:

> Safe railway operations, etc.
> (4) In determining, for the purposes of this Act, whether railway operations are safe railway operations, or whether an act or thing constitutes a threat to safe railway operations or enhances the safety of railway operations, regard shall be had not only to the safety of persons and property transported by railways but also to the safety of other persons and other property.

18. Section 32.01 of the *Railway Safety Act* enables the Minister to make Orders where there is a "threat to safe railway operations":

> Order — safe railway operations
> 32.01 If the Minister considers it necessary in the interests of safe railway operations, the Minister may, by order sent to a company, road authority or municipality, require the company, road authority or municipality to stop any activity that might constitute a threat to safe railway operations or to follow the procedures or take the corrective measures specified in the order, including constructing, altering, operating or maintaining a railway work.

22. Section 36(1) of the *Railway Safety Act* provides the Minister with the power to require a company to provide information necessary for Orders made under the *Act*:

> Power to require information

> 36 (1) The Minister may order that a company provide, in the specified form and within the specified period, information or documents that he or she considers necessary for the purposes of ensuring compliance with this Act and with the regulations, rules, orders, standards and emergency directives made under this Act.

23. The Plaintiffs plead, and the fact is, that the Minister of Transportation has never before used these or other provisions within the above referenced legislation to require a medical procedure as a pre-condition to accessing federally regulated transportation services. Put differently, the Vaccine Mandates were truly unprecedented in Canadian history.

24. The first Vaccine MO, with respect to aviation, was implemented on October 30, 2022, officially titled, "Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19". These Vaccine MOs were renewed by the Minister for a total of 79 times, until they were finally suspended on June 20, 2022.

25. In repealing the (most recent) Vaccine MO, the Minister declared that the "Interim Order is no longer required to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public". No particular evidence was provided to substantiate this significant change in government policy that justified the sudden suspension of the Vaccine MO's.

~~The impugned MOs were enacted between October 2021 until June 20, 2022, after which the impugned MOs were suddenly "suspended".~~

Vaccine Mandate's Impact on the Plaintiffs' Section 6, 7, 12 and 15 *Charter* Rights

26. The Vaccine Mandates, as implemented and renewed through the Vaccine MOs, violated several of the Plaintiffs' rights under the *Charter*, in a manner that was not demonstrably justifiable.

27. The Vaccine Mandates, as implemented through the Vaccine MOs, violated ~~the Plaintiffs'~~ Mr. Harrison's Section 6 *Charter* Mobility Rights. By making vaccination a precondition of travel, Mr. Harrison unable to board an airplane to leave Canada and fly to the United Kingdom. As such, Mr. Harrison's international movement was restricted such that it was not realistically possible for him to leave Canada for Europe or elsewhere, considering the modern realities of travel.

28. With respect to Mr. Rickard, his right to leave Canada to visit the United Kingdom, where he holds citizenship, is a breach of his rights under Section 19(2) of the *Immigration and Refugee Protection Act* (S.C.2001, c.27) and associated jurisprudence as well as a breach of his international mobility rights as contained in Article 12 of the *International Convention on Civil and Political Rights.* Mr. Rickard pleads, and the fact is, that Canada is a signatory to the *International Convention on Civil and Political Rights* and, therefore, must be observed and upheld by Canadian courts and adhered to by the Canadian Government.

29. The Plaintiffs plead that the effect of the Vaccine Mandates was such that it denied their right to visit the United Kingdom – despite having the right to do so as citizens of the United Kingdom.

~~30.~~ The Vaccine Mandates, as implemented through the Vaccine MOs, violated the Plaintiff~~'s s~~' Section 7 right to liberty. By forcing these Plaintiffs to choose between undertaking an irreversible medical treatment ~~as a precondition for any~~ or subjecting themselves to a medical procedure they did not want and had concerns about in order to exercise their right to travel beyond Canada and within Canada, through federally regulated transportation, the Plaintiffs' decision-making concerning their personal autonomy was compromised undermining their dignity and independence as human beings in a democratic society ~~and their independence.~~

31. The Plaintiffs further plead that their violation of Section 7 liberty rights was not in accordance with the principles of fundamental justice as the Vaccine Mandates were arbitrary and grossly disproportionate for reasons identified hereafter.

32. The Vaccine Mandates, as implemented through the Vaccines MOs, also violated Section 15 of the Charter which guarantees equality rights under Canadian law.

~~33. As a result of Vaccine Mandates, the Plaintiffs were unable to travel within Canada or outside of Canada until June 20, 2022 using federally-regulated transportation.~~

~~34. During this time, both Plaintiffs were confronted with an option to either receive an irreversible medical treatment, against their will and conscience, or forego any travel beyond Canada or within Canada using federally-regulated transportation.~~

35. The Plaintiffs plead that, on its face, the Vaccine MOs were discriminatory by segregating Canadians, including these Plaintiffs into identifiable categories of the "vaccinated" and "unvaccinated". This distinction was discriminatory as it prejudiced the rights of these Plaintiffs to access and make use of federally regulated transportation services putting them at a disadvantage and withholding a benefit that was available to vaccinated Canadians. Consequently, this perpetuated an unsubstantiated and prejudicial and scientifically

unsubstantiated stereotype or generalized perception that unvaccinated Canadians, like these Plaintiffs, posed some higher risk of Covid-19 transmission or infection within the transportation system.

36. The Plaintiffs plead, and the fact is, that, at all material times, there was no scientific and epidemiological evidence to suggest that unvaccinated Canadians possessed a heightened health safety profile than vaccinated Canadians.

37. As a result of their personal medical choice to forego vaccination against Covid-19, the Plaintiffs were effectively identified as belonging to a new, segregated class of Canadians who could not travel by plane or train. Consequently, for a period of seven (7) months, the Plaintiffs could not visit their respective parents, who reside in the United Kingdom, and who are both in poor health and aging. Additionally, Mr. Harrison could not travel to the UK to attend to his businesses.

38. The Plaintiffs further plead that the status of being vaccinated against Covid-19 is medically irreversible and, further, receiving a Covid-19 vaccine to travel would have significantly undermined their sincerely held sense of dignity, worth and personal autonomy while also requiring the Plaintiffs to disregard their genuine concerns about the vaccine's safety and efficacy.

39. The Plaintiffs further plead that the consequences for refusing a Covid-19 vaccine – namely being denied access to and use of federally regulated transportation to leave Canada and visit the United Kingdom – amounted to cruel and unusual punishment in breach of Section 12 of the *Charter*.

40. In particular (i) revoking mobility rights for unvaccinated Canadians is cruel and unusual treatment; (ii) absent Covid-19, the Plaintiffs would have every right to access and use

federally regulated transportation and, therefore, leave Canada (iii) the Government's decision to deny these Plaintiffs the ability to access transportation was degrading and dehumanizing and grossly disproportionate to what would have been appropriate in the circumstances having regard to the available scientific understanding of both the Covid-19 vaccine's efficacy and non-pharmacological alternatives to vaccination.

~~**The Canadian Government knew the Vaccine Mandate, which is a Prima Facie *Charter* Breach, had no Empirical Scientific or Epidemiological Basis**~~

The Canadian Government's Vaccine Mandate was Grossly Negligent and Implemented in Bad Faith

41. The Plaintiffs plead that the Vaccine Mandates were not implemented to protect public safety in the transportation system, but rather ~~implemented~~ to fulfil the Prime Minister's political pledge that was expressly made during the general election period – and formally incorporated into the campaign platform of the Liberal Party as a wedge issue at the time of the 2021 general election.

42. The Plaintiffs plead that the Vaccine Mandate, as a piece of policy, was unsupported by any cognizant scientific basis. Further, it was not recommended by Public Health Agency of Canada or by Health Canada.

43. ~~Alternatively~~, Additionally, the Plaintiffs plead that the Federal Government restricted Canadians' access and use of the federally regulated transportation sector in order to enhance its own, desired public health objective of achieving mass vaccination among Canadians while being willfully blind or without any due regard as to: (a) the efficacy (or lack thereof) of this policy and (b) suitable alternatives that would not require Canadians to effectively undergo ~~an effectively compelled~~ what is still an experimental medical procedure, namely vaccination.

44. The Plaintiffs further plead that the decision, implementation and continuation of the Vaccine Mandates was made in a manner that was clearly wrong, grossly negligent and rooted in bad faith.

45. In particular, the Minister of Transportation and the Public Health Agency of Canada and supporting agencies and organizations failed and neglected to:

    a. Conduct any investigation, study, review, or analysis as to the risk and risk profile that Covid-19 specifically presented to the transportation sector, including having regard to (a) existing protective measures in place against Covid-19 during the relevant time period and (b) risk of Covid-19 transmission within the transportation system (i.e. airports, airplanes etc.) despite the obvious relevance this information would have in implementing a mandatory vaccine policy;

    b. Implement any ~~system, whatsoever,~~ mechanism by which to monitor and review the effectiveness of Covid-19 vaccination within the transportation sector on an on-going basis, or at all during the time in which the Vaccine Mandates were in place~~d~~ and renewed on a periodic basis;

    c. Investigate and ~~E~~evaluate the vaccine's purported protection against Covid-19 transmission;

    d. Investigate, ~~E~~evaluate and consider the protection against infection and transmission of Covid-19 that was afforded by alternative, Non-Pharmaceutical Interventions, including masking, negative PCR testing as well as natural immunity;

    e. Establish a cogent, intelligible and transparent method of analyzing the unique risk of infection and transmission for different Covid-19 variants during the time period that the Vaccine Mandates were ~~maintained~~ implemented and renewed;

f. Establish *any* framework or criteria for decision-making with respect to extending the ~~Vaccine Mandates~~ Vaccine MOs for such time as it was in force and effect;

g. Consider, study, monitor and understand the anticipated effects of the proposed Vaccine Mandates within a broader, epidemiological context to assess the risk of Covid-19 transmission and/or an outbreak of Covid-19 within the transportation sector as compared to the same risk within the community, generally.

h. Ignored or trivialized the medical/scientific evidence as to the ineffectiveness (and therefore the utility and appropriateness) of the Covid-19 vaccines, namely waning immunity, on reducing or stopping the transmission of Covid-19.

46. Furthermore, the Plaintiffs state that the Public Health Agency of Canada never recommended or advised to the Minister of Transportation and Transport Canada to implement a vaccine mandate for travel. In fact, in the weeks and days leading to the Government's announcement of the Vaccine Mandate, members within the Government were actively seeking a public health *justification* to support ~~their~~ the political decision to implement a ~~the~~ Vaccine Mandate.

~~47. The Plaintiffs also state that~~ ~~t~~The Government was willfully blind, reckless, ~~or~~ and acted in bad faith in developing the scope of the Vaccine Mandate, for those reasons listed in paragraph 36 ~~19(a). In fact, the team within the Ministry of Transportation that was responsible for its policy development and implementation did not even include a medical doctor or an epidemiologist who might have advised as to the initial and continued scientific justification, or lack thereof, for various aspects of the Vaccine Mandates.~~

48. In fact, the Plaintiffs plead that the Government had multiple opportunity to assess and evaluate the efficacy of the Vaccine Mandates each time the Vaccine MO's were renewed, but failed to do so in order to aggressively promote an agenda to achieve mass vaccination among

Canadians despite no demonstrable evidence that this would improve public safety within the transportation system or more broadly within the local community.

49. Similarly, the Canadian Government was grossly negligent, willfully blind ~~or~~ and acted in bad faith in maintaining the Vaccine Mandate despite ~~knowing~~ having scientific evidence that the Covid-19 vaccine provided imperfect and time – limited protection against infection from Covid-19 and despite having little to no scientific certainty as to the vaccine's impact on the transmission of Covid-19 between infected and non-infected individuals, especially in different settings within the transportation system.

50. The Government acted in bad faith by withholding information that the risk of Covid-19 vaccination were still unknown, yet publicly declaring them to be "safe".

51. The Government acted in bad faith by neglecting to conduct periodic studies of vaccination efficacy and effectiveness (particularly within the transportation system) before it renewed each Vaccine MO.

52. In light of the foregoing, the Canadian Government, including the Minister of Transportation and the individuals involved with developing and implementing the Vaccine Mandates acted in a manner that was negligent and willfully blind with respect to relevant scientific and epidemiological facts and data known to them at that time. Accordingly, the decision to both enact the several impugned MOs and maintain these MOs until June 20, 2022, was an act of bad faith by the Defendant.

The Vaccine Mandates were not Justified by Section 1 of the *Charter*

53. The Plaintiffs plead that the *Charter* – infringing Vaccine Mandate is not saved by Section 1 of the Charter.

54. The Vaccine Mandates, as implemented through the Vaccine MOs do not meet the proportionality requirement under the Oakes test. The Plaintiffs plead those alternative measures – including, but not limited to, masking and recognizing natural immunity – would equally serve the Government's stated objective of protect public safety within the transportation system. The singular requirement for vaccination to access transportation services was a grossly disproportionate and unnecessary means to meet the Government's stated objective.

55. The Plaintiffs plead that the Vaccine Mandates also lacked a rational connection to the Government's objective; the Government lacked the scientific evidence that Covid-19 vaccination meaningfully reduced the risk of transmitting Covid-19 in a transportation contact. Put differently, there was no causal link between Covid-19 vaccination and a reduction in the onward transmission of Covid-19.

56. The Plaintiffs plead that the Vaccine Mandates, as implemented through the Vaccine MOs, offended the "minimal impairment" requirement. The Government had alternative and equally effective measures to ensure public safety against Covid-19 within the transportation context, which it ignored. There were, in fact, less right-impairing means of achieving their objective in a real and substantial matter, including by recognizing natural immunity to Covid-19 infections and implementing non-pharmacological intervention such as testing, masking, and temperature checks all of which were, inexplicably, deemed inadequate.

57. The Plaintiffs plead the Government fundamentally failed to carefully tailor the Vaccine Mandates to its objectives and significantly and unnecessarily impaired the rights of these Plaintiffs beyond what was reasonably necessary having regard to the know science at the time concerning both the Covid-19 vaccines and the Covid-19 virus. Indeed, the Government showed a complete disregard in assessing credible alternatives to vaccinations that would minimally (or not at all) impair *Charter* rights while achieving reasonable safety within the transportation sector.

Section 24(1) *Charter* Damages are Just and Appropriate in the Circumstances

58. The Plaintiffs state that, in light of the foregoing, the manner in which the Defendant introduced and maintained the Vaccine Mandates through repeatedly renewing the Vaccine MOs notwithstanding the lack of scientific justification for doing so at each renewal, amounts to a clear disregard for the *Charter* rights and freedoms of these Plaintiffs and, indeed, of all Canadians.

59. The Government's strategic disregard for (a) disconfirming scientific evidence challenging the efficacy of Covid-19 vaccination together with the known waning and short-term efficacy of vaccination (b) lack of recommendation from public health about the need for vaccination as a pre-condition for travel (c) its own admission that the risks of the Covid-19 vaccination were yet unknown and little understood and (d) lack of intelligible criteria against which the decision to continue to discontinue the Vaccine MOs could be made and (e) the absence of any scientific studies that considered the efficacy of Covid-19 vaccine against each Covid-19 variant, highlight the fact that the decision to implement and maintain the Vaccine MOs was made in bad faith and in a grossly negligent manner.

60. Furthermore, the *Charter* – infringing Vaccine Mandates diminished public faith in the efficacy of the *Charter's* protection of fundamental rights and freedoms.

61. In light of the foregoing, an award of constitutional damages pursuant to Section 24(1) of the *Charter* is functionally justified in the circumstances. In particular, such an award would:

    a. compensate the Plaintiffs for their humiliation, indignity and inability to travel, at all, using federally regulated transportation in order to visit their ailing parents;

    b. vindicate their *Charter* rights and freedoms that were breached; and,

    c. deter similar, unjustifiable and politically-motivated policies which prima facie breach the *Charter* rights and freedoms of Canadians.

62. The Plaintiffs plead and rely upon the following:

    a. *Canadian Charter of Rights and Freedoms*, s. 6, 7, 12, 15, 25(1), Part 1 of the Constitution Act, 1982;

    b. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27;

    c. Article 12 of the *International Convention on Civil and Political Rights; and,*

    d. *Federal Court Rules* (SOR/98-106), Rules 75, 200, and 201.

63. The Plaintiff proposes that this action be tried in Toronto, Ontario ~~at Ottawa~~, Ontario.

~~**November 28, 2023**~~

~~**June 3, 2024**~~

October 4, 2024

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SOR/2021-150, s. 12

TAB 3

Court File No. T-2536-23

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 unprecedent. 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 dismissed[2] 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;

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[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]

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[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]

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[10] *Al Omani v Canada*, 2017 FC 786 at para 14At 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 controversy[13] 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]

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[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]

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[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, untrammeled 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…

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[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 tight 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]

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[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]

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[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 choices[36] 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.]

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[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 cocerce 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

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[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. 27and 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 <u>they are not made on merit</u> but on the basis of a personal characteristic and, therefore, the thrust of identification of analogous grounds is to reveal grounds based on characteristics <u>people cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law</u>.[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]

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[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 Alberta[55] 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.

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[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]

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[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 of 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]

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[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,

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[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, with- out 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

PLAINTIFFS' WRITTEN REPRESENTATIONS

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SHAUN RICKARD and KARL HARRISON
Plaintiffs

and

HIS MAJESTY THE KING, et al.
Defendants

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MOTION RECORD OF THE PLAINTIFFS

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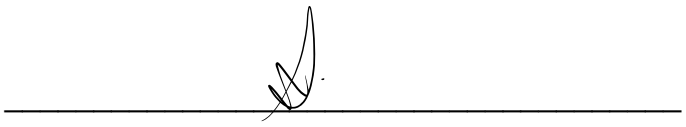
This is **Exhibit "E"** referred to in the Affidavit of Evan Presvelos sworn January 8, 2025



Commissioner for Taking Affidavits

SAM A. PRESVELOS

Federal Court Cour fédérale

Date: 20241128

Docket: T-2536-23

Citation: 2024 FC 1915

Ottawa, Ontario, November 28, 2024

PRESENT: Associate Judge Trent Horne

BETWEEN:

SHAUN RICKARD AND KARL HARRISON

Plaintiffs

and

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

Defendants

ORDER AND REASONS

I. Overview

[1] The amended statement of claim ("Claim") seeks damages pursuant to 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*"). In general terms, the plaintiffs allege that their section 6, 7, and 15 *Charter* rights were infringed by a number of "vaccine mandates" that required mandatory vaccination against COVID-19 for air, rail, and marine

transport. All references to sections in these reasons are to sections of the *Charter*, unless otherwise indicated.

[2] More specifically, the Claim asserts that a series of Interim Ministerial Orders ("IMOs") made pursuant to the *Aeronautics Act*, RSC 1985 c A-2 and the *Railway Safety Act*, RSC 1985 c 32 (4th Supp) were discriminatory in that they segregated Canadians into two groups: vaccinated and unvaccinated. The plaintiffs state that they made a personal medical choice to forego vaccination against COVID-19, and therefore could not travel by air or rail until the IMOs were rescinded in June 2022. Inability to travel by air resulted in the plaintiffs being unable to visit their respective parents, who are stated to reside in the United Kingdom and be in poor health. It is also claimed that the plaintiff Karl Harrison could not travel to the United Kingdom to attend to his businesses.

[3] The defendants ("Crown") have brought a motion to strike the Claim in its entirety, without leave to amend, with the limited exception that leave to amend should be granted in respect of claims by Mr Harrison based on subsection 6(1) as they apply to international air travel. The motion is granted in part.

II. The Plaintiffs' Motion

[4] On the same day as they filed a responding record on the Crown's motion to strike, the plaintiffs also filed a separate motion to permit the filing of a further amended statement of claim ("Proposed Claim"). The Proposed Claim adds claims and causes of action based on section 12, as well as the *Immigration and Refugee Protection Act*, SC 2001 c 27 ("IRPA") and the

International Covenant on Civil and Political Rights, Can TS 1976 No. 47 ("ICCPR"). The plaintiffs' motion was not contemplated in the July 31, 2024 direction that set a timetable for the Crown's motion to strike. Neither the Court nor the Crown had notice of this motion before it was served.

[5] The service of the plaintiffs' motion was improper. I agree with the defendants that the Proposed Claim may be helpful to demonstrate how the plaintiffs can cure the defects in their pleadings, however the plaintiffs should not attempt to amend their pleading while a motion to strike is pending.

[6] I apply the following principle articulated in *Bruce v John Northway & Son Ltd.*, [1962] OWN 150 at 151:

> After service of a notice of motion, as a general rule, any act done by any party affected by the application which affects the rights of the parties on the pending motion will be ignored by the Court.

[7] The Crown's rights as a moving party cannot be defeated by a subsequent step taken by the plaintiffs (*Kornblum v Canada (Human Resources and Skills Development)*, 2010 FC 656 at para 29; see also *Viiv Healthcare Company v Gilead Sciences Canada, Inc*, 2020 FC 11 at para 26).

[8] While the plaintiffs' motion did not directly conflict with the motion to strike (for example, when a party facing a motion to strike moves for summary or default judgment), it was improper because it was effectively used to split the argument on the main motion, and create a vehicle for making representations twice. The *Federal Courts Rules*, SOR/98-108 ("Rules") do

not expressly limit the length of written representations on a motion. This can be contrasted to memoranda of fact and law, which are limited to 30 pages (Rule 70). There is, however, a strong expectation that written representations on a motion will not exceed 30 pages. By filing written argument twice on the same issues, the plaintiffs exceeded that limit.

[9] At the hearing of the motion, the plaintiffs submitted that there was nothing prejudicial about adding a motion to amend because "all roads lead to Rome," and the amendment would have been before the Court in any event. That may be, but this route to Rome has been circuitous. With a stated intention by the plaintiffs to make further requests to amend, it is not apparent that the Rubicon has been crossed. Multiple versions of the statement of claim have increased the burden for the Crown. A statement of claim cannot be a constantly evolving document. At some point, the plaintiffs must plant a flag with the claim they want to pursue. The Crown should not be faced with a moving target on a motion to strike.

[10] The plaintiffs' motion will be adjudicated, but the inefficiencies arising from the evolving nature of the proposed statement of claim is a factor that will be considered in the assessment of costs.

III. Law on Motions to Strike

[11] The legal principles applying to motions to strike are well known. The threshold to strike a claim is a high one.

[12] To strike a statement of claim it must be plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. It needs to be plain and obvious that the action is certain to fail because it contains a radical defect (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 ("*Imperial Tobacco*")). Pleadings must be read as generously as possible (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at paras 88–90).

[13] A motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. On such a motion, the Court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial (*Imperial Tobacco* at para 21; *La Rose v Canada*, 2023 FCA 241 at para 109 ("*La Rose*")).

[14] To disclose a reasonable cause of action, a claim must: (a) allege facts that are capable of giving rise to a cause of action; (b) disclose the nature of the action which is to be founded on those facts; and (c) indicate the relief sought, which must be of a type that the action could produce and the court has jurisdiction to grant (*Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5).

IV. Analysis

A. *The Application for Judicial Review*

[15] Before filing the Claim, the plaintiffs commenced an application for judicial review in Court file T-1991-21 seeking declarations that the IMOs were unconstitutional, and orders that

the IMOs be struck. The notice of application relied on sections 6, 7, and 15. This application, and other applications for judicial review seeking the same or similar relief, were dismissed as moot after the IMOs were repealed (*Ben Naoum v Canada (Attorney General)*, 2022 FC 1463, aff'd *Peckford v Canada (Attorney General)*, 2023 FCA 219, application for leave to appeal to the Supreme Court dismissed *Honourable A Brian Peckford v Attorney General of Canada*, 2024 CanLII 80711).

[16] I give no weight to the plaintiffs' argument that the Attorney General did not take the position in the application that the *Charter* claims lacked a reasonable prospect of success by bringing a motion to strike, and therefore the Crown's position on this motion is a disingenuous attempt to delay a meritorious claim that has been founded on a comprehensive evidentiary record.

[17] Judicial review is meant to be a timely, summary proceeding allowing the state to implement its administrative decisions with minimal delay if the decision is challenged and found lawful or, if found unlawful, to quickly make corrective measures so that the decision complies with law and can take effect (*Wildchild Stockholm, Inc v Canada (Attorney General)*, 2019 FC 874 at para 50). The Court discourages interlocutory motions in applications for judicial review *(Canadian Generic Pharmaceutical Association v Canada (Governor in Council)*, 2007 FC 154 at para 25). This specifically applies to motions to strike. Respondents are encouraged to speak to deficiencies in the notice of application at the hearing, not on motions to strike (*Eidsvik v Canada (Fisheries and Oceans)*, 2011 FC 940 at paras 15-27).

[18] There is no parallel expectation in an action, or jurisprudence that encourages parties to wait until trial to request that claims or causes of action be struck. There is no indication that, in the earlier application, the Crown conceded or admitted that claims based on sections 7, 12, and 15 were properly before the Court. There is no estoppel argument in this respect. Whether the Claim discloses a cause of action will be determined without regard to the proceedings in T-1991-21.

B. *Section 6*

[19] Subsection 6(1) provides that "every citizen of Canada has the right to enter, remain in and leave Canada." The Claim does not state that the plaintiffs are Canadian citizens. Taking the Claim at face value, and assuming the allegations to be true, it is fundamentally flawed, and must be struck.

[20] Striking a pleading without leave to amend is a power that must be exercised with caution. If a statement of claim shows a scintilla of a cause of action, it will not be struck out if it can be cured by amendment (*Al Omani v Canada*, 2017 FC 786 at paras 32-35).

[21] The Crown concedes that Mr Harrison is able to plead a cause of action under subsection 6(1) if there is, among other things, an assertion that he was a citizen of Canada at the material time. The Proposed Claim includes such a statement, and I am satisfied that these deficiencies in the Claim can be cured by an amendment as they relate to Mr Harrison.

[22] I reach a different conclusion in respect of Mr Rickard, who was not a citizen of Canada at the material time. Subsection 6(1) is plainly limited in its application to Canadian citizens. This can be contrasted to subsection 6(2), which applies to both citizens and permanent residents. I cannot accept the plaintiffs' argument that there is a gap in the Constitution that is capable of being filled by the jurisprudence. Extending the application of subsection 6(1) to permanent residents would plainly require a constitutional amendment.

[23] *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, appeal dismissed as moot *Taylor v Newfoundland and Labrador*, 2023 NLCA 22, leave to appeal to the Supreme Court of Canada granted *Canadian Civil Liberties Association v His Majesty the King in Right of Newfoundland and Labrador*, 2024 CanLII 35287 ("*Taylor*") does not assist the plaintiffs. There, the applicant was a Canadian citizen who was unable to travel from Nova Scotia to Newfoundland for her mother's funeral as a result of travel restrictions put in place pursuant to subsection 28(1)(h) of the *Public Health Protection and Promotion Act*, SNL 2018, c P-37.3. Ms Taylor claimed that this section was beyond the legislative authority of the province, and alternatively that the travel restriction violated her right to mobility and right to liberty as guaranteed by sections 6 and 7. The Supreme Court of Newfoundland and Labrador, General Division, concluded (para 301) that the right to "remain in" Canada, as embodied in subsection 6(1), includes the right of Canadian citizens to travel in Canada for lawful purposes across provincial and territorial boundaries, I read nothing in *Taylor* that would extend the mobility rights in subsection 6(1) beyond citizens to also include permanent residents.

[24] The plaintiffs also rely on *Sahakyan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1542 ("*Sahakyan*") for the proposition that permanent residence, like citizenship, carries privileges, one being the right to leave Canada in the knowledge that one is entitled to return, provided residency requirements are maintained (para 38). This decision is not instructive. *Sahakyan* does not consider section 6 at all, and does not support an argument that subsection 6(1) can somehow be expanded beyond its plain meaning to apply to permanent residents. I am not aware of any jurisprudence that concludes, or even suggests, that the subsection 6(1) mobility right extends to, or can possibly extend to, permanent residents.

[25] The plaintiffs caution against taking what they describe as an "originalist" approach to subsection 6(1). I disagree that taking the subsection as it is written, including its express limitations, is overly narrow or "originalist." The subsection says what it says. If there is to be an evolution in thinking to address a perceived gap in subsection 6(1), as the plaintiffs argue, that gap must be filled by way of a constitutional amendment. I fail to see how the Courts have the power to do so.

[26] The Claim does not expressly rely on subsection 6(2), which relates to interprovincial mobility rights. This subsection provides that Canadian citizens and permanent residents have the right "to move to and take up residence in any province," and "to pursue the gaining of a livelihood in any province." The plaintiffs have not pleaded any limit on their interprovincial mobility rights, and indicated at the hearing of the motion that subsection 6(2) is not in issue.

[27] While the Claim refers to IMOs that placed restrictions on rail travel, there are no material facts in any version of the statement of claim to support a claim for damages arising from an inability to travel by rail. The Crown's written representations in their moving motion materials state:

> 29. Therefore, it is unclear how the Ministerial Orders in respect of rail had any impact on the Plaintiffs whatsoever, and certainly not in a manner that infringed their *Charter* rights. The Amended Statement of Claim fails to plead the elements necessary to satisfy section 6 of the *Charter*, and as such fail to disclose a reasonable cause of action in relation to rail.

[28] The plaintiffs' responding materials and Proposed Claim do not answer this challenge. Having had three opportunities to do so, I am not satisfied that the plaintiffs are able to plead material facts to support a claim for damages arising from an inability to travel by rail.

[29] The plaintiffs submit that they are able to challenge IMOs as they relate to rail travel because an intention to travel by rail at the material time is irrelevant; they say the inability to travel by rail alone triggers the ability to advance a claim. I cannot agree. There is no indication in any version of the statement of claim that the plaintiffs ever intended to travel by rail when the IMOs were in place. There is no loss or harm, and no basis to claim damages, in this respect. A claim for damages based on railway travel would be an abstract complaint about a government restriction that had no impact or consequence on the plaintiffs. I fail to see how either of the plaintiffs have standing to advance a claim for damages based on a method of transportation they did not use, and expressed no interest in using. At the hearing, the plaintiffs directly stated that they are not advancing a claim based on public interest standing. Leave to amend in this respect is refused.

[30] The Claim makes a single passing reference to federally regulated marine transportation. There are no material facts in any version of the statement of claim that the plaintiffs ever used marine transportation, intended to use marine transportation, or that the IMOs impaired their ability to travel over water. I reach the same conclusion for marine transportation as I did for rail travel. I am not satisfied that the plaintiffs are able to plead material facts to support a claim for damages arising from marine travel. Leave to amend in this respect is refused.

[31] The Proposed Claim intends to argue that Mr Rickard's rights under subsection 19(2) of IRPA were breached. This subsection provides permanent residents a right to enter Canada if an officer is satisfied following an examination on their entry that they have that status. Section 19 of IRPA has no application. Mr Rickard was not prevented from getting into Canada, he was unable to get out. More importantly, IRPA does not provide a civil cause of action. There is no nominate tort based on the breach of a statutory provision alone (*R in right of Canada v Saskatchewan Wheat Pool* [1983] 1 SCR 205 at pages 225-226). A claim by Mr Rickard based on IRPA does not assist with advancing a claim for damages under subsection 6(1), particularly when he is not a Canadian citizen. As discussed above, this subsection plainly does not apply to permanent residents. Any claims or causes of action based on IRPA are doomed to fail.

[32] The Proposed Claim also purports to rely on Article 12 of the ICCPR. The plaintiffs intend to rely on the ICCPR for two reasons: to bolster an argument that subsection 6(1) should be read to include permanent residents, and that it provides a stand-alone cause of action. I cannot agree with either argument.

[33] Article 12 of the ICCPR reads:

> ***Article 12***
>
> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

[34] The application of the ICCPR to section 6 claims was considered in *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 ("*Divito*"): "as a treaty to which Canada is a signatory, the ICCPR is binding. As a result, the rights protected by the ICCPR provide a minimum level of protection in interpreting the mobility rights under the *Charter*" (para 25). The Federal Court of Appeal in *Canada v Boloh 1(a)*, 2023 FCA 120 applied *Divito*, and concluded that Article 12 "lay behind" section 6 of the *Charter*, and was essential to its interpretation (para 38).

[35] The Crown concedes that an argument based on Article 12 of the ICCPR can be made in support of Mr Harrison's claim for damages under subsection 6(1).

[36] I cannot accept that the ICCPR, or other treaties to which Canada is a signatory, can be applied to amend or override the express language of the *Charter* as written, specifically to extend the subsection 6(1) mobility rights beyond citizens to also include permanent residents.

[37] The Court in *Taylor* stated that Article 12 can be used to consider section 6 mobility rights (paras 332-336), however I find no support in this decision, or elsewhere in the jurisprudence, for the proposition that *Charter* rights can be expanded, beyond their clear and express meaning, with reference to international treaties.

[38] The Crown relies on *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, aff'd 2022 SCC 30:

> [80] For this fundamental reason, international instruments cannot become Canadian law without domestic legislative action. Put another way, international instruments are not self-executing in Canadian domestic law. They must be incorporated into Canadian domestic law by legislation that adopts the international instrument in whole or in part or enacts standards borrowed from or related to that instrument: *Capital Cities Comm. v. C.R.T.C.*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141, (1977), 81 D.L.R. (3d) 609, at pages 171–172 S.C.R.; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, (1999),174 D.L.R. (4th) 193 [*Baker*]; and many others. If Parliament decides not to adopt a particular international instrument, that instrument does not become binding domestic law: *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437, (1998), 166 D.L.R. (4th) 193, at paragraph 137. Those who want it to be binding law have only one recourse: they must persuade some politicians to make it so.

[39] The ICCPR preceded the *Charter*. To the extent the ICCPR was adopted in Canada, it was in the language of section 6.

[40] 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 (*Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 149). Mobility rights of permanent residents (as opposed to citizens) is not rule of

customary international law or a peremptory norm. Article 4, paragraph 2, of the ICCPR states that there will be no derogation from certain Articles. Article 12 is not one of them. Further, Article 12 is not absolute. Paragraph 3 provides an express exception for laws necessary to protect national security, public order, public health, or the rights and freedoms of others.

[41] The Proposed Claim does not request damages for breach of Article 12, however the plaintiffs indicated at the hearing that this was an oversight, and that a further amendment would be sought in this respect. I am not satisfied that there is a cause of action for an alleged breach of rights under the ICCPR alone.

[42] In *Canada* (*Minister of National Revenue) v MacIver*, 2002 FCT 877 at para 15 ("*MacIver*"), the Court considered a claim based on the *Universal Declaration of Human Rights, 1948*, and concluded that the declaration "forms no part of domestic law, and cannot be relied on to create substantive rights." The same applies here. The ICCPR forms no independent part of domestic law. To the extent it is incorporated in the *Charter*, damages can be claimed for any infringement of *Charter* rights. I do not read anything in *Divito*, *MacIver*, or any other decision that permits the ICCPR to ground a stand-alone cause of action.

[43] To the extent the plaintiffs intend to argue that their dignity was compromised because their non-vaccinated status prevented them from travelling by air, dignity is not a constitutional right. It is a fundamental value that serves as a guide for the interpretation of all *Charter* rights (*R v Bissonnette*, 2022 SCC 23 at para 59). It is open to Mr Harrison to plead a loss of dignity in association with claims brought under subsection 6(1).

[44] The amended statement of claim is therefore struck, with leave to amend to advance a claim by Mr Harrison based on subsection 6(1) for international air travel only. Mr Harrison may plead and rely on Article 12 of the ICCPR in association with his claims based on subsection 6(1), provided that any such reliance is properly particularized. It is plain and obvious that Mr Rickard may not rely on subsection 6(1), and leave to amend in this respect is refused. It is also plain and obvious that there is no stand-alone cause of action based on the ICCPR alone, so the plaintiffs may not plead and rely on Article 12 of the ICCPR as a separate cause of action.

[45] The Crown's motion requests an order that any amended statement of claim name His Majesty the King in Right of Canada as the only defendant. The plaintiffs oppose this request. The difficulty I have is that this issue is not addressed in the defendants' notice of motion (other than asking for the relief) or written representations. The burden is always on the party asserting a proposition or fact that is not self-evident (*Voltage Holdings, LLC v Doe #1*, 2023 FCA 194 at para 40). I am not satisfied that it is self-evident that His Majesty the King in Right of Canada is the only proper defendant, particularly since the respondent in T-1991-21 was the Attorney General of Canada, and it does not appear that this was amended or corrected in 2022 FC 1463. The defendants' motion in this respect is dismissed, without prejudice to a subsequent motion or informal request for the same relief.

C. *Section 7*

[46] Section 7 is directed to life, liberty and security of person, and states that "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."

[47] The plaintiffs argue that they were forced to make a "constitutional trade-off," where they were forced to decide between protecting their bodily integrity and autonomy in refusing vaccination (described as a section 7 liberty interest), and exercising their section 6 mobility rights.

[48] The interplay between sections 6 and 7 as it relates to travel was expressly considered in *Khadr v Canada (Attorney General)*, 2006 FC 727 ("*Khadr*"), an application for judicial review challenging a decision to deny issuance of a passport:

> [74] However, *Godbout*, above, makes clear that the section 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.
>
> [75] The ability to travel where and when one wants outside Canada does not strike at that basic value of individual dignity and independence. I say this because the matter of choice to leave Canada is enshrined in section 6 of the Charter. If one provision of the Charter covers a specific freedom, other sections of the Charter should not be presumed to cover the same freedom. There is a presumption against redundancies in legislation. The denial of a passport, while limiting the right to leave Canada, is not tantamount to making one a prisoner in one's own country. As such, I would not consider that the right to leave Canada constitutes a section 7 right to liberty.

[49] There are factual differences between *Kadhr* and this case. In *Kadhr*, the applicant was not faced with a choice, the outcome of which would have made him eligible for a passport. But that difference does not impact the fundamental reasoning in *Kadhr* regarding the presumption against redundancies in legislation.

[50] The plaintiffs in this action were not deprived of the ability, the liberty, to make a choice to accept the COVID vaccine or refuse it. They were not coerced or forced to be vaccinated, or to

refrain from taking the vaccination. There were consequences to their decision not to be vaccinated, including an inability to leave the country by air. That squarely engages, for Mr Harrison, the mobility right in subsection 6(1). I agree with the Crown that the fact that the plaintiffs may have faced consequences in terms of their ability to travel by air does not amount to coercion, and is insufficient to trigger the section 7 right to liberty.

[51] *Taylor*, which involved travel restrictions arising from the COVID-19 pandemic and is relied on by the plaintiffs, expressly rejected a claim under section 7.

> [378] The Respondents make the argument, convincingly in my view, that s. 7 is not an amalgam of expressed rights under the *Charter*, and where an expressed right exists the Court should reject s. 7 claims as creating parallel rights with different tests and standards.
>
> [379] In this case the expressed right is the right to mobility. Section 6(1) rights, apply to citizens of Canada and s. 6(2) rights to citizens of Canada and permanent residents. Section 7 on the other hand applies to "everyone", interpreted as "every human being who is physically present in Canada and by virtue of such presence amenable to Canadian Law" (*Singh v. Canada (Minister of Employment and Immigration)*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at p. 202).
>
> [380] Furthermore, s. 6 mobility rights are subject to the application of s. 1 of the *Charter* and may be infringed where the infringement can be demonstrably justified in a free and democratic society. Section 7 is subject to the principles of fundamental justice. These principles demand that the law not be arbitrary, overbroad or grossly disproportionate to its object. The inclusion of mobility rights in s. 7 under the guise of a "liberty" right would thus give rise to a new constitutional standard for mobility.
>
> [381] In *R. v. Lloyd*, 2016 SCC 13 the Supreme Court of Canada struck down the one year mandatory minimum jail sentence for certain drug offences as being "grossly disproportionate" and thus in violation of the prohibition against cruel and unusual punishment in s. 12 of the *Charter*.

> [382] In response to Lloyd's argument that his *Charter* right to liberty under s. 7 of the Charter was also violated, Chief Justice McLachlin observed that the "principles of fundamental justice in s. 7 must be defined in a way that promotes coherence within the Charter and conformity to the respective roles of Parliament and the courts" (*Lloyd*, at para. 40).
>
> [383] The present circumstance is not unlike that in *Lloyd*, where the Chief Justice concluded that to invoke the s. 7 right to liberty would give rise to a new constitutional standard lower than s. 12, leading to incoherence in the *Charter*.

[52] I see no principled basis for reaching a different outcome here. I also note that the leave application to the Supreme Court of Canada filed by the Canadian Civil Liberties Association and Kimberley Taylor, and their factum on the pending appeal (SCC docket 40952), do not raise arguments based on section 7.

[53] It is plain and obvious that subsection 7(b) cannot be expanded to include mobility rights when such rights are already specifically addressed in section 6. I am satisfied that the Claim does not disclose a cause of action under section 7 and must be struck in this respect. I am also satisfied that the deficiencies as they relate to section 7 cannot be cured with better drafting, therefore the Claim as it relates to section 7 is struck without leave to amend.

D. *Section 15*

[54] Section 15 provides equality rights. Subsection 15(1) states that "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."

[55] Vaccination status is not an enumerated ground in section 15, nor has it been recognized as an analogous ground. Analogous grounds are those similar to the enumerated grounds that would often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity (*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13).

[56] No material facts are specifically pleaded in respect of the section 15 claim. The plaintiffs broadly allege that the vaccine mandates, implemented through the IMOs, violate section 15.

[57] *Charter* actions do not trigger special rules on motions to strike; the requirement of pleading material facts still applies. The Supreme Court of Canada has defined in the case law the substantive content of each *Charter* right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is no mere technicality, "rather, it is essential to the proper presentation of Charter issues" (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 21).

[58] Litigants have attempted to have vaccination status identified as an analogous ground under section 15. It appears that all have been unsuccessful (*Lewis v Alberta Health Services*, 2022 ABCA 359 at paras 62-70 ("*Lewis*"); *Costa, Love, Badowich and Mandekic v Seneca College of Applied Arts and Technology*, 2022 ONSC 5111 at paras 91-95 ("*Costa*"); *R v Lauterpacht*, 2023 ONCJ 51 at paras 85-89).

[59] The plaintiffs distinguish *Lewis* on the facts, particularly that vaccination status was not found to be an immutable personal characteristic, nor was it one that was changeable only at unacceptable cost to the personal identity of the plaintiff in that case (para 68). *Costa* is distinguished on the factual findings that the applicants in that proceeding fell well short of showing that they could not be safely vaccinated, or that the act of doing so would tear asunder immutable or even deeply held beliefs (para 94).

[60] In the Proposed Claim, the plaintiffs intend to allege that receiving the vaccine would have significantly undermined their sincerely held sense of dignity, worth and personal autonomy, while also requiring the plaintiffs to disregard their genuine concerns about the vaccine's safety and efficacy.

[61] While the chances of having vaccination status recognized as an analogous ground for the purposes of section 15 may be remote in light of the current jurisprudence, I am not satisfied that such an argument is bound to fail if the plaintiffs allege that vaccination would constitute an unacceptable cost to their personal identity, or would tear asunder immutable or even deeply held beliefs. *Lewis* and *Costa* do not foreclose this possibility, or stand for the proposition that vaccination status is incapable of constituting an analogous ground. While it may be dim, there is a "glimmer of hope" (*La Rose* at para 122) that vaccination status could be recognized as an analogous ground. Leave to amend to add a cause of action under section 15 is granted for both plaintiffs, however any such amendment must be fully and completely particularized.

E. *Section 12*

[62] Section 12 provides that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment." This section was raised for the first time in the Proposed Claim. Claims based on section 12 were not raised in the application for judicial review, or the earlier versions of the statement of claim.

[63] The Proposed Claim does not disclose a cause of action under section 12. Section 12 is only mentioned in a single paragraph, and is little more than a statement that the denial of access to federally-regulated transportation amounts to cruel and unusual punishment. The plaintiffs' written submissions assert that the IMOs constitute cruel and unusual treatment; it was clarified at the hearing that the plaintiffs intended to assert cruel and unusual treatment.

[64] A leading case on the interpretation of section 12 is *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 611-612 ("*Rodriguez*"). There, the appellant suffered from amyotrophic lateral sclerosis. She applied for an order declaring subsection 241(b) of the *Criminal Code*, RSC 1985 c C-46 ("*Criminal Code*"), which prohibited the giving of assistance to commit suicide, invalid (pages 608-612). The majority concluded that section 12 was not engaged. More specifically, the Court concluded that "a mere prohibition by the state on certain action, without more, cannot constitute "treatment" under s. 12" (page 610). Ms Rodriguez was "simply subject to the edicts of the *Criminal Code*, as are all other individuals in society. 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" (page 611).

[65] If the actions of the state that denied Ms Rodriguez the ability to elect medically-assisted suicide do not engage section 12, I fail to see how the IMOs, which prevented the plaintiffs from travelling by air without being vaccinated for a certain period, could engage section 12. There was no state control over the plaintiffs that compelled them to be vaccinated or unvaccinated. The plaintiffs were not engaged in the state administrative or justice system, rather were subject to IMOs that applied to everyone.

[66] The plaintiffs argue that *Rodriguez* was overturned by *Carter v Canada (Attorney General)*, 2015 SCC 5 ("*Carter*"). I disagree. *Carter* did revisit subsection 241(b) of the *Criminal Code*, however that decision involved no analysis of section 12. The plaintiffs also seek to distinguish *Rodriguez* on the basis that the plaintiffs previously had the ability to travel without a vaccination, lost that ability when the IMOs were enacted, and that constituted active state process and operation. Again, I disagree. All legislation, including the *Criminal Code*, can be characterized as an action of the state. At a high level, every amendment to the *Criminal Code* affects the legality of certain conduct. If the plaintiffs' position is correct, every legislative or administrative act of government that adds a form of restriction could be subject to section 12. This finds no support in *Rodriguez* or other jurisprudence. Again, the IMOs applied to everyone, and did not compel the plaintiffs to be vaccinated.

[67] The fact that the plaintiffs may view the prohibitions imposed by the IMOs as "degrading and dehumanizing" does not assist them. As stated earlier, it is open to Mr Harrison to plead a loss of dignity in association with his claims brought under subsection 6(1), and for both plaintiffs under section 15.

[68] The plaintiffs' section 12 claim has no jurisprudential root, and is conceptually outside the scope of section 12, at least as it has been understood to date (*La Rose* at para 123). Leave to amend to add a cause of action under section 12 is refused.

V. Costs

[69] The Court has full discretionary power over the amount and allocation of costs (subrule 400(1)).

[70] The plaintiffs were unsuccessful on their motion. The defendants were substantially successful on their motion. The unexpected service of the plaintiffs' motion and evolving nature of the statement of claim are also factors that weigh in the defendants' favour.

[71] Costs will be fixed in accordance with Column III of Tariff B. The defendants are awarded five units for preparation of their own motion, and five units for responding to the plaintiffs' motion. Five units are awarded for appearance on the motions (2.5 hours x 2 units per hour). At $180 per unit, costs are fixed at $2,700.00, payable in any event of the cause.

ORDER in T-2536-23

THIS COURT ORDERS that:

1. The plaintiffs' motion is dismissed.

2. The defendants' motion is granted in part. The amended statement of claim is hereby struck, with leave to amend in accordance with these reasons.

3. Any fresh as amended statement of claim shall be served and filed within 30 days of the date of this order.

4. Costs of the motion are fixed at $2,700.00, payable by the plaintiffs to the defendants in any event of the cause.

"Trent Horne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2536-23
STYLE OF CAUSE:	SHAUN RICKARD ET AL v HIS MAJESTY THE KING ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 18, 2024
ORDER AND REASONS:	HORNE A.J.
DATED:	NOVEMBER 28, 2024

APPEARANCES:

Sam Presvelos	FOR THE PLAINTIFFS
James Schneider Zachary Lanys	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Presvelos Law LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFFS
Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANTS

SHAUN RICKARD ET AL.
Plaintiffs

HIS MAJESTY THE KING ET AL.
Defendants

Court File No.: T-2536-23

FEDERAL COURT

Proceeding Commenced at Toronto

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TAB 3

Court File No. T-2536-23

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

PART I - OVERVIEW

1. The Plaintiffs appeal the Order of Associate Justice Trent Horne, which struck their Section 7 and 12 *Charter* claims, without leave to amend, as failing to disclose a reasonable cause of action.
2. Respectfully, AJ Horne erred, in law and in law and fact, in his assessment of both *Charter* claims as they were advanced in the Plaintiffs' pleading and argued on the Defendants' motion to strike.
3. With respect to Section 7, the Court circumvented the argument as presented by the Plaintiffs and decided the matter as it was re-framed by the Defendants and the Court.
4. With respect to Section 12, the Court engaged in conclusory analysis without appeal to applicable jurisprudence while ignoring the unique factual circumstances of the Ministerial Orders, and the context in which the Ministerial Orders operated within.

5. It is trite law that the threshold to strike a pleading as failing to disclose a reasonable cause of action is very high. The Plaintiffs' advanced novel constitutional arguments in response to unprecedented government measures.
6. It was and is far from clear that the Plaintiffs' *Charter* claims could not succeed on a fulsome evidentiary record and in light of the developing *Charter* jurisprudence.

BACKGROUND

7. In late 2021 and 2022, the Minister of Transportation created interim Ministerial Orders pursuant to the *Aeronautics Act*, which prevented unvaccinated Canadians from accessing federally – regulated transportation.
8. These impugned Ministerial Orders were known as "Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19."[1]
9. The Plaintiffs declined to get a Covid-19 vaccine for personal reasons. As such, and solely on account of the Ministerial Orders in place at the time, they were prevented from travelling by airplane.
10. As a consequence of the Ministerial Orders, the Plaintiffs were unable to visit their ageing parents who resided in the United Kingdom, where the Plaintiffs are also citizens. Mr. Harrison was also unable to conduct any business in the Europe where he employs a significant workforce.

[1] Government of Canada Website, Transport Canada: https://tc.canada.ca/en/ministerial-orders-interim-orders-directives-directions-response-letters/repealed-interim-order-civil-aviation-respecting-requirements-related-vaccination-due-covid-19.

11. The Plaintiffs brought an action seeking *Charter* damages due to the unconstitutional nature of the Ministerial Orders which breached their *Charter* rights. The Plaintiffs specifically sought damages for breach of their Section 6, 7, 12 and 15 *Charter* rights and freedoms.
12. The Defendants brought an early motion to strike the Plaintiffs' claim as failing to disclose a reasonable cause of action.
13. The Defendants' motion to strike was heard before AJ Trent Horne on November 18, 2024.
14. On November 28, 2024, AJ Horne released his Order and Reasons which struck Section 6(1) as it pertained to Mr. Rickard only[2]; Section 7 and Section 12 of the Plaintiffs' *Charter* claims without leave to amend.

PART II – ISSUES ON APPEAL

15. The issue to be decided on this motion is whether this Court should appeal and set aside the Order of AJ Horne dated November 28, 2024, dismissing the Plaintiffs' Section 7 and 17 *Charter* claims for failing to disclose a cause of action.

[2] Mr. Rickard was a permanent resident at the time of the impugned Ministerial Orders although he has since become a Canadian citizen.

PART III – LAW AND ARGUMENT

(1) Standard of Review on Appeal

16. The decision to strike a pleading is an exercise of discretionary power. The applicable standard of review is that discretionary orders of Associate Judges should only be interfered with when such decisions are incorrect in law or based on a palpable and overriding error.[3]

17. Questions of mixed fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness.[4]

(2) AJ Horne's Section 7 Analysis

18. AJ Horne dismissed the Plaintiffs' Section 7 *Charter* claim on the basis that the Plaintiffs were, ultimately, able to decide whether to receive or refuse vaccination.[5]

19. As the Associate Judge explained, because the Plaintiffs "were not coerced or forced to be vaccinated" their Section 7 right to liberty was, therefore, not "triggered". Therefore, the consequences from deciding not to be vaccinated should, instead, dealt with by Section 6(1) of the *Charter*.

20. The Court ignored the fact that the Government attempted to coerce the Plaintiffs into vaccination by revoking their ability to exercise their mobility rights if they did not accept the requirement established by the Ministerial Order.

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[3] *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 (CanLII), at paras. 64 – 67.
[4] *Tetreault v. Boisbriand (City)*, 2023 FC 168n (CanLII) at para. 22.
[5] *Rickard v. His Majesty the King,* 2024 FC 1915 at para. 50

21. Respectfully, AJ Horne also failed to address the Plaintiffs' argument on the motion – namely whether the Government could force Canadians into deciding between protecting a right at the expense of sacrificing a freedom, and, whether creating a prospective constitutional trade – off could engage the Plaintiffs' Section 7 liberty interest.

22. This Plaintiffs clearly made this point in their Written Representations before the Court. In fact, the Plaintiffs expressly argued against an approach that considers Section 6 and Section 7 of the *Charter* in isolation (which is precisely what the Court did):

> Contrary to the Defendants' arguments, **the Plaintiffs are not alleging that the Ministerial Orders underlying the Vaccine Travel Mandate physically forced them into vaccination. Nor are the Plaintiffs asking this Court to expand Section 7 liberty interest to include mobility rights.** Respectfully, these arguments fundamentally fail to grasp the claims being advanced in this proceeding.[6] [Emphasis added.]

…

> … 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.[7]

…

> 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 direct, inescapable constitutional trade-off which should not be permissible in a free and democratic society.[8]

…

> 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[9]

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[6] Written Submissions of the Plaintiff dated October 4, 2024, at para. 57.
[7] Written Submissions of the Plaintiff dated October 4, 2024, at para. 59.
[8] Written Submissions of the Plaintiff dated October 4, 2024, at para. 60.
[9] Written Submissions of the Plaintiff dated October 4, 2024, at para. 62.

23. AJ Horne did not appeal to any legal authority which considered the unique constitutional dilemma created by the impugned Ministerial Order and which trade-off the Plaintiffs argued violated Section 7 of the *Charter*.

24. By focusing exclusively and individually on Section 6 and Section 7 of the *Charter*, AJ Horne ignored the Plaintiffs' argument/cause of action advanced – namely whether the existence of a constitutional trade-off, *in and of itself*, engages Section 7 liberty interest on account of the coercive nature of forcing this decision upon Canadians.

25. AJ Horne's analysis and reliance upon *Khadr v. Canada* – despite acknowledging the "factual differences" in that case - was misplaced.[10] That decision dealt with whether mobility rights, themselves, were captured under Section 7 of the *Charter*. This had no applicability to the Plaintiffs' pleadings.

26. By appealing to the "presumption against redundancies" in *Charter* interpretation, the AJ Horne concluded that Section 7(b) cannot be expanded to "include mobility rights when such rights are already specifically addressed in Section 6".[11] This analysis demonstrates the Court's failure to engage with the Plaintiffs' argument about whether the Government could force Canadians to trade – off constitutional rights and freedoms, even though the Court had, initially, correctly articulated the argument at paragraph 47 of its decision.

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[10] *Rickard v. The King*, 2024 FC 1915, at paras. 48 – 50, citing *Khadr v. Canada (Attorney General)*, 2006 FC 727 at paras. 74 and 75.
[11] *Rickard v. The King*, 2024 FC 1915, at para. 53.

27. Meanwhile, the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*[12] held that, "in our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference" and that Section 7 must be "broadly interpreted and in accordance with the principles and values underlying the *Charter* as a whole and that it protects an individual's personal autonomy".[13]

28. Asking Canadians to decide which *Charter* right or liberty they wish to preserve at the expense of compromising another *Charter* right of liberty is anathema to the concept of liberty and the principles underlying the *Charter*.

29. Government action should not pit *Charter* rights and freedoms against each other. Such an approach undermines the dignity of the individual and the integrity of the rights and freedoms the *Charter* is intended to protect.

30. By recognizing that "there were consequences to their decision not to be vaccinated" AJ Horne had, in effect, confirmed that the Plaintiffs' decision not to receive a Covid-19 vaccination was not "free from state interference".[14]

31. While this is a novel *Charter* argument, the novelty of an argument is not, on its own, sufficient to strike a cause of action unless it is clearly devoid of merit having regard to the appropriate jurisprudence, which analysis was not taken by the Court.

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[12] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII).
[13] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII) at para. 49.
[14] *Rickard v. The King*, 2024 FC 1915, at para. 50.

(3) AJ Horne's Section 12 Analysis

32. AJ Horne also struck the Plaintiffs' cause of action rooted in Section 12 of the *Charter* on the basis that "there was no state control over the plaintiffs that compelled them to be vaccinated or unvaccinated"[15] and, further, that "the plaintiffs were not engaged in the state administrative or justice system, rather were subject to IMOs that applied to everyone".[16]

33. There are several errors with AJ Horne's analysis and decision regarding the Plaintiffs' Section 12 *Charter* claim.

34. First, AJ Horne failed to consider what was meant by the term "state administrative". The Defendants and the Court had no jurisprudence on the meaning of this term.

35. In fact, AJ Horne does not explain, at all, what "state administrative" might mean and, further, why the Plaintiffs were not subject to the "state administrative" in the context of federally regulated transportation.

36. Similarly, AJ Horne failed to explain why there was no "state control over the plaintiffs" considering that the Supreme Court of Canada has held that "state control" might include a "prohibition". Instead, the Courts analysis on this point is simply conclusory.

[15] *Rickard v. The King*, 2024 FC 1915, at para. 65.
[16] *Rickard v. The King*, 2024 FC 1915, at para. 65.

37. As the Plaintiffs argued, the federal transportation sector is entirely state – controlled; a variety of regulations and orders are made and implemented under the *Aeronautics Act*, create and influence operations including how travellers are handled at the airport.

38. Section 4(1) of the *Aeronautics Act* makes clear that regulations enacted under the Act apply to "all persons and to all aeronautics products and other things in Canada, to all persons outside Canada who hold Canadian aviation documents and to all Canadian aircraft and passengers and crew members thereon outside Canada".

39. Section 4(1) of the *Aeronautics Act* affords the Minister with responsibilities to regulate aeronautics and "supervise all matters connected with aeronautics".

40. Section 4(2) of the *Aeronautics Act*, which was, in part, the legislative basis for the impugned Ministerial Orders provides as follows:

> The Governor in Council may by regulation authorize the Minister to make orders with respect to any matter in respect of which regulations of the Governor in Council under this Part may be made.

41. Additionally, Section 4.7(2) of the *Aeronautics Act* authorizes the Governor in Council (and, therefore, the Minister of Transportation) to implement regulations respecting aviation safety and "the safety of the public, passengers". This supports the Plaintiffs' position that they, and all Canadians for that matter, were under the direct "state administrative" with respect to the impugned Ministerial Orders.

42. It cannot be credibly maintained that the regulation of passengers at our airports, which is a federally regulated entity, could not possibly qualify as coming under “the state administrative”, which term has not been judicially defined within the context of Section 12 of the *Charter*. Yet none of this was considered by AJ Horne.

43. An illustration of the fact that airports are, in fact, heavily regulated by the Government and, therefore, could be considered part of the “state administrative” can be seen from privacy considerations which have been modified to reflect the unique nature and concerns present at Canada’s airports. For example, the Office of the Privacy Commissioner of Canada has published a specific guidance concerning “privacy at airports and borders”.[17]

44. In dismissing the Section 12 claim as failing to disclose a reasonable cause of action, AJ Horne exclusively relied on the Supreme Court of Canada decision in *Rodriguez v. British Columbia (Attorney General)*[18]. In that decision, the Supreme Court held that a “mere prohibition by the state on certain action, without more, cannot constitute “treatment” under s.12”.

45. However, this was not the entirety of the analysis in *Rodriguez*. The Supreme Court also explained:

> **There must be some more active state process in operation, involving an exercise of state control over the individual, whether it be positive action, inaction or prohibition**. To hold that the criminal prohibition in s. 241(*b*), without the appellant being in any way subject to the state administrative or justice system, falls within the bounds of s. 12 would stretch the ordinary meaning of being "subjected to . . . treatment" by the state

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[17] https://www.priv.gc.ca/en/privacy-topics/airports-and-borders/your-privacy-at-airports-and-borders/ published December 17, 2018.

[18] *Rodriguez v. British Columbia (Attorney General)* 1993 CanLII 75 (SCC).

46. AJ Horne failed to consider whether and how the impugned Ministerial Orders - which established a new and unprecedented requirement for passengers to be vaccinated against Covid-19 - amounted to an “exercise of state control over the individual” desiring to access federally regulated transportation services, and which “state control” which can include: (a) a positive action (b) inaction or (c) prohibition.
47. AJ Horne’s conclusion that the impugned Ministerial Orders it did not amount to an “exercise of state control” over the Plaintiffs, required *some* analysis to explain how this conclusion was reached. The Court’s failure to do so is an error of law.
48. The implementation of the Ministerial Orders requiring vaccination to travel – which never previously existed as a pre-condition to access transportation services – amounts to “active state process” which involved “state control” in the form of a “prohibition”; namely that unvaccinated travellers could no longer travel until the impugned Ministerial Orders were removed.
49. The *Rodriguez* decision is patently distinguishable from the case at hand. In that case, the claimant challenged a *Criminal Code* provision which prevented assisted suicide in Canada. The *Criminal Code* provision applied uniformly to all Canadians, regardless of their individual health circumstances and forms the foundation of how our society regulate criminal activity.
50. In contrast, the Minister of Transportation revoked and prohibited the Plaintiffs’ right to access federally regulated transportation services.

51. The Government did so by proactively mandating a public health policy (which is a form of state control) in the transportation sector that established a distinction between vaccinated and unvaccinated passengers and treated them differently based on their vaccination status.

52. The impugned mandate represented an active state process; one which targeted a specific group of Canadians – unlike the indiscriminate criminal prohibition which was before the Supreme Court of Canada in *Rodriguez*.

53. There is a significant and meaningful distinction between a blanket *Criminal Code* provision - which applied to everyone in Canada regardless of their personal condition - and an interim, Ministerial Order that creates a new qualification, based on one's medical status, which became a pre-condition to access services which are, themselves, federally regulated.

54. It is also noteworthy that the Court's description of "treatment" in *Rodriguez* has not been fully judicially considered or interpreted in the non – criminal / punitive context. The definition remains capable of growth and evolution.

55. For instance, in *Canada (Minister of Employment and Immigration) v. Chiarelli*, a decision rendered almost two decades after *Rodriguez*, the Supreme Court of Canada passingly referred to the *Concise Oxford Dictionary* to consider the term "treatment", which it defined as "a process or manner of behaving towards or dealing with a person or thing".[19]

[19] *Canada (Minister of Employment and Immigration) v. Chiarelli*, 1992 CanLII 87 (SCC).

56. The novelty of Section 12 *Charter* jurisprudence was acknowledged in the Supreme Court of Canada decision of *Quebec (Attorney General) v. 9147-0732 Quebec inc.*,[20] a 2020 decision, which was "the first case in which the Court has been asked to determine the scope of s. 12, that is, who or what comes under its protection".[21]

57. Where *Charter* jurisprudence on Section 12 is clearly still emerging, the Court should not have struck this claim as failing to disclose a reasonable cause of action, particularly considering the high threshold necessary to reach this conclusion.

CONCLUSION

58. The appeal raises novel and significant constitutional questions about the interplay between different *Charter* rights and the scope of Sections 7 and 12 in the context of unprecedented public health measures.

59. These important issues deserve full consideration on their merits, particularly given the motion to strike's high threshold and the evolving jurisprudence around Section 12's application outside the criminal context.

60. The constitutional implications of forcing citizens to choose between competing *Charter* rights, and whether government-imposed conditions on federally regulated transportation constitute "treatment" under Section 12, are matters of public importance that warrant thorough judicial consideration rather than summary dismissal on technical grounds.

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[20] *Quebec (Attorney General) v. 9147-0732 Quebec inc.*, 2020 SCC 32.
[21] *Quebec (Attorney General) v. 9147-0732 Quebec inc.*, 2020 SCC 32 at para. 50.

PART IV – ORDER SOUGHT

61. In light of the foregoing, the Plaintiffs seek the following:

    a. An Order granting this appeal and overturning the Order of AJ Horne, AJ dismissing the Plaintiffs claims pursuant to Section 7 and Section 12 of the *Charter* without leave to amend;

    b. Costs of this motion; and,

    c. Such further and other relief as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th day of January 2025

Sam Presvelos

Sam A. Presvelos

PART V – LIST OF AUTHORITIES

1. *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII).
2. *Canada (Minister of Employment and Immigration) v. Chiarelli*, 1992 CanLII 87 (SCC).
3. *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology,* 2016 FCA 215 (CanLII).
4. *Rickard v. His Majesty the King,* 2024 FC 1915.
5. *Tetreault v. Boisbriand (City),* 2023 FC 168 (CanLII).
6. *Quebec (Attorney General) v. 9147-0732 Quebec inc*., 2020 SCC 32.
7. *Rodriguez v. British Columbia (Attorney General)* 1993 CanLII 75 (SCC).

APPENDIX "A" – STATUES AND REGULATIONS

Federal Court Rules, SOR/98-106

Appeal
51 (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.
Service of appeal
(2) Notice of the motion shall be served and filed within 10 days after the day on which the order under appeal was made and at least four days before the day fixed for the hearing of the motion.

Aeronautics Act, R.S.C. 1985, c. A-2

Application of Part
4 (1) Subject to any regulations made pursuant to paragraph 4.9(w), this Part applies in respect of aeronautics to all persons and to all aeronautical products and other things in Canada, to all persons outside Canada who hold Canadian aviation documents and to all Canadian aircraft and passengers and crew members thereon outside Canada.

Minister's responsibilities respecting aeronautics Mission
4.2 (1) The Minister is responsible for the development and regulation of aeronautics and the supervision of all matters connected with aeronautics and, in the discharge of those responsibilities, the Minister may…

Ministerial orders
4.3(2) The Governor in Council may by regulation authorize the Minister to make orders with respect to any matter in respect of which regulations of the Governor in Council under this Part may be made.

Aviation security regulations
4.71 (1) The Governor in Council may make regulations respecting aviation security.

Contents of regulations
(2) Without limiting the generality of subsection (1), regulations may be made under that subsection
(a) respecting the safety of the public, passengers, crew members, aircraft and aerodromes and other aviation facilities;

Canadian Charter of Rights and Freedoms

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.

Treatment or punishment

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

SHAUN RICKARD ET AL.
Plaintiffs

HIS MAJESTY THE KING ET AL.
Defendants

Court File No.: T-2536-23

FEDERAL COURT

Proceeding Commenced at Toronto

PLAINTIFFS' WRITTEN SUBMISSIONS

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SHAUN RICKARD ET AL.
Plaintiffs

HIS MAJESTY THE KING ET AL.
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PLAINTIFFS' MOTION RECORD

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