Dockets: A-251-22 A-252-22 A-253-22 A-254-22

FEDERAL COURT OF APPEAL

BETWEEN

THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, and AEDAN MACDONALD

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

SHAUN RICKARD and KARL HARRISON

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

THE HONOURABLE MAXIME BERNIER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

NABIL BEN NAOUM

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPELLANTS, SHAUN RICKARD AND KARL HARRISON

PRESVELOS LAW LLP
141 Adelaide Street West, Suite 1006
Toronto, Ontario
M5H 3L5

Sam A. Presvelos (LSO[redacted]
Tel: ([redacted]
E: [redacted]

Evan A. Presvelos (LSO#)
Tel: [redacted]
E: [redacted]

Counsel for the Appellants, Shaun Rickard and Karl Harrison (Docket: A-252-22)

TO: Attorney General of Canada
Department of Justice Canada Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, ON
K1A 0H8

J. Sanderson Graham, Robert Drummond and Virginie Harvey

Counsel for the Respondent, the Attorney General of Canada

AND TO: **Charter Advocates Canada**
Charter Advocates Canada
439 University Avenue, Suite 529 Toronto, Ontario
M5G 1Y8

Allison Kindle Pejovic

Counsel for the Appellants Peckford et al (A-251-22)

AND TO:

Samuel Bachand

Counsel for the Appellant, The Honourable Maxime Bernier (A-253-22)

AND TO: **Nabil Ben Naoum**

Self-Represented Appellant (A-254-22)

TABLE OF CONTENTS

PART I – OVERVIEW AND FACTS

1. This is an appeal of Associate Chief Justice Gagne's (the "**motion judge**") decision to strike the Appellants' applications for judicial review of several Ministerial Orders 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.)) (collectively, the "**Impugned Regulations**"), preventing unvaccinated Canadians from travelling between October 2021 – June 2022, as moot.
2. The court's fundamental role is to oversee the exercise of public powers by ensuring conformity with the *Constitution.*
3. The Impugned Regulations prima facie violated the Appellants' Charter rights by forcing them to choose between the right to bodily autonomy and mobility. They are accordingly entitled to know whether that violation was justified and, if not, to a remedy under the *Charter*. The Appellants' access to meaningful remedies must not be smothered in procedural delays and difficulties.
4. Until the court decides the appropriateness and content of that remedy, the underlying applications concern a live controversy that affects the rights of these Appellants – they are not moot.
5. In the alternative, if this court decides the issues are moot, the motion judge's analysis of the second branch the *Borowski* test – the residual discretion branch - was incorrect and incomplete. Her Honour did not consider the court's role in the broader political framework of this country and, as a result, did not properly weigh the relevant factors in determining whether to exercise the court's residual discretion to hear a moot matter, anyway. These errors are critical and entitled to no deference on appeal.

6. In August 2021, a year and a half into the Covid-19 pandemic, and in the midst of a political re-election campaign, Prime Minister Justin Trudeau announced that the federal government would implement a Covid-19 vaccine requirement to travel by air, rail, or boat. This measure was constitutionally unprecedented in Canadian history.
7. To implement the Government's vaccine policy, the Minister of Transportation made several Ministerial Orders 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.)). Neither legislation had ever been used to enforce a public health measure as a pre-condition to transportation.
8. While the ultimate decision-maker(s) remains unknown, it is presumed that the Minister of Transportation undertook the executive action and implemented the Orders under the amorphous authority conferred by the respective legislation that regulates air and rail travel.
9. These Appellants chose not to be vaccinated against Covid-19 but required travel for business and personal reasons. Because of the Impugned Regulations, they were unable to do so.

1. The Applications on the Merits

10. In December 2021, the Appellants brought a constitutional challenge to the Federal Court seeking (1) to strike the Impugned Regulations as violating the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and (2) declaratory relief as to the constitutionality of the Impugned Regulations and its impact on *Charter* rights.
11. Subsequently, three other Applications were brought, all of which challenged, in some form, the constitutionality of the Impugned Regulations (together, the "**Applications**"). The Applications were consolidated, and case managed by Prothonotary Tabib.

12. The Attorney General expended significant resources and vigorously defended the Applications. This expense recognized and was commensurate with the widespread application of the Impugned Regulations and their effect on core Canadian *Charter* rights.
13. Between January 2022 and June 2022, the parties exchanged voluminous materials, which contained extensive scientific evidence, and conducted cross-examinations spanning over two (2) months.
14. Importantly, the voluminous evidence pertaining to these topics was not frozen in time. It spanned from October 2021 up until the time of the Application hearing. The evidence considered the Delta variant (which was the prevalent variant around the time the Impugned Regulations were announced) as well as the Omicron variant and subvariant (BA.2) which overtook the Delta variant around December 2021 and remained the dominant variant around the time that the government temporarily suspended the Impugned Regulations.
15. The scientific evidentiary record that had been produced through these Applications was remarkably substantive.
16. The Appellants, for their part, produced extensive expert evidence on substantive issues in the Application. Some of the experts and their evidence included:
    a. **Dr. Jennifer Grant** – a Medical Microbiologist and Infectious Disease specialist and medical doctor who had first-hand experience treating acute Covid-19 patients in British Columbia. Dr. Grant's expert report discussed vaccine effectiveness for symptomatic disease, vaccine effectiveness *vis a vis* preventing Covid-19

transmission, the significance of natural immunity from Covid-19, the impact of travel on health outcomes of vaccinated and unvaccinated passengers.[1]

b. **Dr. Neil Rau** – a Medical Microbiologist and Infectious Disease specialist and medical doctor who treated Covid-19 patients in Ontario. Dr. Rau's report discussed general patterns in the emergence of Covid-19 variance, the ineffectiveness of previous border measures to stop the development and spready of Covid-19 variants, the role of herd and natural immunity, observations regarding the pattern and trajectory of the Covid-19 virus and its many variants, the inability of vaccines to stop the development of Covid-19 virus variants, data demonstrating that travel is an insignificant source of Covid-19, and possible testing alternatives for Covid-19 in the context of travel.[2]

c. **Dr. Richard Schabas** - Ontario's former Chief Medical Officer. Dr. Schabas' report discussed the effectiveness of travel restrictions, important similarities, lessons learned from the influenza pandemic, evidence from the World Health Organization which did not suggest border measures and travel restrictions were effective, socio-political harms in coercing Canadians to get vaccinated in order to travel, particularly in light of the high immunization rates. [3]

d. **Dr. Joel Kettner** - Manitoba's former Chief Medical Officer. His report opined on risk of transmission of Covid-19 in various circumstances relevant to transportation, and provided a risk assessment of hospitalization and death resulting from a Covid-19 infection in various scenarios.[4]

[1] Appeal Book Volume II, Tab 33.
[2] Appeal Book, Volume II, Tab 35.
[3] Appeal Book, Volume II, Tab 36.
[4] Appeal Book, Volume II, Tab 34.

e. **Dr. Adam Sirek** - a doctor with experience in aviation medicine. Dr. Sirek worked for Transport Canada. Dr. Sirek's report considered various aircraft features and how aircraft ventilation significantly reduces the risk of Covid-19 transmission within an airplane.[5]

17. Several high-ranking government officials who were involved with managing Covid-19 at the highest levels and who were responsible for the monitoring and responding to the Covid-19 pandemic were retained to provide their opinions and evidence to the court on behalf of the government. Three prominent examples include Dr. Celia Lourenco, Dr. Eleni Galanis and Jennifer Little.

a. **Dr. Lourenco** is the Acting Associate Assistant Deputy Minister of Health and previously the Director General for Biologics and Genetic Therapies Directorate. Dr. Lourenco and was responsible for approving Covid-19 vaccines for use in Canada. Dr. Lourenco's team is also responsible for monitoring vaccine effectiveness including the effectiveness of Covid-19 vaccine boosters.[6]

b. **Dr. Galanis** is the Director General of the Centre for Integrated Risk Assessment in the Public Health Agency of Canada. Dr. Galanis is part of a small team of health care professionals that directly advised Canada's Chief Public Health Officer, on Covid-19.[7]

c. **Ms. Jennifer Little** was the Director General of the Covid Recovery with Transport Canada. Ms. Little was responsible for establishing the parameters of the mandatory vaccine policy and assisting with its implementation.[8]

[5] Appeal Book, Volume II, Tab 32.
[6] Appeal Book, Volume I, Tab 21.
[7] Appeal Book, Volume II, Tab 30.
[8] Appeal Book, Volume I, Tab 25.

18. The parties' evidentiary record provided a contemporary and comprehensive set of scientific, political and policy information from which the motion judge could assess whether the Impugned Regulations were justified under Section 1 of the *Charter*.

2. The Federal Court's Decision on the Mootness Motion

19. On June 20th, 2022, as the Applicants were set to finish cross-examining the Respondent's final witnesses, the Canadian government temporarily suspended the Impugned Regulations. It did so while also expressly reserving its right to re-introduce the same public health measure at some future point in time if they considered it necessary to deal with changing circumstances in public health.[9] That continues to be the *status quo*.

20. Immediately, the Attorney General brought a motion to dismiss the Applications on the technical basis that they had become moot (the "**Mootness Motion**"). In doing so, it seeks to circumvent the adjudication of these *prima facie* unconstitutional travel mandates on their merits simply because this public health measure was being tucked away for now.

21. The Mootness Motion was heard on September 19, 2022. The motion judge released her decision in *Ben Naoum v Canada (Attorney General)*, 2022 FC 1463 on October 20th, 2022, with reasons provided on October 27th, 2022, which were then corrected on November 29th, 2022 (the "**Decision**").

22. In the Decision, the motion judge determined (i) there was no longer a "live controversy" regarding the constitutionality of the vaccine travel mandates because they had been

[9] Treasury Board of Canada Secretariat, *Suspension of the vaccine mandates for domestic travellers, transportation workers and federal employees* (June 14, 2022) accessed online: <https://www.canada.ca/en/treasury-board-secretariat/news/2022/06/suspension-of-the-vaccine-mandates-for-domestic-travellers-transportation-workers-and-federal-employees.html> and Transport Canada, Suspension of the mandatory vaccination requirement for domestic travellers and federally regulated transportation workers (June 14, 2022) accessed online: <https://www.canada.ca/en/transport-canada/news/2022/06/suspension-of-the-mandatory-vaccination-requirement-for-domestic-travellers-and-federally-regulated-transportation-workers.html>.

temporarily suspended; and (ii) in any event, this matter was not worthwhile for the Court to exercise its discretion to hear it anyways.

23. As a result, a measure that was constitutionally unprecedented in Canadian history evaded judicial review leaving these Appellants and millions of affected Canadians without a court ruling on the constitutionality of this extraordinary exercise of public power.

PART II– ISSUES

24. The issues to be determined on this appeal are as follows:

    a. What is the standard of review?

    b. Did the motion judge err in:

        i. Finding the Applications presented no "live controversy?"; and

        ii. Deciding to not exercise the court's residual discretion to hear the merits of the Applications in accordance with the approach established in *Borowski v. Canada (Attorney General)*[10] ("**Borowski**")?

PART III – LAW & ANALYSIS

1. The Standard of Review

25. The standard of review with respect to the mootness doctrine is the standard of correctness.[11]

[10] *Borowski v. Canada (Attorney General)* 1989 1 SCR 342.
[11] *Association des juristes d'expression française du Nouveau-Brunswick c. Commissariat aux langues officielles du Nouveau-Brunswick et autre*, 2023 NBCA 7 at para 23 citing *Housen v. Nikolaisen*, 2002 SCC 33 and *Baron v. Canada (Public Safety and Emergency Preparedness*), 2009 FCA 81.

26. The motion judge failed to engage in a proper and/or complete analysis of the second branch of the *Borowski* test – the residual discretion branch – and which error is also subject to a correctness standard of review.

27. The residual discretion branch of the mootness doctrine requires the court to consider: (1) the presence of an adversarial context; (2) the concern for judicial economy; and (3) the court's role in our political framework.

28. The Supreme Court in *Borowski* made clear that the analysis requires the court to consider *each* branch of the test:

> In exercising its discretion in an appeal which is moot, **the Court should consider the extent to which <u>each</u> of the three basic rationalia for enforcement of the mootness doctrine is present**. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. **The presence of one or two of the factors may be overborne by the absence of the third, and *vice versa***. [emphasis added].[12]

29. At paragraph 34 of the Decision, the motion judge correctly identified the test and that she <u>must</u> consider each branch of it:

> The Supreme Court in *Borowski* also provided guidance with respect to this second branch of the test. More specifically, ***Courts <u>must</u> look into***:
>
> - The presence of an adversarial context (this is not contested in the present case, the parties having spent a day in Court debating this motion being a strong indication it is the case);
> - The concern for judicial economy; and
> - The need for the Court to be sensitive to its role as the adjudicative branch in our political framework. [emphasis added][13]

30. Despite these comments, the motion judge failed to consider the third and arguably most important factor on these Applications: the court's need to consider its role in Canada's broader political framework. This error is fatal and entitled to no deference by this court.

---

[12] *Borowski v. Canada (Attorney General)* 1989 1 SCR 342. [1989] 1 SCR 342 at p 393.
[13] Decision, at para 24.

2. The Mootness Doctrine

31. Justice Sopinka writing for the Supreme Court of Canada, laid out the test to consider the mootness doctrine in the seminal case of *Borowski v. Canada (Attorney General)*:

> ***First** it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. **Second**, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.* The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. ***In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant***.[14] [Emphasis added]

a) The Applications are not moot

i. The Applications Present a Live Controversy

32. The motion judge erred in finding no live controversy because the IOs/MO no longer had any adverse effect on the lives of the Applicants "the minute they were repealed".[15] The Impugned Regulations breached core *Charter* rights, which engaged the Applicants' dignity and continue to do so.

33. The motion judge focused on the remedies available to the Applicants solely through the lens of section 52 of the *Constitution Act, 1982* and placed undue weight on the effect of their no longer being in force.[16] Little value was placed on the relief sought under s. 24(1) of the *Charter* or the usefulness of declaratory relief in these circumstances.

A. Declaratory relief is a valid form of relief

34. Canadian courts have repeatedly held *ubi jus, ibi remedium*: where there is a right, there must be a remedy. Courts should be wary of smothering and delaying access to these remedies through procedural motions such as a mootness motion:

---

[14] *Borowski v. Canada (Attorney General)* 1989 1 SCR 342.
[15] Decision, at para. 23.
[16] Decision, at para 28.

> [1] To the extent that it is difficult or impossible to obtain remedies for *Charter* breaches, the *Charter* ceases to be an effective instrument for maintaining the rights of Canadians.
>
> [20] Section 24(1)'s interpretation necessarily resonates across all *Charter* rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach. From the outset, this Court has characterized the purpose of s. 24(1) as the provision of a "direct remedy" (Mills, supra, p. 953, per McIntyre J.). As Lamer J. stated in Mills, ***"[a] remedy must be easily available and constitutional rights should not be 'smothered in procedural delays and difficulties'"*** (p. 882). Anything less would undermine the role of s. 24(1) as a cornerstone upon which the rights and freedoms guaranteed by the Charter are founded, and a critical means by which they are realized and preserved.[17] [Emphasis added]

35. Declarations through section 24(1) of the *Charter* are valid forms of relief, even on their own. The Supreme Court of Canada in *Doucet- Boudreau* has held as much:

> Declarations are a valid form of relief when there is nothing more tangible to provide and can operate to be meaningful, in that it is "relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied".[18]

36. The Supreme Court more recently recognized the usefulness of declaratory relief in *Canada (Prime Minister) v. Khadr*:

> In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that ***the proper remedy is declaratory relief***. A declaration of unconstitutionality is a discretionary remedy: Operation Dismantle , at p. 481, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821. ***It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes":*** R. v. Gamble, [1988] 2 S.C.R. 595, at p. 649. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.
>
> The prudent course at this point, ***respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it***.[19] [Emphasis added]

37. Meanwhile, the motion judge dismissed the availability of declaratory relief because the matter was moot. According to the motion judge:

> Finally, I agree with the Respondent that requests for declaratory relief cannot sustain a moot case in and of itself and that the declaratory remedies the Applicants seek fail to provide live issues for judicial resolution. **Mootness "cannot be avoided" on the basis that declaratory relief is sought (*Rebel News Network Ltd v Canada (Leaders' Debates Commission)*, 2020 FC**

[17] *R. v. 974649 Ontario Inc.,* 2001 SCC 81, at paras 1 and 20.
[18] *Doucet-Boudreau* at para. 55.
[19] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, at paras 46-47.

> **1181, at para 42).** Courts will grant declaratory reliefs only when they have the potential of providing practical utility, that is, if when they settle a "live controversy" between the parties. The Court sees no practical utility in the declaratory reliefs sought by the Applicants.[20] [Emphasis added.]

38. In the *Rebel News* case, unlike in this case, the court had already vindicated the applicant's rights by granting it injunctive relief. Furthermore, that decision, in turn, relies on *Rahman v. Canada (Minister of Citizenship and Immigration)*[21] which cites the earlier decision of *Fogal v. Canada*.[22] These decisions do not stand for the proposition that declaratory relief cannot, alone, avoid mootness:

> …Mr. Justice McKeown's observation, that mootness cannot be avoided by way of Rule 64, **does not mean that the declaratory relief is automatically gone, once the principal relief falls as moot, but rather that the judge or prothonotary hearing a motion to strike out for mootness still has the discretion to decide whether the whole matter, not only the principal moot point, but also the plea for declaratory relief, ought still to proceed to trial on the basis of *Borowski*.**[23] [Emphasis added.]

B. The relief sought is specific to the facts of this case

39. The motion judge erred when she characterized the Appellants' declaratory relief as an invitation for the court to express an "opinion" on "questions of law in a vacuum".[24]

40. The Appellants sought declaratory relief concerning the Impugned Regulations in a very specific and contemporaneous factual matrix.

41. The Application provided the court with a rare opportunity to consider evidence pertaining to many aspects of Covid-19 pandemic, including the transmission and infectiousness of the Covid-19 virus, vaccine effectiveness and waning immunity, as well as the impact of natural immunity and nonpharmaceutical interventions (such as masking).

---

[20] Decision, at para 32.
[21] *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137.
[22] *Fogal v. Canada*, 1999 CanLII 7932 (FC).
[23] *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137 at para. 18.
[24] Decision, at para 28.

42. The constitutional declarations sought were properly in reference to the same scientific evidence that the Government purportedly considered and relied upon in implementing and continuing the Impugned Regulations for the many months that it did. The very evidence which the Government purportedly relied on in implementing the Impugned Regulations was produced before the Court on the Mootness Motion. There was no vacuum.

43. The Appellants were not, as the Decision implies, asking the Court to make a free-standing pronouncement on the constitutionality of the Impugned Regulations. As the Supreme Court of Canada noted in *Doucet-Boudreau v. Attorney General of Nova Scotia* and which commentary is equally applicable to this matter:

> Finally, the Court is not overstepping its institutional role in deciding this case. ***Unlike Borowski, the appellant is not requesting a legal opinion on the interpretation of the Charter in the absence of legislation or other governmental action which would otherwise bring the Charter into play***. [25]

44. Like the appellants in *Doucet-Boudreau*, these parties are not seeking a legal opinion on the interpretation of the *Charter* in the absence of a specific government action. It is not a reference of any sort.

45. The Appellants have always maintained that the Application must be decided on the evidentiary record produced in the litigation. While a determination of the constitutionality of the Impugned Regulations would involving findings of fact on this Application, adjudicating the constitutionality of future public health measures would be assessed in light of the specific public health measure(s) enacted at that future time as well the scientific reality in a future scenario. In short, there could be no prejudice as the matter would be distinguishable. However, if the matter is not distinguishable, then determining

[25] 2002 SCC 62 (CanLII) ("*Doucet-Boudreau*")

the present constitutional matter would have some precedential value to future courts (and litigants) faced with deciding the constitutionality of a similar public health policy.

46. The Impugned Regulations *prima facie* violated the Appellants' *Charter* mobility rights. The *Charter* envisages that democratic rights and freedoms shall not be infringed, subject to rare, limited, and justified exceptions. Any infringement of a *Charter* right is serious and deserves serious consideration from the courts.

47. There were no reasons provided or any evidence produced by the Respondent at the Mootness Motion that would entitle the Court to conclude, as it did, that a declaration on the constitutionality of the Impugned Regulations "could prejudice cases and should be avoided"[26]. With the greatest of respect, it is a puzzling and circular argument to rely on other cases to prejudice the outcome of this case, while at the same time refusing to decide the merits of these Applications for fear that they may prejudice the outcome of future cases.[27]

48. Although the Covid-19 pandemic seems to have improved, the issues engaged in the Applications remain of national importance and consequence. Indeed, the government believes that, in certain circumstances, making travel conditional upon vaccination is a perfectly legitimate public health measure. The government has expressly reserved its right to re-activate this same measure in the future.

49. Undoubtedly, Covid-19 created uncertainty. However, it is precisely during these difficult moments that courts must be especially vigilant to ensure individual rights and freedoms are preserved against the threats of government over-reach, pandering to populist sentiment and, with it, the possible politicization of public health measures.

---

[26] *Ibid*.
[27] Decision, at paras 42-43.

50. The court's assessment of the Impugned Regulation's "adverse effects" only considered whether the Appellants, as of the hearing date for the Mootness Motion, could travel despite their personal vaccine status.

51. This analysis excluded the broader concerns that transpired due to the Impugned Regulations which presented these Appellants (and in excess of 5 million other Canadians) with a constitutionally unprecedented dilemma of having to choose between competing *Charter* rights; specifically, mobility rights and the right to bodily autonomy.

52. Adjudicating the constitutional crisis that was created by the extraordinary measure to exclude unvaccinated Canadians from travelling was not a "hypothetical" or "abstract" matter for the motion judge to consider.

53. Mobility is a cornerstone right in a free and democratic society. It is one of the few rights and freedom that is exempted from the *Charter*'s Notwithstanding Clause.

54. The ability to move freely goes to the core of human dignity. This is equally the case whether someone wishes to travel within their country or leave their country, for any lawful reason at all.

55. The fact that the vaccine mandates were temporarily suspended is not an answer to the fact that such a restriction existed in the first place. It also does not mean that such a measure presented no controversy before this Court which may practically affect the rights of these parties and, indeed, the rights of those Canadians who were affected by the travel mandate. A constitutional democracy cannot turn a blind eye to unconstitutional measures simply because these measures are "hopefully not to be repeated".[28] Mootness should not become a procedural tool used to deny access to meaningful *Charter* remedies.

[28] Decision, at para 42.

56. The question before the Court was, therefore, whether there continued to be a live controversy that *affected* or *potentially* affected the *Charter* rights of these Appellants notwithstanding the suspension of the mandates.

57. In determining this, it was important to note that the controversy engendered by the Impugned Regulations was not singular in scope and nature. It extended beyond the obvious and immediate controversy of whether the Appellants could physically board a boat, train, or plane as of the date the motion was heard.

58. The controversy remains as to whether a Covid-19 vaccine requirement as a precondition for travel was and is a justified constitutional public health measure.

59. In the face of a government that continued to believe that this public health measure was constitutional, and could be re-implemented in the future, it cannot be said that this controversy disappeared or would have no potential effect on the rights of the parties. Canadians ought to be able to expect that their courts will seriously consider the recognition of a *Charter* breach, regardless of what point in time that breach transpired, as a necessary and worthwhile pursuit of justice.

b) This Court Should Exercise its Discretion to Hear the Application, Even if Moot

60. In exercising discretion to hear a moot matter, the Court must consider and weigh the following three rationalia identified in *Borowski*: (a) the presence of an adversarial context; (b) concern for judicial economy; and (c) need for Courts to be sensitive to its role as the adjudicative branch in the political framework.

61. The assessment of these three *rationalia* is not a mechanical process, the court must nevertheless consider all three factors, which the motion judge failed to do.[29]

[29] *Borowski,* supra para 27.

i. The Adversarial Context

62. The parties concede, and the motion judge acknowledged, that there is an adversarial context to this dispute.

ii. The Concern for Judicial Economy

63. The court in *Borowski* explained that this branch of the test involves a consideration of (1) the practical effect on the rights of the parties in determining the controversy; (2) the recurring nature of the controversy; and (3) the social costs of leaving the controversy undecided:

> ***The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action***. The influence of this factor along with that of the first factor referred to above is evident in *Vic Restaurant Inc. v. City of Montreal*, supra.
>
> ***Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration***. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, supra. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. ***If the point was ever to be tested, it almost had to be in a case that was moot.*** Accordingly, this Court exercised its discretion to hear the case. To the same effect are *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, 1970 CanLII 192 (SCC), [1970] S.C.R. 713, and *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, 1973 CanLII 135 (SCC), [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.
>
> There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. ***The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law***. See *Minister of Manpower and Immigration v. Hardayal*, 1977 CanLII 162 (SCC), [1978] 1 S.C.R. 470, and Kates and Barker, supra, at pp. 1429-1431. Locke J. alluded to this in *Vic Restaurant Inc. v. City of Montreal*, supra, at p. 91: ***"The question, as I have said, is one of general public interest to municipal institutions throughout Canada."***[30] [emphasis added]

[30] *Borowski*.

A. The practical effects on the rights of the parties

64. The motion judge found that, "these proceedings will have no practical effect on the rights of the Applicants" because "[t]hey have obtained the full relief available to them…"[31]

65. The motion judge went on to, again, exclusively focus on fact that the Appellants could now travel, which speaks to whether there is a live controversy rather than the court's residual discretion to hear a moot matter anyway.

66. According to *Borowski*, the court is to engage in further analysis as to whether the parties' rights may be impacted ***even though*** the initial "concrete" controversy no longer exists. Indeed, if it did exist, the second stage of the mootness analysis would be unnecessary. The Court was required, but did not, consider whether, beyond the fact that the live controversy has disappeared, there were other reasons to decide the Applications.

67. In this instance, the Court ought to have considered the applicability and effects declaratory relief might have on the Appellants who come to court seeking vindication and constitutional clarity on their mobility rights. On this point, the court simply re-stated the conclusions it reached under the first branch of the *Borowski* test:

> ***As stated above***, these proceedings will have no practical effect on the rights of the Applicants. They have obtained the full relief available to them and a decision of the remaining declaratory relief would provide them no practical utility. If they suffered damages as a result of these IOs/MO being in force, they would have to bring an action against the Crown and have their respective rights assessed in light of all the relevant facts.[32] [emphasis added]

68. A deeper analysis was required that considered the applicability and appropriateness of a declaratory remedy to address the Appellants' *Charter* violations. It was an error of law for the motion judge to simply repeat the same reasoning she used for initially declaring the matter moot at the first stage of the *Borowski* analysis.

---

[31] Decision, at para 41.
[32] Decision, at para. 41.

The Applicants have a right to a remedy

69. The Impugned Regulations are *prima facie* unconstitutional. As such, the Appellants have the right to seek an appropriate remedy from this Court. According to section 24(1) of the *Charter*:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, ***have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy*** as the court considers appropriate and just in the circumstances. [emphasis added]

70. Section 24(1) must be interpreted and applied in a broad and liberal manner, considering the remedial nature of this provision. As the Supreme Court of Canada explained in *Doucet-Boudreau*:

> It is well accepted that the Charter should be given a generous and expansive interpretation and not a narrow, technical, or legalistic one. (pg. 23)
>
> …
>
> ***The requirement of a generous and expansive interpretive approach holds equally true for Charter remedies as for Charter rights*** (*R. v. Gamble*, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595; *R. v. Sarson*, 1996 CanLII 200 (SCC), [1996] 2 S.C.R. 223; R. v. 974649 Ontario Inc., [2001] 3 S.C.R. 575, 2001 SCC 81 ("*Dunedin*")). In *Dunedin*, McLachlin C.J., writing for the Court, explained why this is so. She stated, at para. 18:
>
> > [Section] 24(1), like all Charter provisions, commands a broad and purposive interpretation. This section forms a vital part of the Charter, and must be construed generously, in a manner that best ensures the attainment of its objects . . . . Moreover, it is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a "large and liberal" interpretation . . . . Finally, and most importantly, the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of Charter rights. In Mills, McIntyre J. observed at p. 965 that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion". This broad remedial mandate for s. 24(1) should not be frustrated by a "(n)arrow and technical" reading of the provision . . . . [Reference omitted.]
>
> Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for Charter violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach" (Dunedin, supra, at paras. 19-20). ***A purposive approach to remedies in a Charter context gives modern vitality to the ancient maxim ubi jus, ibi remedium: where there is a right, there must be a remedy.*** More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.

…

> ***Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the Charter.*** As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.[33]
> [emphasis added.]

71. Declaratory relief does have a practical effect on the parties' rights. It would provide vindication and clarification on the exercise of mobility rights. As the Supreme Court of Canada stated in *Association des parents de l'ecole Rose-des-vents v. British Columbia (Education)*[34] declaratory relief is effective because there is a tradition in Canada of state actors taking *Charter* declarations seriously.

72. In *Certified General Accountants Association of Canada v. Canadian Public Accountability Board*,[35] the Ontario Divisional Court held that the appropriateness and utility of declaratory relief is not *limited* to whether it would resolve the specific present or existing legal issue (referred to as the "tangible and concrete dispute" in Borowski):

> The jurisprudence does not support the conclusion that declaratory relief should be granted only in those cases in which the declaratory relief, if granted, will resolve a specific present or existing legal dispute. In the decisions of Morneault v. Canada (Attorney General) (2000), 2000 CanLII 15737 (FCA), 189 D.L.R. (4th) 96 (F.C.A.) and Operation Dismantle Inc. v. Canada, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, the Court recognized that it was a much broader relief justified by serving a "useful purpose" or even a "preventative role". ***The question of the function and import of the declaratory relief on the facts of this case should be left to the argument of the matter on its merits***.[36] [Emphasis added.]

[33] *Doucet-Boudreau*, paras 23-25 and 55.
[34] *Association des parents de l'ecole Rose-des-vents v. British Columbia (Education)* 2015 SCC 21.
[35] *Certified General Accountants Association of Canada v. Canadian Public Accountability Board* 2008 CanLII 1536 (ON SCDC)
[36] Ibid., at para. 69.

73. In *Shaka v. Canada (Citizenship and Immigration)*[37] the Federal Court relied on the established approach to determine whether declaratory relief might be warranted in the facts of that case:

> A court may, in its discretion, grant a declaration "where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought" (Ewart v. Canada, 2018 SCC 30, [2018] 2 S.C.R. 165, at paragraph 81).[38]

74. The court's singular focus on the absence of a "practical utility" in declarative relief misses the objective and spirit of Section 24(1) of the *Charter*. It also ignores jurisprudence from many different levels of Court about the importance of such relief. The motion judge undertook no discussion or analysis on how declaratory relief would affect the rights of these Appellants, and the purpose it would serve in these circumstances in deciding whether to expend additional judicial resources.

75. By refusing to consider whether the Appellants' *Charter* rights had been violated, the court has left these Appellants with no remedy at law. Even if declaratory relief might have little "practical utility", section 24(1) of the *Charter* clearly contemplates a remedy where *Charter* rights have been violated. The decision to dismiss the Applications as moot also sets a precedent in which an extraordinary public health measure that is *prima facie* unconstitutional will be tolerated without recognition or consequence, provided it is suspended before the courts can address the issue.

76. Providing the Appellants with a remedy for their *Charter* breach – where that breach has also impacted the lives of millions of Canadians - is surely worth a five (5) day hearing and the review of 37 substantive affidavits.

---

[37] *Shaka v. Canada (Citizenship and Immigration)* 2019 FC 798 (CanLII), [2019] 4 FCR 288.
[38] Ibid. at para. 61.

77. The motion judge acknowledged that the parties and the court, "have already invested financial and human resources in these files". However, she weighed the costs of a five-day judicial review hearing to occur in front of one judge to find that this militated against expending further resources to decide these applications.[39] The motion judge erred by failing to consider the broader social costs the Impugned Resolutions inflicted.

78. While the Appellants are sensitive to the consumption of the Court's resources, the motion judge did not weigh the relevant evidence that should inform the judicial economy analysis. Instead, the motion judge only considered what would be required, from the court, to determine the Applications on their merits:

> It is true that the parties, and to some extent the Court, have already invested financial and human resources in these files. However, most of the Court resources are yet to come with a five-day judicial review hearing and extensive writing time … that is without considering possible appeals to the Federal Court of Appeal and to the Supreme Court of Canada. [40]

79. As the Court was aware, the Applications were case managed to ensure proportionality and efficiency. The parties coordinated to prepare a joint brief and the Applicants cooperated to ensure their submissions were not repetitive. As such, all reasonable measures were taken to minimize the consumption of judicial resources occasioned by the several judicial review applications. The motion judge gave no consideration to this fact within her discussion on judicial economy.

80. Moreover, the very fact that this matter is now before the Federal Court of Appeal undermines the concern that deciding to hear the Application could result in further use of judicial resources by appealing the outcome. To the contrary, a transparent and rigorous

[39] Decision, at para 40.
[40] Decision, at para. 40.

judgment is less likely to result in an appeal than the swift dismissal of a substantive *Charter* challenge. In any event, the same appellate routes are available regardless of whether the motion judge decided the Applications. Judicial resources are being consumed all the same.

81. Spending five days to hear the Applications, and a few weeks to review the evidence and come to a decision is a worthwhile investment that *would have* "some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action".[41]

82. The social costs arithmetic is also influenced by Canadians' right to a judicial remedy and the cost to society where such a remedy is not delivered.

B. The Impugned Regulations are recurring

83. The motion judge dismissed the Impugned Regulations' likelihood of being repeated by *hoping* they would not return:

> These Applications arose in a very specific and exceptional factual context: that of the COVID-19 global pandemic. Deciding these Applications would simply result in applying settled Charter jurisprudence to those exceptional — ***hopefully not to be repeated*** — circumstances; that is to a particular epidemiological point in the pandemic that is unlikely to be exactly replicated in the future.[42] [emphasis added]

84. No one saw the pandemic coming. In late 2019, no one could have foreseen that in a few short months, every Canadian would be confined to their homes and then, in the case of the Impugned Regulations, denied approximately 5.2 million Canadians from travelling within or outside of their own country. The motion judge's analysis with respect to the likelihood of such measures returning is wrong, or at least speculative.

---

[41] *Borowski*.
[42] Decision, at para 42.

C. The social costs of legal uncertainty outweigh the economic concerns

85. The social cost of leaving this controversy undecided involve: the actual costs of the Applicants' access to meaningful justice; and the costs of uncertainty in the jurisprudence.

The cost of judicial uncertainty is high

86. Expending judicial resources on a public health measure that impacted the lives and liberty of every Canadian is a worthwhile endeavour.

87. Pandemics are a reality of the human condition, especially in a globalized world. Even before the Covid-19 pandemic, Canada's health experts collaborated to establish the *Canadian Pandemic Influenza Preparedness: Planning Guidance for Health Sector*,[43] in response to the H1N1 crisis. Since Covid-19, there has been a consensus among health experts, that it is not a matter of whether there will be another pandemic, but rather when.

88. Although Canada has dealt with prior public health risks, including SARS and H1N1, it has never used a travel mandate as a public health measure. Its willingness to do so for Covid-19 indicates that it may do so again when faced with a future pandemic threat. The Court cannot simply hope a future pandemic does not happen.

89. Given that the Government considers this a legitimate public health tool, the benefits to be achieved from providing clarity and guidance on the constitutionality of this novel public health measure, that affects every Canadian, outweighs the additional judicial resources that is required to achieve this.

90. In her analysis, the motion judge also ignored the uncertainty that existed on account of the constitutional conflict that resulted from the Impugned Regulations and that was argued by these Appellants; specifically, whether the Government could ever force Canadians to

[43] Appeal Book, Volume II, Tab 36, the Affidavit of Dr. Richard Schabas at paras. 14 – 20.

compromise one constitutionally protected right or freedom to exercise another. As the Appellants' argued in their written submissions:

> …the Applicants will ask this Court to consider whether the Government can ever – as it has done here – force Canadians to decide whether they will compromise one Charter right to enjoy another. It should never be permissible to create a circumstance in which protecting one Charter right necessarily requires a citizen to compromise another of their guaranteed rights. This present Application is unlike previous Charter challenges where our Courts are being asked to balance competing rights of different individuals who both seek to have their rights guaranteed.[44]

91. The motion judge's analysis omitted the merits of this argument and there was no evidence that any consideration was given to this constitutional dilemma. The implications of this unique, "Sophie's choice" scenario transcends the "very specific and exceptional factual context"[45] of the Covid-19 global pandemic. The Government's policy of pitting one *Charter* right/freedom against another *Charter* right/freedom is unprecedented in Canadian history. The court needs to reconcile this tension given that the Supreme Court of Canada held that there is no hierarchy among *Charter* rights[46] and no part of the Constitution can abrogate or diminish another part of the Constitution.[47]

92. With 5.2 million Canadians directly impacted by the Impugned Regulations, there is no shortage of Canadians who are aggrieved and concerned about their mobility rights. Indeed, so much interest was shown in these matters that the Federal Court of Canada, seemingly for the first time, resorted to Twitter to inform Canadians on how they could access the court materials filed for the Applications.

---

[44] Written Submissions of the Applicants, Shaun Rickard and Karl Harrison at para. 76.
[45] Decision, at para. 42.
[46] *Dagenais v. Canadian Broadcasting Corp*. 1994 CanLII 39 (SCC) at p. 877.
[47] *New Brunswick Broadcasting*, *supra*, at p. 373, McLachlin J. citing *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, 1987 CanLII 65 (SCC), [1987] 1 S.C.R. 1148

93. The constitutional trade-off that the Impugned Regulations demanded from Canadians, undermines the dignity of the individual and, arguably, must never be tolerated in a constitutional democracy.

iii. The Issues Directly Engage the Court's Law-making Function

94. "Deference ends…where the constitutional rights that the courts are charged with protecting begin".[48] As former Chief Justice McLachlin J. noted in *RJR-MacDonald Inc. v. Canada (Attorney General)*:[49]

> As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. ***But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded***.[50] [Emphasis added.]

95. The motion judge did not consider this branch of the residual discretion test. However, the third *rationalia* weighs strongly in favour of the Appellants.

96. The Court is the only place where aggrieved citizens can go to seek some remedy for their *Charter* rights. Asking this Court to make declarations of constitutionality vis-à-vis government measures and actions is precisely what has allowed our *Charter* to grow and evolve with the rich body of jurisprudence it enjoys today.

97. The Supreme Court recently discussed the role of the court within the broader Canadian political context in *Reference re Code of Civil Procedure (Que.), art. 35*:

---

[48] *Doucet-Boudreau*, at para. 36.
[49] *RJR-MacDonald Inc. v. Canada (Attorney General*)1995 CanLII 64 (SCC), [1995] 3 SCR 199.
[50] *Ibid*.

> The rule of law is maintained through the separation of judicial, legislative and executive functions ((A.) J. Johnson, "The Judges Reference and the Secession Reference at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019), 56 Alta. L. Rev. 1077, at pp. 1100-1101). ***In keeping with the principle of the separation of powers, the task of interpreting, applying and stating the law falls primarily to the judiciary*** (Reference re Manitoba Language Rights, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at p. 744; British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 50).
>
> This separation allows the courts to implement the three fundamental facets of the rule of law: equality of all before the law, the creation and maintenance of an actual order of positive laws, ***and oversight of the exercise of public powers*** (Reference re Manitoba Language Rights, at pp. 748-51; Imperial Tobacco, at para. 58; Cooper v. Canada (Human Rights Commission), 1996 CanLII 152 (SCC), [1996] 3 S.C.R. 854, at para. 16). Historically, the superior courts had primary responsibility for this task.[51]

A. Determining the constitutional controversy is the court's core function

98. Adjudicating the constitutionality of the travel mandates would provide a helpful framework or benchmark if and when such a mandate would be re-enacted in the future. Some of the considerations the Court would likely need to address – and which have applicability beyond the immediate Covid-19 context – include the following:

    a. The presence of risk-assessment or risk analysis.

    b. The existence and effect of countervailing factors, if any. For instance, in the specific context of Covid-19 this may include vaccine effectiveness and waning immunity, natural immunity, nonpharmacological interventions etc.

    c. The presence or absence of criteria or guidelines that measure the effectiveness of the proposed, *Charter*-infringing mandate as well as the detrimental effects of that mandate.

[51] *Reference re Code of Civil Procedure (Que.), art. 35,* 2021 SCC 27, at paras 46-47.

d. Some indication the Government was re-assessing the risk/benefits of the impugned public health measure in a timely manner so that the impugned public health measure was in place only as long as necessary.

99. Exploring a framework or providing insight as to what a government might need to demonstrate for it to satisfy that an otherwise unconstitutional public health measure that may be saved by Section 1, would have a practical and desirable impact on the rights of these litigants and all Canadians. It would also not fetter the role of the legislative branch since it is required to comply with the *Charter* and, indeed, its conduct is constantly subject to *Charter* scrutiny.

100. It is not only important that justice be done, but that it seen to be done to avoid a general feeling or perception of judicial remoteness. This has important consequences for the public confidence in the judiciary and the Constitution. Indeed, the motion judge condemned as "totally inappropriate" the actions of an interested and concerned Canadian who was following this case and from whom the motion judge received a letter.[52]

101. The Chief Justice of the Federal Court of Appeal reinforced this point when he stated, publicly, that the Federal Court of Appeal would not disclose the vaccine status of its judges. According to the Chief Justice "the court's paramount responsibility, especially on an issue as controversial and unprecedented as this, is to ensure that Canadians are confident in the court's capacity and commitment to decide cases on the facts and the law and nothing else…"[53]

[52] Decision, at para. 17.
[53] Law 360 Canada, Court's hiding their COVID-19 vaccination policies legally flawed, against public interest: experts (September 24, 2021). Accessed: <https://www.law360.ca/articles/30000/courts-hiding-their-covid-19-vaccination-policies-legally-flawed-against-public-interest-experts->.

B. Determining the controversy will not bind future political decisions

102. A determination and pronouncement on the constitutionality of the Impugned Regulations would neither "dictate" nor "prevent" future governments from enacting *Charter* – compliant public health measures in response to Covid-19 crisis as it may manifest itself at a future point in time.[54]

103. The facts which may give rise to a similar measure in the future will need to be scrutinized on a case-by-case basis – however, this does not mean that determining the Application on its merits cannot provide some "practical utility" to future courts, the rights of these litigants and, in fact, all Canadians.

104. While it is true that future mandates (regardless as to whether they arise from Covid-19) could be challenged and "should be weighed against the reality in which they are implemented"[55] this should not relieve the motion judge from doing precisely this exercise given the contemporaneous scientific evidence that was before the Court at that time it was asked to determine the Applications on their merits.

PART IV – CONCLUSION AND ORDER REQUESTED

105. The errors of law on the Mootness Motion call for the decision to be set aside.

106. The implications of this decision, and the precedent it sets, extends beyond the Covid-19 pandemic jurisprudence. Where prima facie unconstitutional government actions has infringed on the *Charter* rights of Canadians, those Canadians are entitled to seek some redress from the Court.

[54] Decision, at para. 50.
[55] Decision, at para. 50.

107. In the context of a *Charter* challenge, they should also be entitled to expect that the Court will hear their *Charter* grievance – regardless of the remedy sought. This is not what happened in this case. Here, the motion judge dismissed the request for declaratory relief while leaving open the opportunity for these Appellants to instead seek monetary damages "if they suffered damages as a result of these IOs/Mos being in force".[56]

108. This approach was held without any analytical consideration as to the appropriateness of declaratory relief being sought at the time or the applicability of damages in the circumstances. The motion judge denies these Appellants their right to a *Charter* remedy by declining the opportunity to adjudicate the determination of the *Charter* breach.

109. In this way, the Decision very much affects the rights of these Appellants especially where they seemingly cannot obtain a remedy for the breach of their mobility rights.

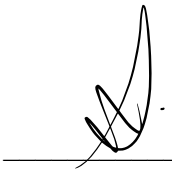
110. Refusing to consider a possible *Charter* violation because the Court has determined, *a priori*, that the *Charter* remedy would have no "practical utility" is a far cry from how Section 24(1) ought to protect the rights and freedoms of all Canadians. It also ignores the test established in jurisprudence for determining where declaratory relief would be appropriate and applicable.

111. While different circumstances will demand different remedies under Section 24(1) of the *Charter*, to offer no remedy at all is to render the rights and freedoms "guaranteed" by the *Charter* ineffective and, at least for these litigants whose mobility rights were infringed, utterly meaningless.

[56] Decision at para. 41.

112. The Appellants respectfully request that the appeal be granted, the Decision of the motion judge overturned, and an order denying the Attorney General's motion entered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th day of April 2023



Sam A. Presvelos

Counsel for the Appellants, Shaun Rickard and Karl Harrison

PART V - LIST OF AUTHORITIES

1. *Association des juristes d'expression française du Nouveau-Brunswick c. Commissariat aux langues officielles du Nouveau-Brunswick et autre*, 2023 NBCA 7
2. *Association des parents de l'ecole Rose-des-vents v. British Columbia (Education)* 2015 SCC 21
3. *Baron v. Canada (Public Safety and Emergency Preparedness*), 2009 FCA 81, 2009 FCA 81 (CanLII)
4. *Borowski v Canada (Attorney General),* [1989] 1. S.C.R. 342, 1989 CanLII 123 (SCC).
5. *Canada (Prime Minister) v. Khadr,* 2010 SCC 3, [2010] 1 S.C.R. 44
6. *Certified General Accountants Association of Canada v. Canadian Public Accountability Board,* 2008 CanLII 1536 (ON SCDC)
7. *Dagenais v. Canadian Broadcasting Corp*. 1994 CanLII 39 (SCC)
8. *Doucet-Boudreau v. Nova Scotia (Department of Education),* 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3
9. *Fogal v. Canada*, 1999 CanLII 7932 (FC)
10. *Housen v. Nikolaisen*, 2002 SCC 33
11. *New Brunswick Broadcasting*, *supra*, at p. 373, McLachlin J. citing *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, 1987 CanLII 65 (SCC), [1987] 1 S.C.R. 1148
12. *R v. 974649 Ontario Inc,* 2001 SCC 81 (CanLII)
13. *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137
14. *Reference re Objection by Quebec to a Resolution to amend the Constitution,* 1982 CanLII 219 (SCC), [1982] 2 SCR 793
15. *Shaka v. Canada (Citizenship and Immigration)* 2012 FC 235 (CanLII)

THE HONOURABLE A. BRIAN PECKFORD ET AL. **and** **ATTORNEY GENERAL OF CANADA**
Appellants Respondent

Docket: A-251-22

FEDERAL COURT OF APPEAL

Proceeding Commenced at Ottawa

MEMORANDUM OF FACT AND LAW OF THE APPELLANTS, SHAUN RICKARD AND KARL HARRISON

PRESVELOS LAW LLP
141 Adelaide Street West, Suite 1006
Toronto, Ontario
M5H 3L5

Sam A. Presvelos (LSO [redacted]

Evan A. Presvelos [redacted]

Lawyers for the Appellants, Shaun Rickard and Karl Harrison (A-252-22)