Court File No. A-251-22

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

Court File No. A-252-22

AND BETWEEN:

SHAUN RICKARD and KARL HARRISON

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Court File No. A-253-22

AND BETWEEN:

THE HONOURABLE MAXIME BERNIER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Court File No A-254-22

AND BETWEEN:

NABIL BEN NAOUM

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, ATTORNEY GENERAL OF CANADA

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8
Fax: 613-954-1920

Per: J. Sanderson Graham, Robert Drummond, Virginie Harvey
Tel: (613) 296-4469, (780) 394-3447, (514) 283-6145

Email: Sandy.Graham@justice.gc.ca, Robert.Drummond@justice.gc.ca, Virginie.Harvey@justice.gc.ca

Counsel for the Respondent

TO: **Allison Kindle Pejovic**
Charter Advocates Canada
Suite 529, 439 University Avenue
[redacted]

Counsel for the Appellants, The Honourable A. Brian Peckford, Leesha Nikkanen, Ken Baigent, Drew Belobaba, Natalie Grcic, and Aedan MacDonald (A-251-22)

AND TO: **Sam A. Presvelos, Evan A. Presvelos**
Presvelos Law LLP
Barristers & Solicitors
141 Adelaide Street West, Suite 1006
Toronto, ON M5H 3L5
[redacted]

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

AND TO: **Samuel Bachand**
LIS s.a.
550 – 555 boul. René-Lévesque O.
Montréal, Québec H2Z 1B1
[redacted]

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

AND TO: **Nabil Ben Naoum**
[redacted]

Self-Represented Appellant (A-254-22)

Court File No. A-251-22

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

Court File No. A-252-22

AND BETWEEN:

SHAUN RICKARD and KARL HARRISON

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Court File No. A-253-22

AND BETWEEN:

THE HONOURABLE MAXIME BERNIER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Court File No A-254-22

AND BETWEEN:

NABIL BEN NAOUM

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, ATTORNEY GENERAL OF CANADA

TABLE OF CONTENTS

OVERVIEW

1. The Appellants challenged the constitutionality of Transport Canada's now repealed air mode Interim Orders ("repealed air provisions") and rail mode Ministerial Orders ("repealed rail provisions") that required air and rail passengers to be fully vaccinated against COVID-19 (collectively, "the repealed provisions"). They primarily sought declarations that those repealed provisions were invalid. All of the challenged provisions were repealed on June 20, 2022 and no longer exist in law. The Motions Judge properly granted the motion of the Attorney General of Canada (Canada) to strike the Appellants' Applications finding that they were moot and, after considering the relevant factors, declining to exercise her discretion to hear the Applications on their merits.

2. The Motions Judge did not err in finding that the Applications are moot. There has been no live controvery affecting the Appellants' rights since June 2022 when the air and rail provisions were repealed.

3. The Motions Judge properly exercised her discretion to refuse to hear these constitutional challenges to the repealed provisions. While there exists an adversarial context, represented by counsel taking opposing positions, the circumstances do not warrant requiring the Federal Court to invest scarce judicial resources in hearing the underlying Applications. Deciding the constitutionality of repealed measures would require the Court to stray outside its traditional adjudicative role into a legislative one. This is especially the case given the importance of facts to a proper *Charter* analysis and the changing factual matrix underlying the implementation of any vaccination mandate. Should Transport Canada later introduce new measures that require the vaccination of passengers, the *Charter* validity of those hypothetical measures would be assessed in the context of the social and scientific facts then in existence.

4. This Court should come to the same conclusion as it did in *Plato v Canada Revenue Agency*[1] and *Wojdan v Canada (Attorney General)*[2] and dismiss this appeal.

---

[1] *Plato v Canada (National Revenue)*, 2015 FCA 217 [***Plato***].
[2] *Wojdan v Canada (Attorney General)*, 2022 FCA 120 [***Wojdan***].

PART I – STATEMENT OF FACTS

A. The challenged air and rail provisions are repealed

5. An enactment that has expired, lapsed or otherwise ceased to have effect is deemed to have been repealed.[3] On June 20, 2022, Transport Canada's air and rail sector vaccination mandates challenged by the Appellants were repealed. Those provisions were implemented under separate legislative regimes, using mechanisms unique to their respective regulatory spheres. They were similarly repealed through those same mechanisms. There have been no new air or rail vaccination mandates introduced since that time.

1) Air sector vaccination mandate has been repealed

6. The air passenger vaccination mandate was implemented by way of a series of 14-day Interim Orders (IO) made by the Minister of Transport pursuant to ss. 6.41(1) and 6.41(1.1) of the *Aeronautics Act*,[4] to deal with a significant risk to aviation safety or the safety of the public.

7. On October 29, 2021, the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No 43*[5] (IO 43) came into effect. It introduced for the first time new measures for the first phase of the federal vaccination mandate in the air transportation sector, including vaccination measures for all commercial air passengers departing from specified Canadian airports.[6] These measures included the requirement that passengers meet the definition of being fully vaccinated against COVID-19.[7] IO 43 included testing as an alternative to vaccination for air passengers.[8]

---

[3] *Interpretation Act*, RSC, 1985, c. I-21, s 2(2).
[4] *Aeronautics Act*, RSC 1985 c A-2 [***Aeronautics Act***], ss 6.41(1), 6.41(1.1).
[5] *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No 43* (Repealed), Appeal Book Vol III [**ABV3**], Tab H iv, pp 15542-95.
[6] *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No 43* (Repealed), ABV3, Tab H iv, pp 15542-95.
[7] *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No 43* (Repealed), ss 1(6) to 1(7) and 17.1 to 17.17, ABV3, Tab H iv, pp 15546-47, 15556-65.
[8] *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No 43* (Repealed), s 17.3(1)(b), ABV3, Tab H iv, p 15558.

8. The second phase of the federal vaccination mandate for air passengers was introduced in *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No 47*[9] (IO 47), which took effect on November 30, 2021. Under IO 47, testing was no longer available as an alternative to vaccination. Vaccination was a requirement for air travel within or departing from Canada[10] with limited and specific exceptions including: medical inability to be vaccinated, essential medical care, sincerely held religious beliefs, foreign nationals (non-residents) departing Canada, travel required in support of national interests, travel to or from remote communities, or cases of emergency travel.[11]

9. The air passenger vaccination mandate was maintained through further IOs until the *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No 63*[12] was implemented on May 19, 2022. As of that date, the provisions related to the air passenger vaccination mandate were removed from IO 63 and instead included in a new series of IOs: *Interim order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19,*[13] *Interim order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19, No. 2,*[14] and *Interim order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19, No. 3.*[15]

---

[9] *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No 47* (Repealed), ABV3, Tab H v, pp 15596-68.
[10] *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No 47* (Repealed), ss 1(6) to 1(7) and ss 17.1 to 17.18, ABV3, Tab H v, pp 15600-02, 15611-27.
[11] *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No 47* (Repealed), s 17.3(2), ABV3, Tab H v, pp 15613-15.
[12] *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No 63* (Repealed), ABV3, Tab H ix, pp 15887-15.
[13] *Interim order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19* (Repealed), ABV3, Tab H i, pp 15387-37.
[14] *Interim order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19, No 2* (Repealed), ABV3, Tab H ii, pp 15438-89.
[15] *Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19, No 3*, (Repealed), ABV3, Tab H iii, pp 15490-41.

10. The *Interim order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19, No. 3* ceased to have effect at 00:00:01 Eastern Daylight Time on June 20, 2022.[16] It was not replaced by another IO. Thus, as of June 20, 2022, there was no vaccination mandate for civil aviation in force under the *Aeronautics Act*.

2) Rail sector vaccination mandate has been repealed

11. The rail passenger vaccination mandate was implemented by way of Ministerial Orders (MO) made pursuant to the *Railway Safety Act*.[17]

12. Section 32.01 of the *Railway Safety Act* provides that, if the Minister considers it necessary in the interests of safe railway operations, the Minister may, by order, require a railway company 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.[18]

13. Subsection 4(4) of the *Railway Safety Act* provides that safe railway operations concern the safety of persons and property transported by railways and the safety of other persons and other property.[19]

14. Section 36 of the *Railway Safety Act* provides that the Minister may order that a railway company provide, in the specified form and within the specified period, information or documents that the Minister considers necessary for the purposes of ensuring compliance with the *Railway Safety Act* and with the regulations, rules, orders, standards and emergency directives made under that Act.[20]

---

[16] *Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19, No 3*, s 36 (Repealed), ABV3, Tab H iii, p 15532.
[17] *Railway Safety Act*, RSC 1985 c 32 (4th Supp) [***Railway Safety Act***], ss 4(4), 32.01, and 36.
[18] *Railway Safety Act*, s 32.01.
[19] *Railway Safety Act*, s 4(4).
[20] *Railway Safety Act*, s 36.

15. On October 29, 2021, a Minister's delegate[21] issued the *Order pursuant to section 32.01 of the Railway Safety Act (MO 21-08) Vaccine mandate for Passengers* (*MO 21-08*).[22] This MO included the requirement that passengers be fully vaccinated against COVID-19.

16. The vaccination mandate continued through a series of replacement MOs, the last of which was *Order pursuant to section 32.01 of the Railway Safety Act (MO 21-09.2) Vaccine mandate for Passengers*[23] (MO 21-09.2).

17. On June 20, 2022, MO 22-02, *Order pursuant to Section 32.01 of the Railway Safety Act, Order Ending Vaccine mandates for Passengers and Employees*,[24] came into effect. It repealed MO 21-09.2 and did not implement any further vaccination requirements. Thus, as of June 20, 2022, there was no vaccination mandate for rail passengers in force under the *Railway Safety Act*.

B. The Applications and the parties

18. The Appellants are Canadian citizens and permanent residents. In the Applications underlying these Appeals, they raised myriad arguments. The Appellants generally sought declarations that the repealed provisions violated their *Charter* rights, that they were not saved under s. 1, and that they were of no force or effect and should be struck down pursuant to s. 52(1) of the *Constitution Act, 1982* and/or s. 24(1) of the *Charter*.[25]

---

[21] Section 45 of the *Railway Safety Act* provides that the Minister of Transport may delegate the making of an order under sections 32.01 and 36 of that Act.

[22] *Order pursuant to section 32.01 of the Railway Safety Act (MO 21-08) Vaccine mandate for Passengers (MO 21-08)* (Repealed), ABV3, Tab H x, pp 15916-20.

[23] *Order pursuant to section 32.01 of the Railway Safety Act (MO 21-09.02) Vaccine mandate for Passengers* (Mo 21-09.2) (Repealed), ABV3, Tab H xii, pp 15930-40.

[24] *Order pursuant to Section 32.01 of the Railway Safety Act (MO 22-02), Order Ending Vaccine mandates for Passengers and Employees*, ABV3, Tab H xiv at pp 15941-42.

[25] Notice of Application (T-168-22) at para 5(a), Appeal Book Vol I [**ABV1**], Tab D i, p 79; Notice of Application (T-1991-21) at paras 1(a)-1(g), ABV1, Tab D ii, pp 98-99; Notice of Application (T-145-22) at p 1/2, ABV1, Tab D iv, pp 120-21; Notice of Application (T-247-22) at paras 6 and 7, ABV1, Tab D iii, p 108.

1) Rickard et al v AGC (T-1991-21)

19. Shaun Rickard and Karl Harrison (the Rickard Appellants) challenged the repealed air provisions as set out in IO 49[26] and the repealed rail provisions set out in MO 21-09.[27] The grounds for their Application were focused on the "Travel Restrictions", which they interpreted as meaning "that Canadian citizens who have not received a COVID-19 vaccine, as accepted by the Government of Canada, will be unable to travel, by aircraft or railway, both domestically and abroad to other countries, with limited exceptions for circumscribed medical or religious reasons".[28]

20. They sought:

i) declarations that the vaccine mandate provisions violate their rights under ss. 6, 7, and 15 of the *Charter* in a manner that cannot be saved by s. 1 of the *Charter*;

ii) declarations that the vaccine mandate provisions are unconstitutional and of no force or effect;[29]

iii) an order pursuant to s. 24(1) of the *Charter* and/or s. 52(1) of the *Constitution Act, 1982,* that the vaccine mandate provisions be struck for failing to comply with the *Charter*;[30] and,

iv) as alternative relief, a freestanding declaration that would amend the operation of IO 49 and MO 21-09.[31]

---

[26] *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No 49*, ss. 17.1 to 17.3 and 17.13, ABV3, Tab H vi, pp 15684-88 and 15697. See Notice of Application (T-1991-21) at paras 1(a), 1(b), 1(f) and 1(h), ABV1, Tab D ii, pp 98-99.

[27] *Order pursuant to Section 32.01 of the Railway Safety Act (MO 21-09) Vaccine mandate for Passengers – Phase 2* (Repealed), ss A and C, ABV3, Tab H xi, p 15922. See Notice of Application (T-1991-21) at paras 1(c), 1(g), and 1(h), ABV1, Tab D ii, pp 98-99.

[28] Notice of Application (T-1991-21) at para 2(d). See also paras 2(e)-2(p), ABV1, Tab D ii, pp 99-102.

[29] Notice of Application (T-1991-21) at paras 1(a)-1(g), ABV1, Tab D ii, pp 98-99.

[30] Notice of Application (T-1991-21) at paras 1(f)-1(g), ABV1, Tab D ii, pp 98-99.

[31] Notice of Application (T-1991-21) at para 1(h), ABV1, Tab D ii, p 99.

2) Nabil Ben Naoum c Procureur général du Canada (T-145-22)

21. M. Nabil Ben Naoum (M. Ben Naoum) challenged the repealed air provisions of IO 52 on the grounds that they violated his rights under ss. 6, 7, and 15 of the *Charter* and breached Canada's international commitments in respect of Article 13(2) of the *Universal Declaration of Human Rights,*[32] which stipulates that every individual has the right to leave and return to any country. The substance of these provisions is identical to the repealed air provisions challenged by the Rickard Appellants with respect to IO 49.

22. He sought:

i) a declaration that article 17.3 of the *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19* [IO 52] be declared constitutionally invalid for breaching the Applicant's rights under ss. 6(1), 7, and 15 of the *Charter*;

ii) a declaration that his *Charter* rights have been violated; and,

iii) a declaration making article 17.3 of IO 52 inoperative.[33]

3) The Honourable A. Brian Peckford et al v AGC et al (T-168-22)

23. The Honourable Brian Peckford, Leesha Nikkanen, Ken Baigent, Drew Belobaba, Natalie Grcic, and Aedan MacDonald (the Peckford Appellants) challenged the "Minister of Transport's decision to make an interim order restricting the mobility and other rights of Canadians based on their COVID-19 vaccination status", which they stated was communicated to them in IO 52.[34] The substance of these provisions is identical to the repealed air provisions challenged by the Rickard Appellants with respect to IO 49.

---

[32] *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810, at 71 (1948).
[33] Notice of Application (T-145-22) at p 1/2, ABV1, Tab D iv, pp 120-21.
[34] Notice of Application (T-168-22) at para 1, ABV1, Tab D i, p 78, *Interim order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No 52* (Repealed), ABV3, Tab H vii, pp 15742-14.

24. The Peckford Appellants sought:

i) multiple declarations that IO 52 is invalid or *ultra vires*,[35] or that sections of IO 52 relating to the vaccine mandate (ss. 17.1 to 17.4, 17.7, 17.9, 17.10, 17.22, 17.30 to 17.33, 17.26, and 17.40 ("the Vaccine Provisions")) are unconstitutional for breaching the Applicants' rights under ss. 2(a), 6, 7, 8, and 15 of the *Charter*,[36] violated their rights under ss. 1(a) and (b) of the *Canadian Bill of Rights* (*Bill of Rights*),[37] and violated Articles 7, 12, 18, and 26 of the *International Covenant on Civil and Political Rights*;[38]

ii) a declaration that prohibits Canada from issuing "subsequent orders of a substantially similar or identical nature that prohibit or further restrict individuals who are not vaccinated against Covid-19 from boarding aircraft leaving Canadian airports";[39]

iii) as an alternative, freestanding remedy, a declaration that "'natural immunity to Covid-19', as evidenced by a serology test, be recognised as equivalent to being 'fully vaccinated', as defined in [IO 52]";[40] and,

iv) an order quashing the "Vaccine Provisions" of IO 52.[41]

4) L'Honorable Maxime Bernier c Le Ministre des Transports et le Procureur général du Canada (T-247-22)

25. The Honourable Maxime Bernier (M. Bernier) challenged the repealed air provisions as set out in the *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19,*

---

[35] Notice of Application (T-168-22) at paras 37 and 38 in respect of IO 52 being *ultra vires* the governing legislation for being made for an improper purpose and errors of law, jurisdiction, fact and/or mixed fact and law for abusing or fettering his discretion, ABV1, Tab D i, p 88.
[36] Notice of Application (T-168-22) at paras 5(c) and 5(f), ABV1, Tab D i, pp 79-80.
[37] *Canadian Bill of Rights*, SC 1960, c 44.
[38] *International Covenant on Civil and Political Rights*, [1976] Can TS No 47.
[39] Notice of Application (T-168-22) at para 5(i), ABV1, Tab D i, p 80.
[40] Notice of Application (T-168-22) at para 5(j), ABV1, Tab D i, p 80.
[41] Notice of Application (T-168-22) at para 5(k), ABV1, Tab D i, p 80.

No 53 (IO 53)[42] on the grounds that they violated his rights under ss. 2(b), 2(c), 2(d), 3, 6, 7 and 15 of the *Charter* and his rights under s. 2 of the *Bill of Rights*. The substance of these provisions is identical to the repealed air provisions challenged by the Rickard Appellants with respect to IO 49, and challenged by M. Ben Naoum and the Peckford Appellants with respect to IO 52.

26. M. Bernier sought:

i) an order in the nature of *certiorari* quashing IO 53;

ii) a declaration that IO 53 is unconstitutional and inapplicable, or in the alternative a declaration that articles 1(6) and (7), 2(3) and (4) and 17.1-17.17 (collectively defined as "Clauses vaccinales") of IO 53 are unconstitutional and inapplicable;

iii) a declaration that IO 53 violates the Applicant's ss. 3, 6, 7, and 15 *Charter* rights, or in the alternative, a declaration that the "Clauses vaccinales" violate the Applicant's ss. 3, 6, 7, and 15 *Charter* rights;

iv) a declaration that IO 53, or the "Clauses vaccinales" violate article 81.1 of the *Canada Elections Act*, S.C. 2000 c. 9; and,

v) an order prohibiting any decision similar to IO 53 from being taken in the future, as it pertains to the vaccine status of individuals.[43]

C. The Motion to dismiss the Applications as moot

27. On June 28, 2022, Canada filed a motion to strike the Applications as moot. The Court declined to suspend the timelines for the Applications pending a hearing of the motion. It set down the motion to strike for September 21, 2022 and also set down a schedule for steps to bring the Applications to hearing for five days beginning October 31, 2022.

28. The Applicants filed four separate memoranda on the Applications as well as a "single joint compendium" consisting of the materials which would have been in the parties' application

---

[42] *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No 53* (Repealed), ABV3, Tab H viii, pp 15815-86.

[43] Notice of Application (T-247-22) at paras 6-7, ABV1, Tab D iii, p 108.

records, and which they were permitted to reference as part of the motion to dismiss.[44] That compendium – representing the record that the Court would have considered as part of the Applications – was enormous; the over 14,000 pages included 23 affidavits and 15 expert reports. These included extensive and highly technical evidence that covered a wide range of scientific topics. It also included transcripts of 31 days of cross-examination, which continued even after the vaccination mandates in the IOs and MOs ceased to exist.

29. The motion to dismiss for mootness was heard by the Honourable Associate Chief Justice Gagné (Motions Judge) on September 21, 2022. The decision was reserved. On October 20, 2022, the Motions Judge granted the motion and struck the Applications with reasons following on October 27, 2022.[45] In her reasons, the Motions Judge identified the applicable test for a motion on mootness as that established in *Borowski v Canada (Attorney General)*.[46] As such, she considered two questions: i) Were the issues raised by the Applications moot?; and ii) If the issues were moot, should the Court nevertheless exercise its discretion to hear the merits of those Applications?

30. In respect of the first question, the Motions Judge determined that there was no live issue. The MOs and IOs that had contained vaccination mandates were no longer in force and no such mandate had existed since June 2022. They all ceased to have any adverse effect on the lives and livelihoods of the Applicants upon their repeal.[47] Additionally, the Motions Judge noted that it was inappropriate to grant the requested declarations, so as not to express an opinion on a question of law in a vacuum or where it was unnecessary to dispose of a case,[48] and that requests for declarations do not by themselves sustain a moot case.[49]

---

[44] See Joint Application Compendium, filed August 10, 2022, ABV1, Appeal Book Vol II [**ABV2**] and ABV3, Tab F i, pp 272-14655.
[45] Order and Reasons for Judgment of the Honourable Associate Chief Justice Gagné dated October 27, 2022 and Corrected November 29, 2022, ABV1, Tab C i, pp 54-74 [**Order and Reasons**].
[46] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [***Borowski***]; Order and Reasons at para 14, ABV1, Tab C i, p 59.
[47] Order and Reasons at paras 22-23, ABV1, Tab C i, p 62.
[48] Order and Reasons at para 28, ABV1, Tab C i, pp 63-64.
[49] Order and Reasons at para 32, ABV1, Tab C i, p 65.

31. In respect of the second question, the Motions Judge identified the three *Borowski* factors – the presence of an adversarial context, the concern for judicial economy, and the need for the Court to be sensitive to its role in the political framework – to determine if she should nonetheless consider the Applications. Then, as now, the parties had agreed that there was an adversarial context.[50] Notwithstanding that the parties had invested significant resources, there was no important public interest or inconsistency in the law that would justify allocating significant judicial resources to hear the Applications over a five day hearing; there was no uncertainty in the jurisprudence requiring attention; the MOs and IOs were not evasive of judicial review; and it was not the role of the Court to comment on possible future legislative actions of the government.

PART II – POINTS IN ISSUE

32. The issues on appeal are:

i) What are the standards of review for this appeal?;

ii) Whether the Motions Judge properly determined that the Applications were moot; and

iii) Whether the Motions Judge properly exercised her discretion by deciding not to consider the Applications further notwithstanding that they were moot.

PART III – SUBMISSIONS

A. The standards of review

33. The *Housen* framework governs the standards of review in the present appeal, at both steps of the mootness analysis. For findings of fact and inferences of fact, the standard is palpable and overriding error; for pure questions of law, the standard of review is correctness; and for questions of mixed fact and law, the standard is palpable and overriding error, unless there is an extricable

[50] Order and Reasons at para 34, ABV1, Tab C i, p 65.

error in principle which will be treated as a question of law and not subject to deference.[51] A palpable and overriding error is one that is obvious and affects the outcome of the case.[52]

34. The identification of the legal factors to determine if a case is moot is a question of law reviewable on the standard of correctness.[53] The judge's application of the test for mootness involves questions of mixed fact and law to which deference is owed. In this case, the Motions Judge identified the proper test and made no palpable and overriding error in applying it to the facts and determining that there was no live controversy.

35. Once it is established that a case is moot, the judge has a broad discretion to determine if the matter should be heard, but must properly weigh the criteria established in *Borowski*. This fine exercise of balancing is a mixed question of fact and law to which deference is owed.[54] The Motions Judge made no palpable and overriding error in declining to exercise her discretion to hear the case notwithstanding that it was moot.

B. Mootness principles

36. A matter is moot where there is no longer a live controversy between the parties and an order will have no practical effect. Even if a live controversy existed at the beginning of a proceeding, if subsequent events during its course resolve the controversy, the case is moot. As a general policy, the Court should decline to hear matters that are moot.[55]

37. A court may exercise its discretion to hear a case that is moot upon considering the following three factors: a) the absence or presence of an adversarial context; b) whether there is any practical utility in deciding the matter or if it is a waste of judicial resources; and c) whether the court would be exceeding its proper role by making law in the abstract, a task reserved for

---

[51] *Housen v Nikolaisen*, 2002 SCC 33.
[52] *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 59-74 [***Mahjoub***]. See also *Mand v Canada*, 2023 FCA 94 at para 10.
[53] *Plato* at para 4; *Prince Albert Right to Life Association v Prince Albert (City)*, 2020 SKCA 96 (CanLII) at para 34.
[54] *Plato* at para 4; *Gupta v Canada (Attorney General)*, 2021 FCA 202 at para 3; *Mahjoub* at paras 71-74; *Imperial Manufacturing Group Inc. v Decor Grates Incorporated*, 2015 FCA 100 at paras 18-29.
[55] *Borowski* at 353.

Parliament. The discretion is "to be judicially exercised with due regard for established principles."[56]

38. Although the threshold for striking a matter for mootness is high, the Federal Courts have dismissed applications for judicial review on many occasions, including on preliminary motions to strike for mootness prior to the hearing.[57]

39. Even at a preliminary stage, if an application is doomed to fail because it is moot, and a balancing of the *Borowski* factors does not favour further consideration, the Court should dismiss the application. Alleging that the *Charter* has been infringed "does not automatically convert a moot application into a live controversy nor does it require the Court to exercise its discretionary authority to hear a moot application."[58] In considering a motion to dismiss an application, the task of the motion judge is to "gain 'a realistic appreciation' of the application's 'essential character' by reading it holistically and practically."[59]

C. The Motions Judge properly determined the Applications were moot

40. The Rickard Appellants alone on appeal argue that their Application is not moot. They argue that the Motions Judge erred in finding that a live controversy ended when the air and rail provisions were repealed. There is no merit to this argument.

41. The Motions Judge did not err in concluding that the Applications were moot. She properly found that the IOs and MOs had been repealed and, therefore, ceased to have any adverse effect on the lives and livelihoods of the Appellants. She correctly cited the principle that courts should refrain from expressing opinions on questions of law that are not necessary to dispose of a case.

---

[56] *Borowski* at 358.
[57] *Canada (National Revenue) v JP Morgan Asset Management (Canada)*, 2013 FCA 250; *Buck v Canada (Attorney General)*, 2021 FCA 1; *Cardin v Canada (Attorney General)*, 2017 FCA 150; *Lukács v Canada (Transportation Agency)*, 2016 FCA 227; *Lavergne-Poitras v Canada (Attorney General)*, 2022 FC 1391 [***Lavergne-Poitras***]; *Rebel News Network Ltd. v Canada (Leaders' Debates Commission)*, 2020 FC 1181 [***Rebel News***].
[58] *Rebel News* at para 49.
[59] *David Suzuki Foundation v Canada (Health)*, 2017 FC 682 at para 6.

She also properly found that the declaratory relief sought would not settle any live controversy between the parties.

1) The challenged vaccination mandates had been repealed and no longer existed in law

42. Under the *Borowski* principles, as noted by the Motions Judge, it is first necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. A case is moot if it fails to meet this live controversy test.[60]

43. As of June 20, 2022, the impugned provisions were repealed and not, as the Rickard Appellants suggest, merely suspended.[61] The following chart sets out the vaccination provisions of the air IOs that the Appellants challenged, as set out in their Notices of Application. It illustrates that none of the challenged air passenger vaccination requirements existed in law in October 2022 or exists today:

IO 49 to IO 64	**Rickard Appellants**	**M. Ben Naoum**	**Peckford Appellants**	**M. Bernier**	**Were the provisions in place in October 2022?**
ss. 17.1 to 17.17 set out the vaccination requirements for passengers and ss. 17.20-17.40 set out the vaccination requirements for non-passengers	Challenged ss. 17.1 – 17.3 and 17.13 of IO 49.	Challenged s. 17.3 of IO 52.	Challenged ss. 17.1 to 17.4, 17.7, 17.9, 17.10, 17.22, 17.30 to 17.33, 17.36 and 17.40 of IO 52.	Challenged ss. 17.1 to 17.17 of IO 53.	Provisions did not exist in law.
ss 1(6)-1(7) set out the definition of	Did not challenge.	Did not challenge.	Did not challenge.	Challenged ss. 1(6)-1(7).	Provisions did not exist in law.

[60] *Borowski* at 353; *Fibrogen, Inc. v Akebia Therapeutics, Inc.*, 2022 FCA 135 at para 30.
[61] Memorandum of Fact and Law of Shaun Rickard et al [**Rickard Memorandum**] at paras 19, 55.

IO 49 to IO 64	Rickard Appellants	M. Ben Naoum	Peckford Appellants	M. Bernier	Were the provisions in place in October 2022?
"fully vaccinated"					
ss 2(3)-2(4) set out the requirement that air carriers notify passengers that they may be required, under the *Quarantine Act* to notify the Minister of Health of information related to their COVID-19 vaccination, and that they may be liable to a monetary penalty if they provide a false confirmation.	Did not challenge.	Did not challenge.	Did not challenge.	Challenged ss. 2(3)-2(4).	Provisions existed in IO 65. However, these provisions did not require the vaccination of passengers. Rather, they placed an obligation on *air carriers* to notify passengers of obligations under the *Quarantine Act*.

44. The last of the IOs made pursuant to the *Aeronautics Act* provided that it ceased to have effect on June 20, 2022.[62] As it was not replaced by another IO, there were no vaccination mandates for civil aviation in force under the *Aeronautics Act* as of that date.

[62] *Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19, No 3*, s 36 (Repealed), ABV3, Tab H iii, p 15532.

45. The Rickard Appellants also challenged ss. A and C of MO 21-09, relating to the vaccination of rail passengers. On June 21, 2022, these provisions were repealed by MO 22-02, *Order Ending Vaccine mandates for Passengers and Employees*.[63]

46. The repeal of Transport Canada's vaccination mandates meant that there was (and is) no live controversy between the parties. The Ontario Superior Court of Justice concluded the same with respect to COVID-19 provincial public health measures that had been repealed, noting:

> The repeal of impugned legislation is a classic example of mootness. This principle can be traced back more than a hundred years to the Supreme Court of Canada's decision in *Moir v The Corporation of the Village of Huntington*, (1891), 1891 CanLII 36 (SCC), 19 S.C.R. 363 in which the repeal of a municipal by-law foreclosed any challenge to the by-law.
>
> Any adverse effects caused by the impugned regulations on the lives and livelihoods of the applicant's members ended when those regulations were revoked and replaced. The issues raised by the application have become academic.[64]

47. The Federal Courts have consistently held that the repeal of public health measures directed at controlling the spread of COVID-19 renders challenges to such measures moot.[65] Some provincial superior courts have done the same.[66]

---

[63] *Order pursuant to Section 32.01 of the Railway Safety Act (MO 22-02) Order Ending Vaccine mandates for Passengers and Employees 2022-06-17*, ABV3, Tab H xiv, pp 15941-42.

[64] *Work Safe Twerk Safe v Ontario (Solicitor General)*, 2021 ONSC 6736 (CanLII) [***Work Safe***] at paras 5-6.

[65] *Spencer v Canada (Attorney General)*, 2023 FCA 8 (quarantine measures); *Wojdan* (vaccination requirements for the public administration); *Lavergne-Poitras* at paras 9-17 (vaccination requirements for government suppliers); *Kakuev v Canada*, 2022 FC 1465 at paras 20-24 (vaccination requirements for foreign nationals travelling to Canada); *Yates v Canada (Attorney General)*, (16 March 2023), Toronto T-1736-22, T-1738-22 (FC).

[66] *Bowen v City of Hamilton*, 2022 ONSC 5977 (CanLII) (termination provisions of vaccination policy); *Gianoulias v Quebec (Attorney General)*, 2022 QCCS 3509 (CanLII) (vaccination/test requirements for access to care settings); but see *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, 2022 BCSC 1606 (CanLII) (public gathering restrictions) and *Mercier* c *Procureur général du Québec*, 2022 QCCS 1264 (CanLII), affirmed *Procureur général du Québec* c *Mercier*, 2022 QCCA 1134 (CanLII) (vaccination passport).

48. The Rickard Appellants focus on words used during press conferences and in media releases announcing that the vaccination mandates were being "suspended"[67], to argue that the issue is not moot;[68] however, the most that can be said is that such statements were public messaging and not legal characterizations. Legally, the provisions were repealed. The Appellants' rights are not affected.

49. Nor can it be said that the Appellants' rights are potentially affected.[69] Again, the provisions have been repealed, not suspended. The possibility that similar provisions might be introduced in some form in the future in response to different public health concerns through new instruments does not alter the fact that the impugned measures did not exist in October 2022 under any IO or MO.[70] A challenge to any new measures would be decided based on the circumstances and evidentiary record in that future application.[71]

2) The remedies sought were unnecessary and unavailable

50. With few exceptions that do not affect the mootness of the underlying Applications, the Appellants sought declarations of invalidity in respect of the air and rail passenger vaccination mandates. As all of these provisions had been repealed, there was nothing for any Court to declare invalid. By virtue of the repeal, the remedy sought by the Appellants was unnecessary and unavailable.

51. Nonetheless, the Appellants sought to have the Federal Court comment on the constitutionality of repealed legislation. This relief was unavailable to them. Courts should avoid expressing opinions on questions of law not necessary to dispose of the case, particularly on constitutional questions. At worst, abstract constitutional pronouncements may prejudice future

---

[67] Affidavit of Marla McKitrick, affirmed June 23, 2022 [**McKitrick Affidavit**] at para 11 and Exhibit E, ABV1, Tab E i, pp 142 and 267-70.
[68] Rickard Memorandum at paras 19, 55, 56, 59. See also Memorandum of Fact and Law of the Honourable A. Brian Peckford et al. [**Peckford Memorandum**] at paras 28, 45.
[69] Rickard Memorandum at paras 56-59.
[70] *Work Safe* at para 7.
[71] *Baber v Ontario (Attorney General)*, 2022 ONCA 345 (CanLII) [***Baber***] at paras 8-9.

cases.[72] At best, as this Court has cautioned, "a mere jurisprudential interest fails to satisfy the need for a concrete and tangible controversy."[73]

52. M. Ben Naoum sought declarations that IO 52 be declared invalid and inoperative for breaching his rights under the *Charter*.

53. M. Bernier sought an order to quash IO 53 and declarations that it was unconstitutional and breached his *Charter* rights and the *Canada Elections Act*. He also sought a prohibition against speculative future provisions that may be similar to IO 52. Courts cannot issue prohibitions against potential, future, as yet undefined, legislative measures.

54. The Rickard Appellants sought declarations of invalidity of portions of IO 49 and MO 21-09 that implemented passenger vaccination mandates, on the grounds that they breached their *Charter* rights. They also sought an "Order" that the now-repealed IO 49 and MO 21-09 be amended to "include recognition of natural immunity or permit travelers to show proof of a negative PCR test before travel".[74] Such changes would not have been relevant as the mandates to which they related were gone.

55. The Peckford Appellants sought to have IO 52 quashed. They sought declarations that it was *ultra vires* the *Aeronautics Act* as it was made for an improper purpose and in bad faith in furtherance of an ulterior motive ("to pressure Canadians into taking the Covid-19 vaccines"). Finally, they also alleged that there were errors related to "abusing and/or fettering [the Minister's] order-making discretion and authority".[75] These are factually-specific to the implementation of IO 52 and do not demonstrate a live issue. The allegations by the Peckford Appellants that their *Charter* rights were breached relate only to the vaccination mandate provisions of IO 52.

---

[72] *Phillips v Nova Scotia (Commissioner of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 [***Phillips***] at paras 9-12; *Mackay v Manitoba*, [1989] 2 SCR 357 at 361-62; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at 1099-01.
[73] *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 7 [***Air Canada***], citing *Borowski*; *Public Service Alliance of Canada v Canada (Attorney General)*, 2021 FCA 90 [***PSAC***] at para 8.
[74] Notice of Application (T-1991-21) at para 1(h), ABV1, Tab D ii, p 99.
[75] Notice of Application (T-168-22) at paras 5(a), 5(b), 5(k), and 37-38, ABV1, Tab D i, pp 79-80 and 88.

56. The Peckford Appellants also sought pre-emptive declarations of invalidity for breaches of *Charter* rights against speculative future mandates and factual declarations that "natural immunity to covid-19" be recognized as the equivalent to being "fully vaccinated" in IO 52.[76] This argument has been rejected in very similar contexts where public health measures were repealed:

> I do not agree with counsel for the applicant that the possibility of new discriminatory regulations in the future keeps the issues alive. The validity of any new regulation would have to be determined on the facts and circumstances at that time. There is no basis in the record to suppose that the regulations were repealed and replaced to evade judicial review in this court. Quite the contrary, the COVID-19 crisis has led the government to revisit its response to the public health crisis on an ongoing basis, as circumstances have changed, and the changes to regulations affecting establishments affected by the impugned regulations reflect this pattern.[77]

57. The Court cannot adjudicate on the constitutionality of speculative future measures based on facts that do not yet exist. Any argument that similar provisions may be introduced in the future "is speculative and would not justify proceeding with …[a matter]… which is moot."[78]

3) A request for declarations does not sustain a moot case

58. Contrary to what the Rickard Appellants have suggested,[79] a request for declaratory relief cannot, in and of itself, sustain a case that is moot. Mootness "cannot be avoided" on the basis that declaratory relief is sought.[80] The Supreme Court of Canada has held that courts should avoid expressing an opinion on a question of law where it is not necessary to do so to dispose of a case, especially when the question is constitutional in nature.[81] Moreover, this Court has recently held

---

[76] Notice of Application for Judicial Review (T-168-22) at para 5(j) and 5(i), ABV1, Tab D i, p 80.
[77] *Work Safe* at para 7.
[78] *N.O. v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 214 at para 4, citing *Guzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 358 at para 4.
[79] Rickard Memorandum at paras 34-38.
[80] *Fogal v Canada*, 1999 CanLII 7932 (FC), 167 FTR 266 (TD), affirmed 2000 CanLII 15624 (FCA), [2000] FCJ No 916 (CA) at paras 24-27; see also *Rahman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137 (CanLII) at paras 17-21.
[81] See for example, *Rebel News* at para 64, citing *Phillips* at para 9.

that a declaration may be granted only if it will have a practical utility, that is, if it will settle a "live controversy" between the parties.[82]

59. As stated, a declaration would have had no practical utility given the earlier repeal of the vaccination mandates.[83] Further, a declaration based on the facts of this case would have no utility in future cases which would have to be decided on new facts.[84]

D. The Motions Judge properly exercised her discretion not to hear the moot Applications

60. A Court has discretion to hear and determine a matter that is moot and the exercise of such discretion is reviewable on the standard of palpable and overriding error. The Appellants have not identified any basis on which this Court should interfere with the Motions Judge's exercise of discretion.

61. The Motions Judge correctly identified the three elements from *Borowski* as the factors she should consider in exercising her discretion whether to hear the Applications.[85] Canada acknowledges that there was and is an adversarial context, indicated by counsel taking opposing positions.[86] However, the remaining *Borowski* factors strongly favoured the Motions Judge exercising her discretion not to hear the moot Applications.

1) Hearing the Applications would have entailed the expenditure of significant judicial resources

62. Judicial economy weighed strongly in favour of not hearing the moot Applications. Hearing matters that are moot necessarily means that others will be delayed. This is an issue of access to justice.[87] Where a proceeding will not have a "practical effect upon the rights of the

---

[82] *Right to Life Association of Toronto v Canada (Attorney General)*, 2022 FCA 220 [***Right to Life Association of Toronto***] at paras 12–15; *Income Security Advocacy Centre v Mette*, 2016 FCA 167 at para 6, citing *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11; *Solosky v The Queen*, [1980] 1 SCR 821, and *Borowski*.
[83] *PSAC* at para 8.
[84] *Right to Life Association of Toronto* at para 14; see also *Work Safe* at para 7.
[85] Order and Reasons at para 34, ABV1, Tab C i, p 65.
[86] *Air Canada* at para 10.
[87] *Pelletier v Fort William First Nation*, 2021 FC 562 [***Pelletier***] at para 17.

parties, it has lost its primary purpose" and so the "Court should no longer devote scarce resources to it".[88]

63. Considerations regarding the appropriateness of applying scarce judicial resources weighed heavily against hearing the moot Applications for six reasons. First, deciding the Applications would have had no practical effect. Second, it would not have provided certainty to an unsettled area of the law. Third, hearing these Applications would have been a significant draw on scarce judicial resources by virtue of the volume of material and length of the hearing, and also by virtue of the extensive amount of expert evidence being proffered on a variety of issues. Fourth, the air and rail vaccination mandates were not evasive of review. Fifth, any decision would have had limited, if any, value in speculative future litigation regarding air and rail vaccination mandates. Sixth, even if the issues engaged were of national importance, it was not a sufficient consideration to warrant hearing these moot Applications.

i. A decision would have had no practical effect on the Appellants

64. The absence of a practical or jurisprudential benefit to hearing these Applications weighed strongly against the Court exercising its discretion to continue with the litigation. A practical result does not arise by addressing the possibility or "threat of reimposition" of any vaccine mandate, as suggested by the Peckford Appellants.[89]

65. This is not a case where the Court's decision would have some practical effect on the rights of the parties notwithstanding that it would not have the effect of determining the controversy which gave rise to the proceedings.[90] After the mandates were repealed, there was no concrete or tangible relief to be provided to the Appellants that warranted the Court's intervention. The impugned provisions had and have no continuing effect. The Motions Judge properly determined that any declaration that the mandates were invalid or otherwise not compliant with the *Charter* would not have had any practical utility for the Appellants.[91]

---

[88] *Amgen Canada Inc v Apotex Inc*, 2016 FCA 196 [***Amgen***] at para 16, citing *Borowski*.
[89] Peckford Memorandum at para 58.
[90] *Borowski* at 360.
[91] Order and Reasons at para 32, ABV1, Tab C i, p 65.

66. While Canada agrees with the Rickard Appellants that there may be circumstances where a declaration may be useful beyond determining an immediate dispute between the parties,[92] the authorities cited nonetheless demonstrate that declarations must have some practical utility. The Supreme Court noted in *Association des parents de l'ecole Rose-des-vents v British Columbia (Education)*, that a declaration might serve to encourage the parties to remedy ongoing breaches of minority language education rights.[93] In *Shaka v Canada (Citizenship and Immigration)*, the Federal Court noted that a declaration on the availability of a pre-removal risk assessment may affect the Applicant's ability to obtain refugee status.[94] Indeed, in the case of *Ewert v Canada,* cited in *Shaka*, the Supreme Court specifically noted that, in the exceptional circumstances of that case, a declaration concerning the continued use of impugned assessment tools on Indigenous inmates would directly affect Mr. Ewert's interests in decisions made about his incarceration.[95]

ii. A decision would have had no practical effect on the state of the law

67. Although the Rickard and Peckford Appellants argue that the Applications raised novel issues not yet adjudicated,[96] they were not "exceptionally rare cases" where the need to settle uncertain jurisprudence was of such great practical importance that a court might nevertheless exercise its discretion to hear a moot proceeding.[97] Deciding these Applications would have involved the application of settled *Charter* jurisprudence to a very specific factual matrix.[98] Even the issue of the *vires* of the air vaccination mandate, raised by the Peckford Appellants, relied on the particular factual matrix of the pandemic and impact of vaccination at the time that mandate was in place. For example, the Peckford Appellants alleged that the air vaccination mandate was "made for an improper purpose, and in bad faith in furtherance of an ulterior motive to pressure

---

[92] Rickard Memorandum at paras 71-73.
[93] *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21 at paras 64-68.
[94] *Shaka v Canada (Citizenship and Immigration)*, 2019 FC 798 at paras 78-80.
[95] *Ewert v Canada*, 2018 SCC 30 at paras 82-87.
[96] Peckford Memorandum at paras 39-43; Rickard Memorandum at paras 90-93.
[97] *Amgen* at para 16, citing *M v H*, [1999] 2 SCR 3 at paras 43-44.
[98] See, for example, *Reference re Same Sex Marriage*, 2004 SCC 79 at paras 50-54, for the procedure for resolving alleged conflicts between *Charter* provisions.

Canadians into taking the COVID-19 vaccines."[99] There was no jurisprudential value to the Court determining this fact-specific issue.

iii. Hearing the Applications would have been a significant draw on scarce judicial resources

68. While the Peckford Appellants argue that the costs of an action for *Charter* damages would use more resources than hearing the Applications,[100] the possibility of an action and the judicial resources needed to devote to that action are currently matters of speculation only. In contrast, it is certain that proceeding with the Applications would have required the dedication of significant amounts of judicial time and effort, which weighed heavily against the Court hearing them.

69. Where a case raises an issue of public importance, the resolution of which is in the public interest, the economics of judicial involvement are weighed against the social cost of continued uncertainty in the law.[101] As noted above, there is no uncertainty in the law. The only issue is the application of the existing *Charter* jurisprudence to a particular factual matrix, including a particular epidemiological point in the pandemic that is unlikely to be replicated in the future.

70. Hearing and deciding the Applications, however, would have required the expenditure of significant judicial resources. While the Applications were partly consolidated for efficiency, proceeding any further would have required an extensive use of scarce judicial resources for little, if any, value.

71. The record that would have been considered by the Federal Court was enormous, consisting of over 14,000 pages. It included 23 affidavits and 15 expert reports totalling approximately 6,650 pages. These included extensive and highly technical evidence that covered a wide range of scientific topics of deep disagreement among the parties and over which the Court would have been asked to adjudicate. The record included transcripts of 31 days of cross-examinations. Additionally, the Federal Court extended the page limits for some of the parties' memoranda: the

---

[99] Notice of Application (T-168-22) at para 37, ABV1, Tab D i, p 88; Peckford Memorandum at para 3.
[100] Peckford Memorandum at paras 44-46.
[101] *Borowski* at 361.

Peckford Appellants filed a memorandum of 45 pages; the Rickard Appellants filed a memorandum of 35 pages; and Canada filed a memorandum of 75 pages.

72. The hearing was scheduled for five days starting October 31, 2022. Were this appeal to be granted, the Federal Court would need to spend considerable time and resources to prepare for the hearing, hear the matter, and issue a judgment. These tasks would require a significant expenditure of judicial resources for no useful purpose.

73. The sheer volume of resources the Court would have had to expend to hear the Applications weighed heavily against the Motions Judge exercising her discretion to hear them.[102]

iv. The air and rail passenger vaccination mandates were not evasive of review

74. Contrary to the suggestion of the Peckford Appellants,[103] the constitutional validity of vaccination mandates was not evasive of review.

75. The underlying Applications are distinguishable from some other cases in which evasiveness of review has been invoked, for example, where the live controversy had existed for many years and its resolution would "continue to determine" subsequent disputes,[104] or where a test case was deemed necessary because the constitutionality of the legislation would otherwise never be tested.[105] Here, it would be inaccurate to suggest that the constitutionality of these measures was not otherwise tested.

76. The constitutionality of Transport Canada's air and rail vaccination mandates, including whether they breached parties' *Charter* rights was reviewed in another Court. In *Syndicat des métallos, section locale 2008 c Procureur général du Canada*,[106] a matter noted by the Motions

---

[102] Order and Reasons at para 40, ABV1, Tab C i, pp 66-67.
[103] Peckford Memorandum at para 35.
[104] *Saskatchewan (Minister of Agriculture, Food and Rural Revitalization) v Canada (Attorney General)*, 2005 FC 1027 (CanLII) at para 26 (a case involving a longstanding dispute over egg quota allocations, which had expired by the time of the hearing but would continue to inform future quota orders).
[105] *McCorkell v Director of Riverview Hospital*, 1993 CanLII 1200 (BC SC), [1993] BCJ No 1518 at 11.
[106] *Syndicat des métallos, section locale 2008 c Procureur général du Canada*, 2022 QCCS 2455 (CanLII) [***Syndicat des métallos***].

Judge,[107] the Applicants alleged that provisions of the air passenger and employee vaccination mandate and the rail employee vaccination mandate breached their rights under s. 7 of the *Charter*. In that case, the repeal of all MOs and IOs establishing vaccination obligations between the hearing and the issuance of a decision had made the matter suddenly moot; however, given the parties' investment in the process to that point, the existence of other related disputes involving the Plaintiffs, the union members and the employers mis-en-cause in a labour relations context, and the clear desire of all parties to have a judgment, the Quebec Superior Court exercised its discretion in favour of delivering a ruling on the application for judicial review and the constitutional issue it raised.[108]

77. In *Kozarov*,[109] this Court declined to exercise its discretion to hear a moot appeal involving a *Charter* challenge to legislation, noting that there were similar cases in the Federal Court, including one that was adjourned pending appeal.[110]

78. Moreover, the Applications did not concern issues of a "recurring nature but of brief duration" regularly becoming moot before they could be subject to review by the Court so as to warrant their being heard.[111] The fact that the provisions challenged were contained in IOs and MOs that were updated and revised multiple times between the time of their implementation and their repeal was not a barrier to review, as demonstrated by the decision in *Syndicat des métallos*. Despite the two-week validity of the air mode IOs, that litigation proceeded to completion. While the Applications were not determined during the eight months that the vaccination provisions were in effect, this does not demonstrate that the issues were evasive of review. There is no reason why the same would not be true with respect to any future measures.

79. Constitutional challenges to the Public Health Agency of Canada's quarantine measures in 2021 further demonstrate that public health orders similar in nature to the IOs under the *Aeronautics Act*, which require repeated review, updating, and reimplementation under the

---

[107] Order and Reasons at paras 44-45, ABV1, Tab C i, p 68.
[108] *Syndicat des métallos* at para 66.
[109] *Kozarov v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 185 [***Kozarvo***].
[110] *Kozarov* at paras 5-6.
[111] *Borowski* at 360.

enabling authority, are capable of being subjected to judicial review. In those cases, applicants challenged measures under the *Quarantine Act*, which were implemented through successive Orders in Council, at the Ontario Superior Court of Justice[112] and in judicial review applications at the Federal Court.[113] The Courts heard the matters and upheld the constitutional validity of the Orders in Council.

80. It is speculative to suggest any future provisions will be evasive of review, either because they are rendered moot prior to review or otherwise. As such, this was not a case where the Court should have exercised its discretion to hear a moot matter.

81. In any event, as the Supreme Court held in *Borowski*:

> 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.[114]

v. A decision on these Applications would be of limited value to any future vaccination mandate litigation

82. This is not a case where the Court is required to resolve uncertain jurisprudence. Nor is it a matter involving a generally static set of facts having broad application. Similar issues based on similar factual and epidemiological circumstances are not "apt to arise" in the future.[115] A decision on the merits of the Applications would offer limited, if any, benefit to speculative future litigation.

83. Courts have recently and repeatedly recognized that the validity of future public health measures would need to be determined based on the facts and the circumstances then in existence. The Ontario Court of Appeal has reiterated that hypothetical future applications must be decided based on the circumstances and evidentiary records in place at that time. In dismissing an appeal

---

[112] *Canadian Constitution Foundation v Attorney General of Canada*, 2021 ONSC 2117 (CanLII).
[113] *Spencer v Canada (Health)*, 2021 FC 621; affirmed 2023 FCA 8.
[114] *Borowski* at 361.
[115] Distinguishing *Ontario (Provincial Police) v Mosher*, 2015 ONCA 722 (CanLII) at paras 43-47.

as moot because the challenged public health measures were no longer in force and the circumstances did not warrant exercising its discretion to hear the matter, it held:

> If public health restrictions related to the pandemic are enacted in the future, and if Mr. Baber seeks to challenge them on the basis of his rights under the Charter, his private interest standing to bring that hypothetical future application would be decided based on the circumstances and evidentiary record in that future application. The application judge's reasons would not be binding in a hypothetical future application based on legislation and/or regulations in place at that time. [116]

84. Similarly, in commenting on the dynamic nature of the pandemic in dismissing a rehearing of an injunction order on the basis of mootness, the Nova Scotia Supreme Court held that "[t]he Injunction Order was granted in markedly different circumstances which existed six weeks ago. Who knows what another six weeks will bring. The mind contemplates anything from an extinguished pandemic to a raging variant fuelled fourth wave."[117]

85. Any pronouncement on the moot Applications would not be binding on, or relevant to, hypothetical future applications based on mandates in place at that time. The measures were repealed on the basis of the evolving state of the pandemic. Potential future mandates would be based on future circumstances.[118] The characteristics of the dominant SARS-CoV-2 variant, and the impact of vaccinations on it, are a central consideration in respect of a *Charter* analysis, especially in respect of s. 1 of the *Charter*.

86. The Notices of Application illustrate the importance of the factual matrix at the time of the mandates to the ultimate issues to be determined. For example, the Peckford Appellants asserted that the air vaccination mandates could not be justified under s. 1 of the *Charter*, as they are "not a rational means to pursue the stated objective as there is no evidence to show that the prohibition of unvaccinated Canadians from air travel limits or reduces the spread of Covid-19."[119] Similarly, the Rickard Appellants alleged that the air and rail vaccination mandates "appear[ed] to be based on Respondent's unsubstantiated assumption that passengers who have not received a Covid-19

---

[116] *Baber* at paras 8-9.
[117] *Nova Scotia (Attorney General) v Freedom Nova Scotia*, 2021 NSSC 217 at para 37.
[118] McKitrick Affidavit at para 11 and Exhibit E, ABV1, Tab E i, pp 142 and 267-70.
[119] Notice of Application (T-168-22) at para 42, ABV1, Tab D i, p 91.

vaccine…pose a significant health and safety risk to passengers who have received a Covid-19 vaccine…in that, they allegedly increase the likelihood of transmitting the etiological agent known as SAR-CoV-2 [*sic*] which, in turn, poses a risk to the health care system, at large."[120] Canada disagrees with these factual assertions, but the point is that these were considerations tied to point-in time epidemiological evidence. The evidence presented in the Applications may not be applicable to future circumstances. It is speculative to suggest that a decision in the Applications would have value to future courts interpreting and applying differently constituted provisions made to address what would be different factual circumstances.[121]

vi. The important subject matter did not warrant hearing the moot Applications

87. While the subject matter of the Applications may be important, measures that are no longer in effect – and may not necessarily be replicated in the same fashion in the future – cannot be said to continue to affect Canadians or amount to issues of national importance[122] such that their resolution is in the public interest.

88. In any event, even if the Applications raised issues of national importance, this factor in an otherwise moot matter is insufficient to warrant the Court's exercise of its discretion to hear it. There needs to be an additional ingredient of social cost of uncertainty in the law in leaving the matter undecided.[123] As noted above, there is no such social cost here.

2) Hearing these moot Applications would have exceeded the Court's proper role

89. A consideration of the third *Borowski* factor likewise indicates that the Motions Judge made no error in declining to consider the Applications further, notwithstanding that she provided limited analysis respecting the Court's proper adjudicative role, concluding that it was not the role of the Court to dictate or prevent future government actions.[124] Before reaching this conclusion,

---

[120] Notice of Application (T-1991-21) at para 2(i), ABV1, Tab D ii, p 100.
[121] See for example *McKenzie v British Columbia (Minister of Public Safety and Solicitor General)*, 2007 BCCA 507 (CanLII) at paras 42-44; *Klassen v British Columbia (Attorney General)*, 2021 BCSC 2254 (CanLII) at para 31.
[122] Peckford Memorandum at para 48.
[123] *Borowski* at 362.
[124] Order and Reasons at para 50, ABV1, Tab C i, p 69.

the Motions Judge adverted to this element of the *Borowski* test[125] and referred to the "well known" proposition that courts do not decide questions that are not necessary to dispose of a case because of the possibility of prejudice to future cases.[126]

90. If the Federal Court had decided the Applications, it would have been adjudicating future vaccination mandates without the necessary factual circumstances and would have exceeded its proper role by making law in the abstract. This consideration weighed strongly in favour of not hearing the moot Applications. Without a live dispute, the Court's determinations regarding vaccination mandates would have amounted to a form of law-making that is reserved to the legislative branch.[127]

91. In *Borowski,* the Supreme Court cautioned that a court faced with a request to adjudicate a matter that has become academic must "be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch."[128]

92. This policy of judicial restraint is "based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen."[129] As this Court held in *CUPE Air Canada Component v Air Canada,* "gratuitously interpreting the former wording of a provision in issue, in a case with no practical consequences, just to create a legal precedent, would be a form of law-making for the sake of law-making. That is not our proper task."[130] Even if proceeding further with the moot Applications would not have taken the Court

---

[125] Order and Reasons at para 34, ABV1, Tab C i, p 65.
[126] Order and Reasons at para 28, ABV1, Tab C i, pp 63-64. As this Court has noted in *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320, deciding a case on non-consttiutional grounds where possible avoids an unnecessary impact on the powers of legislative or executive branches.
[127] *Yahaan v Canada*, 2018 FCA 41 at para 32; *Canada (National Revenue) v McNally*, 2015 FCA 248 at paras 5, 15.
[128] *Borowski* at 362; *Amgen* at para 16.
[129] *Anglin v Alberta (Chief Electoral Officer),* 2021 ABQB 353 (CanLII) at para 39, citing *Phillips* at para 9.
[130] *Air Canada* at para 13.

into the realm of law-making, it would nonetheless have been unnecessarily deciding a dispute without any practical benefit.[131]

93. As was noted in respect of a challenge to public health bylaws created by a band council in respect of COVID-19, pronouncing on repealed legislation would become an intrusion into the legislative sphere when the "Court's role on judicial review is not to create general precedents to govern future interactions, but rather to scrutinize the actual decisions under review."[132]

E. Matters unrelated to the mootness decision

94. Finally, Canada notes that the Appellants have raised various matters that are unrelated to the Motions Judge's decision on mootness and instead go to the merits of the Applications. For example: M. Bernier argues that the air mode vaccination mandate was not authorized under the *Aeronautics Act* and that it violated his political freedoms;[133] the Rickard Appellants assert that the vaccination mandates demonstrated a *prima facie* breach of *Charter* rights;[134] M. Ben Naoum likens the vaccination mandates to mid-20th century segregationist policies in the American South;[135] and the Peckford Appellants suggest that the mandates were the most egregious restriction on mobility rights ever in Canadian history.[136] Canada does not agree with these submissions and conclusions. In any event, such submissions do not address the question of whether the Motions Judge properly dismissed the Applications based on a determination of mootness. Considering those submissions further would take this Honourable Court outside of its proper appellate role and into an evaluation of the merits of Applications themselves.

F. Conclusion

95. The Applications were properly struck as moot. The air and rail passenger vaccination mandates had been repealed. The Appellants could not have obtained any further proper remedy. There was and is no live controversy between the parties that required the Court's intervention.

---

[131] *Coalspur Mines (Operations) Ltd v Canada (Environment and Climate Change)*, 2021 FC 759 at para 17.
[132] *Pelletier* at para 18.
[133] Memorandum of Fact and Law of the Honourable Maxime Bernier at paras 25-47.
[134] Rickard Memorandum at paras 20, 26, 46, 69, 75.
[135] Memorandum of Fact and Law of Nabil Ben Naoum at paras 25-31.
[136] Peckford Memorandum at paras 55-57.

96. Further, there were cogent public interest reasons why the Motions Judge properly declined to exercise her discretion to hear the moot Applications. Proceeding with the Applications would have required the dedication of significant judicial resources in order to render a decision that would have had no effect on the parties' rights. It would have been a poor use of scarce judicial resources, and would have created the risk of the Court pronouncing law in the abstract.

97. If air and rail vaccination mandates are introduced in the future, they can be properly challenged and should be weighed against the relevant factual circumstances then arising.

PART IV – ORDER SOUGHT AND SUBMISSIONS CONCERNING COSTS

98. An Order dismissing the consolidated appeal with costs to the Attorney General of Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 29th day of May, 2023, in the City of Ottawa, in the Province of Ontario, and in the City of Edmonton, in the Province of Alberta and in the City of Montréal, in the Province of Québec.

J. Sanderson Graham

J. Sanderson Graham

Robert Drummond

Robert Drummond

Virginie Harvey

Virginie Harvey

on behalf of the Attorney General of Canada

PART V – LIST OF AUTHORITIES

Statutes and Regulations		Cited at Para(s)
1	*Aeronautics Act*, RSC 1985 c A-2	6, 10, 44, 55, 70, 94
2	*Canada Elections Act*, SC 2000, c 9	26, 53
3	*Canadian Bill of Rights*, SC 1960, c 44	24
4	*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	Multiple paragraphs throughout
5	*Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11	18, 20
6	*Interim order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19* (Repealed)	9
7	*Interim order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19, No 2* (Repealed)	9
8	*Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19, No 3* (Repealed)	9, 10, 44
9	*Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No 43* (Repealed)	7
10	*Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No 47* (Repealed)	8
11	*Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No 49* (Repealed)	19
12	*Interim order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No 52* (Repealed)	23
13	*Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No 53* (Repealed)	25
14	*Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No 63* (Repealed)	9

Statutes and Regulations		Cited at Para(s)
15	*International Covenant on Civil and Political Rights*, [1976] Can TS No 47	24
16	*Interpretation Act*, RSC, 1985, c. I-21	5
17	*Order pursuant to section 32.01 of the Railway Safety Act (MO 21-08) Vaccine mandate for Passengers (MO 21-08)* (Repealed)	15
18	*Order pursuant to Section 32.01 of the Railway Safety Act (MO 21-09) Vaccine mandate for Passengers – Phase 2* (Repealed)	19, 20, 45, 54
19	*Order pursuant to section 32.01 of the Railway Safety Act (MO 21-09.02) Vaccine mandate for Passengers* (Mo 21-09.2) (Repealed)	16, 17
20	*Order pursuant to Section 32.01 of the Railway Safety Act (MO 22-02), Order Ending Vaccine mandates for Passengers and Employees*	17, 45
21	*Quarantine Act*, SC 2005, c 20	43, 79
22	*Railway Safety Act*, RSC 1985 c 32 (4th Supp)	11, 12, 13, 14, 15, 17
23	*Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810, at 71 (1948)	21

Case Law		Cited at Para(s)
24	*Amgen Canada Inc v Apotex Inc*, 2016 FCA 196	62, 67, 91
25	*Anglin v Alberta (Chief Electoral Officer)*, 2021 ABQB 353 (CanLII)	92
26	*Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21	66
27	*Baber v Ontario (Attorney General)*, 2022 ONCA 345 (CanLII)	49, 83
28	*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342	29, 31, 35, 36, 37, 39, 42, 51, 58, 61, 62, 65, 69, 78, 81, 88, 89, 91

Case Law		Cited at Para(s)
29	*Bowen v City of Hamilton*, 2022 ONSC 5977 (CanLII)	47
30	*Buck v Canada (Attorney General)*, 2021 FCA 1	38
31	*Canada (National Revenue) v JP Morgan Asset Management (Canada)*, 2013 FCA 250	38
32	*Canada (National Revenue) v McNally*, 2015 FCA 248	90
33	*Canadian Constitution Foundation v Attorney General of Canada*, 2021 ONSC 2117 (CanLII)	79
34	*Canadian Society for the Advancement of Science in Public Policy v British Columbia*, 2022 BCSC 1606 (CanLII)	47
35	*Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67	51, 61, 92
36	*Cardin v Canada (Attorney General)*, 2017 FCA 150	38
37	*Coalspur Mines (Operations) Ltd v Canada (Environment and Climate Change)*, 2021 FC 759	92
38	*Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12	58
39	*Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086	51
40	*David Suzuki Foundation v Canada (Health)*, 2017 FC 682	39
41	*Ewert v Canada*, 2018 SCC 30	66
42	*Fibrogen, Inc. v Akebia Therapeutics, Inc.*, 2022 FCA 135	42
43	*Fogal v Canada*, 1999 CanLII 7932 (FC), 167 FTR 266 (TD), aff'd 2000 CanLII 15624 (FCA), [2000] FCJ No 916 (CA)	58
44	*Gianoulias v Quebec (Attorney General)*, 2022 QCCS 3509 (CanLII)	47
45	*Gupta v Canada (Attorney General)*, 2021 FCA 202	35
46	*Guzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 358	57

Case Law		Cited at Para(s)
47	*Housen v Nikolaisen*, 2002 SCC 33	33
48	*Imperial Manufacturing Group Inc. v Decor Grates Incorporated*, 2015 FCA 100	35
49	*Income Security Advocacy Centre v Mette*, 2016 FCA 167	58
50	*Kakuev v Canada*, 2022 FC 1465	47
51	*Klassen v British Columbia (Attorney General)*, 2021 BCSC 2254 (CanLII)	86
52	*Kozarov v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 185	77
53	*Lavergne-Poitras v Canada (Attorney General)*, 2022 FC 1391	38, 47
54	*Lukács v Canada (Transportation Agency)*, 2016 FCA 227	38
55	*M v H*, [1999] 2 SCR 3	67
56	*Mackay v Manitoba*, [1989] 2 SCR 357	51
57	*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157	33, 35
58	*Mand v Canada*, 2023 FCA 94	33
59	*McCorkell v Director of Riverview Hospital*, 1993 CanLII 1200 (BC SC), [1993] BCJ No 1518	75
60	*McKenzie v British Columbia (Minister of Public Safety and Solicitor General)*, 2007 BCCA 507 (CanLII)	86
61	*Mercier c Procureur général du Québec*, 2022 QCCS 1264 (CanLII)	47
62	*N.O. v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 214	57
63	*Nova Scotia (Attorney General) v Freedom Nova Scotia*, 2021 NSSC 217	84
64	*Ontario (Provincial Police) v Mosher*, 2015 ONCA 722 (CanLII)	82
65	*Pelletier v Fort William First Nation*, 2021 FC 562	62, 93

Case Law		Cited at Para(s)
66	*Phillips v Nova Scotia (Commissioner of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97	51, 58, 92
67	*Plato v Canada (National Revenue)*, 2015 FCA 217	4, 34, 35
68	*Prince Albert Right to Life Association v Prince Albert (City)*, 2020 SKCA 96 (CanLII)	34
69	*Procureur général du Québec c Mercier*, 2022 QCCA 1134 (CanLII)	47
70	*Public Service Alliance of Canada v Canada (Attorney General)*, 2021 FCA 90	51, 59
71	*Rahman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137 (CanLII)	58
72	*Rebel News Network Ltd v Canada (Leaders' Debates Commission)*, 2020 FC 1181	38, 39, 58
73	*Reference re Same Sex Marriage*, 2004 SCC 79	67
74	*Right to Life Association of Toronto v Canada (Attorney General)*, 2022 FCA 220	58, 59
75	*Saskatchewan (Minister of Agriculture, Food and Rural Revitalization) v Canada (Attorney General)*, 2005 FC 1027 (CanLII)	75
76	*Shaka v Canada (Citizenship and Immigration)*, 2019 FC 798	66
77	*Solosky v The Queen*, [1980] 1 SCR 821	58
78	*Spencer v Canada (Health)*, 2021 FC 621	79
79	*Spencer v Canada (Attorney General)*, 2023 FCA 8	47, 79
80	*Syndicat des métallos, section locale 2008 c Procureur général du Canada*, 2022 QCCS 2455 (CanLII)	76, 78
81	*Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320	89
82	*Wojdan v Canada (Attorney General)*, 2022 FCA 120	4, 47
83	*Work Safe Twerk Safe v Ontario (Solicitor General)*, 2021 ONSC 6736 (CanLII)	46, 49, 56, 59

Case Law		Cited at Para(s)
84	*Yahaan v Canada*, 2018 FCA 41	90
85	*Yates v Canada (Attorney General)*, (16 March 2023), Toronto T-1736-22, T-1738-22 (FC)	47