Court File No.: T-1736-22

FEDERAL COURT

BETWEEN:

AMANDA YATES, PATRIC LAROCHE, JENNIFER HARRISON, VICTOR ANDRONACHE, SCOTT BENNETT, BEVERLY MASON-WOOD, DAWN BALL, MATTHEW LECCESE, DARLENE THOMPSON, ALEXANDER MACDONALD, AND MARCEL JANZEN

Applicants

-and-

ATTORNEY GENERAL OF CANADA

Respondent

Court File No.: T-1738-22

FEDERAL COURT

AND BETWEEN

CORRINE JANZEN and CODY TILBURY

Applicants

– and –

CANADA (MINISTER OF HEALTH)

Respondent

WRITTEN SUBMISSIONS OF THE APPLICANTS CORRINE JANZEN and CODY TILBURY

OVERVIEW

1. Corrine Janzen and Cody Tilbury ("Janzen Applicants") state that the Government of Canada wrongly told Canadians that the use of ArriveCAN was legally required of persons

crossing the Canadian border between November 2020 and September 2022. In that period of approximately two years, at least 190 people, including Cody Tilbury, were directly fined thousands of dollars for not using ArriveCAN. Others, such as Corrine Janzen, provided their personal information to the Minister of Health through ArriveCAN under threat of prosecution.

2. The Janzen Applicants state that ArriveCAN was not legally required of persons crossing the Canadian border between November 2020 and September 2022 because the Minister of Health failed to specify it as the "electronic means" by which persons crossing the border were required to provide mandatory health and travel information to the Minister of Health as stated in the various Orders in Council which are identified below.

3. The Janzen Applicants argument is that ArriveCAN was not legally binding upon persons entering Canada and they seek a declaration to that effect. It is only in the alternative that the Janzen Applicants seek declarations on the jurisdictional and constitutional validity of the ArriveCAN application.

4. The Janzen Application is notably different from the Yates Application in that the Janzen Applicants are not challenging the requirement to quarantine and they are not seeking damages. Moreover, the Janzan Applicants do not seek any relief under sections 2, 6, or 15 of the *Canadian Charter of Rights and Freedoms*.

PART I – FACTUAL BACKGROUND

5. The Janzen Applicants state that the following factual background is important to the hearing of this motion.

    a. On October 30, 2020, the Governor in Council issued an OIC bearing PC Number 2020-0840 which required persons entering Canada by aircraft to provide certain mandatory travel and health information to the Minister of Health and others via an "electronic means" specified by the Minister of Health. The OIC does not specify the electronic means to be ArriveCAN.[1]

    b. On February 14, 2021, the Governor in Council issued an OIC bearing PC Number 2021-0075 which required persons entering Canada by either aircraft or any other mode of transport to provide certain mandatory travel and health information to the Minister of Health and others via an "electronic means" specified by the Minister of Health. The OIC does not specify the electronic means to be ArriveCAN.[2]

    c. On June 6, 2021, the Governor in Council issued an OIC bearing PC Number 2021-0615 which required persons entering Canada by either aircraft or any other mode of transport to provide certain mandatory travel and health information to the Minister of Health and others, including their vaccination status, via an "electronic means" specified by the Minister of Health. The OIC does not specify the electronic means to be ArriveCAN.[3]

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[1] PC Number 2020-0840 at s. 15(2)(a), 15(4)(b), 15(3)(1)(b)
[2] PC Number 2021-0075
[3] PC Number 2021-0615

d. The Applicant Corrine Janzen provided her personal information to the Minister of Health through ArriveCAN in or around November 2021 when returning to Canada from Mexico. She provided this information under fear of being charged with an offence or receiving an expensive ticket. She objects to the ongoing retention and any sharing of her personal information.[4]

e. The ArriveCAN privacy note, printed August 9, 2022, states that fully vaccinated persons must upload an image of their proof of vaccination documentation via ArriveCAN. The information is required for purposes of determining eligibility for new border measures and to support a COVID-19 public health response. The information may be shared with other organizations in accordance with the *Privacy Act*, *Quarantine Act* and its Emergency Orders.[5]

f. The aforesaid ArriveCAN privacy notice additionally states that personal information uploaded or entered into ArriveCAN may be disclosed to contractors working for the Public Health Agency and Service of Canada as well as other government institutions, provincial, territorial, municipal governments and international health organizations, as well as their institutions. While the personal information inputted into ArriveCAN will be retained for a minimum of two years, no maximum period of retention is specified.[6]

[4] Responding Motion Record of the Janzen Applicants, Affidavit of Mark Joseph, Paragraph 4
[5] Responding Motion Record of the Janzen Applicants, Affidavit of Mark Joseph, Paragraph 6
[6] Responding Motion Record of the Janzen Applicants, Affidavit of Mark Joseph, Paragraph 6

g. The Applicant, Cody Tilbury, returned to Canada from Mexico on or around August 6, 2022. Upon his return, Mr. Tilbury refused to provide mandatory travel and health information to the Minister of Health through ArriveCAN for reasons of privacy. As a result of this refusal, Mr. Tilbury received a ticket in the amount of $6,255 pursuant to the *Contraventions Act* for "failure to comply with an order prohibiting or subjecting to any condition the entry into Canada." This charge remains outstanding and there is currently no trial date.[7]

h. The Public Health Agency of Canada has stated that 190 people have been issued fines for failing to use ArriveCAN since it first became mandatory for air travellers and motorists crossing the border into Canada.[8]

i. The Janzen Applicants contend that the Minister of Health failed to specify that ArriveCAN was the electronic means referred to in any of the OICs. On October 3, 2022, Alan Honner had a telephone call with counsel for the Attorney General in which he asked for proof that the Minister of Health specified ArriveCAN as the electronic means referred to in the order. This telephone call was followed by a letter requesting the same information. To date, the Attorney General has not provided the requested information, despite the fact that the information, if it exists, would definitively answer the Janzen Applicants main objection.[9]

PART II - ISSUE

[7] Responding Motion Record of the Janzen Applicants, Affidavit of Mark Joseph, Paragraph 2
[8] Responding Motion Record of the Janzen Applicants, Affidavit of Mark Joseph, Paragraph 5
[9] Responding Motion Record of the Janzen Applicants, Affidavit of Mark Joseph, Paragraph 7

6. The issue before this court is whether the Janzen Application is moot and, if so, whether the court should exercise its discretion to hear it.

PART III – ARGUMENT

7. A matter is moot where there is no longer any "live controversy" or "tangible and concrete dispute" between the parties, rendering the issues academic[10]. The Attorney General argues that this application is moot because the final OIC requiring the mandatory use of ArriveCAN was repealed on September 30, 2022.[11] The Janzen Applicants respond that the repeal of the OIC has no bearing on this application, at least insofar as it relates to their main contention that use of ArriveCAN was not legally required of persons crossing the border from October 2020 to September 2022. To put the matter succinctly, a legal requirement that does not exist cannot be repealed.

8. Alternatively, if the Attorney General does show that the Minister of Health specified ArriveCAN as the electronic means required by the various OICs, which it has so far refused to do, the Janzen Applicants state that there is still a live controversy. First, Cody Tilbury continues to face a fine of $6,255.00 for not using ArriveCAN. Second, Corrine Janzen continues to object to the retention and sharing of her personal information, which she contends is a breach of her privacy rights under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*.[12]

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[10] *Borrowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at 353, 358-362
[11] *Borrowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at 353, 358-362
[12] Motion Record, Notice of Application of the Janzen Applicants, page 55, paragraphs 26-27

9. For the aforesaid reasons, this application is distinct from cases like *Lavergne-Poitras v. The Attorney General of Canada (Minister of Public Services and Procurement)*, where the suspension of the vaccination policy in question put the applicant in the same position he would be in if the court granted his application because the barrier to his employment would be removed.[13] While the Janzen Applicants may now be able to cross the border without cause for complaint, the repeal of the border measures does not cure the ongoing *Charter* breach claimed by Corrine Janzen nor does it erase the ticket faced by Cody Tilbury.

Mootness & Discretion

10. Should the court agree that the Janzen Application is moot, it nevertheless retains discretion to hear the application in accordance with three considerations: 1) whether an adversarial context continues to exist between the parties; 2) concern for judicial economy; and 3) whether the Court would be intruding on the legislature's role by rendering a decision.[14] As discussed below, the Janzen Application should proceed based on an assessment of these criteria.

Adversarial Context

[13] *Lavergne-Poitras v. Canada (Attorney General)*, 2022 FC 1391 at 14 ("Lavergne-Poitras")
[14] *Borrowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at 353, 358-362

11. The Attorney General has conceded that there is an adversarial context to this application.[15] This concession is appropriate as the legal proceeding consists of two sides, each represented by counsel, and each taking opposing positions.[16]

Judicial Economy

12. The Supreme Court of Canada stated in *Borowski* that concern for judicial economy as a factor in deciding whether to hear moot cases will be partially answered where 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.[17] That is the case here, as Cody Tilbury has an outstanding ticket for $6,255.00. His case, and possibly as many as 189 others facing similar charges, would benefit from clarity about the legality of ArriveCAN or a determination about whether its mandatory use unjustifiably infringes privacy rights as protected by sections 7 and 8 of the *Charter*. Likewise, Corrine Janzen, and others who have concerns about the ongoing retention and potential sharing of their personal information, would benefit from clarity about the legality of ArriveCAN or a decision about whether it unjustifiably infringes privacy rights.

13. An expenditure of judicial resources is warranted in cases which, although moot, are of a recurring nature but brief duration.[18] That is also the case here, as the requirements on travellers crossing the border were of a temporary but recurring nature, expiring and

15 Motion Record, Written Representation of the Respondents, page 73, paragraph 41
16 *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 10
17 *Borrowski* at pages 360-361
18 *Borrowski* at pages 360-361

renewing approximately every 30 days, and which were only suspended without renewal after this application was brought.

14. The Attorney General argues that border cases occurring within the COVID-19 context are not evasive of review because two cases challenging border measures have been decided.[19] Both cases referred to by the Attorney General challenged requirements that air travellers must quarantine in government designated facilities upon entering Canada. In contrast, the Janzen Applicants do not challenge quarantine requirements, but rather challenge the factual legality of the ArriveCAN requirement, and alternatively challenge the orders on privacy grounds. It is improper to equate this challenge with *Spencer* and *Canadian Constitutional Foundation* simply because those applications and this one both challenge border measures.

15. The cases of *Spencer* and *Canadian Constitutional Foundation* are also distinct in that the impugned border requirements were still in place at the time the hearings took place. In contrast, the Attorney General cites six cases in its written submissions which related to rescinded COVID-19 measures and which were struck for mootness.[20] To add to this list, an appeal in *Spencer* was recently struck for mootness after the requirement to quarantine in a designated facility was repealed.[21] These seven cases suggest that the government has been able to evade review of its decisions by repealing measures before they can be heard by the court.

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[19] Motion Record, Written Submissions of the Respondent, page 74-75, paragraph 46 referring *Canadian Constitutional Foundation v. Attorney General of Canada*, 2021 ONSC 2117 ("Canadian Constitutional Foundation") and *Spencer v. Canada (Health)*, 2021 FC 361 ("Spencer")

[20] Motion Record, Written Representation of the Respondents, pages 69-71, paragraphs 26-32

[21] Spencer v. Canada (Attorney General), 2023 FCA 8

16. As a final note on judicial resources, determining whether ArriveCAN was properly specified by the Minister of Health is a straightforward matter which would not involve expert evidence, extensive affidavit evidence, or a complicated record. It is open to the court to allow the Janzen Application to proceed on this point alone, which raises an important issue about whether people were being charged, ticketed or compelled to submit their personal information through a government application that was not in fact legally required. As the rule of law would not countenance people being charged or compelled to provide personal information according to a law that does not exist, this application raises an important subject matter which warrants some use of judicial resources.

Intrusion upon the Legislature

17. The final point a court should consider when deciding to use its discretion to hear a moot application is whether doing so would intrude upon the legislative branch of government. For clarity, it should be noted that the ArriveCAN requirement, if it exists, was not a direct product of the legislative branch. The requirement arises from the Governor-in-Council ("GIC") making an emergency order under s. 58 of the *Quarantine Act*, which put conditions on the entry into Canada of certain classes of persons. It then required the Minister of Health to specify that ArriveCAN is the "electronic means" by which travellers must provide mandatory health and travel information in accordance with the GIC's order. In other words, no legislature was involved in the drafting of the OIC or the ArriveCAN requirement, except indirectly when the *Quarantine Act* became law approximately 15 years ago.

18. If the court limits itself to issuing declarations, as the Janzen Applicants request, and particularly if it limits itself to issuing a declaration over whether ArriveCAN was actually the law, then the court need not worry that it is exercising anything but an adjudicative function. It would specifically not be creating freestanding law, as was arguably the case in *Borrowski*, where the appellant asked the court to decide whether a fetus is protected from the date of conception in accordance with section 7 of the *Charter*. In that case, the court was asked to make a novel ruling about *Charter* rights in the absence of a proper legal context because the abortion law in question had already been struck in *R. v. Morgentaler* and was no longer being challenged. The court found that deciding the issue would change the appeal into a private reference, and could result in speculation about how the law should be applied by doctors and legislatures. There is no similar concern here as the Janzen Applicants are not seeking an interpretation that would create new law, but are rather seeking declarations about whether ArriveCAN was the law and alternatively whether the mandatory use of ArriveCAN infringed and continues to infringe their privacy rights.

Legality

19. On a final note, the Attorney General cites *Lavergne-Poitras* in support of its argument that concerns over the legality of government actions are not a sufficient reason to proceed with litigation that is ostensibly moot.[22] In *Lavergne-Poitras,* the applicant challenged a government policy requiring personnel of third-party suppliers to the federal government

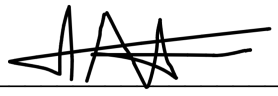
[22] Attorney General's Written Submissions, Motion Record, page 73, paragraph 39

to be fully vaccinated against COVID-19 in order to access Government of Canada workplaces where government employees were present. The applicant argued this policy was *ultra vires* and that it infringed the security of the person under both the *Canadian Bill of Rights* and the *Canadian Charter of Rights and Freedoms.* The court remarked that deciding such questions "abstracted from their factual context" would be entirely academic because their determination would serve no useful purpose beyond setting precedent. However, the Janzen Applicants are putting forth a very different argument. The Janzen Applicants' primary complaint is not that the mandatory use of ArriveCAN is an unconstitutional law. Rather, their primary complaint is that ArriveCAN was not in fact the law. This argument would not require the court to answer abstract questions devoid of a factual context. It would require the Attorney General to produce the law, which it has so far refused to do.[23]

PART IV – ORDER SOUGHT

20. The Janzen Applicants state that this motion should be dismissed with costs.

ALL OF WHICH IS RESPECTIVELY SUBMITTED this 30th day of January, 2022



Alan Honner
The Democracy Fund
Lawyers for the Janzen Applicants

[23] Affidavit of Mark Joseph, paragraph 8

PART V – LIST OF AUTHORITIES

Case Law
Borrowski v. Canada (Attorney General), [1989] 1 SCR 342
Lavergne-Poitras v. Canada (Attorney General), 2022 FC 1391
Canadian Union of Public Employees (Air Canada Component) v Air Canada, 2021 FCA 67
Canadian Constitutional Foundation v. Attorney General of Canada, 2021 ONSC 2117
Spencer v. Canada (Health), 2021 FC 361
Spencer v. Canada (Attorney General), 2023 FCA 8

Statutes and Regulations
Minimizing the Risk of Exposure to COVID-19 Coronavirus Disease in Canada Order, PC 2020-0840
Minimizing the Risk of Exposure to COVID-19 Coronavirus Disease in Canada Order, PC 2020-0075
Minimizing the Risk of Exposure to COVID-19 Coronavirus Disease in Canada Order, PC 2021-0615