IN THE CANADIAN COURT OF JUSTICE
ON APPEAL FROM THE FEDERAL COURT OF APPEAL

BETWEEN:

ERIC DROUIN

APPELLANT

and

NATIONAL PANDEMIC RESPONSE ACTION COMMITTEE

RESPONDENT

FACTUM OF THE APPELLANT

COUNSEL FOR THE APPELLANTS

School Number 5

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PART I – OVERVIEW

[1] This is a case about the state exceeding its authority. The federal government did not have the authority under the *Constitution Act, 1867*,[1] to pass the *Act to safeguard Canadian health and economic prosperity*[2] (the "Act"). The National Pandemic Response Action Committee (the "Committee") did not make a reasonable decision in denying a vaccination exemption request for Émilie Carson.

[2] This case cannot be understood without understanding the context in which the Act was passed and the Committee was formed. Canada is still recovering from the devastation of COVID-19 and the federal government has faced criticism for how they handled that crisis.[3] Federal ministers responded to that criticism by telling Canadians that in the event of another epidemic, they would do "everything in [their] power."[4] Another flu, AH4N1 ("AH") is now upon us, and Parliament is overreacting in an attempt to fix their past mistakes. COVID-19 was terrifying, isolating, and economically crushing, but the government should not use fear, both their own and that of all Canadians, to justify constitutional and administrative overreach.

[3] The scheme created by the Act and the *Regulation respecting measures to reduce the impact of AH4N1*[5] (the "Regulation") is outside of Parliament's jurisdiction. The scheme concerns the administration of healthcare, access to education, and local trade – all matters within the exclusive jurisdiction of the provinces.[6]

[4] The Committee, too, was motivated by fear in its denial of an exemption for Émilie. They told her father that "[i]n times like these, the greater good unfortunately outweighs the risk posed to the few."[7] Their response was callous and unreasonable. The Committee overvalued the harm to society and undervalued the harm posed to Émilie. They did not properly consider her immunodeficiency, the lack of evidence as to the efficacy of the vaccine, or the *Charter* rights engaged of both her and her father.[8]

[5] The Act should be struck as *ultra vires* Parliament. The exemption order should be granted. Federalism and *Charter* rights must be respected.

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[1] (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].
[2] SC 2022, c 15 [the Act].
[3] *Drouin v National Pandemic Response Action Committee*, T-800-19 (FC) at para 4 [*FC Decision*].
[4] *Ibid* at para 9.
[5] SOR/22-115 [the Regulation].
[6] Sections 92(13), 92(16), 93, *Constitution Act, 1867*, *supra* note 1.
[7] *FC Decision*, *supra* note 3 at para 39.
[8] *Canadian Charter of Rights and Freedoms*, ss 2(a), 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *FC Decision*, *supra* note 3 at para 38.

PART II – STATEMENT OF FACTS

[6] This matter arises from a dispute about a mandatory vaccination order issued by the Committee to the Appellant, Mr. Drouin. The order required Mr. Drouin to vaccinate his daughter, Émilie Carson, a nine-year-old immunocompromised girl from Sudbury, Ontario.[9]

[7] The 2021 flu season has been difficult, and a new mild flu strain, AH, has put a damper on efforts to get Canada's economy back on track following the devastation of COVID-19. Federal and provincial governments are concerned that AH will have a serious effect on the Canadian economy, as workers have been absent from work because they are ill or are tending to ill children.[10] Despite being particularly contagious, AH has a much lower fatality rate than COVID-19 and it has not led to an increase in hospitalizations across the country.[11]

[8] All the provinces and territories responded to the economic and health threats of AH by declaring states of emergency. Various other measures were also implemented in different provinces based on necessity.[12] The federal government did not declare a state of emergency, and instead responded by passing the *Act to safeguard Canadian health and economic prosperity*.[13]

1. The Committee and the Regulation

[9] The primary effect of the Act is the creation of the Committee.[14] The Minister of Health appoints a Chairperson, who then names eight other members in consultation with the Minister. At present, the Committee is made up of three epidemiologists or public health specialists (including the chair), five economists, and one public safety and security expert.[15] Committee members serve terms of up to two years, which can be renewed for a maximum of three terms. The Chair also serves two-year terms, but they can be renewed an indefinite number of times.[16]

[10] Under section 15 of the Act, the Committee is empowered to "by regulation, enact all measures and make all orders necessary to prevent and mitigate the impact of AH4N1 on Canadians' health and on the national economy."[17] Section 37 creates a summary conviction offence for violating any order made in a regulation, "punishable by

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[9] *FC Decision, ibid* at paras 36-37.
[10] *Ibid* at para 11.
[11] *Ibid* at para 11.
[12] *Ibid* at para 18.
[13] *Supra* note 2.
[14] The Act, *ibid*, s 5.
[15] *FC Decision*, *supra* note 3 at para 21.
[16] The Act, *supra* note 2 at ss 8-9.
[17] *Ibid*, s 15.

a fine of up to $100,000 or up to six months' imprisonment."[18] The Committee published the Regulation two weeks after they were formed.[19]

[11] Among other measures, section 15 of the Regulation includes a mandatory vaccination order against "a similar strain of the flu" that applies to children aged five to 18 who attend public schools.[20] Children who are not vaccinated are not permitted to attend school and their parents or guardians are subject to the penalties created in the Act.[21] According to an explanatory document published alongside the Regulation, this vaccine requirement is intended to "lessen the burden on parents of school-aged children" and therefore "ease the economic burden on employees across the country."[22]

[12] This vaccine has been approved by Health Canada for use against AH,[23] but research is preliminary.[24] International studies from France, Netherlands, and the United States are inconclusive about the efficacy of the vaccine against AH specifically.[25] One study, performed by a Dr. Elisabeth Olmstead, found that the vaccine leads to a more severe infection of AH in a small but statistically significant number of cases (the "Olmstead Report").[26]

[13] Section 16 of the Regulation provides that "any parent seeking an exemption for their child must demonstrate that the child is already in a poor or weakened state of health and thus particularly susceptible to any potential side effects of the vaccine."[27] Section 17 of the Regulation states that: "[n]o other considerations are deemed relevant in the evaluation of an application for an exemption from the mandatory vaccination requirement."[28]

2. Eric Drouin and Émilie Carson's application

[14] Mr. Drouin applied to the Committee for an exemption to this order on behalf of his daughter five days after the Regulation came into effect.[29] 30 days after his application, the Committee responded to Mr. Drouin in writing, denying his application.[30]

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[18] *Ibid*, s 37.
[19] *FC Decision*, *supra* note 3 at para 24.
[20] *Ibid* at para 27.
[21] *Ibid* at para 28.
[22] *Ibid* at para 29.
[23] *Ibid* at para 30.
[24] *Ibid* at para 31.
[25] *Ibid* at para 30.
[26] *Ibid* at para 30.
[27] *Ibid* at para 34.
[28] *Ibid* at para 34.
[29] *Ibid* at para 38.
[30] *Ibid* at para 39.

[15] Mr. Drouin works from home as a graphic designer.[31] Émilie is nine years old, immunocompromised, and attends public school.[32] In his application to the Committee, Mr. Drouin submitted Émilie's medical records showing that she is immunocompromised, the Olmstead Report, and arguments concerning the *Charter* rights that would be affected by this mandatory vaccination order if he and Émilie were forced to comply.[33]

[16] The Committee Chairperson replied to Mr. Drouin with a short decision stating that: [34]

- his request was denied;
- Émilie's medical records did not demonstrate a serious enough an immunodeficiency to suggest she was at real risk from the vaccine;
- the vaccine will likely prevent her from contracting AH;
- the Committee did not accept the Olmstead Report;
- the harm to Émilie does not outweigh the likely harm to her teachers and peers if she attends school without being vaccinated;
- "…the greater good unfortunately outweighs the risk posed to the few";
- Mr. Drouin had 60 days to vaccinate Émilie; and
- if Émilie remained unvaccinated she would not be allowed at school, and Mr. Drouin may be subject to the Act's penalties.

3. The Federal Court decision

[17] Mr. Drouin sought judicial review of the Committee's decision in the Federal Court, alleging that the Act was *ultra vires* Parliament because it related to public health and the economy, both of which fall under provincial jurisdiction.[35] He also alleged that the Committee was unreasonable in its decision to deny his application for an exemption. Specifically, Mr. Drouin argued that the decision was unreasonable because the Committee failed to consider evidence of the inefficacy of the vaccine and the risks outlined in the Olmstead Report. Further, the Committee erred in refusing to consider Mr. Drouin's *Charter* arguments at all.[36]

[18] Justice Fuller in the Federal Court agreed with Mr. Drouin, finding that the decision was unreasonable. Justice Fuller would have set aside the decision entirely because it failed to consider Mr. Drouin's *Charter* rights. In any event, Justice Fuller also found that the Act was *ultra vires* the federal government.

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[31] *Ibid* at para 36.
[32] *Ibid* at paras 3 & 37-38.
[33] *Ibid* at para 38.
[34] *Ibid* at para 39.
[35] *Ibid* at para 44.
[36] *Ibid* at para 43.

4. The Federal Court of Appeal decision

[19] The Committee appealed to the Federal Court of Appeal. They raised the argument of the Act being valid under the emergency power of peace, order, and good government ("POGG"), which had not been made at the Federal Court. Justice Torrence allowed the argument, but Justice Dautry did not.[37] Justice Potashnik did not address it, but in any event, it was not determinative.

[20] A majority of the Federal Court of Appeal allowed the Committee's appeal and found the decision reasonable. Per Justice Torrence's reasons, the Committee was not required to consider the *Charter* because the wording of the Act specifically says that the Committee may only consider the poor or weakened state of health of a child.[38] In any event, even if the Committee had considered the *Charter*, Justice Torrence found that they would likely have reached the same decision.

[21] The Federal Court of Appeal also allowed the appeal on the issue of legislative jurisdiction, finding that the Act was *intra vires* Parliament. Justice Torrence found the Act valid under both the national concern and emergency branches of POGG,[39] whereas Justice Dautry found that it was valid only under the national concern branch, and not the emergency branch.[40] Justice Potashnik found it valid under Parliament's section 91(27) power over the criminal law, and did not address POGG.[41]

[22] Eric Drouin has appealed this decision, leading to the case before the court today.

PART III – OBJECTIONS BY APPELLANT TO JUDGMENT APPEALED FROM

[23] The Act is *ultra vires* Parliament's jurisdiction.

[24] The Regulation is *ultra vires* Parliament's jurisdiction.

[25] The decision of the Committee is unreasonable.

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[37] *Drouin v National Pandemic Response Action Committee*, A-1500-19 (FCA) at paras 27–33, 48 [*FCA Decision*].
[38] *Ibid* at para 16.
[39] *Ibid* at paras 22 & 33.
[40] *Ibid* at paras 45 & 47.
[41] *Ibid* at para 39.

PART IV -- ARGUMENT

1. The appellate standard of review is correctness

[26] The standard of review of the Federal Court of Appeal's decision is correctness – this court must "step into the shoes" of the lower courts to determine whether they applied the standard of review for each issue correctly.[42]

2. The Act is *ultra vires* Parliament's legislative jurisdiction

[27] Mr. Drouin submits that the Federal Court was correct in finding that the Act was *ultra vires* Parliament's jurisdiction, and that the Act is properly under the jurisdiction of the provinces under sections 92(13), 92(16) and 93 of the *Constitution Act, 1867*.[43]

[28] The standard of review for this issue is correctness, as this is a question "regarding the division of powers between Parliament and the provinces."[44]

2.1 The pith and substance of the Act is limiting and mitigating the negative effects of AH on health and the economy through the regulation of certain industries and schools

[29] The purpose of the Act is to "mitigate the impact of AH4N1 on the health of Canadians as well as on the Canadian economy."[45] This is supported by extrinsic evidence.[46] Members of Parliament discussed the need for a "robust federal response to protect the Canadian economy,"[47] highlighting impacts on the food processing, vehicle manufacturing, and steel production industries.[48] Notably, the health impacts of AH are

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[42] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 46–47.
[43] *Supra* note 1.
[44] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 55 [*Vavilov*].
[45] *Supra* note 2.
[46] *R v Morgentaler*, [1993] 3 SCR 463 at 483-484, 107 DLR (4th) 537 [*Morgentaler*].
[47] *FC Decision*, *supra* note 3 at para 14.
[48] *Ibid* at para 14.

not as severe as COVID-19 and hospitalizations are not increasing.[49] Evidence tendered in the courts below suggests that protecting health is only a purpose of the law insofar as having a healthy population means a population that can contribute to the economy.

[30] The legal effects of the Act are the creation of a summary offence and a Committee empowered to "take all measures and make all orders necessary to prevent and mitigate the impact of AH4NI."[50] The practical effects of the Act are in the Regulation[51] – mandatory masks for certain businesses and schools, mandatory vaccines for schoolchildren, and mandatory operational requirements for certain industries.[52] The "actual or predicted practical effect"[53] is keeping businesses and schools open by limiting the spread of AH through the use of masks, business practices, and vaccines.

[31] The intention of the Act is therefore limiting and mitigating the negative effects of AH on health and the economy through the regulation of certain industries and schools. Justice Fuller found the Act's matter was "the limitation or mitigation of the negative effects of the AH epidemic on Canadians' health as well as their economic well-being."[54] Justice Potashnik was more general, describing the "overall matter" as "the prevention and mitigation of the various harms caused by AH."[55] These definitions, however, did not include the Committee and its powers. These are an important feature of the Act and its practical effect, particularly on Mr. Drouin and his daughter.

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[49] *Ibid* at para 11.
[50] *Supra* note 2, ss 15, 37.
[51] *Monsanto Canada v Ontario (Superintendent of Financial Services)*, 2004 SCC 54 at para 35.
[52] *FC Decision*, *supra* note 3 at paras 25–28.
[53] *Morgentaler*, supra note 46 at 483.
[54] *FC Decision*, *supra* note 3 at para 65.
[55] *Ibid* at para 41.

2.2 The Act should be classified within provincial jurisdiction under sections 92(13), 92(16), and 93 of the *Constitution Act, 1867*

[32] The Act infringes significantly on the administration of healthcare, regulation of education, and regulation of local trade, all areas of exclusive provincial jurisdiction. By passing such an overreaching law and attempting to justify it under Parliament's powers under the *Constitution Act, 1867*, Parliament has ignored the constitutional principle of federalism and respect for the constitutional division of powers.[56]

i. The constitutional division of powers over laws concerning healthcare

[33] AH is a virus that affects the health of Canadians, and any law that tries to limit its spread is a law concerning healthcare. The Federal Court of Appeal did not perform a complete analysis of jurisdiction, stopping at finding the Act *intra vires* Parliament. However, the parts of the Act that concern the administration of healthcare are in the exclusive jurisdiction of the province.

[34] Healthcare is not an enumerated head of power under the *Constitution Act, 1867*, and is often called a matter of concurrent jurisdiction.[57] Courts in this country, however, have consistently treated it as provincial, particularly when it involves the administration of healthcare.[58] In *Schneider v The Queen*, Justice Dickson of the Supreme Court of Canada (as he then was) provided a summary of healthcare law in Canada and concluded that the provinces' jurisdiction over healthcare "is now not seriously questioned."[59]

[35] Parliament's concurrent power over healthcare is limited and comes from its taxation and criminal law powers under sections 91(3) and 91(27). The *Canada Health*

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[56] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32, 161 DLR (4th) 385.
[57] *Schneider v The Queen*, [1982] 2 SCR 112 at 144, 139 DLR (3d) 417 [*Schneider*].
[58] *Morgentaler*, *supra* note 46 at 490–91.
[59] *Schneider supra* note 57 at 137.

Act,[60] for instance, addresses how taxes are distributed to provinces for the purpose of providing healthcare. Provinces then have control over that provision. The *Controlled Drugs and Substances Act*[61] is a criminal law making the possession of certain drugs and substances illegal. This, however, does not give Parliament jurisdiction over all drug treatment. In *Schneider*, the Supreme Court held that British Columbia's *Heroin Treatment Act* was *intra vires* the province as it dealt with the treatment of patients, not the criminal control of the drugs themselves.[62] Parliament's jurisdiction does not include the power to dictate to provinces how to administer healthcare.

ii. The provincial power over the administration of healthcare

[36] The provincial power over healthcare comes first from the provinces' power over matters of a local and private nature in section 92(16).[63] A person's health is a supremely private matter. They may share concerns about their health with their family and friends, or perhaps medical professionals, but these are choices they make for themselves.

[37] The spread of flu viruses is also a matter of a local nature – they spread through close contact. Although our highly-connected modern world can enable a global spread of viruses, it can be curtailed in individual regions by local policies. COVID-19 was an apt display of this – different provincial approaches in controlling spread had different results. Community spread was the problem. A person in New Brunswick was not directly affected by the positive test of a person in Manitoba because it had different rules. Viruses spread locally; their spread is within the jurisdiction of the province.

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[60] RSC 1985, c C-6.
[61] SC 1996, c 19.
[62] *Schneider*, *supra* note 60 at 138.
[63] *Ibid*.

[38] The provincial power over healthcare also comes from sections 92(7) and 92(13), which give provinces power over laws concerning "… Hospitals ... in and for the Province" and "Property and Civil Rights."[64] The first gives provinces authority over the location of healthcare and, by extension, over the care itself. The second authorizes the province to (1) decide what healthcare services are provided by provincial health insurance schemes,[65] and (2) pass laws regulating the healthcare profession.[66]

[39] All of these powers together give provinces control over the administration of healthcare in the province. In Ontario, this administration is legislated in the *Health Protection and Promotion Act*,[67] which contains provisions concerning mandatory health programs, the spread of communicable diseases, and health protection and promotion. Ontario is also one of two provinces with an *Immunization of School Pupils Act*.[68]

iii. *The provincial power over industry and education*

[40] The Act concerns specific industries and schools under provincial jurisdiction. The work places the Act targets are entirely within the provinces – food processing plants, steel production and manufacturing plants, and mining and oil and gas extraction sites.[69] Parliament does not have the power to "[regulate] a single trade, even though it be on a national basis."[70] Education is also exclusively within provincial jurisdiction under section 93 of the *Constitution Act, 1867*.[71]

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[64] *Constitution Act, 1867*, *supra* note 1.
[65] *Health Insurance Act*, RSO 1990, c H.6, s 11.2.
[66] E.g. *Regulated Health Professions Act, 1991*, SO 1991, c 18.
[67] RSO 1990, c H-7.
[68] RSO 1990, c I-1; *Public Health Act*, SNB 1998, c P-22.4, s 42.1.
[69] *FC Decision*, *supra* note 3 at para 25.
[70] *Labatt Breweries of Canada Ltd. v Attorney General of Canada*, [1980] 1 SCR 914 at 941–42, 110 DLR (3d) 594.
[71] *Supra* note 1.

[41] Parliament does not have the authority to prevent children from attending public, provincially-run schools, nor does it have the authority to require businesses operating entirely within a province to conform to their regulations, absent an emergency. For reasons further discussed below, AH is not such an emergency. If the Regulation targeted industries like airlines or shipping, it may be constitutional, but as written, it is not.

2.3 The Act is not valid under Parliament's power over the criminal law

[42] The Act does not have a criminal purpose, as required to be a valid exercise of the criminal law power.[72] Section 37 of the Act creates a prohibition (contravening any orders made in regulations) and a penalty (a fine or imprisonment), but the Act is not addressing an "evil" and therefore has no valid criminal purpose.[73]

[43] It is not evil to get sick. Justice Potashkin found that the evil addressed by the Act was "*any human action that contributes to the spread and negative impacts of AH*."[74] This is an extremely broad and dangerous characterization that cannot be allowed to stand. AH spreads extremely easily – to call "any human action" that "contributes to the spread" evil is to call all Canadians evil. A hug, a cough, a song – these are not evil acts.

[44] It is also not evil to not contribute to the economy. In the explanatory document published alongside the Regulation, the vaccine requirement was explained as lessening the burden on parents.[75] The economic impact of AH comes from people staying home from work, "whether because they are ill or because they are tending to ill children."[76] Calling in sick is hardly a threat that requires criminal sanction because of potential

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[72] *Ibid*, s 91(27).
[73] *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] SCR 1 at 49, 1 DLR 433.
[74] *FCA Decision*, *supra* note 37 at para 42 (emphasis in original).
[75] *FC Decision*, *supra* note 3 at para 29.
[76] *Ibid* at para 11.

impact on the economy. It is stigmatizing and wrong to characterize the Act as such, and it must not be allowed to stand.

[45] Finding this Act, which is primarily concerned with regulating human behaviour in schools and workplaces, criminal legislation is to allow Parliament to "regulate virtually every aspect"[77] of health and the economy. As Justice Kasirer said in his dissent in the *Reference re Genetic Non-Discrimination Act*, it is not enough to merely *relate* to a criminal purpose, Parliament must be responding to a threat that has "well-defined and have ascertainable contours" and Parliament must have "a concrete basis and a reasoned apprehension of harm."[78] AH does not have severe health impacts and hospitalizations are not rising – the concern seems to be people calling in sick or businesses closing.[79] The criminal law power may be plenary in nature,[80] but it cannot be applied colourably.[81]

2.4 The Act is not valid under Parliament's power over matters of national concern

[46] Finding legislation valid under the national concern branch of POGG is difficult and should be done sparingly, due to the "high potential risk to the Constitution's division of powers presented by the broad notion of 'national concern'."[82]

[47] The Act does not deal with "new matters which did not exist at Confederation", the first category of matters of national concern.[83] Justice Potashnik found that the Act addresses issues that "stem from one root problem – the propagation of the new flu."[84]

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[77] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 285.
[78] 2020 SCC 17 at para 233.
[79] *FC Decision*, *supra* note 3 at para 10.
[80] *RJR-MacDonald v Canada (AG)*, [1995] 3 SCR 199 at 240, 127 DLR (4th) 1.
[81] *R v Hydro-Québec*, [1997] 3 SCR 213 at para 121, 151 DLR (4th) 32.
[82] *Ibid* at para 67.
[83] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 432, 49 DLR (4th) 161 [*Crown Zellerbach*].
[84] *FCA Decision*, *supra* note 37 at para 24.

Although this mutation of AH has emerged this year, the general concept of flus is not new. The national concern doctrine gives Parliament the power to legislate on all aspects of a general matter – as with aeronautics, where a Privy Council decision gave Parliament power to legislate over "almost every conceivable matter relating to aerial navigation."[85] As Justice Beetz said, in statements concurred with by a majority of the court in the *Anti-Inflation Reference*, "inflation is a very ancient phenomenon, several thousands years old …. The Fathers of Confederation were quite aware of it."[86] Flu viruses are probably even older. They are not a "new matter."

[48] The Act also does not deal with "matters which, although originally matters of a local or private nature in a province, have since … become matters of national concern,"[87] the second category of matters of national concern. As discussed above, the flu is still a local and private matter. We may travel more, but flus still spread the same way they have for thousands of years. The fact that people across the country may have AH does not make it any more nationally concerning than the fact that all Canadians can own property, go to public school, or get cancer.

[49] The Act does not deal with a single, distinct, and indivisible matter, as is also required for a matter of national concern.[88] Although the Federal Court of Appeal described the matter here as the specific AH flu, the "matter" addressed by the Act, as discussed above, is "limiting and mitigating the negative effects of AH on health and the economy through the regulation of certain industries and schools." This can be divided in many ways – limiting and mitigating are different actions, health and the economy are

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[85] *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 455 [*Anti-Inflation Reference*].
[86] *Ibid* at 458.
[87] *Crown Zellerbach*, *supra* note 83 at 432.
[88] *Crown Zellerbach*, *supra* note 83 at 432.

different concerns, and the industries and schools targeted are all distinct. *Crown Zellerbach* defined the pollution of marine water as a matter of national concern, distinguishing it from the pollution of fresh water.[89] Marine waters are all connected by the ocean – there is no such global commons connecting health, the economy, and public schools. The national concern doctrine must not be applied too broadly: "in order for a matter to qualify as one of national concern falling within the federal [POGG] power it must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned."[90] There are no limits, reasonable, ascertainable or otherwise, on the powers of the Committee (they can "enact all measures and make all orders necessary"), and they have a significant impact on provincial jurisdiction.

[50] There is no provincial inability to regulate in the area, which can be evidence of a matter of national concern.[91] Provinces are capable of mask mandates and vaccine requirements, as shown by the provincial response to AH[92] and statutes like Ontario's *Immunization of School Pupils Act*.[93] Provinces are capable of restricting access over their own borders and establishing their own testing and quarantining requirements, as shown by the "maritime bubble" during COVID-19.[94] One province's lack of response would not have a serious impact on a second such that the federal government must intervene, since that second province would still have the ability to respond itself. In practical terms, Quebec failing to require its children to be vaccinated would not have an impact on the oil and gas industry in Alberta or the steel production industry in Ontario,

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[89] *Ibid* at 436.
[90] *Ibid* at 438, emphasis added.
[91] *Ibid* at 432.
[92] *FC Decision*, *supra* note 3 at para 18.
[93] *Supra* note 68.
[94] *Taylor v Newfoundland and Labrador*, 2020 NLSC 125.

unless those provinces were not able to pass their own vaccination laws, which they are. They can only be affected insofar as "the economy" affects all Canadians, but just as "the environment" is too broad to be a matter of national concern, so too is "the economy."[95]

[51] Finally, the scale of impact on provincial jurisdiction is not "reconcilable with the fundamental distribution of legislative power under the Constitution."[96] The *Constitution Act, 1867* created areas of "exclusive jurisdiction."[97] The residual power in the POGG preamble, which courts have interpreted as including power over matters of national concern, cannot be used to override that distribution. This Act's primary concern is with the administration of healthcare, access to public schools, and regulation of local trade. If Parliament is given the general, plenary power to legislate over all aspects of a flu and its impact on the economy, "a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear not gradually but rapidly."[98]

2.5 The Act is not valid under Parliament's power over emergencies

[52] Mr. Drouin accepts that it is in the interests of justice for the Attorney General to be allowed to raise this argument, as it is important for matters of federalism to be determined correctly.[99] Nevertheless, this head of power does not apply.

[53] There is no rational basis for finding the Act "temporarily necessary to meet a situation … imperilling the well-being of the people of Canada as a whole and requiring

[95] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 64, 88 DLR (4th) 1.
[96] *Crown Zellerbach*, *supra* note 83 at 432.
[97] *Supra* note 1 at ss 91–92.
[98] *Anti-Inflation Reference*, *supra* note 85 at 445.
[99] *Vavilov*, *supra* note 44 at para 55.

Parliament's stern intervention in the interests of the country as a whole."[100] The word emergency has a sense of immediacy: it is an emergency because something must be done right away. It is not enough for a problem to be large. Justice Torrance called it "plain and obvious" that "the potentially enormous impact of AH on Canadian health and the economy" was an emergency,[101] but many issues have enormous impacts without rising to the level of emergency. Parliament and provinces are well-equipped to handle them with the tools that the *Constitution Act, 1867* already provides.

[54] There is no proof within the Act that Parliament considered AH a temporary emergency. Although the absence of the word emergency is not determinative,[102] there are no other words in the Act that suggest it is being enacted in a time of urgent crisis. The provisions establishing the Committee envisage members being appointed for up to six years.[103] Flu seasons do not last that long, so there is no indication that the Act stops applying when this current flu season is over.

[55] Extrinsic evidence[104] also does not show Parliament believed AH to be an emergency. Although the Hansard shows some members calling the economic situation an emergency, others called for the creation of a "flexible, responsive body."[105] Flexibility and responsiveness are not features of temporary, sweeping, and immediate emergency legislation. The fact that the Committee had no time limit to publish any regulations[106] also suggests Parliament did not see the situation as an emergency – if it

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[100] *Anti-Inflation Reference*, *supra* note 85 at 375.
[101] *FCA Decision*, *supra* note 37 at para 35.
[102] *Anti-Inflation Reference*, *supra* note 85 at 422.
[103] The Act, *supra* note 2, s 9.
[104] *Anti-Inflation Act Reference*, *supra* note 85 at 391.
[105] *FC Decision*, *supra* note 3 at para 14.
[106] *Ibid* at para 24.

required urgent action, Parliament could have included the restrictions within the Act itself. As it was written, nothing in the Act requires or even requests the Committee act quickly in enacting regulations or creating orders.

[56] AH does not meet the standard of being an emergency as defined in the *Emergencies Act*, which, although not a constitutional statute, can inform whether a situation is an emergency or not.[107] In the *Emergencies Act*, a national emergency includes "an urgent and critical situation of a temporary nature that … seriously endangers the lives, health or safety of Canadians" and that "cannot be dealt with under any other law of Canada."[108] As discussed above, AH is not particularly threatening to lives or health, and there are a number of other laws that exist to address the health and economic impacts of the virus. Although the *Emergencies Act* does not limit Parliament's constitutional authority, it does provide context for what Parliament considers an emergency to be. In this case, this context suggests that there was no rational basis for Parliament to believe an emergency, as they define it, existed.

3. Even if the Act is *intra vires* Parliament, the Regulation is not

[57] Parliament cannot shield itself from constitutional scrutiny by delegating powers it does not have to administrative boards.[109] As discussed above, the main effects of the Act are found in the Regulation and they intrude significantly on exclusive provincial jurisdiction – the Act's main action is creating and empowering the Committee to create regulations. The Act and Regulation are a complete scheme. Although Mr. Drouin maintains that the whole scheme is invalid, in the event that the court finds the Act *intra*

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[107] *Emergencies Act*, RSC, 1985, c 22 (4th Supp.)
[108] *Ibid*, s 3.
[109] *Vavilov*, *supra* note 44 at para 56.

vires Parliament, the current Regulation, with its infringing effects, should be struck and the regulation-making power granted to the Committee should be interpreted to only allow regulations pertaining to areas within federal jurisdiction.

4. The Committee's denial of Mr. Drouin's application was unreasonable

[58] The Committee failed to produce reasons that were justified, transparent and intelligible in light of the factual and legal context. Finally, the Committee's unreasonable rationale led to an unreasonable outcome. Mr. Drouin asks the Court to quash the Committee's decision and find that the only reasonable decision is to grant the exemption order. Alternatively, Mr. Drouin asks the Court to remit the decision back to the Committee for reconsideration.

4.1 Reasonableness is the appropriate standard of review

[59] The standard for reviewing the Committee's decision is reasonableness.[110] This standard asks whether the *Charter* should apply. While constitutional questions are typically reviewed on a correctness standard,[111] it is the Committee's decision and not the Act itself that engages Mr. Drouin's *Charter* rights, so the *Doré v Barreau du Québec* exception applies.[112] This gives rise to a reasonableness standard of review.[113]

4.2 Principles guiding reasonableness review

[60] Judicial review of an administrative body's decision begins with the reasons of the decision maker, where available.[114] Courts must consider the written reasons "holistically and contextually, for the very purpose of understanding the basis on which a

[110] *Ibid* at paras 10, 16 & 23.
[111] *Ibid* at para 55.
[112] *Ibid* at para 53; *Doré v Barreau Du Québec*, 2012 SCC 12 [*Doré*].
[113] *Vavilov*, *ibid* at para 57.
[114] *Ibid* at para 15 & 83.

decision was made."[115] A decision is reasonable when it "is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker."[116] Hallmarks of reasonableness from *Dunsmuir v New Brunswick*[117] and *Vavilov*[118]—justification, transparency, and intelligibility—are integral to this review.

[61] A decision is unreasonable when the challenging party shows that it does not exhibit the "requisite degree of justification, intelligibility and transparency."[119] The issues of the challenger "must be more than merely superficial or peripheral to the merits of the decision"—"the issues should be sufficiently central or significant to render the decision unreasonable."[120] Reasons that "simply repeat statutory language, summarize arguments made and then state a peremptory conclusion" do not allow a reviewing court to understand the rationale of a decision because they "are no substitute for statements of fact, analysis, inference and judgment".[121]

[62] The Committee's decision was unreasonable given that it:

- failed to respond to Mr. Drouin's *Charter* arguments in his application;
- misunderstood the statutory scheme governing its discretion;
- unreasonably fettered its own discretion through the Regulation;

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[115] *Ibid* at para 85.
[116] *Ibid*.
[117] 2008 SCC 9 at paras 47 & 74.
[118] *Supra* note 44 at para 99.
[119] *Ibid* at para 100.
[120] *Ibid*.
[121] *Ibid* at para 102 citing R.A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at 139.

- did not appropriately consider the evidence that was available to it about AH, Émilie's community; or the questionable efficacy of the vaccine;
- did not justify its conclusions about Émilie's immunocompromised status;
- resulted in an unnecessary infringement of Mr. Drouin's *Charter* rights; and
- set an example of an administrative body circumventing *Charter* obligations.

5. The Committee's decision is based on unreasonable rationale

5.1 The Committee did not respond to the *Charter* arguments in the application

[63] It was unreasonable for the Committee to fail to consider Mr. Drouin's *Charter* rights when he specifically brought *Charter* concerns forward. The Committee "fail[ed] to provide a transparent and intelligible justification".[122] This is especially glaring here, as the statutory scheme requires the Committee to provide reasons to every exemption request.[123] The Committee's reasons do not mention the *Charter* once.

[64] The lack of a *Charter* balancing analysis in the Committee's reasons is a central flaw, showing that it did not have a clear understanding of all the material issues in Mr. Drouin's application. When reasons do not address an essential element that is at issue, the decision is not justified, transparent, or intelligible.[124] The exclusion of a *Charter* consideration in its reasons shows that the Committee made the decision unreasonably.

[65] At the Federal Court of Appeal, Justice Torrence suggested that the following sentence should be enough to fulfil the Committee's *Charter* obligations: *"*In times like these, the greater good unfortunately outweighs the risk posed to the few."[125] These words do not consider the *Charter*. At no point in the decision does the Committee refer

[122] *Ibid* at para 136.
[123] The Act, *supra* note 2, s 20.
[124] *Vavilov*, *supra* note 44 at para 98.
[125] *FCA Decision*, *supra* note 37 at para 20.

to the *Charter* or Mr. Drouin's rights under sections 2(a) and 7. It makes no response to Mr. Drouin's concerns about freedom of conscience or the rights to liberty and security of the person. There is no other evidence on record that shows the Committee considered *Charter* concerns. This failure is a central flaw in the Committee's rationale, and therefore the decision is unreasonable.[126]

[66] While omissions are not "stand-alone grounds for judicial intervention", to omit *Charter* balancing is to omit a key issue and central argument of Mr. Drouin's application.[127] *Vavilov* stated that "a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it."[128] The omission of a *Charter* balancing makes the decision unreasonable.

[67] Had the Committee considered the *Charter*, the only reasonable decision would have been to grant the exemption. *Doré* requires the balancing of statutory objectives with *Charter* values.[129] The Committee must balance the need to protect school-aged children from AH against the infringement of *Charter* rights under sections 2(a) and 7. Mr. Drouin submitted that "his conscience prevents him from permitting his daughter to be administered a vaccine of questionable efficacy" and that "the mandatory order interferes with his right to liberty" in raising his child.[130] Mr. Drouin's *Charter* values would be best protected if he was not forced to vaccinate his daughter.[131] The statutory objective is served by other parts of the Regulation, like the imposition of "mandatory

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[126] *Vavilov*, *supra* note 44 at para 40.
[127] *Ibid* at para 122.
[128] *Ibid* at para 128.
[129] *Doré*, *supra* note 112 at para 55-56.
[130] *FC Decision*, *supra* note 3 at para 38.
[131] *Doré*, *supra* note 112 at para 56.

mask wearing in all public […] education institutions, for all students and employees over the age of 7."[132] This measure alone would protect Émilie and others in her school without infringing any of Mr. Drouin's *Charter* rights. Mr. Drouin's *Charter* rights need not be infringed. Here, the only reasonable decision is to grant the exemption order.

5.2 The Committee failed to consider *Charter* values in its statutory scheme

[68] The statutory scheme does not remove *Charter* obligations. The governing statutory scheme for the Committee is its enabling Act;[133] the Regulation;[134] and an explanatory document published in conjunction with the Regulation.[135] Parliament did not invoke the notwithstanding clause of the *Charter* in the Act.[136] There is no explicit language that separates the Act or the Committee from *Charter* obligations. As part of the foundational legal framework for all laws of Canada, *Charter* considerations must be a part of every Committee decision.[137]

[69] At the Federal Court of Appeal, Justice Torrence inaccurately cited *R v Conway*[138] for the principle that administrative bodies may not consider the impact of their decisions on citizen's *Charter* concerns.[139] In *Conway*, the Supreme Court of Canada considered whether the statutory scheme governing the Ontario Review Board empowered the Board to consider *Charter* remedies. The Supreme Court took a context specific approach which followed the principle that administrative bodies do not have the power to make decisions or act in ways that Parliament or the Legislature did not intend.

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[132] *FC Decision*, *supra* note 3 at para 25.
[133] *Ibid* at paras 23-24.
[134] *Ibid* at paras 25-28, 34.
[135] *Ibid* at para 29.
[136] *Supra* note 8, s 33.
[137] *Doré*, *supra* note 112 at para 24.
[138] 2010 SCC 22.
[139] *FCA Decision*, *supra* note 37 at para 17.

Mr. Drouin's matter is fundamentally different. Mr. Drouin is not asking the Committee for a *Charter* remedy; he is simply asking that the Committee consider the *Charter* rights that its decision engages. This request is not unique and asks the Committee to consider its obligations under the *Charter* as a Canadian administrative body.[140]

[70] Justice Torrence also erred in finding that section 22 of the Act precluded the Committee from considering the *Charter*.[141] *Doré* addresses how administrative decision makers should consider *Charter* protections, calling them a "fundamental and pervasive obligation, no matter which adjudicative forum is applying it."[142] Administrative bodies are uniquely placed to understand the statutory context and facts of the decision before it.[143] This unique placement gives these bodies the ability and context to consider the *Charter* rights they have engaged.[144]

[71] Contrary to Justice Torrence's assertion that the Act provides for "only *one* reason for which an exemption order must be granted",[145] sections 15 and 21 of the Act do not give the Committee the power to ignore the *Charter* when considering an exemption. It is unreasonable to think that this would be the case absent clear language expressing that parliamentary intention.[146] Parliament and provincial legislatures may enact legislation that operates notwithstanding certain *Charter* protections by explicitly invoking section 33 of the *Charter*. That was not done here. The Act does not remove the Committee's *Charter* obligations when it requires that the Committee balance nation-

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[140] *Doré*, *supra* note 112 at para 24.
[141] *FCA Decision*, *supra* note 37 at para 17.
[142] S*upra* note 112 at para 4.
[143] *Ibid* at para 48.
[144] *Ibid*.
[145] *FCA Decision*, *supra* note 37 at para 16.
[146] *Charter*, *supra* note 8, s 33.

wide efforts with individual concerns,[147] nor when it restricts the Committee from considering questions of law. Section 33 of the *Charter* requires explicit language stating that the Act will operate notwithstanding the *Charter*.[148]

[72] Sections 16 and 17 of the Regulation cannot be read in a way that excludes *Charter* considerations. The Committee's authority to create regulations does not mean that the Committee may excuse itself from *Charter* obligations.[149] Disregarding the *Charter* is outside the power afforded to the Committee by Parliament through the Act. The Committee has an obligation to consider applicant's *Charter* rights that may be engaged by the Committee's decisions[150] – especially when applicants bring *Charter* concerns forward, as Mr. Drouin did. [151]

5.3 <u>The Committee used its Regulation to fetter its own discretion</u>

[73] The Committee's Regulation unreasonably fetters its discretion. In section 22 of the Act, Parliament instructs the Committee to consider "any question of fact necessary to render a decision on a request for exemption." However, sections 16 and 17 of the Regulation restrict the Committee's factual considerations of a vaccination exemption request. The Committee will only consider whether a "child is already in a poor or weakened state of health and thus particularly susceptible to any potential side effects of the vaccine."[152] This is an unreasonable and significant fettering of the Committee's

[147] *Supra*, note 2, s 21.
[148] *Ford c Québec (Attorney General)*, [1988] 2 SCR 712 at 741-742, 54 DLR (4th) 577.
[149] *Vavilov, supra* note 44 at para 108-109. See also para 68.
[150] *Doré*, *supra* note 112 at paras 24 & 55-57.
[151] *FC Decision, supra* note 3 at para 38.
[152] The Regulation, *supra* note 5, ss 16-17.

discretion.[153] Because of this, the Committee unreasonably restricted the facts it took into account when considering Mr. Drouin's application.

5.4 The Committee failed to give appropriate weight to Mr. Drouin's evidence

[74] The facts before the Committee in this case are vast, considering that section 22 gives the discretion to consider "any question of fact necessary to render a decision on a request for exemption." Further, section 21 requires the Committee to evaluate whether "the harm caused to the objector by the application of the order or measure objected to outweighs the harm caused to society as a whole by the non-application of that order or measure" when considering an exemption request. The general factual matrix that the Committee must consider relates to the health of Canadians and the Canadian economy.[154] The failure of the Committee to understand and account for the evidence before it shows that it made its decision unreasonably.[155]

i. The Committee misapprehended the evidence about the risk AH poses

[75] The Committee misapprehended the degree of risk of AH. COVID-19 left lingering fear and pain throughout Canada and was a tragedy that Canadian healthcare workers, citizens and lawmakers will carry with them for years to come. Canadians continue to carry trauma from COVID-19, but AH is not COVID-19. The evidence before the Committee was that AH has not led to a significant increase in hospitalizations across the country, as COVID-19 did; and AH has a significantly lower fatality rate compared to COVID-19.[156] The reaction that the Committee showed would only be an appropriate reaction to an illness of the same magnitude and impact as COVID-19.

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[153] *Vavilov*, *supra* note 44 at para 108.
[154] The Act, *supra* note 37, s 15. See also the Act's preamble.
[155] *Vavilov*, *supra* note 44 at para 126.
[156] *FC Decision*, *supra* note 3 at para 11.

[76] To react to AH as if it poses the same danger and justifies a similar incursion on citizens' lives as COVID-19 did is unreasonable. Government violations of rights must be measured and proportionate to the purpose of the intrusion.[157] The Committee's reaction to AH in light of the threat it poses is disproportionate and unreasonable.

ii. The Committee misapprehended the preliminary research about the vaccine

[77] The Committee also misapprehended the evidence before it about the vaccine. The Committee provided these comments about the evidence Mr. Drouin submitted: "…the report you have submitted by Dr. Elizabeth Olmstead is based on the results of one clinical study. We note that other studies have not found any similar outcomes from the administration of this vaccine."[158] It is unreasonable for the Committee to rely on early studies of the vaccine's success while ignoring early studies of its problems The Committee's reasons on this point lack transparency and intelligibility.

[78] Further, the Committee provided no rationale for the conclusions it drew about Émilie's medical records. The Committee stated that:

> "An examination of Émilie's medical records demonstrates that although she suffers from an immune deficiency, it is not so serious that there is a real risk that Émilie will come to any harm from having the vaccine in question administered. **To the contrary, it is likely that the vaccine will prevent her from suffering more serious harm by preventing her from contracting AH4N1.**"[159]

The evidence before the Committee included preliminary research studies with inconclusive results on the vaccine's efficacy against AH.[160] Both parties acknowledged that "emerging research … may confirm or disprove any of the initial conclusions drawn

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[157] *Charter*, *supra* note 8, s 1.
[158] *FC Decision*, *supra* note 3 at para 39.
[159] *Ibid*, emphasis added.
[160] *Ibid* at para 30.

by the first clinical studies".[161] Saying that "it is likely the vaccine will prevent her from suffering more serious harm" is an unjustified assumption based on a misapprehension of the evidence. The Committee has not provided intelligible or transparent reasoning.

iii. *The Committee failed to take proper account of Émilie's community*

[79] It was unreasonable to for the Committee to suggest that "any potential harm to Émilie does not outweigh the likely harm that will occur to society should Émilie attend school without having been vaccinated, in which case she will risk spreading AH4N1 to her teachers and peers."[162] This conclusion is unreasonable and does not consider evidence of Émilie's school circumstances. The Committee's decision came five days after the exemption application deadline.[163] The record established that the remainder of the school would be vaccinated and everyone, including Émilie, would be required to wear masks.[164] Émilie would not pose a risk to those persons or that community. Further, if Émilie were to fall ill, Mr. Drouin, who works from home,[165] would be able to tend to her while continuing his contributions to the economy.

iv. *The Committee's conclusions about Émilie's health are not justified or transparent*

[80] The Committee did not adequately explain its conclusions about Émilie's health. The Regulation requires parents to demonstrate that their child is "already in a poor or weakened state of health and thus particularly susceptible to any potential side effects of the vaccine."[166] The Committee had Émilie's medical record before it,[167] but concluded

[161] *Ibid* at para 31.
[162] *Ibid* at para 39.
[163] *Ibid* at paras 38-39.
[164] *Ibid* at para 25.
[165] *Ibid* at para 35.
[166] *Ibid* at para 33.
[167] *Ibid* at para 38.

that "although she suffers from an immunodeficiency, it is not so serious that there is a real risk that Émilie will come to any harm from having the vaccine in question administered."[168] Without further explanation from the Committee, the reasoning for this conclusion is unknowable and should be found to be unreasonable.

6. Given the factual and legal context, the Committee's decision results in an unreasonable outcome

6.1 The potential harm of the decision on Émilie and Mr. Drouin may be drastic[169]

[81] Given that the preliminary research on this vaccine indicates that the vaccine may be either useful or harmful,[170] a mandatory vaccination order gambles with the lives of Canadian children. An exemption allows concerned parents to protect their immunocompromised children from this gamble. If the Committee's decision stands, Mr. Drouin will be forced to take that gamble with his daughter's health in the face of inconclusive evidence about the efficacy of the vaccine. It is not enough for the Committee to feel justified in its own decision; it must explain that justification to Mr. Drouin. The majority in *Vavilov* stated that: "reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, **not in the abstract, but to the individuals subject to it.**"[171] The Committee must be able to justify to Mr. Drouin why it came to the conclusions it did, and it has not done so.

[82] Finally, the Committee has not considered the harm to Mr. Drouin and Émilie from having their *Charter* rights breached. These concerns go to the very issue of harm.

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[168] *Ibid* at para 39.
[169] *Vavilov*, *supra* note 44 at para 133.
[170] *FC Decision*, *supra* note 3 at para 30-31.
[171] *Vavilov*, *supra* note 44 at para 95, emphasis added.

6.2 The decision sets a dangerous precedent for future administrative bodies

[83] Allowing this order to stand will condone the circumvention of the *Charter* by administrative decision makers. Although they are not bound by *stare decisis*, they are expected to act consistently.[172] Allowing this order to stand will establish a practice that the Committee may ignore *Charter* rights. It is unreasonable for the Committee to move forward on such a basis, and it would be unjust for the Court to condone such behaviour.

[84] Canadians expect *Charter* rights to be respected. At minimum, Mr. Drouin expected his *Charter* rights to be considered. It is unreasonable and unjust for this Court to allow these expectations to go unanswered. *Vavilov* established that "the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain."[173] Administrative bodies and courts must consider what is expected of them and create reasoning that may be justly reiterated. Arbitrary decision making that does not respond to legitimate expectations "would undermine public confidence in administrative decision makers and in the justice system as a whole."[174]

[85] Courts must "develop and strengthen a culture of justification in administrative decision making."[175] The Committee's reasons present conclusions without explanation – without justification, and without a transparent, intelligible line of reasoning. Administrative bodies have immense power to affect people's lives, and a heightened responsibility to make reasonable and justified decisions given the factual and legal

[172] *Ibid* at para 129
[173] *Ibid* at para 131 (citations omitted).
[174] *Ibid* at para 131.
[175] *Ibid* at para 2.

context.[176] Canadian citizens deserve better from the administrative bodies that force decisions about people's lives on those who are unwilling.

[86] The Committee's decision must not only be reasonable, but also justified.[177] It has an obligation to justify its conclusions to Mr. Drouin.[178] The Committee's decision was not justified, transparent or intelligible. The outcome of this decision is untenable and unreasonable given the factual and legal context. There is only one reasonable outcome to this matter if the facts and *Charter* are considered: that Émilie's exemption be granted.

[87] There is only one reasonable outcome, so there is no need for the Court to remit this decision.[179] Mr. Drouin requests that the Court quash the Committee's decision and grant his exemption request. W the court finds that there may be multiple reasonable outcomes, Mr. Drouin asks that the decision be remitted to the Committee for consideration in light if the full evidentiary record and his *Charter* concerns.

PART V – ORDER SOUGHT AND NAMES OF COUNSEL

[88] The Appellant requests that the Canadian Court of Justice:

> **ALLOW** the appeal of the Appellant;
> **SET ASIDE** the Committee's Decision requiring Émilie Carson's vaccination;
> **DIRECT** the Committee to order an exemption for Émilie Carson,
> or in the alternative;
> **REMIT** the matter back to the Committee for reconsideration with direction to consider *Charter* concerns and the full evidentiary record.
> **WITH COSTS** throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of January, 2021.

Anna White
Counsel #1 for the Appellant

Florence Hogg
Counsel #2 for the Appellant

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[176] *Ibid* at para 135.
[177] *Ibid* at para 86.
[178] *Ibid* at para 86.
[179] *Ibid* at para 142.

APPENDIX A – LIST OF AUTHORITIES

JURISPRUDENCE

Agraira v Canada (Public Safety and Emergency Preparedness), 2013 SCC 36.
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.
Drouin v National Pandemic Response Action Committee, A-1500-19 (FCA).
Drouin v National Pandemic Response Action Committee, T-800-19 (FC).
Doré v Barreau Du Québec 2012 SCC 12.
Dunsmuir v New Brunswick, 2008 SCC 9.
Ford c Québec (Attorney General), [1988] 2 SCR 712, 54 DLR (4th) 577.
Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3, 88 DLR (4th) 1.
Labatt Breweries of Canada Ltd. v Attorney General of Canada, [1980] 1 SCR 914, 110 DLR (3d) 594.
Monsanto Canada v Ontario (Superintendent of Financial Services), 2004 SCC 54.
R v Crown Zellerbach Canada Ltd, [1988] 1 SCR 401, 49 DLR (4th) 161.
R v Hydro-Québec, [1997] 3 SCR 213, 151 DLR (4th) 32.
R v Morgentaler, [1993] 3 SCR 463 at 483-484, 107 DLR (4th) 537.
Re: Anti-Inflation Act, [1976] 2 SCR 373.
Reference re Assisted Human Reproduction Act, 2010 SCC 61.
Reference re Genetic Non-Discrimination Act, 2020 SCC 17.
Reference re Secession of Quebec, [1998] 2 SCR 217, 161 DLR (4th) 385.
Reference re Validity of Section 5 (a) Dairy Industry Act, [1949] SCR 1, 1 DLR 433.
RJR-MacDonald v Canada (AG), [1995] 3 SCR 199, 127 DLR (4th) 1.
Schneider v The Queen, [1982] 2 SCR 112, 139 DLR (3d) 417.
Taylor v Newfoundland and Labrador, 2020 NLSC 125.

LEGISLATION

Act to safeguard Canadian health and economic prosperity, SC 2022, c 15.
Canadian Charter of Rights and Freedoms, ss 2(a), 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
Canada Health Act, RSC 1985, c C-6.
Constitution Act, 1867, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
Controlled Drugs and Substances Act, SC 1996, c 19.
Emergencies Act, RSC, 1985, c 22 (4th Supp.).
Health Insurance Act, RSO 1990, c H.6.
Health Protection and Promotion Act, RSO 1990, c H-7.
Immunization of School Pupils Act, RSO 1990, c I-1.

Public Health Act, SNB 1998, c P-22.4.
Regulated Health Professions Act, 1991, SO 1991, c 18.
Regulation respecting measures to reduce the impact of AH4N1, SOR/22-115.