

COURT FILE NO:

FEDERAL COURT

BETWEEN

CORRINE JANZEN and CODY TILBURY

Applicants

– and –

CANADA (MINISTER OF HEALTH)

Respondent

APPLICATION UNDER ss 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7 and Rules 300(a) and 317 of the *Federal Courts Rules*, SOR/98-106

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at (place where Federal Court of Appeal (or Federal Court) ordinarily sits).

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN

YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

August 22, 2022

Issued by:_____

Address of local office:

Federal Court
Toronto Local Office
180 Queen Street West
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TO: **MINISTER OF HEALTH**
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AND TO: **ATTORNEY GENERAL OF CANADA**
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Lawyers for the Respondent

APPLICATION

THIS APPLICATION is for a declaration that there is no legal requirement that persons entering Canada use ArriveCAN as the Minister of Health has not properly and legally specified the electronic means by which any person entering Canada must provide mandatory travel and health information to the Minister of Health, a screening officer or a quarantine officer pursuant to *Minimizing the Risk of Exposure to Covid-19 in Canada Order P.C. 2022-836* (“the Order”).

In the alternative, this is an application for the Minister to produce the specific decision made requiring persons to use ArriveCAN.

In the alternative, this is an application for prerogative relief by way of *certiorari* striking down any actions of the Minister of Health purporting to require persons entering Canada to use ArriveCAN as *ultra vires* the *Quarantine Act* and the Order.

In the alternative, this is an application for judicial review in respect of any decisions made by the Minister of Health, pursuant to the Order, purporting to specify ArriveCAN as the electronic means by which mandatory information must be provided by any person entering Canada to the Minister of Health, a screening officer or a quarantine officer. The Applicants assert that any requirement to use ArriveCAN would infringe their right to privacy and right to be free from unreasonable search and seizure rights as guaranteed by sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”) in a manner not saved by s. 1.

THE APPLICANTS MAKE APPLICATION FOR:

1. A declaration that the use of ArriveCAN is not legally required of persons entering Canada as the Minister of Health has not specified it as the electronic means by which any person entering Canada must provide mandatory travel and health information to the Minister of Health, a screening officer or a quarantine officer by persons entering Canada.
2. In the Alternative, if the Minister of Health did specify ArriveCAN as the electronic means by which any person entering Canada must provide mandatory travel and public health information to the Minister of Health, a screening officer, or a quarantine officer, the Applicants make application for:
 - a. Disclosure of any applicable ArriveCAN order.
 - b. A declaration that the decision of the Minister is *ultra vires* the Quarantine Act and the Order as it exceeds the scope of what is permitted by their provisions.
 - c. A declaration that the mandatory use of ArriveCAN unreasonably and unjustifiably infringes the Applicants' privacy rights and their rights to be free from unreasonable search and seizure as protected by sections 7 and 8 of the *Charter*, including but not limited to the seizure of private information, including medical information, without requisite constitutional grounds, the unreasonable over-seizure of private information, and the unreasonable sharing of this information with other government, non-government and international bodies; and

- d. Orders pursuant to section 24(1) of the *Charter* and sections 18(1) and 18.2 of the *Federal Courts Act*, in the nature of *certiorari*, quashing the Minister of Health's decision specifying ArriveCAN as the electronic means by which mandatory travel information must be provided to the Minister of Health and others pursuant to the Order.
- e. A declaration prohibiting the Respondent from issuing subsequent orders of a substantially similar or identical nature that mandate the use of ArriveCAN for the provision of mandatory travel information by any person entering Canada pursuant to the Order.
- f. An Order under section 18.1(2) of the *Federal Courts Act*, if necessary, extending the time for making this application for judicial review;
- g. An Order under Rule 8 of the *Federal Court Rules* for extension of time to file supporting affidavits and documents;
- h. The costs of this Application; and,
- i. Such further and other relief as counsel may request and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

Parties

3. The Applicant, Cody Tilbury, is a Canadian citizen who resides in the Province of Ontario. He returned to Canada from Mexico on or around August 6, 2022. Mr. Tilbury did not provide mandatory travel and health information through ArriveCAN as this information would tend to reveal intimate details of his health, lifestyle and personal choices, including information which may lead to stigmatization and discrimination. Mr. Tilbury does not consent to the disclosure or sharing of his personal information with any person, government, organization or entity as contemplated by ArriveCAN's privacy policy. As a result of Mr. Tilbury's refusal to use ArriveCAN, he received a ticket in an amount of \$6,255.00, pursuant to the *Contraventions Act*, for "Failure to comply with an order prohibiting or subjecting to any condition the entry into Canada."
4. The Applicant, Corrine Janzen, is a Canadian citizen who resides in the Province of Alberta. She inputted her personal information into ArriveCAN in or around November 2021 when returning to Canada from Mexico under fear of being charged with an offence or being ticketed. Ms. Janzen does not consent to the retention of her personal information by the Minister of Health, or any government, organization or other entity. She does not consent to sharing this information with any person, government, organization or entity as contemplated by ArriveCAN's privacy statement.
5. The Minister of Health is responsible for specifying the electronic means by which mandatory travel information must be provided to the Minister of Health, a screening officer or a

quarantine officer pursuant to the Order.

6. ArriveCAN is computer software that can be downloaded as an application on a person's smartphone or accessed online through Government of Canada websites. Through ArriveCAN, a person can input and upload mandatory information required by the Order and provide it to the Minister of Health, a screening officer, or a quarantine officer. The Government of Canada states on certain of their webpages that ArriveCAN is the electronic means specified by the Minister of Health for providing mandatory information pursuant to the Order.

Background - ArriveCAN

7. Pursuant to s. 58(1) of the *Quarantine Act*, SC 2005, c. 20, the Governor in Council may make an order prohibiting, or subjecting to any condition, the entry into Canada of any class of persons who have been in a foreign country, if the Governor in Council is of the opinion that:
 - a. There is an outbreak of a communicable disease in the foreign country;
 - b. The introduction or spread of the disease would pose an imminent and severe risk to public health in Canada;
 - c. The entry of members of that class of persons into Canada may introduce or contribute to the spread of the communicable disease in Canada; and
 - d. No reasonable alternatives to prevent the introduction or spread of the disease are available.
8. On June 25, 2022, the Governor in Council, on the recommendation of the Minister of Health,

made an Order in Council entitled *Minimizing the Risk of Exposure to Covid-19 in Canada Order P.C. 2022-836*. The Order came into effect on June 27, 2022, and it expires on September 30, 2022. The Order was preceded by several similar or identical orders and is likely to be succeeded by similar or identical orders.

9. Pursuant to 19(4) of the Order, every person who enters Canada must provide to the Minister of Health, a screening officer or a quarantine officer, either a suitable quarantine plan or their contact information for the 14-day period that begins on the day on which they enter Canada, depending on what class of persons they fall into. This information must be provided by an “electronic means” specified by the Minister of Health unless the person is a member of an exempted class.
10. Pursuant to ss. 20(1) and 20(8) of the Order, every person entering Canada must disclose to the Minister of Health, a screening officer or a quarantine officer, the countries they were in during the 14-day period before the day on which they enter Canada. This information must be provided by an “electronic means” specified by the Minister of Health unless the person is a member of an exempted class.
11. Pursuant to ss. 20(2) and 20(8) of the Order, every person entering Canada must disclose to the Minister of Health, a screening officer, or a quarantine officer information related to their COVID-19 vaccination, including whether they received a COVID-19 vaccine, the brand name or any other information that identifies the vaccine, the date on which the vaccine was administered and the number of doses. Additionally, a fully vaccinated person, as defined by

the Order, must provide evidence, as defined by the Order, of their COVID-19 vaccination. All of this information must be provided by an “electronic means” specified by the Minister of Health unless the person is a member of an exempted class.

12. Pursuant to ss. 23(a) and (b) a person who is required to quarantine upon entering Canada must report their arrival at, and the civil address of, their place of quarantine within 48 hours after entering Canada. Additionally, while remaining in quarantine, a person must monitor for signs and symptoms of COVID-19 and report daily on their health status relating to signs and symptoms of COVID-19 to the Minister of Health, a screening officer or a quarantine officer. This information must be provided either by an electronic means specified by the Minister of Health or by telephone using a number specified by the Minister of Health, unless the person is a member of an exempted class.

ArriveCAN – Never Specified

13. The Applicants state that the Minister of Health never specified ArriveCAN as the electronic means by which persons entering Canada must provide mandatory travel and health information to the Minister of Health pursuant to the Order. In the circumstances, the use of ArriveCAN is not legally required of any person entering Canada.

ArriveCAN’s Privacy Statement

14. According to ArriveCAN’s Privacy Statement:

- a. Personnel Information inputted and uploaded to ArriveCAN may be shared with other organizations in accordance with the *Privacy Act*, *Quarantine Act* and its Emergency Orders;
- b. Proof of vaccination documentation and personal information inputted and uploaded to ArriveCAN will be retained for a minimum of two years following its last administrative use;
- c. Personal information inputted and uploaded into ArriveCan may be used for program evaluations;
- d. Personal information provided through ArriveCAN may not be reflected in the relevant Personal Information Bank;
- e. Personal information inputted and uploaded to ArriveCAN will be used and disclosed for the following purposes:
 - i. For public health follow-up (including disclosure for this purpose to the Province or Territory where you will be in quarantine/isolation);
 - ii. For monitoring and verifying compliance with the *Quarantine Act* and the Emergency Orders made under it (including disclosure for this purpose to law enforcement including, in particular, peace officers); and

- iii. To help determine eligibility for new border measures and to support a public health response to COVID-19.
- f. Information verifying that a person has arrived at their place of isolation or quarantine and/or their COVID-19 test results (if applicable) will be disclosed to law enforcement to monitor and verify compliance with the *Quarantine Act* and the Emergency Orders made under it;
- g. Symptom information, where required during a person's quarantine, will be used and/or disclosed to the Province or Territory where the person will be in quarantine or isolation for public health follow-up.
- h. Personal information may be disclosed to contractors working for the Public Health Agency of Canada and Service Canada as well as to the following entities: other government institutions, as well as provincial, territorial, municipal governments or international organizations.
- i. In other limited and specific circumstances, personal information may be used and/or disclosed without consent in accordance with section 7 and section 8(2) of the *Privacy Act*.

Disclosure to Foreign Governments

15. Section 56(1) of the *Quarantine Act* allows for personal information obtained under the Act to be disclosed to a foreign government or a foreign health authority where the Minister has reasonable grounds to believe that the disclosure is necessary to prevent the spread of a communicable disease or enable Canada to fulfill its international obligations.

16. Section 8(2)(f) of the *Privacy Act* permits personal information under the control of a government institution to be disclosed to a foreign government, an international organization of states, or an international organization established by the government of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation.

Offence

17. Pursuant to s. 71 of the *Quarantine Act*, anyone who contravenes an order made under section 58 of the *Quarantine Act* is guilty of an offence and liable on summary conviction to a fine of not more than \$750,000 or imprisonment for a term of not more than six months, or to both.

18. Alternatively, a person contravening s. 58 of the *Quarantine Act* may be ticketed and fined \$5,000, exclusive of any surcharges, under the *Contraventions Act* and the *Contraventions Regulations* SOC/96-313, for “failure to comply with an order prohibiting or subjecting to any condition the entry into Canada.”

19. Both of the above provisions are applicable to persons who fail or refuse to use ArriveCAN

when entering Canada.

Charter Violations

20. The mandatory use of ArriveCAN is a violation of the Applicants *Charter* rights under section 7 of the *Charter*, which protects everyone's right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
21. Among other things, the mandatory use of ArriveCAN deprives the Applicants of the ability to control the dissemination of their personal information, as obtained by the government, as the ArriveCAN privacy policy, together with provisions of the *Privacy Act* and *Quarantine Act*, allows for intimate details of the Applicants' health, lifestyle and personal choices to be shared with unspecified organizations, including unspecified international organizations and foreign governments whom the Government of Canada cannot regulate.
22. The disclosure of personal information to unspecified organizations, including international organizations and foreign governments, bears no relation to the object of the law authorizing ArriveCAN, and is therefore overbroad and not in accordance with the principles of fundamental justice.
23. Alternatively, the disclosure of personal health information to unspecified organizations, including international organizations and foreign governments, has no connection with the

object of the law authorizing ArriveCAN and is therefore arbitrary and not in accordance with the principles of fundamental justice.

24. There is gross disproportionality between the purpose of the law authorizing ArriveCAN and the negative effects on the rights of the Applicants, including their loss of dignity, autonomy and integrity, and the penal and financial consequences of not complying with the mandatory use of ArriveCAN.
25. The mandatory use of ArriveCAN is a violation of the Applicants' rights under section 8 of the *Charter*, which provides everyone with the right to be secure against unreasonable search or seizure. In particular, the mandatory use of ArriveCAN results in a compelled production or a government seizure of personal information. The Applicants have a reasonable expectation of privacy in this information as it would tend to reveal intimate details of their health, lifestyle and personal choices.
26. The indefinite retention of the Applicants' personal information, and in particular but not limited to the indefinite retention of their personal information after the expiration of the Order, is an ongoing and unreasonable seizure which infringes their rights under section 8 of the *Charter*.
27. The broad provisions allowing information to be shared with other government, non-government, and international actors is unreasonable and contrary to s. 8 of the *Charter*.

28. The mandatory use of ArriveCAN constitutes an unlawful search insofar as it results in a seizure or compelled production of personal information which is conducted for purposes outside of s. 58(1) of the *Quarantine Act*, including the purposes of determining eligibility for unspecified future border measures, attempts to modernize border control, and other unstated objectives.

29. The Minister erred in law, acted in a manner contrary to law, and acted unreasonably by failing to fully and properly consider the Applicant's constitutional and legal rights under sections 7 and 8 of the *Charter*.

THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

30. Such supporting affidavits and documentary exhibits as the Applicants may serve and file pursuant to Rules 306 and 309 of the *Federal Courts Rules*.

31. Materials requested pursuant to Rule 317 of the *Federal Courts Rules* and produced to the applicants and to the Court pursuant to Rule 318; and

32. Such further and other material as counsel may advise and this Honourable Court may permit.

PURSUANT TO RULE 317 OF THE FEDERAL COURT RULES, the Applicants request that the Minister of Health and the Governor in Council provide to the Applicants and to the Registry of the Federal Court certified copies of all documents relating, directly or indirectly, to Minister

of Health's decision to specify ArriveCAN as the electronic means by which mandatory travel information must be provided to the Minister of Health or other persons pursuant to the Order. The Applicants further request certified copies of all documents relating to the Governor in Council's decision, made on the recommendation of the Minister of Health, to make the Order under s. 58(1) of the *Quarantine Act*, including documentation relating to the risk that an outbreak of a communicable disease in a foreign country would lead to the introduction or spread of the disease in Canada, would pose an imminent and severe risk to public health in Canada, that entry of members of a class of persons into Canada may introduce or contribute to the spread of the communicable disease in Canada, and that no reasonable alternatives to prevent the introduction or spread of the disease were available. Finally, the Applicants request that the Respondents provide the Applicants with information and documentation gathered on them through ArriveCAN, including information and documentation showing how their personal information was disclosed and shared with other persons, governments, organizations and entities of any kind.

August 23, 2022



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