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F I L E D	FEDERAL COURT COUR FÉDÉRALE December 18, 2023 18 décembre 2023
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Jonathan Macena	
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Court File no:

FEDERAL COURT

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Applicant

-and-

MINISTER OF NATIONAL DEFENCE

Respondent

Notice of Application

(Application pursuant to ss. 18 and 18.1 of the *Federal Courts Act*,
R.S.C. 1985, c. F-7, as amended)

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

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 file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if 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.

Date: _____

Issued by: _____

Thomas D’Arcy McGee Building
90 Sparks Street, 5th Floor
Ottawa, Ontario
K1A 0H9

**TO: The Honourable Bill Blair
Major-General George R. Pearkes Building
101 Colonel By Drive
Ottawa, Ontario K1A 0K2**

AND TO: THE ATTORNEY GENERAL OF CANADA

National Capital Region
Civil Litigation Section
50 O’Connor Street
Ottawa, ON
K1A 0H8
Fax: (613) 954-1920
Email: AGC_PGC_OTTAWA@JUSTICE.GC.CA

**AND TO: REQUESTER
112 Prairie Lane
RM of Aberdeen, SK S0K 0A0**

THIS IS AN APPLICATION seeking an order compelling the Minister of National Defence (“Minister”) to implement the Information Commissioner of Canada’s (“Commissioner”) order and respond to an access to information request (institution file number A-2022-00506) as required by the *Access to Information Act* (“Act”). On July 17, 2023, the Commissioner ordered the Minister, pursuant to section 36.1 of the Act to, “provide a complete response to the access request no later than November 30, 2023” (hereinafter “the Order”).

The applicant makes application for:

1. A declaration that, as of the date of this Application, the Minister is in violation of his legal duty by failing to implement the Commissioner’s Order under the Act;
2. A writ of *mandamus*, compelling the Minister to implement the Order by providing a complete response to the access to information request as set out by the Commissioner’s Order, within 10 days of the issuance of an order by this court;
3. An order of costs of this application in favour of the applicant; and
4. Such further and other relief as counsel may advise and this Court may permit.

The grounds for the application are:

5. The Minister is the Head of the Department of National Defence (“DND”) for the purposes of the Act;
6. On June 15, 2022, DND received a request under the Act (hereafter, the “Access Request”) for all records for the period spanning: January 1, 2019, until June 15, 2022, related to options analysis, assessments, and recommendations pertaining to

the CAF COVID-19 vaccination mandate and public health measures (including, but not limited to, masking, quarantine, physical distancing, air quality assessments, infrastructure assessments), which were produced by or submitted to five offices, their staff and/or subordinate organizations;

7. On July 13, 2022, DND extended the time they had to respond to the request pursuant to paragraph 9(1)(a) of the Act by an additional 90 days. DND did not respond to the Access Request when the time extension expired on October 17, 2022;
8. On October 27, 2022, the Office of the Information Commissioner (“OIC”) received and investigated a complaint under the Act (OIC file number 5822-04665) from the requester concerning DND’s failure to respond within the extended period of time taken under subsection 9(1) of the Act;
9. On June 12, 2023, pursuant to subsection 37(1) of the Act, the Commissioner issued her Initial Report concluding that the complaint was well founded. She found that DND did not meet its obligation to respond within the extended period and therefore, DND was deemed to have refused access to the requested records under subsection 10(3) of the Act by failing to provide the requested records within the extended period of time taken. She set out the terms of her intended order, which would require the Minister to provide a complete response to the Access Request no later than November 30, 2023. She further requested pursuant to paragraph 37(1)(c) of the Act, that the Minister give her notice by July 10, 2023, of whether DND planned to implement the Order;
10. In response to the Initial Report, DND’s Acting Executive Director of the Directorate Access to Information and Privacy wrote to the Commissioner and stated that DND would be implementing the Order;

11. On July 17, 2023, pursuant to subsection 37(2) of the Act, the Commissioner ordered the Minister to provide a complete response to the Access Request no later than November 30, 2023;
12. The Minister did not seek a review of the Order with the Federal Court in accordance with subsection 41(2) of the Act, the deadline for which was September 6, 2023;
13. The Minister failed to implement the Order by November 30, 2023, and has yet to provide a complete response to the Access Request;
14. The Minister's ongoing violation of his legal duty to implement the Commissioner's binding Order issued under the Act is contrary to the law. As such, the Commissioner has a direct interest in seeking the present application to ensure compliance with the Act;
15. The Minister has a public legal duty to implement the Order, in the absence of having sought review of the Order pursuant to subsection 41(2) of the Act;
16. There is a clear right to the performance of the legal duty in that:
 - i. the Commissioner issued an Order against the Minister to provide a complete response to the Access Request by no later than November 30, 2023;
 - ii. a reasonable period of time to implement the Order has elapsed and the time to seek review under subsection 41(2) of the Act has expired; and *inter alia*
 - iii. as of the day of this application, the Minister has not implemented the Order, causing unreasonable delay;
17. Under the Act, the Minister's legal duty to implement the Order with the Commissioner's Order is not discretionary;

18. The Commissioner has a genuine interest in bringing the matter before the Court to ensure that government institutions adhere to binding orders rendered by the Commissioner under the Act;
19. The application raises a serious justiciable issue and it is in the public interest to require that the head of a government institution comply with their legal obligations under the Act, which include their obligation to abide by an Order's issued by the Commissioner under the Act;
20. The Commissioner has exhausted all of her authority under the Act and there are no other adequate remedies available to the Commissioner to compel the Minister to comply with his legal duty to implement the Commissioner's Order. The application is therefore a reasonable and effective means to compel compliance under the Act;
21. The order sought in this application will be of practical value and effect, as it will enforce the quasi-constitutional right of access, enforce the Commissioner's Order to ensure compliance with the Act and maintain the rule of law. The lack of responsiveness is in clear contravention of the Minister's legal duty under the Act. It is an abuse of process, which undermines the credibility of the access system, the Commissioner's order-making powers and the access to information regime;
22. No equitable bar exists to granting the relief sought;
23. The balance of convenience favours an order of *mandamus*;
24. Sections 17, 18, 18.1, 28 and 44 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, and Rules 2, 3, 4, 133, 64, 300-319, and 431 of the *Federal Courts Rules*, SOR-98-106, as amended; and
25. The *Access to Information Act*, R.S.C., 1985, c. A-1.

This application will be supported by the following material:

26. Affidavits to be sworn or affirmed and filed at a later date; and
27. Such further and other materials as counsel may advise and this Court may permit.

December 18, 2023

R. Nadeau.

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