

COURT FILE NUMBER

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

WETASKIWIN

PLAINTIFFS

DR. BLAINE ACHEN, DR. GERT GROBLER,
DR. NADR JOMHA and DR. TYLER MAY

DEFENDANT

ALBERTA HEALTH SERVICES

DOCUMENT

INJUNCTION APPLICATION

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

Ackroyd LLP
Barristers and Solicitors
1500, 10665 Jasper Avenue
Edmonton, Alberta T5J 3S9

Justice Centre for Constitutional
Freedoms
#253, 7620 Elbow Drive SW
Calgary, Alberta T2V 1K2

Clerk's Stamp

NOTICE TO DEFENDANTS:

This application is made against you. You are a Defendant.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: **December 14, 2021**

Time: **9:00 am**

Where: **Wetaskiwin Court Centre virtually via WebEx Video Conferencing**

Before Whom: **The Presiding Justice in Chambers**

Go to the end of this document to see what else you can do and when you must do it.

Basis for this claim:

1. On or about August 31, 2021, the Defendant, Alberta Health Services (“AHS”) announced the implementation of a policy requiring all employees and contracted healthcare providers, including physicians and other frontline workers (“Healthcare Providers”), to be fully vaccinated for Covid-19 by October 13, 2021 (the “Policy”). The stated objective of the Policy is: “to set out worker immunization requirements for Covid-19 to protect the health and safety of workers, patients, and the communities that AHS serves.”
2. On or about September 14, 2021, AHS implemented the Policy, which is entitled “Immunization of Workers for Covid-19” and referenced as AHS Policy 1189. On or about October 22, 2021, AHS announced that the deadline would be extended to November 30, 2021 (“AHS Delay 1”). On or about November 28, 2021, AHS announced another extension to December 13, 2021, and allowed rapid antigen testing (“Rapid Testing”) at certain critical AHS sites across the Province (“AHS Delay 2”).
3. Non-Compliance with the Policy results in Healthcare Providers being placed on a voluntary, unpaid leave of absence for the period required to become fully vaccinated. If they do not voluntarily agree to an unpaid leave of absence, the Healthcare Providers are terminated and are subject to disciplinary actions.

Remedy Claimed or Sought:

4. This Application to be heard on an urgent basis;
5. An Order abridging the time for service of this Injunction Application and supporting materials, if necessary;
6. An Interim Order granting the Plaintiffs’ exemption requests for workplace accommodation based on their naturally acquired immunity;
7. In the alternative, an Interim Order prohibiting the termination or placement of the Plaintiffs on involuntary, unpaid leave of absence;

8. In the further alternative, an Interim Order directing AHS to follow Alberta's Restriction Exemption Program and allow Rapid Testing inline with the accommodation in AHS Delay 2 for Rapid Testing in certain locations in Alberta;
9. An Order prohibiting the Defendant from enforcing the Policy, and any amended policies, orders, directions, advice, guidance, instructions or additional compliance requirements made thereunder;
10. In the alternative, an Order restraining and enjoining Defendant from enforcing coercive measures similar to those in the Policy;
11. An Order prohibiting the Defendant from forcing the Plaintiffs to be inoculated against Covid-19 as a condition of their engagement with AHS;
12. Costs of this Application based on the determination that this matter is in the public interest; and
13. Such further and other relief as counsel may advise and this Honourable Court permits.

Grounds for making this Application:

14. Four separate coronavirus vaccines are currently authorized in Canada to treat Covid-19: AstraZeneca Vaxzervai, Moderna Spikevax, Pfizer-BioNTech Comirnaty, and Johnson & Johnson Janssen (the "Vaccines"). The Vaccines were developed and approved more swiftly than any previous vaccine and are still undergoing clinical trials, some will not be completed until 2027. This means that the Vaccines are still in the experimental phase until trials are completed.
15. The Vaccines are also known to cause severe adverse effects for some individuals, including death, paralysis, myocarditis, pericarditis, anaphylactic shock, severe chronic fatigue, blood clots, heart attacks and strokes. The long-term side effects of the Vaccines are still unknown.

16. The Defendant implemented the Policy stating that health workers have an ethical and professional responsibility to protect others and that evidence overwhelmingly confirms that immunization mitigates potential harm to patients and health-care workers. The Defendant has not provided evidence to support these claims.
17. The Policy does not recognize the natural immunity possessed by the Plaintiffs who have already recovered from Covid-19. Natural immunity is as robust and durable as any immunity attained through the most effective of the Vaccines and provides significantly more effective protection than some of the Vaccines currently approved. Thus, the Policy infringes on the personal autonomy and bodily integrity of those with naturally acquired immunity.
18. Given that naturally acquired immunity confers equal or greater protection than the Vaccines, the Policy is arbitrary and irrational.
19. The Policy is irreconcilable with and frustrates the objectives of the Province of Alberta and is not consistent with Alberta's own Covid-19 Restriction Exemption Program, which provides accommodation in the form of Rapid Testing as an alternative to being injected against one's will.
20. As a result of the measures in AHS Delay 2, the Policy arbitrarily and irrationally provides accommodation in the form of a Rapid Testing in only certain select locations across Alberta. Rapid Testing provides immediate evidence of the presence of the SARS-CoV-2 virus in the body which is known to help prevent infection and transmission irrespective of where the virus is located in Alberta.
21. AHS Delay 1 and AHS Delay 2 demonstrate a lack of urgency and lack of forethought in development of the Policy.
22. It is counter-productive to put masses of capable Healthcare Providers, who have hitherto been able to treat and assist patients safely, on unpaid leave in the middle of a declared state of public health emergency. Such action will invariably cause a greater burden on an already overwhelmed medical system.

23. Section 3 of the Policy states that those “unable to be immunized due to a medical reason, or for another protected ground under the *Alberta Human Rights Act*, will be reasonably accommodated, up to the point of undue hardship, in accordance with the AHS Workplace Accommodation Policy.” However, AHS denied exemption to those who are naturally immune, and largely to those who objected on the grounds of freedom of religion, conscience, or the right to informed consent. In the rare instance where AHS granted an exemption, AHS continued to deny entry to AHS facilities to those “accommodated” effectively nullifying the exemption in any event.
24. The disciplinary and other burdens that the Defendant is using to leverage compliance with the Policy are not proportional to the purported public health aims and are causing substantial and irreparable harm to the Plaintiffs.
25. The Defendant has not disclosed information about compliance levels, how many people will or have been terminated, and how the Policy will affect the public health system in Alberta. Nor has the Defendant provided a plan regarding how AHS will manage emergency and medical care with the loss of Healthcare Providers due to the Policy. The public health system of Alberta as a whole is already suffering substantial and irreparable harm as a result of the pandemic.
26. The Policy requires workers to prove their vaccination status to their employers, which is an unreasonable invasion of their privacy as the Defendant has no authority under which to gather such information, nor has it disclosed what additional steps will be taken to ensure the effectiveness of those measures.
27. The terms of the engagement entered into by the Plaintiffs with AHS did not include mandatory Covid-19 vaccination. In fact, all vaccination was to be voluntary.
28. By threatening adverse professional and personal consequences, the Policy not only directly and palpably violates the Plaintiffs’ personal autonomy and bodily integrity, it forces them to endure the stress and anxiety of choosing between their employment and their health. In effect, the Policy simply aims at controlling personal health care decisions rather than promoting a legitimate public health objective.
29. All medical doctors working in Alberta are subject to AHS policies and mandates because AHS is Canada’s largest provincewide, integrated health system. AHS healthcare providers,

like the Plaintiffs, are not equivalent to private-sector employees or contractors because AHS can strip the Plaintiffs of employment in the entire province of Alberta if they chose not to comply with mandates or policies enforced by AHS.

30. The benefits the Policy provides are disproportionate when compared to the harm restrictions, and intrusive options conferred to the Plaintiffs.
31. The Plaintiffs refuse to take one of the Vaccines since the essential elements of informed consent set out in AHS' own Informed Consent protocols and the CPSA's Standard of Practice are subverted by the Policy.
32. The *Canadian Charter of Rights and Freedoms* (the "*Charter*") is violated when individuals are forced to take a vaccine for a virus that presents a risk of illness or death to a subset of individuals and an exceedingly low likelihood of transmission due to protective measures such as natural immunity, masking and virtual work.
33. The *Alberta Bill of Rights*, which recognizes and declares that in Alberta the right to "liberty" and "security of the person" and "the right not to be deprived thereof except by due process of law" is violated.
34. The Policy contradicts the *Alberta Human Rights Act* ("*AHR Act*") prohibiting discrimination against a person, or class of persons, that will likely expose that class of persons to hatred or contempt. Further, employers are expected to create an inclusive workplace that respects the dignity of every individual.
35. In denying the Plaintiff's exemption request and providing accommodation to the Applicants, the Respondents are infringing on protected grounds protected under the *AHR Act* to promote an environment all Albertans can contribute to and provide equal opportunity to all.
36. The Policy is arbitrary, egregious, unethical coercion which is putting the Plaintiffs under undue hardship and duress by forcing a choice between one of two following options:
 - i. take the experimental Covid-19 injection and keep practicing as a medical doctor in Alberta; or,

- ii. refuse the experimental Covid-19 injection, and lose the ability to practice medicine, with a consequent loss of livelihood, and inability to continue to serve the serious medical needs of patients in Alberta.
37. The Defendant has not disclosed the legislation and authority upon which the Policy was enacted.

The Plaintiffs

38. The Plaintiffs, who refuse to submit to forcible medical treatment under the Policy are in the medical profession.

Dr. Blaine Achen

39. Dr. Achen was the Chief of Cardiac Anesthesia at the Mazankowski Alberta Heart Institute, until he was immediately terminated by AHS for refusing to comply with the Policy. Dr. Achen has worked for sixteen years both as a general and cardiac anesthesiologist.
40. Dr. Achen has fully recovered from Covid-19. As a result, he has acquired robust natural immunity as confirmed unequivocally in a positive antibody test from the Mayo Clinic Lab. Dr. Achen should be exempted from the Policy immediately.
41. On October 1, 2021, Dr. Achen requested a medical exemption on the basis of natural immunity as well as grounds protected under the *Alberta Humans Rights Act*. This was denied on October 15, 2021 by AHS (Dr. David Zygun, Edmonton Zone Medical Director, on the recommendation of the Exemption Review Panel).
42. Given his robust immunity and his personal and professional beliefs, Dr. Achen refused to take one of the Vaccines. As a result, he will face adverse disciplinary consequences and job loss.
43. The Policy violates Dr. Achen's right to consciousness and religion protected under section 2(a) and (b) of the *Charter*, as well as Dr. Achen's life, liberty, and security of the person under section 7 of the *Charter*.
44. If the Policy is implemented and does not recognize Dr. Achen's natural immunity, it will further negatively impact the public. The medical system in Alberta is already struggling.

Alberta had a shortage of anaesthesiologists before the pandemic, especially in Dr. Achen's practice area of Edmonton, and this has only been exacerbated by the closure of operating rooms. Everyday Dr. Achen is absent from practice, patients are deprived of life-enhancing and life-saving surgical procedures.

45. Under the principle of informed consent, it is Dr. Achen's moral and legal right to assess the safety and efficacy of the Vaccines and make his own decision about treatment without being placed under duress.

Dr. Gert Grobler

46. This Applicant is a General Practitioner who is part of a clinic in Medicine Hat and has been a medical doctor for 27 years.
47. Dr. Grobler has fully recovered from Covid-19. Given his robust immunity and his personal and professional beliefs, Dr. Grobler has elected not to take the Vaccine. As a result, his hospital privileges will be terminated, and he will not be able to see his patients in any AHS facility.
48. Dr. Grobler has been practicing medicine for 25 year and currently practices in Medicine Hat, Alberta where he performed all C-Sections and small surgeries. He is part of a nine-person team of family General Practitioners, eight of whom do weekly hospital calls. During the weekly hospital calls, he looks after the patients admitted on a 24-hour basis. The clinic has 24-45 patients daily.
49. Throughout the Covid-19 Pandemic, Dr. Grobler worked in all levels of the hospital ward except for the Intensive Care Unit and Emergency Unit. Moreover, he was actively involved with patient cases in the Covid-19 Unit without being infected with Covid-19. However, on September 26, 2021, he contracted the virus outside of the hospital setting from a vaccinated friend. Dr. Grobler advised his supervisor, Dr. Carl Nohr, that he had acquired natural immunity and that he would not provide any other private medical information to AHS.
50. Not only does the Policy wrongfully fail to take Dr. Grobler's natural immunity into account, it also violates his right to life, liberty, and security of the person under section 7 of the *Charter*; thus, Dr. Grobler should be exempted from the Policy immediately.

51. The forced departure of Dr. Grobler will cause irreparable harm to patients in Alberta and increase the on-going strain on the Alberta medical system as a whole, particularly in rural communities that are affected more gravely, which pre-dated the Covid-19 outbreak.
52. It is Dr. Grobler's moral and legal right to weigh the safety and efficacy of the Covid-19 vaccine so that he may make his decision based on informed consent. Informed consent is required; coercion automatically abrogates informed consent.
53. Moreover, Dr. Grobler has the moral and legal right to make his decision in the absence of threats, coercion, or duress from the Defendant.

Dr. Nadr Jomha

54. Dr. Jomha has been in practice for 23 years and is the only Orthopaedic Surgeon at the University of Alberta Hospital (and one of a few in Edmonton) that performs complex knee ligament reconstruction and he performs complex foot and ankle repair/reconstruction after trauma. He is the only surgeon in Alberta that has performed talar prosthetic implantation and is the only doctor in Canada developing a bone and cartilage cold-preservation transplant program.
55. Dr. Jomha has fully recovered from Covid-19. As a result, he has acquired robust natural immunity as confirmed unequivocally in a positive antibody test from the Kinexus Bioinformatics. Dr. Jomha should be exempted from the Policy immediately.
56. Given his robust immunity, his personal and professional beliefs and his concerns regarding negative impacts from the Vaccine, Dr. Jomha refused to take one of the Vaccines. As a result, he will face adverse disciplinary consequences and job loss.
57. The Policy violates Dr. Jomha's right to consciousness and religion protected under section 2(a) and (b) of the *Charter*, as well as Dr. Jomha's life, liberty, and security of the person under section 7 of the *Charter*.
58. If the Policy is implemented and does not recognize Dr. Jomha's natural immunity, it will further negatively impact the public. Dr. Jomha is uniquely qualified to perform complex orthopaedic surgeries and is the lead in novel joint and tissue transplant research. Everyday Dr. Jomha is absent from practice, patients are deprived of life-enhancing and life-saving surgical procedures.

59. Under the principle of informed consent, it is Dr. Jomha's moral and legal right to assess the safety and efficacy of the Vaccines and make his own decision about treatment without being placed under duress.

Dr. Tyler May

60. Dr. May has been serving the underserved rural community in and around Manning, Alberta since 2012. Dr. May is also the acting Community Medical Director at the Manning Community Health Centre. Dr. May almost exclusively dealt with the Covid-19 outbreak and treatment in and around Manning. Throughout the Covid-19 pandemic, Dr. May worked in the Manning hospital and clinic and he was actively involved with patient cases in the Covid-19 Unit without being infected with Covid-19.
61. Dr. May has fully recovered from Covid-19. Given his robust immunity and his personal and professional beliefs, Dr. May has elected not to take the Vaccine. As a result, his clinical privileges will be terminated, and he will not be able to see his patients in his clinic.
62. Not only does the Policy wrongfully fail to take Dr. May natural immunity into account, it also violates his right to conscious and freedom of religion protected under section 2 (a) and (b) of the *Charter* and the right to life, liberty, and security of the person under section 7 of the *Charter*; thus, Dr. May should be exempted from the Policy immediately.
63. The loss of Dr. May at his clinic will cause irreparable harm to patients in Alberta and increase the on-going strain on the Alberta medical system as a whole, particularly in rural communities that are affected more gravely, which pre-dated the Covid-19 outbreak.
64. It is Dr. May's moral and legal right to weigh the safety and efficacy of the Covid-19 vaccine so that he may make his decision based on informed consent. Informed consent is required; coercion automatically abrogates informed consent.
65. Moreover, Dr. May has the moral and legal right to make his decision in the absence of threats, coercion, or duress from the Defendant.

Charter Violations

66. The Policy:

- a. overrides an individual's objections to the Vaccines based on the fundamental rights of freedom of conscience, religion, thought, belief, and opinion contrary to sections 2(a) and 2(b) of the *Charter*;
 - b. violates the right to life, liberty, and security of the person, and its corollaries, the right to informed consent and the principles of fundamental justice, contrary to section 7 of the *Charter*, and
 - c. infringes the right to equal protection and benefit of the law by creating a disadvantaged class – the unvaccinated – and discriminating against the class, contrary to section 15 of the *Charter*.
67. The Plaintiffs will continue to suffer ongoing damages from the Defendant's conduct. There is no adequate remedy at law, as there are no damages that could compensate the Plaintiffs for the deprivation of their *Charter* rights.
68. The Policy is an unjustified infringement of the fundamental freedoms and rights protected by sections 2(a), 7 and 15 of the *Charter*, and is causing irreparable harm to the Plaintiffs and the public health care system of Alberta. A stay of the Policy as it applies to the Applicants, as well as all AHS staff impacted by the Policy, pending a determination of its constitutionality, is, on balance, in the public interest.

Lack of Statutory Authority

69. AHS has further unlawfully interfered with the ability of the Plaintiffs to provide voluntary, informed consent, contrary to sections 1 and 3 of the AHS Consent to Treatment Policy by:
- a. making proof of Covid-19 vaccination a prerequisite for employment;
 - b. threatening the Plaintiffs with leave without pay and professional sanctions if they do not comply with the vaccine mandate set out in the Policy;
 - c. threatening and coercing the Plaintiffs and causing duress in order to pressure them to take the Covid-19 vaccine; and
 - d. mandating that the Plaintiffs take the Covid-19 vaccine when it is still in clinical trials, and the short- and long-term risks of the vaccine are unknown.

70. The Plaintiffs meet the tripartite test for injunctive relief as set out by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)*:
 - a. There is a serious issue to be tried;
 - b. Irreparable harm will result if the Injunction is not granted; and
 - c. The balance of convenience favours granting the Injunction because greater harm will accrue to the Plaintiffs as compared to the Defendants if the injunction is not granted.

Material or evidence to be relied on:

71. Affidavit of Dr. Blaine Achen;
72. Affidavit of Dr. Gert Grobler to be sworn or affirmed on a future date;
73. Affidavit of Dr. Nadr Jomha;
74. Affidavit of Dr. Tyler May;
75. Affidavit of Dr. Joel Kettner to be sworn or affirmed on a future date; and
76. Such further and other material as counsel may advise and this Honourable Court permits.

Applicable Acts and regulations:

77. *Constitution Act*, 1867, 30 & 31 Vict, c 3;
78. *Canada Act 1982 (UK)*, 1982, c 11, including the *Canadian Charter of Rights and Freedoms*;
79. *Alberta Bill of Rights*, RSA 2000, c A-14;
80. *Alberta Human Rights Act*, RSA 2000, c A-25.5;
81. *Alberta Rules of Court*, Alta Reg 124/2010, its regulations and amendments;
82. *Occupational Health and Safety Act*, SA 2020, c O-2.2;

83. *Health Professions Act*, RSA 2000, c H-7;
84. *Health Information Act*, RSA 2000, c H-5;
85. *Personal Information Protection Act*, SA 2003, c P-6.5;
86. *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5;
87. *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25;
88. *Criminal Code of Canada*, RSC 1985, c. C-46;
89. *Public Health Act*, RSA 2000, c P-37, its regulations and amendments;
90. *Nuremberg Code (1947)*; and
91. Such other enactments and legislation as the Plaintiffs may advise and this Honourable Court may consider given the circumstances.

Any irregularity complained of or objection relied on:

92. None.

How the application is proposed to be heard or considered:

93. In Chambers, before the presiding Justice, either in person or via videoconferencing technology.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.