Action No.: 2112-00433
E-File Name: RVQ21ACHENB
Appeal No.:_____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF WETASKIWIN

BETWEEN:

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

Plaintiffs

and

ALBERTA HEALTH SERVICES

Defendant

P R O C E E D I N G S

Edmonton, Alberta
December 17, 2021

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M.J. Epp (remote appearance)	For Alberta Health Services
I. Ibragimov	Court Clerk

THE COURT: Good morning. It is Justice Henderson speaking.

THE COURT CLERK: Good morning, Justice Henderson. This is Mr. Clerk.

MR. SECORD: Good morning, My Lord.

THE COURT: I see Mr. Secord is here, Mr. Epp is here --

MR. EPP: Good morning, My Lord.

THE COURT: -- and Ms. Chipiuk. Did I pronounce that name correctly?

MS. CHIPIUK: You did. Thank you.

THE COURT: Okay. So are we ready to proceed?

MR. SECORD: Yes.

Decision

THE COURT: Okay, good. This is the Achen, Grobler, Jomha, May matter versus Alberta Health Services, and I am here today to give my reasons for decision in relation to the interim injunction application. I will begin with an overview.

The plaintiffs are a group of four physicians who on December 9th, 2021 commenced this action against Alberta Health Services by way of a statement of claim filed in Wetaskiwin.

In the action, the plaintiffs challenge the decision of Alberta Health Services to implement a mandatory vaccine policy which required them to be fully immunized for (INDISCERNIBLE) failing which they would face suspension which is at AHS facilities.

After some delays, the vaccine policy became effective on Monday, December 13th, 2021. None of the four plaintiffs are vaccinated for COVID-19. As a result, all of the plaintiffs have been adversely affected by the policy. Because of the policy, three of the four plaintiffs have had their privileges suspended and are, therefore, effectively prevented from carrying on any medical practice at any AHS facility. The fourth plaintiff is permitted to carry on his medical practice only at one AHS facility with the use of a rapid testing regime.

In the action, the plaintiffs seek broad relief that can be summarized in part as follows. Firstly, they seek an interim and permanent injunction declaring that the policy -- and when I refer to policy throughout these reasons, I am, of course, referring to the mandatory vaccine policy -- but they seek interim and permanent injunctive relief declaring that the policy is unlawful and staying or enjoining the policy until the matter can be properly adjudicated in court.

They also seek a declaration that the policy is overbroad and unreasonable. They seek a declaration that the policy infringes their rights under sections 2(a), 7 and 15 of the *Charter of Rights and Freedoms* and that the infringements are not justified by section 1 of the *Charter*.

The plaintiffs also seek a declaration that AHS is not handling exemption requests consistently or in a way that provides for procedural fairness. They also seek general damages as well as special damages for loss of income. They seek solicitor-client or indemnity costs. And finally, they seek any other relief that the Court deems just and appropriate.

When the statement of claim was filed -- that is December 9th -- the plaintiffs also filed a number of other materials including the following: an injunction application returnable in Wetaskiwin on December 14th, 2021. They filed four affidavits, one by each of the plaintiffs either sworn or affirmed. And in addition, they filed the affidavit of Dr. Joel Kettner of Winnipeg, Manitoba who the plaintiffs will seek to qualify as an expert witness in the area of public health matters. Dr. Kettner's affidavit attaches his curriculum vitae as well as an expert's report and a series of scientific papers that were referred to in Dr. Kettner's report.

The statement of claim, the application and some of the supporting materials were served upon Alberta Health Services at approximately 5:16 PM on Wednesday, December 9th, 2021. Alberta Health Services was able to retain counsel the very next day, December 10th,

2021. There were a few remaining materials that were ultimately served the next day, December 11th, 2021.

Counsel appeared before me on Tuesday, December 14th, 2021 in Wetaskiwin morning chambers as part of the regular civil list. At that time the plaintiffs sought interim injunctive relief in the following respects: Firstly, an interim order granting the plaintiffs' exemption requests for workplace accommodation based on their naturally-acquired immunity; secondly, an interim order prohibiting the termination or placement of the plaintiffs on involuntary unpaid leave of absence.

Third, they seek an interim order directing Alberta Health Services to follow Alberta's restriction exemption program and allow rapid testing in line with the accommodation that AHS granted (INDISCERNIBLE) situations in some locations on November 29th, 2021.

They also seek an order prohibiting AHS from enforcing the policy and amended policy, orders, directions, advice, guidance, instructions or other additional compliance requirements made in relation to the policies.

They also seek an order restraining and enjoining AHS from enforcing coercive measures similar to those in the policy.

They also seek an order prohibiting AHS from forcing the plaintiffs to be inoculated against COVID-19 as a condition of their engagement with AHS.

Finally, they seek costs on the basis that this is a matter of public interest. Finally, they ask for whatever other relief the Court might permit. So that is the application that was argued before me on December 14th, and that is what I will respond to with these reasons.

It should be noted that Alberta Health Services has filed a statement of defence in this action. It should be noted that they did not file any materials in response to the application. However, I certainly would not have expected Alberta Health Services to have been able to prepare and file a statement of defence in the time that was permitted, nor would I have expected Alberta Health Services to respond by way of affidavit which could be available at the time of the hearing of this motion.

I say that because I note that the plaintiffs' affidavits are extensive. They put together a package that was detailed, and it takes considerable time to work one's way through those materials to gain a full understanding of their position. The total of the affidavits is roughly 1,750 pages including exhibits. So if the challenge to get through I fault (INDISCERNIBLE) provide no attribution of fault to AHS for not filing materials.

Of course, when dealing with any application in a courtroom, it is quite unusual to proceed with an application having heard "only one side of the story" to use the words of Mr. Epp --

UNIDENTIFIED SPEAKER: No.

THE COURT: -- counsel for AHS. It is even more unusual to proceed with an application of any complexity in morning chambers, particularly where the materials are extensive, even more so in Wetaskiwin where the application was scheduled on the last chambers day before the holiday break and where the docket list was already fully in place involving an extensive array of family applications, civil applications and represented adult applications. So the circumstances for hearing this application are not ideal.

Despite this, I proceeded with the interim application for two reasons. The first reason is urgency. The urgency arose because AHS had taken steps on December 13th, 2021, just a day before the application, it took steps to deny privileges to three of the four plaintiffs and to partially deny privileges to the fourth plaintiff. Thus, for all practical purposes, the plaintiffs have been denied the opportunity to continue the practice of medicine in Alberta. That gave rise to urgency. That required that I hear the application.

The second reason that I proceeded with the interim application was that it was just an interim only. The only relief being sought on this application is extremely time-limited. Any relief granted to the plaintiffs on this application would only extend to the date on which the application or the interlocutory injunction is actually argued. The plan that counsel had worked out amongst themselves is that steps will be taken to have the interlocutory injunction argued in early to mid-March 2022. So at most, any order that I would make today would last for only three months. That is the second reason that I agreed to proceed with hearing the application, despite the unfavourable circumstances.

To consider this application and before discussing the test for granting interim injunctive relief, it is first necessary to review some of the background because that background will provide assistance in terms of determining whether or not the test for the interim injunctive relief has been met.

So I will start with a discussion of the policy. This is a policy which is identified as AHS Policy 1189. It was put into place on September 14th, 2021. It was to be effective on October 31st, 2021. It had a scheduled review date approximately six months later to be held April 22nd, 2022. The objectives as stated in the policy were as follows:

> To set out worker immunization requirements for COVID-19 to protect the health and safety of workers, patients, and the

> communities that Alberta Health Services (AHS) serves.

The principles of the policy include the following:

> AHS is committed to protecting the health and safety of workers, patients, visitors, and others accessing AHS sites. Immunization against COVID-19 is the most effective means to prevent the spread of COVID-19, to prevent outbreaks in AHS facilities, to preserve workforce capacity to support the health care system, and to protect workers, patients, visitors, and others accessing AHS sites. Immunization against COVID-19 also supports the AHS Values of Compassion, Accountability, Respect, Excellence, and Safety.

The policy required all workers to be fully immunized against COVID-19 by October 31st, 2021 and to disclose accurate proof of vaccination. The policy contains provisions which require proof of immunization records to be collected but securely and confidentially retained in accordance with the provisions of the *Freedom of Information and Privacy Act*.

The policy specifically provides for accommodations for persons who are unable to be immunized due to a medical reason, or for another protected ground under the Alberta *Human Rights Act*. In that regard, the policy sets in place a procedure to be followed by persons seeking such accommodation.

The consequences for noncompliance with the policy are specifically addressed in clause 4. Those consequences include placing persons on unpaid leave of absence for failing to provide proof of vaccination.

Now, on October 22nd, 2021, AHS announced that the deadline for the implementation of the policy would be delayed until November 30th, 2021. The plaintiffs refer to this as "AHS Delay 1".

On November 29th, 2021, AHS made a further announcement. At that time they advised that the implementation of the policy would be further delayed, this time until December 13th, 2021. The plaintiffs refer to this as "AHS Delay Number 2".

The important second element to the November 29th, 2021 announcement was the advice by AHS that the policy would be amended to permit some non-vaccinated persons to work in certain critical AHS sites in Alberta provided that those persons complied with a rapid antigen testing program.

Dr. May qualified for this program; and despite being non-vaccinated, he is permitted to work at the hospital in Manning, Alberta by following the rapid testing program. However, he is not permitted to work in the AHS community health centre in the very same community of Manning.

There is nothing in the record before me to suggest that the implementation of the policy was for any purpose other than that as stated in the policy; that is, to provide for the health and safety of persons at AHS facilities. There is nothing in the evidence to suggest that the policy was targeted specifically at any of these plaintiffs. Instead, it was a broad policy designed to cover all persons working at AHS facilities.

I will spend a few moments discussing the plaintiffs. Each of the plaintiffs is a highly-skilled well-trained, very hard-working physician. All of them have made significant contributions to the health care system in Alberta. Dr. May is a rural general medical practitioner who has carried on his medical practice in Manning, Alberta since 2013. He is the only physician in the community. Uniquely, he was born and raised in Manning and he returned to the community after graduation to provide much needed medical service to the citizens of Manning and its surrounding communities. He is obviously a very valuable asset to the community.

Dr. Jomha is an orthopedic surgeon who completed his residency in 1995. Since 2003 he has been the Director of Orthopedic Research for the Division of Orthopedic Surgery at the University of Alberta. Since 2015 he has been a professor in the Department of Surgery, the Division of Orthopedic Surgery (INDISCERNIBLE). Dr. Jomha performs general orthopedic trauma surgery but also accepts referrals from other trauma surgeons whose patients require complex lower extremity trauma surgery. Dr. Jomha is the only orthopedic surgeon at the University Hospital and one of only a very few in Edmonton who performs complex knee ligament reconstruction surgery after trauma. He is obviously a very talented and dedicated surgeon.

Dr. Achen completed his residency in anaesthesia in 2004. He began his career as an Assistant Clinical Professor in the Department of Anaesthesia & Pain Medicine in 2005. Until November 18th, 2021 when he was terminated, Dr. Achen held the position of Chief of Cardiac Anaesthesia at the Mazankowski Alberta Heart Institute (INDISCERNIBLE) Alberta. There is no evidence before me as to the circumstances of his termination, although I do note that it was prior to the implementation of the policy.

Dr. Grobler is a general medical practitioner who has practised in Medicine Hat since 2012. He has also practised medicine in the United States, in the Netherlands and in South Africa. He is one of nine physicians working in the clinic in Medicine Hat. He and seven of the other physicians in that clinic conduct weekly on-call rotations at the Medicine Hat

Regional Hospital. He is currently an important member of the medical community in Medicine Hat. There is simply no conflicting evidence regarding the qualifications and skill of the plaintiffs.

But I am going to move on now to talk about the position of the plaintiffs as advanced in the action and on this application. And before I discuss their position that they put forward in their evidence and before me, I want to make one thing perfectly clear, that none of the plaintiffs in any way suggest that COVID-19 and the pandemic that flowed from it is not real. None of them suggests that it is not a serious health care emergency. None of them deny that the pandemic has caused millions of deaths worldwide. They do not deny that the pandemic has presented very serious challenges to the health care system in Alberta, specifically in relation to ICU beds. They do not challenge the AHS policy on that basis at all. Instead, they take a principled position in relation to their objection to the policy.

Fundamental to the position of the plaintiffs in this action and on this application is that they have all developed a natural immunity to the COVID-19 virus. All of Drs. Grobler, May and Achen have tested positive for the virus and, after the appropriate period of isolation, they returned to work and have been treating patients since. They believe that because they have been infected with the virus, they have now developed a natural immunity to the virus. They believe that this natural immunity is at least as strong as the immunity that would be provided via a vaccine.

Dr. Jomha has deposed that he has worked in close proximity to COVID patients and suspected COVID patients since the beginning of the pandemic in March of 2020. It is possible that he was also infected with the COVID-19 virus; but if that was the case, then he was asymptomatic. Dr. Jomha deposes that he believes that because of his close contact with COVID-positive patients, he also has developed a natural immunity to the virus.

All of the plaintiffs other than Dr. May have had their blood tested, and the results of those blood tests show the existence of antibodies for COVID-19. Dr. Achen describes his test result in the following terms:

> On September 24th, 2021 I obtained my COVID-19 antibody test results which demonstrated my robust, natural immunity six months post-recovery from COVID-19.

As a result, the position of the plaintiffs on this application and in the action is that they already have natural immunity from COVID-19 and, therefore, it is unnecessary, unreasonable and unlawful to require them to be vaccinated with any of the COVID-19 vaccines, all of which come with potentially serious risks, some of which may be unknown long-term risks. That is the basis upon which they attack the policy.

When this action proceeds (INDISCERNIBLE), the position of the plaintiffs will be supported by the evidence of Dr. Joel Kettner I presume. But just to be clear, the plaintiffs have filed the affidavit of Dr. Kettner; but they did not seek to qualify him as an expert witness before me, and I did not qualify him as an expert witness. Thus, his opinion is not properly admissible in this application.

However, simply by way of information and as an indication of the evidence that the plaintiffs will attempt to submit to the court at trial, I note Dr. Kettner's conclusion -- or one of his conclusions and one that is particularly pertinent to the position that the plaintiffs advance is the following:

> Current evidence and previous scientific observation of other anti-viral vaccines indicate that natural immunity from previous infection is at least as protective - and for at least as long - as vaccine-induced immunity.

So there is likely to be some independent support for the primary position advanced by the plaintiffs.

I earlier referred to the policy as containing provisions for persons who might apply to be exempted from the operation of the policy for various reasons. In this case each of the plaintiffs sought exemptions from AHS, but those exemption requests were not successful. The affidavit evidence tendered by the plaintiffs suggests that the response by AHS to their exemption requests was both arbitrary and unfair.

There is one more key element to the position of the plaintiffs which I think is important to state. None of the plaintiffs have been in receipt of the COVID-19 vaccination. They all object to taking the vaccination. I am satisfied that each of the plaintiffs have genuine subjective concerns regarding the risks associated with the COVID-19 vaccines that are currently available. Whether those concerns are objectively reasonable is an issue that cannot be resolved today and will require more fulsome viva voce evidence and argument at trial.

But one thing is perfectly clear; the plaintiffs have a right to refuse to take the vaccine. No one can force them to take the vaccine. That is a right that must be respected.

What really is an issue in this litigation are consequences, if any, that flow from the decision of the plaintiffs to remain unvaccinated. Throughout their affidavits, the plaintiffs seem to suggest that they should be exempt from the consequences of their decisions, vis-a-vis the policy.

With that background, I will move to a discussion of what is necessary to establish in order to obtain the relief which the plaintiffs seek on this application. A well-known test for an interim or interlocutory injunction is described by the Supreme Court of Canada in a decision which is known as *RJR-MacDonald* going back many, many years to 1994 and also in a more recent decision of the Supreme Court of Canada in the *Canadian Broadcasting Corporation*. That is a 2018 decision.

There is no debate as to what the test is for an interim injunction. It's a three-prong test; firstly, there must be a serious issue to be tried -- although in that context where a mandatory injunction is sought, the test is higher. Where a mandatory injunction is sought, the applicant must show a strong prima facie case as opposed to simply showing a serious issue to be tried.

The second requirement for an interim injunction is that there must be shown to be irreparable harm will be suffered if the injunction is not granted. And thirdly, the balance of convenience must favour the granting of the injunction.

So in terms of the first part of the *RJR* test, the question that must first be determined is whether or not the injunction that is being sought is prohibitive or mandatory. An injunction that requires the defendant to do something is mandatory or is an injunction that requires the defendant to refrain from doing something is prohibitive.

On this application, the plaintiffs seek injunctive relief that is both mandatory and prohibitive. So if we go back to look at the injunction application that was filed December 9th, 2013 (sic) that describes the relief that the plaintiffs are seeking today -- and I am going to go through each of the items for relief and discuss whether it is mandatory or prohibitive -- so the first item that they seek is an interim order granting the plaintiffs' exemption requests for workplace accommodation based on their naturally-acquired immunity.

This is mandatory in nature. It would require the Court to grant the plaintiffs' exemption requests or, more properly, to make an order directing that AHS grant the exemption. This would require the plaintiffs to establish a strong prima facie case.

Next, the plaintiffs seek an order prohibiting the termination or placement of the plaintiffs on involuntary unpaid leave of absence. Of course, that is now impossible because the action has already been taken. The privileges of the plaintiffs have already been suspended. Therefore, I would interpret this claim for relief to be one that seeks a direction that the plaintiffs be reinstated.

That is also mandatory in nature. It would require me to direct AHS to take some action to reinstate the plaintiffs. Again, this is a situation where the plaintiffs would need to show a strong prima facie case.

The next item of relief that the plaintiffs seek is an interim order directing AHS to follow Alberta's restriction exemption program and allow rapid testing in line with the accommodation that AHS granted in certain limited situations as a result of their November 29th, 2021 announcement.

This is also mandatory in nature. It would require the Court to direct that AHS follow a restriction exemption policy in ways that it had not previously contemplated. The plaintiffs would need to demonstrate a strong prima facie case to obtain this relief.

The next item of relief that the plaintiffs seek is an order prohibiting AHS from enforcing the policy and amended policy, orders, directions, advice, guidance, instructions or additional compliance requirements that may be made in relation to the policies.

This is prohibitive in nature; thus, a relief that the plaintiffs seek in this regard would require it to show only a lesser standard of serious issue to be tried. That is a very low threshold.

The plaintiffs next seek an order restraining and enjoining AHS from enforcing coercive measures. And similar to those in the policy, this is also prohibitive in nature. It would only require that the lower threshold serious issue to be tried be met.

Finally, the plaintiffs seek an order prohibiting AHS from forcing the plaintiffs to be inoculated against COVID-19 as a condition of their engagement with AHS. This is prohibitive in nature. Again, a lot lower threshold of serious issue to be tried would be engaged in relation to that relief.

With respect to those aspects of relief that involve mandatory injunctive relief, as I indicated, the test or the threshold is strong prima facie case. That requires that the applicant must satisfy the Court that he is more likely to be successful in the action than the respondent would be, and we see that from the Supreme Court of Canada in *CBC* in 2018 and also as reiterated several times by the Court of Appeal, for example, in *Chehade v. Crossroads*, 2019 ABCA 48 at paragraph 8.

But in this case, it is impossible for me to evaluate whether the plaintiffs are more likely to succeed than AHS because, as Mr. Epp points out, I have only heard "one side of the story". Why is it that I have only heard one side of the story?

In this regard, I repeat what I had earlier said; the plaintiff -- the plaintiffs brought this application without any meaningful notice and in a fashion that for all practical purposes prevented AHS from being able to provide a statement of defence or a responding affidavit that would set out its position in relation to the issues raised by the plaintiffs.

I do observe that the materials that I reviewed which were submitted by the plaintiffs in this application were not likely prepared in a matter of days. Instead, I infer that the preparation of those materials was a work in progress that had been ongoing for some considerable time.

However, I do not infer that any steps taken by the plaintiffs was a deliberate strategy to gain a tactical advantage over AHS. In fact, to the contrary, I think it is much more likely that the reason for the timing of the filing of the pleadings was because the plaintiffs were, at least until last week, hoping that AHS would accommodate them. As I had noted previously, there were two delays in the implementation of the policy; and I expect that the real reason that the pleadings were not filed until the very last minute is that there was a hope that there would be a further delay in the implementation of the policy.

But despite all of that, I have to assess what evidence is before me; and on the AHS side, I am left only with Mr. Epp's submission that AHS does not accept the evidence presented by the plaintiffs and that it will tender much different evidence when given a reasonable opportunity to do so.

Mr. Epp also provides a basic outline of two legal positions that he says will be put forward by AHS. One is that AHS will assert that the Court simply does not have jurisdiction to even hear this case because the AHS medical staff bylaws displace that jurisdiction. This, of course, is disputed by the plaintiffs; and in any event, I understand that this may be an issue which may be considered perhaps even today in another courtroom by Associate Chief Justice Rooke. In any event, that is an issue that AHS wants to raise in the action, and they are entitled to do that.

The other position that AHS says through Mr. Epp they want to put forward is that the *Charter* does not even apply to these parties. Of course, that is hotly contested by Mr. Secord on behalf of the plaintiffs I presume. He will argue that AHS is, in fact, a government entity and that the *Charter* is applicable. But it is not something I can sort out today. I did not receive any meaningful argument on these issues and simply cannot comment on them. They are certainly genuine issues, and they will be addressed and resolved at trial.

While it certainly would not be a rule of general application, I am satisfied that in the circumstances as they played out on this application, I am simply not able to evaluate

whether the plaintiffs have a strong prima facie case. They might have, but I cannot tell whether they have a strong prima facie case without at least having an opportunity to consider something put forward by AHS. I note that this is not a case where AHS has delayed in responding to the application. There was simply no reasonable prospect that they could respond following service of the injunction application.

I would simply say this; the onus is on the plaintiffs to demonstrate that their claim is more likely to succeed. The manner in which this application was brought does not permit me to do the type of assessment necessary to determine whether the plaintiffs have a strong prima facie case.

As a result, the plaintiffs have failed to meet their onus to show this strong prima facie case. In these circumstances, it is not possible to grant any mandatory injunctive relief. I would, therefore, exercise my discretion and not grant any mandatory injunctive relief.

However, some of the relief sought by the plaintiffs is prohibitive in nature. The threshold for this type of injunctive relief is deliberately low. The test is adopted from the House of Lords, a decision in *American Cyanamid*. It is described in a number of different ways; the claim is not frivolous or vexatious or that there is a serious issue to be tried or that there is a real prospect of succeeding. In any event, the threshold is low.

Regardless of what AHS files, that low threshold has been met in this case. Even if AHS filed evidence that seriously conflicted with the evidence tendered by the plaintiffs, that would still give rise to a serious issue to be tried. The affidavit evidence of the plaintiffs clearly raises serious issues; and therefore, no matter what AHS files, that threshold would be met.

Therefore, I am satisfied that the threshold has been met for the prohibitive injunctive relief that the plaintiffs seek but not for the mandatory injunctive relief.

So we will move on to the second stage of *RJR*, and that is that the applicant, the plaintiffs in this case, have to establish that they will suffer irreparable harm if the pre-trial injunctive relief is not granted. Irreparable harm refers to the nature of the harm rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be (INDISCERNIBLE).

Each of the plaintiffs in their affidavits have deposed to irreparable harm. I will start with the affidavit of Dr. Jomha who provides the most detailed recitation. Dr. Jomha deposes that he is a role model in the community of Muslim Arabs. He deposes that he has worked very hard to establish his clinical practice and his research program. He deposes that, "Losing everything I built will be devastating after the last 37 years of hard, tireless work."

He carries on, "A stoppage for any significant period will destroy much of what has been accomplished for those many years."

He further deposes that he has two children. He deposes that he has spousal support obligations. He deposes that he is newly remarried with three stepchildren. He deposes that providing for his family would be extremely difficult without my work as a surgeon. He deposes that he has car payments, he has other loans. He deposes that he has no idea how he will manage his financial obligations if terminated or placed on an unpaid leave of absence. He deposes that he does not know how this will impact him long term.

Dr. May at paragraph 41 of his affidavit addresses the issue of irreparable harm. He says, and I quote, "AHS's indiscriminate and arbitrary policy is causing irreparable harm to me personally and the public health care system generally, particularly in my community where there has always been a persistent problem of understaffing." He provides no details of the irreparable harm. I do note that he continues to work at the hospital.

Dr. Achen in paragraphs 49 to 55 of his affidavit deposes to irreparable harm. He says that he continues to support his married children through their educational endeavours. He points out that the economy is suffering. He is relied upon to support his children because they have either lost jobs or lost employment opportunities. He deposes that his aging parents will require care in the near future, and he plans to care for them in his home.

But he also says that the policy has caused him stress and emotional suffering. He also deposes that his reputation has been tarnished by the termination of his position as the Chief of Adult Cardiac Anaesthesia. On the other hand, his evidence in this regard is not (INDISCERNIBLE) to the policy; and thus, it is questionable as to whether this is relevant.

Dr. Achen also indicates that his career has been halted indefinitely and likely permanent in Alberta. He attributes that to the excessive and harsh treatment by AHS. Again, it is unclear as to whether that is in relation to the policy or in relation to something else.

Dr. Grobler testifies -- or deposes in his affidavit that he is afraid how the COVID-19 vaccine may affect him long term. He deposes that he is the only income-provider in his family and that becoming sick because of a bad reaction to the vaccine will be disastrous to his family. He describes that the policy has caused undue hardship and stress. He deposes that the policy will give rise to a severe loss of income. He says that it will harm his professional reputation, and he says that it will have an effect on the health care system.

In addition to the evidence of the plaintiffs, Mr. Secord argues that the violation of the *Charter* and the Alberta *Bill of Rights* that have been alleged would also give rise to irreparable harm.

When I review the totality of the evidence, I conclude that none of the plaintiffs have demonstrated any irreparable harm for the following reasons. Firstly, the totality of the evidence focuses on the lost income the plaintiffs will suffer as a result of not being able to practise medicine as they have for many years. This is easily compensated for in damages if their claim is successful. It does not give rise to irreparable harm.

Secondly, and in any event, the period of time during which I conduct this assessment of reasonable harm is from today until the time that the interlocutory injunction can be heard in mid-March. There is simply nothing in the evidence to suggest that any of the devastating consequences described by the plaintiffs will arise if the plaintiffs' salaries are interrupted for three months.

In addition, there is no explanation as to how the reputation of the plaintiffs will be impaired if the injunction is not granted; nor is there any explanation as to how their reputations will be restored if an injunction is granted. I do know that vague assertions of hardship and stress do not meet the test. There is no explanation as to how the granting of the injunction will resolve that hardship or stress. The injunction is not going to resolve this litigation which is destined to continue for many months and probably years.

There is simply no evidence to suggest that any irreparable harm will be suffered if this injunction is not granted. The application, therefore, fails on the second branch of the *RJR* test.

I will, nevertheless, go on to briefly discuss the balance of convenience test which is the third stage of *RJR*. In that regard, an applicant, the plaintiffs in this case, must demonstrate that the harm that they will suffer if an injunction is not granted will be greater than the harm that the respondent will suffer if the injunction is granted. A relative strength of the plaintiffs' case is a factor in this balancing process; but for the reasons given earlier, such an assessment is not available here because the application was brought without AHS having any real opportunity to respond.

In relation to the balance of convenience factors, the plaintiffs focus on the public interest factors. They correctly argue that taking four highly-skilled and experienced medical practitioners out of the Alberta medical system will negatively impact and harm medical care to Albertans. They provide evidence in their affidavits that the current medical system is in distress and that further losses of medical talent will have negative consequences. That is a legitimate, relevant factor to consider in assessing the balance of convenience.

However, I also observe that AHS is fully aware that it now has four valuable physicians who are not able to care for patients in its facilities. Those patients still need care. It is the

responsibility of AHS to care for those patients. We have seen from the actions of AHS in Manning that where there is no real alternative, an adjustment to the policy is appropriate. AHS will have the responsibility to do the same in other centres if they are not able to cope with the increased patient load, but it is not for the Court to tell AHS how to handle patient loads.

When considering the public interest component, there are also other factors that must be considered that could potentially harm AHS if the injunction were granted. That is part of the balancing exercise. (INDISCERNIBLE) the policy might infer that AHS was genuinely attempting to institute a program that would make its facilities safer not only for staff and patients but also for other persons who might enter or leave facilities. I repeat the objectives in the policy:

> To set out worker immunization requirements for COVID-19 to protect the health and safety of workers, patients, and the communities that AHS serves.

I repeat the principles in the policy:

> AHS is committed to protecting the health and safety of workers, patients, visitors, and others accessing AHS sites. Immunization against COVID-19 is the most effective means to prevent the spread of COVID-19, to prevent outbreaks in AHS facilities, to preserve workforce capacity to support the health care system, and to protect workers, patients, visitors, and others accessing AHS sites. Immunization against COVID-19 also supports the AHS Values of Compassion, Accountability, Respect, Excellence, and Safety.

These are all worthwhile objectives and principles. There is no evidence before me to suggest that these were not the real and true objectives and principles of AHS. There is nothing to suggest that AHS was acting in bad faith or attempting to illegitimately target any of the plaintiffs.

But if the injunction were granted, it would undermine the objectives of the policy and potentially cause others to consider the merit of complying with the policy. That is not in the best interests of Albertans. That is a public interest feature that must be considered in the balancing exercise.

I do accept that AHS might be wrong in its assessment of the value of vaccines, just as the Chief Medical Officer of Canada might be wrong and the other Chief Medical Officers in

Canada might be wrong; but we have entrusted these decisions to AHS. It would be harmful to Albertans to undermine their decision-making. By creating the policy, AHS has presumably attempted to instill confidence in staff, patients and the general public as to the safety protocols in place in the hospitals and other AHS facilities. AHS presumably wanted to be able to represent to its stakeholders that all persons working in these facilities are vaccinated. An injunction would prevent that from happening.

At worst, AHS is being overly cautious in relation to the implementation of the policy; but I recognize that we are in a pandemic that has persisted for 20 months, and no one really knows how it will progress. The public expects that institutions such as AHS will take steps to protect them, even if they are overly cautious. An injunction would do a disservice to those who are looking for leadership from AHS.

When I look at the totality of the public interest component, I am not satisfied that the balance of convenience weighs in favour of the plaintiffs. For all of these reasons, I dismiss the application.

MR. EPP: Thank you, My Lord. It's Matthew Epp speaking. The delay was because I've been furiously taking notes on my laptop as you spoke.

THE COURT: Well, Mr. Epp, what I am going to do -- not to cut you off -- but Mr. Clerk, I am going to order a transcript, and I direct that you obtain this and provide it to counsel. I do not want them to have to rely on having taken notes. They should have a clear understanding of what I have said. So could you please arrange for a transcript to be sent to counsel, Mr. Clerk.

THE COURT CLERK: And for what turn-around, as quick as possible?

THE COURT: Yes, if you could, yes.

THE COURT CLERK: For sure.

THE COURT: Thank you very much. Sorry, Mr. Epp.

MR. EPP: My Lord, I wonder if you would be inclined to listen to a very brief submission on costs?

THE COURT: I can take a few minutes to do that. I see that my other matter starts right now; so if you want to quickly, you can. We have lost you, Mr. Epp, somehow. Are you still there, Mr. Epp?

MR. EPP: Can you hear me, My Lord?

THE COURT: Yes, I can. Thank you very much, Mr. Epp.

Submissions by Mr. Epp (Costs)

MR. EPP: Thank you, My Lord. I will make it very, very brief. Obviously, these were unusual circumstances requiring a great deal of effort in a short period of time. That said, I recognize the nature of this application. I would simply ask for costs on column 1 for a contested application filed without briefs which I think is a relatively small amount.

THE COURT: Mr. Secord?

MR. SECORD: No objection.

Ruling (Costs)

THE COURT: All right. Those costs will go.

MR. EPP: Thank you, My Lord.

THE COURT: Okay. Nothing further?

MR. SECORD: No, My Lord. Thank you. Thank you for working so hard to get this decision out in such a short time and also for getting us a copy of the transcripts. I have got 13 pages of scribble here, so it will be nice to --

THE COURT: No, I --

MR. SECORD: -- it will be nice to actually have it written out. So thank you for that.

THE COURT: Okay. Well, thank you very much.

MR. EPP: Thank you.

MS. CHIPIUK: Thank you, My Lord.

THE COURT: We are adjourned on this.

(OTHER MATTERS SPOKEN TO)

THE COURT CLERK: And before -- before the parties sign off for the previous matter, can I please get the emails in the chat function so I can -- so the transcripts can go out as fast as they can.

MR. EPP: I've just sent it to everyone, Mr. Clerk.

THE COURT CLERK: Perfect. And I am just waiting for Mr. Secord's as well if he is still here.

MR. EPP: I will send you Richard's -- oh, you just got it.

THE COURT CLERK: Perfect. Thank you so much.

MR. EPP: Okay. Thank you very much. Thank you, My Lord. I am going to sign off now. It is Matthew Epp.

THE COURT: Yes. Thank you very much.

MR. EPP: Thank you.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Iskander Ibragimov, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench held in courtroom 411 at Edmonton, Alberta on the 17th day of December, 2021, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Charlene Hodge, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Charlene Hodge, Transcriber
Order Number: AL26239
Dated: December 19, 2021