

June 6, 2022

The Honourable Carla Qualtrough
Minister of Employment, Workforce Development
and Disability Inclusion
Ottawa, Ontario, Canada K1A 0A6
Email: carla.qualtrough@parl.gc.ca

Dear Minister Qualtrough:

Re: Denial of EI Benefits to Employees Fired for Not Taking Covid-19 Vaccines

I write on behalf of the Justice Centre for Constitutional Freedoms (“Justice Centre”) to express grave concerns that the Government of Canada is denying Employment Insurance (“EI”) benefits to Canadians who have either been suspended or terminated from their employment for declining to take Covid-19 vaccines mandated by their employers.

The Justice Centre is a Canadian legal organization and federally registered charity that defends citizen’s fundamental freedoms under the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) through pro bono (free) legal representation and through educating Canadians about a free society. The Justice Centre has been doing this since 2011.

Service Canada and the Canada Employment Insurance Commission (the “Commission”) have labelled employees’ personal medical decision whether to take the Covid-19 vaccine as “misconduct”, despite it being abundantly clear that the Covid-19 vaccines do not prevent Covid-19 infection or transmission. Further, many Canadians are prevented from taking these vaccines for medical or religious reasons.

These actions of the Government of Canada constitute a gross violation of the constitutional rights of vulnerable Canadians, who have lost their employment income and have now been discriminatorily deprived of the EI benefits despite having paid years of EI premiums.

We urge you to immediately cease and reverse your department’s violation of Canadians’ *Charter* and legal rights, failing which legal challenges on behalf of Canadian employees will ensue.

Context of Covid-19 Vaccines

The Covid-19 vaccines were authorized for distribution in Canada under the *Interim Order for Covid-19 drug authorization*, bypassing the regular approval process under the *Food and Drugs Act*.¹ The vaccines have been under clinical trials despite their national rollout, and any long-term adverse effects from taking these recently developed vaccines are unknown.²

There is no evidence that Covid-19 vaccine products prevent transmission of Covid-19.³ They are marketed as being useful to reduce the severity of Covid-19 symptoms and it has been specifically stated in the emergency use authorization in the United States that, “... nor is there

¹ <https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/interim-order-respecting-clinical-trials-medical-devices-drugs.html>

² See e.g. <https://clinicaltrials.gov/ct2/show/NCT04848584>

³ U.S. Food and Drug Administration, “Emergency Use Authorization (EUA) for an Unapproved Product Review Memorandum” (11 Dec 2020), online (PDF): *United States Government* <<https://www.fda.gov/media/144416/download>>; U.S. Food and Drug Administration, “Emergency Use Authorization (EUA) for an Unapproved Product Review Memorandum” (18 Dec 2020), online (PDF): *United States Government* <<https://www.fda.gov/media/144673/download>>; and U.S. Food and Drug Administration, “Emergency Use Authorization (EUA) for an Unapproved Product Review Memorandum” (27 Feb 2021), online (PDF): *United States Government* <<https://www.fda.gov/media/146338/download>>

evidence that the vaccine prevents transmission of SARS-CoV-2 from person to person."⁴ A recent study concluded: "As this field continues to develop, clinicians and public health practitioners should consider vaccinated persons who become infected with SARS-Co V-2 to be no less infectious than unvaccinated persons."⁵

Another critical medical fact ignored by employers and by Service Canada and the Commission is the natural immunity possessed by those who have recovered from a Covid infection. Research shows that natural immunity to Covid-19 infection is robust and likely lifelong.⁶ In particular, an analysis of Israeli data for 2.5 million people showed that double-vaccinated individuals were six to 13 times more likely to get infected than unvaccinated people who were previously infected with Covid-19.⁷

Following the rollout of the Covid-19 vaccines, numerous employers, including the Government of Canada, attempted to dictate the personal medical choices of their employees by requiring them to take these recently developed vaccines. Employees who did not comply with these demands were placed on involuntary leave without pay or fired.

The Employment Insurance Act

The Employment Insurance benefits program is a mandatory insurance scheme designed to assist Canadians who lose employment through no fault of their own.⁸ Canadian employees pay into this program by way of premiums deducted from their wages.

Section 29 of the *Employment Insurance Act* (the "Act")⁹ states that loss of employment includes suspension from employment. Subsection "c" states that just cause for voluntarily leaving employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to discrimination under the *Canadian Human Rights Act* and practices of the employer that are contrary to law.

⁴U.S. Food and Drug Administration, "FDA Takes Additional Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for Second COVID-19 Vaccine" (18 Dec 2020), online: *United States Government* <<https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid>>

⁵ Phillip P. Salvatore *et al*, "Transmission potential of vaccinated and unvaccinated persons infected with the SARS-CoV-2 Delta variant in a federal prison, July – August 2021" (19 Nov 2021), online: *medRxiv* <<https://www.medrxiv.org/content/10.1101/2021.11.12.21265796v1>>

⁶ For example see: Marty Makary, "Herd Immunity is Near, Despite Fauci's Denial" (24 Mar 2021), online: *Wall Street Journal* <<https://www.wsj.com/articles/herd-immunity-is-near-despite-faucis-denial-11616624554>>; <https://www.uk-cic.org/news/cellular-immunity-sars-cov-2-found-six-months-non-hospitalised-individuals>; UK Corona Virus Immunology Consortium, "Cellular immunity to Sars-CoV-2 found at six months in non-hospitalized individuals" (2 Nov 2020), online: *UK Corona Virus Immunology Consortium*, <<https://pubmed.ncbi.nlm.nih.gov/32743600/>>; Jun Wu *et al*, "SARS-CoV-2 infection induces sustained humoral immune response in convalescent patients following symptomatic COVID-19" (24 July 2020), online: *medRxiv* <<https://www.medrxiv.org/content/10.1101/2020.07.21.20159178v1>>; National Institute of Health, "SARS-CoV-2 antibodies protect from reinfection" (2 Mar 2021), online: *U.S. Department of Health and Human Services* <<https://www.nih.gov/news-events/nih-research-matters/sars-cov-2-antibodies-protect-reinfection>>; Mahesh B. Shenai *et al*, "Equivalency of Protection From Natural Immunity in COVID-19 Recovered Versus Fully Vaccinated Persons: A Systemic Review and Pooled Analysis" (28 Oct 2021), online: *National Library of Medicine* <<https://pubmed.ncbi.nlm.nih.gov/34868754/>>; and Takuya Sekine *et al*, "Robust T Cell Immunity in Convalescent Individuals with Asymptomatic or Mild COVID-19" (1 Oct 2020), online: *National Library of Medicine* <<https://pubmed.ncbi.nlm.nih.gov/32979941/>>

⁷ Meredith Wadman, "Having SARS-CoV-2 once confers much greater immunity than a vaccine – but vaccination remains vital" (26 Aug 2021), online: *Science* <<https://www.science.org/content/article/having-sars-cov-2-once-confers-much-greater-immunity-vaccine-vaccination-remains-vital>>

⁸ <https://www.canada.ca/en/services/benefits/ei/ei-regular-benefit.html>

⁹ *S.C. 1996, c. 23*

Section 30 of the *Act* states that a claimant is disqualified from receiving benefits if the claimant lost their employment because of their “misconduct” or if they “voluntarily” left their employment without just cause.

Misconduct

While the term “misconduct” is not defined in the *Act*, the meaning and definition of the term has been given a great deal of consideration in the Courts across Canada. The Supreme Court of Canada determined that conduct must be “such as to undermine or seriously impair the trust and confidence the employer is entitled to place in the employee in the circumstances of their particular relationship”¹⁰ The misconduct must be a “willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance”.¹¹ In other words, misconduct can be found where there was a serious misconduct, a habitual neglect of duty, incompetence, or conduct incompatible with the duties, or prejudicial to the employer’s business, of if the employee has been guilty of willful disobedience.¹²

An employee’s refusal to undergo a particular medical treatment is not akin to refusing to perform an aspect of one’s duties and responsibilities or refusing to attend work. Given the fact that the Covid-19 vaccines do not prevent infection or transmission, the decision of employees to decline to take these recently developed vaccines is not careless or negligent in nature to effect job performance. Firing employees or placing them on mandatory leave without pay due to their decision not to take mandatory Covid-19 vaccines is without just cause.

Service Canada and the Commission are twisting the meaning of “misconduct” to deny Canadians unemployment benefits if they choose not to take the Covid-19 vaccines. They are implementing an arbitrary policy to promote a political agenda. This Policy is not in accordance with the jurisprudence, including from the Supreme Court of Canada. The bar for proving misconduct is a high one.

Many Canadians deemed to have committed “misconduct” for declining to take the Covid-19 vaccines had exemplary employment records. These were employees who in many cases served on the front lines of our service, industry and health care sectors, sustaining our economy, our country and our lives.

Charter Rights and Freedoms

Many employees have particular medical or religious reasons preventing them from taking the Covid-19 vaccines. Moreover, every Canadian has a basic freedom to choose or refuse medical treatment consistent with their inherent human dignity and bodily autonomy.

Freedom of Conscience and Religion

Section 2(a) of the *Charter* provides that everyone has “freedom of conscience and religion”.

In *R v Big M Drug Mart Ltd*, Dickson J. (as he then was) described the fundamental understanding of freedom in Canadian law, stating that “[f]reedom can primarily be characterized by the absence of coercion or constraint.”¹³ This refers not only to direct physical coercion, but also “indirect forms of control which determine or limit alternative courses of conduct available to others.”¹⁴

¹⁰ *McKinley v. BC Tel*, [2001 SCC 38](#) at para 20

¹¹ *Canada (Attorney General) v. Tucker*, [\[1986\] 2 F.C. 329](#) at para 4

¹² *Port Arthur Shipbuilding Co. v. Arthurs*, [\[1967\] 2 O.R. 49](#) at para 11

¹³ *R v Big M Drug Mart Ltd*, [\[1985\] 1 SCR 295](#) at para 95

¹⁴ *Ibid*

Regardless of whether employers respected the conscientious or religious objections of employees to receiving the Covid-19 vaccines, the Government of Canada must accommodate the sincerely-held personal beliefs of Canadians. Rather the Government has engaged in a blatant attempt to coerce Canadians against their own sincere convictions into taking a recently developed vaccine and removing a basic subsistence income when they are most financially vulnerable if they do not.

Right to Liberty and Security of the Person

Section 7 of the *Charter* states:

Everyone has the 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.

In *Fleming v Reid*, Justice Robins explained the protection section 7 provides to individual's choices:

The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s.7. Indeed, in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as coextensive.¹⁵

The Supreme Court of Canada in *A.C. v Manitoba (Director of Child and Family Services)* helpfully outlined its jurisprudence under section 7 protecting individuals' right to determine their own medical treatment:

Wilson J., in *Morgentaler*, stated that "[liberty], properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance" (p. 166; see also *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 49: ". . . 'liberty' is engaged where state compulsions or prohibitions affect important and fundamental life choices"; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66: "[T]he right to liberty . . . protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference"). And in *Rodriguez*, Sopinka J. for the majority confirmed that the concept of security of the person encompasses "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress" (pp. 587-88). As McLachlin J. (as she then was) explained in dissent:

Security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body. This is in accordance with the fact . . . that "[s. 7](#) was enacted for the purpose of ensuring human dignity and individual control, so long as it harms no one else". [p. 618]

(See also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1177: "[Section 7](#) is . . . implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity.")

The notion that ss. 25(8) and 25(9) engage A.C.'s security of the person and liberty interests also finds support in the common law, which, as shown earlier in these reasons, has long recognized "[t]he right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment" (*Fleming*, at p.

¹⁵ *Fleming v. Reid*, [1991] O.J. No. 1083 (C.A.) at para 41

85). The principle was adopted by this Court in *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119, at p. 135, where Cory J. explained:

It should not be forgotten that every patient has a right to bodily integrity. This encompasses the right to determine what medical procedures will be accepted and the extent to which they will be accepted. Everyone has the right to decide what is to be done to one's own body. This includes the right to be free from medical treatment to which the individual does not consent. This concept of individual autonomy is fundamental to the common law and is the basis for the requirement that disclosure be made to a patient. If, during the course of a medical procedure a patient withdraws the consent to that procedure, then the doctors must halt the process. This duty to stop does no more than recognize every individual's basic right to make decisions concerning his or her own body.

The inability of an adolescent to determine her own medical treatment, therefore, constitutes a deprivation of liberty and security of the person, which must, to be constitutional, be in accordance with the principles of fundamental justice (Gerald Dworkin, "Consent, Representation, and Proxy Consent," in Willard Gaylin and Ruth Macklin, eds., *Who Speaks For The Child: The Problems of Proxy Consent* (1982), 191, at p. 203).¹⁶

In the employment context, the Ontario Labour Arbitration Board in considering a requirement that employees receive the flu vaccine or be placed on leave during an outbreak, noted:

... suspending employees (non-disciplinary) for refusing to undergo medical treatment is a violation of their common law sec. 7 charter rights. Virtually all the court cases, including Supreme Court of Canada and Ontario Court of Appeal, find that enforced medical treatment, and I point out that this is not a medical examination but treatment, is an assault if there is no consent.¹⁷

The actions of the Government of Canada to deny essential unemployment benefits to vulnerable Canadians on account of their personal medical decisions violate their rights to liberty and security of the person. Removing crucial unemployment benefits solely on the basis of what medical treatments employees choose to receive in their own bodies does not accord with the principles of fundamental justice. Thousands of Canadians paid for those EI benefits and acted as exemplary employees during a pandemic. They have been terminated, not because of any actual misconduct, but rather because their employers choose to implement a coercive policy requiring vaccination, despite the Covid-19 vaccines not preventing infection or transmission. Further, these policies applied to employees who already had strong natural immunity to Covid-19 from overcoming prior Covid infections.

Right to Equal Protection and Equal Benefit of the Law

The right to equality protected by section 15(1) of the *Charter* "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."¹⁸

Section 15(1) of the *Charter* prohibits government from discriminating against Canadians on the basis of enumerated and analogous grounds. For those Canadians who cannot receive Covid-19 vaccines on account of a medical condition, denying them EI benefits for not receiving those vaccines discriminates against them on the basis of physical disability. Likewise, for Canadians who cannot receive Covid-19 vaccines on account of their religious beliefs, denying them EI benefits for taking the Covid-19 vaccines discriminates against them on the basis of religion.

¹⁶ *A.C. v. Manitoba (Director of Child and Family Services)*, [2009 SCC 30](#) at paras 100-102

¹⁷ *St. Peter's Health System v. C.U.P.E., Local 778*, [\[2002\] O.L.A.A.No. 164](#)

¹⁸ *R. v. Kapp*, [\[2008\] 2 S.C.R. 483](#), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5696/index.do> at para 15
Andrews v. Law Society of British Columbia, [\[1989\] 1 S.C.R. 143](#), at para 171, per McIntyre J.)

In the past two years, there has been a deliberate attempt by government to target Canadians who have not taken the Covid-19 vaccines, both rhetorically and substantively. They have been publicly demonized by political leaders; subjected to harsher lockdown restrictions; fired from their jobs; and remain prohibited from commercial air travel. These restrictions have not been on the basis of their actual circumstances, but rather has been based on inaccurate stereotyping. Attacking the unvaccinated has been used to misdirect attention away from the governments' own failures to maintain a sufficient public health system. This persistent prejudicial treatment of those who have not received Covid-19 vaccines in Canada violates the purpose of section 15(1) to promote a society where people receive equal concern, respect and consideration, and warrants extending section 15(1) protection to those without Covid-19 vaccination.

"To prove discrimination under s. 15(1), claimants must show that a law or policy creates a distinction based on a protected ground, and that the law perpetuates, reinforces, or exacerbates disadvantage."¹⁹

The Government of Canada is perpetuating disadvantage against Canadians who have not taken the Covid-19 vaccines. Employers across Canada, encouraged by the Government of Canada's divisive rhetoric and reprehensible example, have terminated unvaccinated Canadian workers. Service Canada and the Commission have now removed one of the final safety nets these employees have faithfully contributed to.

There is no justification for denial of EI benefits to Canadians not vaccinated against Covid-19. It is obvious and scientifically verified that Covid-19 vaccination has not prevented infection or transmission of Covid-19. Further, those who have recovered from Covid-19 infection have superior protection against Covid-19 than those double dosed with Covid-19 vaccines.

Canada is out of sync with science and the free world in targeting those who have not received Covid-19 vaccines in such a pernicious manner.

Conclusion

On behalf of thousands of Canadians presently prevented from receiving EI benefits because of their vaccination status, we demand that Service Canada and the Canada Employment Insurance Commission immediately cease its violation of Canadians' *Charter* rights by redefining employment "misconduct" to satisfy a political objective.

Failure to reverse the damaging discrimination against vulnerable unvaccinated and unemployed Canadians will result in legal action.

Yours truly,



Cynthia Murphy
Barrister and Solicitor

Enclosed: Briefing Note to Minister Qualtrough

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Lori MacDonald, CEO of Service Canada: lori.k.macdonald@servicecanada.gc.ca
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¹⁹ *Fraser v Canada (Attorney General)*, 2020 SCC 28, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18510/index.do>, at para 50