

Federal Court



Cour fédérale

Date: 20211217

**Dockets: T-1813-21
T-1870-21**

Citation: 2021 FC 1443

Ottawa, Ontario, December 17, 2021

PRESENT: The Honourable Justice Fuhrer

Docket: T-1813-21

BETWEEN:

**ILLO ANTONIO NERI, MORGAN
CHRISTOPHER WARREN, MARIE-
GAELLE GRENIER and SHAUN
CHARPENTIER**

Applicants

and

THE QUEEN IN THE RIGHT OF CANADA

Respondent

Docket: T-1870-21

AND BETWEEN:

**RONALD ROBERT FLYNN and
BRYAN WILLIAM RUDLING**

Applicant

and

THE QUEEN IN THE RIGHT OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicants are members of the Canadian Armed Forces [CAF] who are unvaccinated against COVID-19 for varied reasons. They are opposed to a vaccine mandate. None of the Applicants has received an exemption or accommodation. They are concerned that as a result of their stance, they will receive a dishonourable release from the CAF. The Applicants therefore seek a “temporary prohibitive injunction” regarding the enforcement of any directive from the (now) Chief of Defence Staff, General W. Eyre [CDS] regarding a vaccine mandate, pending the outcome of their applications for judicial review challenging the directives [JR Applications].

[2] The JR Applications are substantially the same. Consequently, the Applicants’ respective motions were heard together in the interests of utilizing scarce judicial resources effectively to secure the just, most expeditious and least expensive determination of the motions, further to Rules 3 and 105 of the *Federal Courts Rules* [FCR], SOR/98-106. (See Annex “A” for relevant legislative and regulatory provisions.)

[3] Having considered the parties’ evidence, and their written and oral arguments, I find that that none of the Applicants has met the test for a temporary or an interlocutory injunction. The Applicants have failed to establish a serious issue to be tried or that the Court should exercise

residual jurisdiction to grant the injunction they seek despite not having exhausted all alternative adequate remedies. Nor have they satisfied that the Court that they would suffer irreparable harm non-compensable by a monetary award, or that the balance of convenience favours granting a temporary or interlocutory injunction.

[4] For the more detailed reasons that follow, I therefore dismiss the Applicants' motions for injunctive relief to restrain the enforcement of any directive regarding a vaccine mandate pending the outcome of their JR Applications.

[5] I start with the applicable test for the requested relief and the issues that these JR Applications raise, followed by contextual background, and my analysis.

II. Test for Interlocutory Injunctive Relief and Issues

[6] The role of the Court on a motion for a temporary (i.e. an interim or interlocutory) injunction is not to answer the penultimate question(s) in the underlying proceeding but rather to determine if the moving party has met the three-part test described in *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 [*RJR-MacDonald*].

[7] The *RJR-MacDonald* test comprises the following conjunctive questions: (i) is there a serious issue or question to be tried; (ii) will the party seeking the interlocutory injunction suffer irreparable harm, that is not quantifiable and non-compensable in damages, in its absence; and (iii) which party does the balance of convenience favour, that is which party would suffer the greater harm from the grant or refusal of the motion?

[8] A strong finding on one of these questions may lower the threshold on the others: *Bell Media Inc. v GoldTV.Biz*, 2019 FC 1432 [*Bell Media*] at para 56, citing *Bell Canada v 1326030 Ontario Inc. (iTVBox.net)*, 2016 FC 612 at para 30.

[9] The main issue for consideration here is whether the Applicants have met *RJR-MacDonald* test, thus, warranting the grant of temporary injunctive relief pending the disposition of their JR Applications. The Applicants' motions raise the following more granular questions:

- (1) Is there a serious issue as to whether the Directives were issued validly?
- (2) Is there a serious issue as to whether the Directives and Aide-Memoire are unconstitutional by depriving the Applicants of their rights to religious freedom, liberty or security of the person and privacy that is not in accordance with the principles of fundamental justice, contrary to sections 2, 7, 8 and 15 of the *Canadian Charter of Rights and Freedoms* [*Charter*]?
- (3) If their requested injunction is not granted, will the Applicants be harmed irreparably between now and the hearing of their JR Applications?
- (4) Does the balance of convenience favour granting or denying the requested injunctive relief?

[10] Whether the Applicants have demonstrated a serious issue or issues to be tried necessitates a consideration of the merits of the Applications: *RJR-MacDonald*, above at page 337; *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*] at para 12. While the threshold generally is considered low, in the sense that the moving party's case must not be frivolous or vexatious, a more onerous test applies in the case where granting the interlocutory injunctive relief is tantamount to granting the relief sought in the underlying proceeding. The Court must

satisfy itself, through a more rigorous review, that the Applicants likely would prevail: *Wojdan v Canada (Attorney General)*, 2021 FC 1341 [*Wojdan*] at para 12.

[11] Next, the Applicants must persuade the Court that they would suffer irreparable harm – harm that is clear and not speculative – if the interlocutory injunction were refused: *Reckitt Benckiser LLC v Jamieson Laboratories Ltd*, 2015 FC 215 at para 51, citing *Centre Ice Ltd v National Hockey League* (1994), 53 CPR (3d) 34 (FCA) at para 50; *Sleep Country Canada Inc v Sears Canada Inc*, 2017 FC 148 at paras 27-29; *CBC*, above at para 12.

[12] Although the loss of one’s job can have significant consequences, generally it is considered a harm that can be compensated with a monetary award and, hence it is not considered an irreparable harm warranting an injunction: *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232 [*Lavergne-Poitras*] at paras 7, 84; *Wojdan*, above at para 36, citing *Amalgamated Transit Union, Local 113 v Toronto Transit Commission*, 2021 ONSC 7658 at paras 52-53. In my view, the loss of housing or of a land duty allowance, similarly is in the nature of a harm that can be compensated with a monetary award, and thus, does not constitute irreparable harm.

[13] Finally, the balance of convenience assessment involves “identify[ing] the party that would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits”: *CBC*, above at para 12. The overarching consideration is whether the granting of the interlocutory injunction would be just and equitable in all the circumstances and

context of the matter before the Court: *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paras 1 and 25.

III. Background

(1) DND/CAF and COVID-19 Pandemic

[14] Under the *National Defence Act*, RSC 1985, c N-5 [*NDA*], the Department of National Defence [DND] supports the CAF in the CAF's role of defending Canadian national interests domestically and internationally. DND employees and CAF members comprise the Defence Team. The CAF, however, is a separate organization. Appointed by the Governor in Council, the Chief of Defence Staff [CDS] is charged with the control and administration of the Canadian Forces.

[15] Early in the pandemic, the DND and CAF implemented the COVID-19 Layered Risk Mitigation Strategy [LRMS] to protect the Defence Team and the public they serve. According to the affidavit evidence of Brigadier-General [Brig-Gen] Erik Simoneau, the CAF has focused on the preservation of force health and operational effectiveness of critical capabilities, as well as preventing the likelihood of transmission to vulnerable groups they may be called upon to serve, and demonstrated responsible leadership in this regard by applying public health measures. For example, the LRMS included physical distancing, mask wearing, hand washing, and working from home where feasible. The encouragement of vaccination was added later to the LRMS once Health Canada approved four COVID-19 vaccines.

[16] Brig-Gen Simoneau further attests that the CAF has aided the Government of Canada's response to the ongoing COVID-19 pandemic and vaccine roll-out, including by the deployment or provision of: CAF members to long-term care facilities in Ontario and Québec; military medical resources during COVID-19 crises in Manitoba, Alberta and Saskatchewan; support to northern, remote, and First Nations communities; support to the Public Health Agency of Canada [PHAC] in managing and distributing personal protective equipment; and in establishing land border testing sites at sixteen ports of entry.

[17] The impacts of the COVID-19 pandemic on daily life, both globally and here in Canada, cannot be understated. My colleague Justice McHaffie recently summarized the pandemic and related vaccines in *Lavergne-Poitras*, above at paras 17-22. Justice McHaffie based his summary on the affidavit of Dr. Celia Lourenco, a senior scientist with Health Canada. That same affidavit forms an exhibit to a more recent affidavit of Dr. Lourenco, filed in these motions before me, in which she adopts and endorses her earlier affidavit, and provides updated information.

[18] In particular, as of November 26, 2021, almost 60 million vaccine doses were administered in Canada. A total of 27,747 people reported adverse effects, of which 21,304 incidents (0.036% of all administered doses) were considered non-serious, such as soreness at the bodily injection site or a slight fever. 6,443 incidents (0.011% of all administered doses or about 1 in 10,000 doses) were considered serious, such as a severe allergic reaction which has been reported 671 times for all COVID-19 vaccines. It remains the case that adverse effects vary across age groups. Dr. Lourenco emphasizes, however, that adverse events following immunization are not linked necessarily to the vaccine.

[19] According to Dr. Lourenco, she has authorized four COVID-19 vaccines developed by: (i) Pfizer-BioNTech; (ii) Moderna; (iii) AstraZenca; and (iv) Janssen. The first two vaccines are messenger ribonucleic acid [mRNA] vaccines, while latter two are viral vector vaccines. Because of the extensive national roll-out, Health Canada imposed enhanced monitoring and surveillance requirements on the vaccine manufacturers, in close collaboration with the PHAC. Initially subject to interim authorization, the Pfizer-BioNTech and Moderna COVID-19 vaccines in particular were authorized in September 2021, subject to the continuing regulatory oversight by Health Canada that occurs with all authorized vaccines.

[20] As noted by Justice McHaffie with regard to Dr. Lourenco’s earlier affidavit: “the evidence demonstrates that before being approved, COVID-19 vaccines undergo a thorough scientific review of their safety and effectiveness by Health Canada officials, independent of involvement of elected officials; that COVID-19 vaccines reduce both the risk and the impacts of infection; and that vaccination is a key component of Canada’s efforts to combat COVID-19”: *Lavergne-Poitras*, above at para 20.

[21] On October 6, 2021, the Treasury Board Secretariat issued the “Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police” [Public Service Vaccination Policy]. The Public Service Vaccination Policy also was the subject of recent scrutiny by this Court in *Wojdan*.

(2) CAF Vaccination Policy in Response to COVID-19 Pandemic

[22] While the Public Service Vaccination Policy applies to DND employees, it does not apply to CAF members. As a result, the CAF developed the CAF COVID-19 Vaccination Policy [CAF Vaccination Policy] now comprised of a series of three directives issued by the CDS on October 8, 2021 [Directive 1], November 3, 2021 [Directive 2] and December 4, 2021 [Directive 3]. Directives 2 and 3 essentially supplement Directive 1 and refine CDS direction to the CAF. I note that the CAF Vaccination Policy was developed after Health Canada authorized the Pfizer BioNTech and Moderna COVID-19 vaccines, and has evolved, through the successive directives in response to the complex and evolving pandemic.

[23] Directive 1 summarizes the pandemic backdrop driving the development of the CAF Vaccination Policy and states that, “to demonstrate leadership to other GC [Government of Canada] departments and to all Canadians, and continue to protect the Defence Team, the CAF will abide by the general spirit of this policy [Public Service Vaccination Policy], while ensuring the CAF is situated to meet operational imperatives.” The directive confirms that, “CAF efforts throughout the COVID-19 pandemic have been focused on the preservation of force health and the operational effectiveness of critical capabilities, as well as preventing the likelihood of transmission to vulnerable groups.” Further, the “CAF will continue to demonstrate leadership by aligning its policies and orders, to the extent possible, with the Treasury Board Secretariat [TBS] policy on COVID-19 vaccination of the federal workforce...”

[24] Directive 1 recognizes the importance of confirming individuals’ vaccination status while protecting their privacy rights, implementing reasonable accommodation measures for those were unable to be vaccinated, and managing compliance for operational and audit purposes.

Further, the directive posits that as a result of the CAF Vaccination Policy there will be three groups of individuals formed: fully vaccinated; unable to be vaccinated; and unwilling to be unvaccinated (i.e those refusing to disclose their vaccination status or those for whom an accommodation is not granted).

[25] Also of note, Directive 1 assumes that the CAF Vaccination Policy will be temporary, with an initial implementation period of 12 months, and possible extension where required, until the rate of COVID-19 transmission in Canada no longer poses a risk to the national healthcare system.

[26] The above premises in Directive 1 lay the groundwork for the CAF Vaccination Policy. Briefly, the policy contemplates full vaccination of CAF members, attestation (as an alternative to providing proof) of vaccination status, and possible accommodation based on a certified medical contraindication, religious ground or another prohibited or analogous ground of discrimination under the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA]. The directive also introduces alternative and mitigating measures for those who did not attest to full vaccination by November 15, 2021, including COVID-19 testing and educational seminars on the benefits of vaccination. Further, the directive outlines possible career impacts for remaining unvaccinated.

[27] Directive 2 provides greater details regarding requirements to obtain an exemption or accommodation. For example, a request based on a medical contraindication against vaccination by a CAF member must be accompanied by a valid form completed and signed by a healthcare

provider. A request based involving religious grounds cannot be based solely on a sincerely held belief but must be connected reasonably to religious grounds; the CAF member must explain why those grounds prevent vaccination. Similarly, a request based on a ground of discrimination recognized under the *CHRA* must be supported by an affidavit in which the CAF member explains the applicable ground of discrimination and why it prevents vaccination.

[28] Again, CAF members had until November 15, 2021 to comply with the CAF Vaccination Policy, failing which commanding officers [COs] were to consider the full range of remedial administrative action including initiating remedial measures as contemplated by Defence Administrative Order and Directive [DAOD] 5019-4. The CO could consider concluding remedial measures, however, upon the rescindment of the policy or the CAF member's compliance.

[29] The Director of Military Careers Administration [DMCA] prepared an "Aide-Memoire" to assist the chain of command with the implementation of Directive 2 that includes document templates. While the Applicants also challenge the "Aide-Memoire," I note that it is not part of the CAF Vaccination Policy *per se*.

[30] Directive 3 acknowledges delays in dealing with accommodation requests and extends the deadline for submitting all such requests to December 18, 2021. In addition, the directive instructs that members awaiting a decision on their accommodation requests will not be placed on remedial measures for non-compliance.

[31] According to Brig-Gen Simoneau, CAF members have made approximately 1,300 accommodation requests, and as of December 7, 2021, 71 requests have been approved (33 on medical grounds, 24 on religious grounds and 14 on other grounds), while 308 requests have been denied, with the remaining 914 requests pending determination.

(3) Applicants' Status in Relation to CAF Vaccination Policy

[32] Lieutenant-Colonel [Lt-Col] Illo Antonio Neri is a career military pilot who has served in the Regular and Reserve Forces for more than 28 years. His accommodation request was denied on November 19, 2021. The decision letter is an exhibit to the affidavit of Colonel James Kent Judiesch in Court File No. T-1813-21 [First Judiesch Affidavit]. The letter summarizes the bases for the request, namely, the right to privacy, bodily autonomy and informed consent as well as discrimination involving genetic characteristics. It explains that Lt-Col Neri cannot be forced or coerced into medical treatment including vaccines but emphasizes that the CAF has the right to determine its own employment standards. Those standards can include the requirement to be vaccinated. (In fact, Corporals Flynn and Rudling, the Applicants named in Court File No. T-1870-21 admit that the CAF has the authority to mandate a vaccination for its members; their complaint lies in its application.)

[33] The decision letter also explains that the CAF is not required to hire or employ citizens who do not meet these standards. Information regarding a member's accommodation request and vaccination status is collected in accordance with the *Privacy Act*, RSC 1985, c P-21, the *Policy on Privacy Protection* and related instruments. The letter indicates that the requested accommodation is denied for failure to demonstrate discrimination on grounds in the *CHRA*, and

further that, Lt-Col's *Charter* claims can be pursued through a grievance. There is no evidence that Lt-Col Neri has filed a grievance regarding the denial of his accommodation request.

[34] Warrant Officer Morgan Christopher Warren is a non-commissioned CAF officer who has served in the Regular and Reserve Forces for more than 22 years. He requested a religious exemption. No final decision had been made as of December 8, 2021 regarding his accommodation request, although a decision is expected soon.

[35] Corporal [Cpl] Marie-Gaelle Grenier is a military police officer who has served in the Regular Force for more than 3 years. Her accommodation request (under the *CHRA* for genetic discrimination) was denied on November 16, 2021 because the reasons for her request were considered not to fall within the criteria set out in the CAF Vaccination Policy. Cpl Grenier was provided with a notice to initiate remedial measures (counselling and probation) and an opportunity to make submissions before a final decision is taken to initiate counselling and probation. She thus submitted a new accommodation request that is outstanding as of December 8, 2021, although a decision is expected soon.

[36] Petty Officer 2nd Class Shaun Kyle Charpentier is a naval communicator who has served in the Regular Force for more than 13 years. No decision has been made yet regarding his request for a medical exemption. He already is scheduled to be released, however, for medical reasons unrelated to the CAF Vaccination Policy.

[37] The affidavit of Colonel James Kent Judiesch in Court File No. T-1870-21 [Second Judiesch Affidavit] explains that Corporal [Cpl] Ronald Robert Flynn has been given an opportunity to present a plan for being vaccinated with the Janssen (viral vector) vaccine since his objections relate to the mRNA vaccines. Cpl Flynn is not under any remedial measures or administrative actions at this time.

[38] The Second Judiesch Affidavit also describes that the counselling and probation measure was initiated against Cpl Bryan William Rudling on November 26, 2021; this was followed by a notice of intent to recommend release. Cpl Rudling has 14 days (from December 3, 2021) to provide submissions in response. There is no evidence that Cpl Rudling has filed a grievance against the counselling and probation measure, nor against the recorded warning he describes as having received on November 16, 2021, in his affidavit in support of the motion in Court File No. T-1870-21. His affidavit indicates, however, that his contract with the CAF is coming to an end in April 2022, at which time he had intended to release honourably.

[39] Both Cpls Flynn and Rudling are concerned about the possible loss of housing if they eventually are released because they occupy residences provided to them as CAF members. They also expressed concern about the loss of their land duty allowance resulting from not being vaccinated. The Second Judiesch Affidavit states that no decision regarding a release has been made about Cpls Flynn and Rudling.

(4) Grievance Process

[40] Under the *NDA* s 29(1) and chapter 7 of the *Queen's Regulations and Orders Volume 1 – Administration [QR&O]*, a CAF member can grieve the denial of an accommodation request, the initiation of a remedial measure or a release decision resulting from the application of the CAF Vaccination Policy, among other decisions, acts or omissions in the administration of the affairs of the CAF. According to the affidavit of Gordon Prieur, a senior policy analyst with DND, the grievance must be submitted within three months after the day when the grievor knew or reasonably ought to have known of the decision, act or omission for which the grievance is submitted. Grievances submitted after this period nonetheless may be considered if it is in the interests of justice to do so.

[41] The CAF grievance process consists of two levels of authority, the Initial Authority [IA] and the Final Authority [FA]. The IA can be the grievor's commanding officer or next superior officer, while the FA is the CDS, who can delegate this role in certain circumstances. In addition, certain grievances are to be referred to the Military Grievance External Review Committee [MGERC], an independent, arm's-length entity that reviews grievances and makes recommendations to the CDS. The CDS is not bound, however, by MGERC's recommendations but he must provide reasons if he does not act on them.

[42] As noted above, *Charter* claims can be considered in the grievance process.

IV. Analysis

(1) Preliminary Observation

[43] I start my analysis by observing that the Applicants named in Court File No. T-1813-21 opened the hearing with many submissions that in themselves were in the nature of evidence, as opposed to arguments based on the evidence of record, were rife with speculation, and further were an unacceptable attempt to expand the scope of the Notice of Application. Regarding the latter, for example, counsel for these four Applicants characterized the CAF Vaccination Policy as mandated medical treatment that is an abuse of power and an assault on CAF members' freedom.

[44] In addition, counsel for these Applicants stated that this matter is not so much about the CDS, the chain of command or even the Applicants but rather about freedom as Canadian citizens. Counsel asserted that dissent and debate are not allowed in the CAF. Further, counsel indicated that there is no trust or cohesion among CAF members and the Directives are politically driven oppression that engender confusion, fear, shame, bullying, harassment and invasion of privacy, resulting in a hostile work environment.

[45] Applicants' counsel did not point, however, to any evidence of record in support of these oral submissions nor did counsel address in any meaningful way the *RJR-MacDonald* test which is the focus of the motions before me. I conclude, therefore, that the Applicants rely primarily on their written submissions insofar as the applicable test for temporary or interlocutory injunctive relief is concerned.

[46] In my view, this way of addressing the Court was not an effective use of scarce judicial resources, did little to advance the Applicants' motion and is strongly discouraged.

(2) Serious Issue – Validly Issued Directives?

[47] Bearing in mind the high threshold the Applicants must meet to warrant the Court's intervention, I am not satisfied that the Applicants here have demonstrated a likelihood of success in their underlying Applications. For the reasons below, I thus find that the Applicants have not met the first prong of the *RJR-MacDonald* test on either alleged basis.

[48] As noted above, the Applicants in Court File No. T-1870-21 admit that the CAF has authority to mandate vaccination for its members. While they assert the CAF Vaccination Policy is applied unevenly, including possible shortening of the time for a 5(f) release to be completed (as alleged by the Applicants in both matters), I find there is insufficient evidence of record to support this allegation.

[49] Further, despite the allegation of abuse of power by the Applicants in Court File No. T-1813-21, the evidence before the Court demonstrates that the CAF Vaccination Policy development process was evidence-based. The affidavit of Brig-Gen Simoneau establishes that the process was informed by public health modelling. He explains the connection or linkage between the policies for DND employees (i.e. the Public Service Vaccination Policy) and CAF members and notes that that the CAF has a general duty to ensure the health and safety of the whole Defence Team. He also provides statistics regarding accommodation requests, including a breakdown of the reasons (i.e. medical, religious or other grounds) for the more than 70 accommodations granted to date, thus contradicting the Applicants' assertion that the CAF is not accommodating people.

[50] In any event, unless exceptional circumstances are established, the Applicants must exhaust or complete all alternative administrative remedies before seeking judicial review: *Strickland v Canada (Attorney General)*, 2015 SCC 37 at para 42; *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 [*CB Powell*] at paras 30-31; *Lin v Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81 [*Lin*] at para 5; *Gupta v Canada (Attorney General)*, 2021 FCA 202 at para 7.

[51] Were the Applicants here to seek administrative remedies through the grievance process available to them, this would create a more comprehensive administrative record based on actual findings and outcomes, as opposed to speculation, that could be judicially reviewed more effectively. As the Federal Court of Appeal has opined, “only at the end of the administrative process will a reviewing court have all of the administrative decision-maker’s findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience”: *CB Powell*, at para 32. See also *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 36.

[52] Exceptional circumstances are rare, making “the bar as close to absolute as possible so that judicial reviews do not disrupt the orderly and efficient course of administrative proceedings”: *Lin*, at para 6. The Court should exercise its residual jurisdiction to intervene “only... where there is a gap, that is, no adequate alternative remedy available through the appropriate administrative tribunal”: *Amalgamated Transit Union, Local 113 v Toronto Transit Commission*, 2021 ONSC 7658 at para 39. I am not persuaded that any such gap exists in the circumstances of the matters before me.

[53] This Court has noted repeatedly the breadth of the grievance right captured in the *NDA* s 29(1) (“it’s exhaustively comprehensive [...] there is no equivalent provision in any other statute of Canada”): *Fortin v Canada (Attorney General)*, 2021 FC 1061 [*Fortin*] at para 25, citing *Jones v Canada*, (1994) 87 FTR 190 at paras 9, 10 and *Bernath v Canada*, 2005 FC 1232 at para 35. Justice McDonald notes specifically that the grievance process contained in the *NDA* and *QR&O* is sufficiently broad to cover allegations of political interference: *Fortin*, at paras 39-40. In my view, given the breadth of the military grievance process, the circumstances that would be considered to fall outside the purview of the CAF and warranting the exercise of the Court’s residual jurisdiction, will be rare. Such circumstances have not been shown to be present in the matters before me.

[54] As the Federal Court of Appeal instructs: “this Court can and almost always should refuse to hear a premature judicial review on its own motion in the public interest – specifically, the interests of sound administration and respect for the jurisdiction of an administrative decision-maker”: *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 [*Forest Ethics*] at para 22. Further, I find that in the circumstances, the Applicants’ motions can be characterized as premature, disguised grievance and discrimination complaints and, thus, attempts to circumvent the grievance process: *Moodie v Canada (National Defence)*, 2010 FCA 6 at para 6.

(3) Serious Issue – Unconstitutional Directives and Aide Memoire?

[55] In my view, the above principles regarding the exhaustion of alternative administrative remedies also are applicable to the *Charter* issues the Applicants raise because, as mentioned

above, they can be considered in the CAF grievance process. Nonetheless, I find it bears observing that previous case law suggests the mere existence of a policy, such as the CAF Vaccination Policy, in itself is not sufficient to ground a challenge under section 7 of the *Charter*.

[56] As admitted by the Respondent, the Applicants here may have a serious issue to be determined in that their life, liberty or security of person is engaged (which is neither frivolous or vexatious), thus satisfying the first part of the two-part test for demonstrating a breach of section 7 of the *Charter: Lavergne-Poitras*, above at para 61. In my view, however, they have failed, for the purpose of their motions, to meet the second part of the test that requires the Applicants to establish the breach does not accord with the principles of fundamental justice: *Lavergne-Poitras*, above at para 48.

[57] The Applicants in this case equate the CAF Vaccination Policy with an “order to vaccinate” within the meaning of section 126 of the *NDA*, and assert that the policy or order in itself is an infringement of personal security *per se*. As noted above, the Applicants characterize the policy to mandated medical treatment that is an abuse of power and an assault on the freedom of CAF members. The Applicants failed to provide any submissions, however, regarding the second part of the test, that is, whether the CAF Vaccination Policy accords with the principles of fundamental justice.

[58] Further, the possible consequence of a refusal to vaccinate in the context of section 126 of the *NDA* and engagement with section 7 of the *Charter* was considered by the Court Martial

Appeal Court of Canada in *R. v Kipling*, 2002 CMAC 1 where (former) Chief Justice Strayer observed at para 28:

I think the parties would agree that forcible vaccination of an individual would *per se* be an infringement of the right to security, **but that is not what was involved here**. Sergeant Kipling was never vaccinated but sent home instead to face the consequence of a possible trial where it might be demonstrated that he had a “reasonable excuse” for refusing vaccination. In my view **it was not sufficient for the military judge simply to conclude as he did that by the mere order there was an infringement of personal security *per se*; he was also obliged to consider, in applying section 7, whether this right to security was nevertheless denied in accordance with the principles of fundamental justice**. It is well established that a court must balance individual interests *versus* the public interest in deciding whether in the final analysis there is a denial of a right contrary to the principles of fundamental justice so as to invoke the protection of section 7.

[Emphasis added.]

[59] Similarly, I find that what is at stake for the Applicants here is not forcible vaccination but rather the consequences of one’s choice to remain unvaccinated. Further, there is no evidence that any of the Applicants face any charges under the *NDA* s 126. The Applicants also have failed to provide any evidence or arguments to show that their interests outweigh the public interest in ensuring, to the extent possible, the readiness, health and safety of the Forces, the Defence Team, and the vulnerable groups they may be called on to serve, in the context of the COVID-19 pandemic. Nor, in my view, have the Applicants met their evidentiary burden to show a limitation in respect of a section 7 interest that is arbitrary, overbroad or grossly disproportionate in the context of the COVID-19 pandemic.

[60] As I alluded above, notwithstanding the Respondent's admission that the Applicants' *Charter* concerns can give rise to a serious issue (as the Court held in *Lavergne-Poitras*, above at paras 6, 48-49), where an administrative decision maker can hear and decide constitutional issues, the Court should not sanction the bypass of the decision maker's jurisdiction by permitting the constitutional issues to be raised for the first time on judicial review: *Forest Ethics*, above at para 46.

[61] I therefore decline to consider the remaining *Charter* issues, which in any event, are lacking sufficient evidentiary basis for any meaningful consideration by this Court. As an example, regarding freedom of religion protected under paragraph 2(a) of the *Charter*, Warrant Officer Warren's evidence is that he has requested a religious exemption. His request is not in evidence, however, nor is there any evidence or submissions before the Court regarding his beliefs, how they are connected to religious grounds, and how they prevent vaccination. On the other hand, the CAF Vaccination Policy clearly provides for accommodation on religious grounds and the Respondent's evidence shows that accommodations have been granted on such grounds.

[62] As another example, regarding the reasonable expectation of privacy protected under section 8 of the *Charter*, the information at issue is an attestation as to vaccination status without any requirement of proof. There is insufficient evidence and submissions to show, however, that even if this requirement interferes with one's privacy expectations that it is unreasonable in the context of the COVID-19 pandemic. Put another way, the impact that the CAF Vaccination Policy may have on a member's privacy interest is modest on its face and outweighed, in my

view, by the public interest in protecting the readiness, health and safety of the Forces, the Defence Team and the public they may be called upon to serve.

[63] As a final example, regarding protection against discrimination under section 15 of the *Charter*, the accommodation requests of Lt-Col Neri and Cpl Grenier, both of whom requested accommodation on such grounds, are not in evidence, nor is there sufficient evidence or submissions before the Court to establish that the CAF Vaccination Policy is contrary to section 15. Rather, in my view, the policy clearly permits accommodation in accordance with the *CHRA*, including analogous grounds of discrimination.

[64] For the above reasons, I find the Applicants have failed to establish a serious issue regarding the validity or constitutionality of the Directives and the Aide-Memoire.

(4) Irreparable Harm?

[65] Because of my finding that the Applicants have failed to meet the first prong of the conjunctive three-part *RJR-MacDonald* test (meaning all three parts must be met to succeed), I need not consider the remaining two parts. Nonetheless, I will address them briefly.

[66] In my view, the Applicants have not established clear, non-speculative harm that cannot be compensated with an award of damages. As mentioned above, loss of employment, housing and employment related allowances, all can be redressed with a monetary award.

[67] In addition, the Applicants complain that if they are released from the CAF because of non-compliance with the CAF Vaccination Policy, it will occur pursuant to 5(f) of the Table to Article 15.01 of the *QR&O*. A 5(f) release signifies that the reason for release is “unsuitable for further service” and is described as applying to “the release of an officer or non-commissioned member who, either wholly or chiefly because of factors within his control, develops personal weakness or behaviour or has domestic or other personal problems that seriously impair his usefulness to or impose an excessive administrative burden on the Canadian Forces.” The First Judiesch Affidavit confirms the likelihood that 5(f) will be assigned to the release of a CAF member who refuses to be vaccinated.

[68] According to the Applicants, a 5(f) release would mean they have been dishonourably discharged. This is not borne out, however, by Article 15.01(4) of the *QR&O* which provides that:

(4) Where an officer or non-commissioned member is released, the notation on his record of service shall be as follows:

...

where he is released under Item 3, 4 or 5, the notation "Honourably Released".

[69] Apart from the Applicants’ own evidence of what a 5(f) release means to them (i.e. “dishonourable discharge”), none of the Applicants has provided evidence to demonstrate that anyone else has this perception, whether within or outside the CAF. In addition, Cpl Flynn asserted that a 5(f) release would affect the released person’s reputation forever and cannot be undone. Again, however, no supporting evidence has been provided. Further, the affidavit of Brig-Gen Simoneau attests that under Directive 3, unvaccinated members have the option of

requesting a voluntary release. In addition, the Respondent has shown that reenrollment in the CAF can occur in certain circumstances with the approval of the CDS. The Respondent also has shown that remedial measures will be concluded formally if the member gets vaccinated, or if it is determined, through the grievance process, that such measures were initiated incorrectly.

[70] While some of the Applicants have raised concerns about losing post-release benefits, the First Judiesch Affidavit attests that a 5(f) release does not affect a member's entitlements, for example, under the *Canadian Forces Superannuation Act*, or the CAF Relocation Directive regarding moves to an intended place of release.

[71] In any event, none of the Applicants has been approved for release at this point. If and when that occurs, the Applicants have a grievance process available to them, the outcome of which can be challenged by way of an application for judicial review brought before this Court, contrary to the Applicants' assertion that a CAF member cannot seek redress for a decision of the CDS. Additionally, the Second Judiesch Affidavit attests that, under the DND Living Accommodation Instruction, there is some discretion to allow CAF members to continue occupancy beyond their release date. I note that according to the DND Living Accommodation Instruction, which is an exhibit to the Second Judiesch Affidavit, there is a dispute resolution process for DND housing. If the CAF member's complaint cannot be resolved with this mechanism, it also can be grieved.

[72] In light of the above, I am not persuaded that the Applicants have established clear, non-speculative irreparable harm warranting the Court's interference in the circumstances. I find the Applicants thus also have failed to meet the second prong of the *RJR-MacDonald* test.

(5) Balance of Convenience

[73] I find that the balance of convenience favours maintaining the CAF Vaccination Policy for the public good and militates against granting the requested injunction. As mentioned above, the Applicants have failed to demonstrate that their interests outweigh the public interest in ensuring the readiness, health and safety of the Forces, the Defence Team, and the vulnerable groups they may be called on to serve, in the context of the COVID-19 pandemic. The evidence in the matters before me establishes that COVID-19 has posed, and continues to pose, a significant health risk to Canadians, including CAF members who may interact or serve with each other or the public in shared spaces. Infection can occur in shared spaces, even with physical distancing of two or more metres, because of aerosol transmission of the virus. The evidence establishes that vaccination significantly mitigates not only the risk of infection, but also the seriousness of infection if it occurs despite vaccination.

[74] I thus find that on balance, if the requested injunction were issued, material harm to the public interest would ensue, in terms of increased health risks to CAF members and the public they serve, as well as by undermining a measured, evidence-based response, in the form of the CAF Vaccination Policy, to a complex, continuously and rapidly evolving, significant public health emergency. These harms in my view significantly outweigh the harms identified by the

Applicants if the injunction is not granted. The balance of convenience therefore favours refusing the requested injunction.

V. Conclusion

[75] For all the foregoing reasons, I dismiss the Applicants' motions for a temporary or interlocutory injunction to restrain the enforcement of any directive regarding a vaccine mandate, pending the outcome of their JR Applications.

VI. Costs

[76] The Respondent requests costs of these motions on the basis that this Court recently rejected similar motions seeking injunctive relief in respect of vaccination policies applied to the federal work force or personnel interacting with the federal workforce at federal worksites (i.e. *Wojdan* and *Lavergne-Poitras*). In my view, however, the circumstances here are sufficiently different in that: the parties are different; while the issues overlap, they are not identical; and the motions were not vexatious or frivolous. I thus decline to exercise my discretion to award costs of the motions to the Respondent, but without prejudice to the Respondent's right to seek costs in the underlying JR Applications in the event that either of them proceeds.

ORDER in T-1813-21

THIS COURT ORDERS that

1. The Applicants' motions are dismissed.
2. No costs are awarded.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

Federal Courts Rules, SOR/98-106 *Règles des Cours fédérales, DORS/98-106*

General principle

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits

Consolidation of proceedings

105 The Court may order, in respect of two or more proceedings,

(a) that they be consolidated, heard together or heard one immediately after the other;

(b) that one proceeding be stayed until another proceeding is determined; or

(c) that one of the proceedings be asserted as a counterclaim or cross-appeal in another proceeding.

Principe general

3 Les présentes règles sont interprétées et appliquées de façon à permettre d’apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

Réunion d’instances

105 La Cour peut ordonner, à l’égard de deux ou plusieurs instances;

a) qu’elles soient réunies, instruites conjointement ou instruites successivement;

b) qu’il soit sursis à une instance jusqu’à ce qu’une décision soit rendue à l’égard d’une autre instance;

c) que l’une d’elles fasse l’objet d’une demande reconventionnelle ou d’un appel incident dans une autre instance.

National Defence Act, RSC 1985, c N-5

Loi sur la défense nationale, L.R.C. (1985), ch. N-5

Grievances

Right to grieve

29 (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.

...

Griefs

Droit de déposer des griefs

29 (1) Tout officier ou militaire du rang qui s’estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.

...

Authorities for determination of grievances

29.1 (1) The initial authority and subsequent authorities who may consider and determine grievances are the authorities designated in regulations made by the Governor in Council.

...

Autorités compétente

29.1 (1) Les autorités qui sont initialement saisies d'un grief et qui peuvent ensuite en connaître sont désignées par règlement du gouverneur en conseil.

...

...

Final authority

29.11 The Chief of the Defence Staff is the final authority in the grievance process and shall deal with all matters as informally and expeditiously as the circumstances and the considerations of fairness permit

Dernier ressort

29.11 Le chef d'état-major de la défense est l'autorité de dernière instance en matière de griefs. Dans la mesure où les circonstances et l'équité le permettent, il agit avec célérité et sans formalisme.

Refusing immunization, tests, blood examination or treatment

126 Every person who, on receiving an order to submit to inoculation, re-inoculation, vaccination, re-vaccination, other immunization procedures, immunity tests, blood examination or treatment against any infectious disease, wilfully and without reasonable excuse disobeys that order is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

Refus d'immunisation ou d'examens médicaux

126 La transgression, délibérée et sans motif valable, de l'ordre de se soumettre à toute forme d'immunisation ou de contrôle immunitaire, à des tests sanguins ou à un traitement anti-infectieux constitue une infraction passible au maximum, sur déclaration de culpabilité, d'un emprisonnement de moins de deux ans.

**Canadian Charter of Rights and Freedoms Part I of the Constitution Act, 1982, being
Schedule B to the Canada Act 1982 (UK), 1982, c 11**

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

Libertés fondamentales

2 Chacun a les libertés fondamentales suivantes

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

c) liberté de réunion pacifique;

Life, liberty and security of person

7 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.

Vie, liberté et sécurité

7 Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure.

Fouilles, perquisitions ou saisies

8 Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race,

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15 (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées

national or ethnic origin,
colour, religion, sex, age or
mental or physical disability.

sur la race, l'origine nationale
ou ethnique, la couleur, la
religion, le sexe, l'âge ou les
déficiences mentales ou
physiques.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1813-21 AND T-1870-21

STYLE OF CAUSE: ILLO ANTONIO NERI, MORGAN CHRISTOPHER WARREN, MARIE-GAELLE GRENIER and SHAUN CHARPENTIER v.
THE QUEEN IN THE RIGHT OF CANADA
AND BETWEEN
RONALD ROBERT FLYNN and
BRYAN WILLIAM RUDLING
v.
THE QUEEN IN THE RIGHT OF CANADA
PLACE OF HEARING: HELD BY VIDEOCONFERENCE IN OTTAWA,
ONTARIO

DATE OF HEARING: DECEMBER 15, 2021

ORDER AND REASONS: FUHRER J.

DATED: DECEMBER 17, 2021

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