

F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
September 12, 2023		
Lindsay Krieger		
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Court File No.: T-1296-23

FEDERAL COURT

BETWEEN:

FRANCESCO GABRIELE QUALIZZA, and others

Plaintiffs

AND:

HIS MAJESTY THE KING IN RIGHT OF CANADA, and others

Defendants

STATEMENT OF DEFENCE

1. This Statement of Defence is filed on behalf of the Defendants.
2. The Defendants deny each and every allegation in the Amended Statement of Claim (the “Claim”).

FACTS**CAF COVID-19 Vaccination Policy and Directives**

3. In response to the COVID-19 pandemic, the Chief of the Defence Staff (“CDS”) implemented the Canadian Armed Forces (“CAF”) COVID-19 Vaccination Policy (“**Policy**”) as expressed in three Directives. The CDS is charged with the control and administration of the CAF. As such, the CDS has the authority to issue orders and instructions to the CAF, including with respect to requirements related to enrolment and service in the CAF.
4. On October 8, 2021, the CDS issued the first *CDS Directive on CAF COVID-19 Vaccination* (“**Directive 1**”), setting out the Policy. Directive 1 described how the CAF would abide by the general spirit of the Public Service Vaccination Policy, while ensuring the CAF was situated to meet operational imperatives. The Policy applied to all officers and non-commissioned members of the CAF posted to domestic locations, as well as

those on expeditionary operations, exercises, temporary duty, or training outside of Canada.

5. The second Directive (“**Directive 2**”) was *CDS Directive 002 on CAF COVID-19 Vaccination – Implementation of Accommodations and Administrative Action*, issued by the CDS on November 3, 2021. The third Directive was *CDS Directive on CAF COVID-19 Vaccination 002 Amendment 1* (“**Directive 3**”), which was signed on December 4, 2021 (collectively the “**Directives**”).
6. The Directives describe one of the primary objectives of the Policy, as “to protect the readiness, health, and safety of the Force, the entire Defence Team, as well as members of the public they may be called upon to serve.”
7. In line with the Public Service Vaccination Policy, the Policy and Directives mandate that all CAF members had to be fully vaccinated against COVID-19 unless they cannot be fully vaccinated due to a certified medical contraindication, religious grounds, or any other prohibited ground of discrimination as defined in the *Canadian Human Rights Act* (“**CHRA**”).
8. Under the Policy, CAF members were required to provide confirmation of their vaccination status through an attestation process.
9. The attestation deadline was October 29, 2021, for most CAF members.
10. The Directives included an assumption that the Policy would be a temporary measure. Indeed, the Directives and Policy were replaced on October 11, 2022, by way of *CDS Directive 003 on CAF COVID-19 Vaccination for Operations and Readiness*.

Remedial Measures and Administrative Review

11. Directive 1 provides that CAF members unwilling to comply with the attestation requirement could be subject to remedial measures or other administrative action. Directive 2 indicates a member’s failure to comply with the Directives demonstrates an unwillingness to obey and support lawful authority, which is an ethical principle expressed in the *Department of National Defence and Canadian Forces Code of Values and Ethics*. It requires commanding officers to consider the full range of administrative

action, including initiating remedial measures in accordance with *Defence Administrative Order and Directive* (“**DAOD**”) 5019-4, *Remedial Measures* for CAF members not complying with the Policy by November 15, 2021.

12. Remedial measures are part of the range of administrative actions which may be initiated in respect of a CAF member. They are intended to make a CAF member aware of any conduct or performance deficiency, assist the CAF member in overcoming it, and provide the CAF member with time to correct their conduct or improve their performance. Remedial measures are, in escalating significance, “initial counselling”, “recorded warning”, and “counselling and probation.”
13. The Directives also indicate that a failure to comply could lead to an administrative review and potential release from the CAF.
14. An administrative review is the process to determine the most appropriate administrative action, if any, when an incident, a special circumstance, or a conduct or performance deficiency occurs that violates professional standards and calls into question the viability of a CAF member's continued service. An administrative review may be recommended when remedial measures fail to rectify a conduct or performance deficiency. An administrative review includes specific procedural fairness requirements.

The CAF grievance process

15. The Plaintiffs had recourse through the grievance process established under the *National Defence Act* (“**NDA**”). The CAF grievance process is set out in sections 29 to 29.15 of the *NDA* and Chapter 7 of the *Queen’s Regulations and Orders* (“**QR&O**”). Subsection 29(1) of the *NDA* provides that any officer or non-commissioned member of the CAF who has been aggrieved by any decision, act or omission in the administration of the affairs of the CAF for which no other process for redress is provided under the *NDA* is entitled to submit a grievance.

MATTERS THAT DEFEAT THE CLAIM

The Claim is an Improper Pleading

16. The Claim consists of a disparate list of complaints from multiple Plaintiffs that have but three things in common: 1) they all are, or were, members of the CAF, 2) they have some issue with respect to COVID - 19 vaccinations, and 3) they complain about some aspect of their service.
17. The Claim should be dismissed because it:
 - a) is scandalous, frivolous, and vexatious;
 - b) constitutes an abuse of process;
 - c) consists of bald allegations without any material facts necessary to support the causes of action alleged;
 - d) has little to no connection between the allegations in the Claim and the circumstances alleged in relation to individual Plaintiffs;
 - e) does not disclose a cause of action generally, including against the individually named Defendants;
 - f) provides a brief overview for each of the Plaintiffs that has insufficient material facts to allow the Defendants to know what the allegations against them are. What facts are provided indicate that there is little connection between the complaints of the various Plaintiffs. A trial of this matter will be unmanageable, and the pleadings are improper.

The Plaintiffs must engage the grievance process rather than bringing the Claim

18. Further, or in the alternative, at all material times the Plaintiffs either filed a grievance, or could have filed a grievance in relation to the issues raised in the Claim. Therefore, the subject matter of this Claim falls squarely within the scope of the *NDA* grievance process. Accordingly, this Court does not have jurisdiction over the matters raised in the Claim. Alternatively, this Court should not exercise its jurisdiction to hear this matter.

19. In addition, bringing the Claim prior to the resolution of the matters raised in the grievance process is premature. Moreover, pursuant to s 7.27 of the QR&O for the Canadian Forces (Volume 1 – Administration) the within Claim has, or will, result in the suspension of the grievance process for those Plaintiffs who have filed outstanding grievances. This delay further highlights the abuse of process arising from this Claim.

The Plaintiffs are Entitled to Compensation and the Claims are Barred

20. The Plaintiffs, as current or former members of the CAF are entitled to, or may be entitled to, compensation under the provisions of the *Veterans Well-being Act* S.C. 2005, c. 21. If any of the potentially eligible Plaintiffs have not applied for compensation under the *Veterans Well-being Act*, the Claim is barred until such time as they have applied for such compensation, pursuant to section 92(2) of that *Act*.
21. Further, if compensation is, or will be, payable to the Plaintiffs the Claim is barred pursuant to section 9 of the *Crown Liability and Proceedings Act* R.S.C., 1985, c.C-50.

The Claim is Without Merit

22. Further, or in the alternative, the Claim is without merit. The COVID-19 pandemic was a fundamental threat to the lives of Canadians, the Canadian economy, and the ability of the CAF to carry out its mandate. Vaccination forms a key component in protecting the health of CAF members and employees of the Department of National Defence and carrying out the CAF's mandate. The CAF's enactment of the Policy and Directives was reasonable and does not give rise to a duty of care to the Plaintiffs.
23. In addition, vaccination was safe, effective, and accepted as part of a proper response to the pandemic. The Defendants deny that the Plaintiffs, or any of them, suffered as a result of being vaccinated or that they can be liable to the Plaintiffs for any negative effects from taking a vaccine. In any event, most of the Plaintiffs refused to be vaccinated, and therefore cannot have suffered any injury from taking any vaccine.
24. Further, or in the alternative, the Defendants cannot be responsible for any adverse reactions or injury to the Plaintiffs from any vaccine taken.

The Plaintiffs' Charter rights are not engaged

25. The Defendants did not breach any of the Plaintiffs' rights under the *Charter*, as alleged or at all, particulars of which include:
- a) There are no facts pled in the Claim that would ground any claim under section 2(a) of the *Charter*;
 - b) The facts alleged do not disclose any beliefs protected by section 2(a) of the *Charter*;
 - c) The Plaintiffs were given the opportunity to object to vaccination on religious grounds, thereby respecting their freedom of religion as provided for in section 2(a) of the *Charter*;
 - d) There are no facts pled in the Claim which would ground any claim under section 2(d) of the *Charter*;
 - e) The Plaintiff's rights under section 7 of the *Charter* were never engaged. To the extent that many of the Plaintiffs were never vaccinated, they exercised their right to liberty, and security of the person by refusing the vaccine. Further, the Plaintiffs complain that the Defendants' decisions impacted their economic activity but this is not protected by Section 7. In the alternative, any deprivation of the Plaintiffs' section 7 *Charter* interests, which is denied, was in accordance with the principles of fundamental justice.
 - f) Section 8 of the *Charter* is not applicable. There was no search or seizure. Further, the requirement to provide basic information by attesting to vaccination status in the context of a global pandemic does not engage constitutionally protected privacy interests. In the alternative, any interference with any privacy rights was not unreasonable. In any event, many of the Plaintiffs did not provide their vaccine status, and those that did, did so consensually.
 - g) Finally, section 15 of the *Charter* does not apply. The Policy and Directives specifically accommodated protected grounds such as medical contraindication or

religion. Further, vaccine status, or objection to vaccination, is not a personal characteristic that is immutable and is not protected by section 15 of the *Charter*.

26. In the alternative, if any of the Plaintiffs' *Charter* rights were infringed by the Defendants, which is denied, any infringement constitutes a reasonable limit prescribed by law under section 1 of the *Charter*. Specifically,
- a) The purposes of the Policy and Directives that gave rise to the alleged infringements were pressing and substantial; and,
 - b) The means employed to the achieve the objectives of the Policy and Directives were proportionate.
27. Further, or in the further alternative, the Plaintiffs are not entitled to damages under section 24(1) of the *Charter*.

Privacy rights were not engaged

28. The Plaintiffs plead that their rights were breached under the *Privacy Act*. There is no cause of action arising from the alleged infringement of this *Act*, and such claims should be dismissed.

No Damages or Declarations

29. The Defendants deny that the Plaintiffs suffered damages as alleged, or at all. Alternatively, if the Plaintiffs suffered damages, those damages were not caused as a result of the acts or omissions of the Defendants.
30. The Plaintiffs are not entitled to punitive damages pursuant to section 49 of the *Charter of Human Rights and Freedoms* CQLR c C-12, or section 49 of the *Civil Code of Quebec* CQLR c C-1991 as the Defendants did not commit unlawful and intentional interference.
31. In the alternative, any damages were not mitigated by the Plaintiffs.

32. Further, the Plaintiffs are not entitled to the declarations sought, or at all.

The Defendants ask that the Claim be dismissed with costs against the Plaintiffs.

Dated this 12 day of September, 2023



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