



## **ANNEX I - CONSTITUTIONALITY OF THE CAF COVID-19 VACCINATION POLICY**

Before: Nina Frid, Member

Date: 29 May 2023

### **ISSUES**

The aim of this Annex is to determine if portions of the Canadian Armed Forces (CAF) Vaccination Policy pursuant to Chief of the Defence Staff (CDS) COVID-19 directives deprive CAF members of their rights under the *Charter of Rights and Freedoms* (the *Charter*), Section 7 - Life, liberty and security of person, which states:<sup>1</sup>

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.

If section 7 is engaged, then this Annex will also examine whether the CAF has shown that the limitation of the rights guaranteed by section 7 is justified in a free and democratic society under section 1 of the *Charter*, which states:<sup>2</sup>

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

### **CONTEXT / APPLICABLE POLICIES**

On January 25, 2020, the first case of the COVID-19 virus was identified in Canada. Due to the highly contagious nature of the virus, other cases were quickly identified. The Government of Canada implemented public health measures to limit the impact of the virus on Canadians.

On 11 March 2020, the World Health Organization (WHO) assessed the situation related to the spread and severity of illness caused by the COVID-19 virus and declared it a pandemic.<sup>3</sup> In the first months of the pandemic, CAF members were deployed to long-term care facilities in

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<sup>1</sup> *Canadian Charter of Rights and Freedom*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>2</sup> *Ibid.*

<sup>3</sup> WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020 available at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

Québec and Ontario under Operation LASER,<sup>4</sup> supported northern and remote communities, assisted the Public Health Agency of Canada in managing and distributing personal protective equipment, and helped Public Health Ontario with contact-tracing efforts. The CAF also provided support for the distribution of COVID-19 vaccines through Operation VECTOR.<sup>5</sup>

In May 2020, the CAF and Department of National Defence issued the Deputy Minister (DM)/CDS joint directive – Department of National Defence (DND)/CAF COVID-19 public health measures and personal protection,<sup>6</sup> and the Joint CDS/DM Directive for the Resumption of Activities.<sup>7</sup> The intent was to maintain a level of readiness commensurate with the CAF's mandate while ensuring the safety of all CAF members.

On 9 December 2020, Health Canada authorized the first vaccine against COVID-19 and mass vaccination efforts began across Canada later that month.<sup>8</sup>

On 6 January 2021, the CAF launched a vaccination campaign where the priority was afforded to CAF members serving in higher-risk settings given their occupation and duties.<sup>9</sup> In the roll-out message, the CAF Surgeon General stated that:

Like other vaccines provided to CAF members, the COVID-19 vaccine will not be mandatory; this remains a voluntary option for all. Whether or not a vaccine will be made a requirement for an operation or a position is a decision to be made by operational commanders, in consultation with their medical advisors. However, CAF members may require proof of a COVID-19 vaccination in order to operate in certain high-risk environments or with vulnerable populations. The intent remains to protect ourselves, and protect others to maintain operational effectiveness as we serve Canada and Canadians at home and abroad.

Between April and June 2021, the CAF completed its first COVID-19 Immunization Campaign for all individuals entitled to CAF medical care.

On 6 October 2021, the Treasury Board Secretariat announced the Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police (RCMP). The policy applied to DND employees, but not CAF members. It required all public servants regardless of their place of work and on-site contractors to be fully vaccinated. It also

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<sup>4</sup> CDS Tasking Order - OP LASER 20-01 available at <https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/laser.html>.

<sup>5</sup> Military response to COVID-19 - Canada.ca available at <https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/operation-vector.html>.

<sup>6</sup> DM/CDS joint directive - Canada.ca available at <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/dm-cds-joint-directive.html>.

<sup>7</sup> Joint CDS/DM Directive for the Resumption of Activities - Canada.ca available at <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/joint-cds-dm-directive-for-the-resumption-of-activities.html>.

<sup>8</sup> Health Canada authorizes first COVID-19 vaccine - Canada.ca available at <https://www.canada.ca/en/health-canada/news/2020/12/health-canada-authorizes-first-covid-19-vaccine0.html>.

<sup>9</sup> Surgeon General CAF Vaccine Rollout Message - Canada.ca available at <https://www.canada.ca/en/department-national-defence/maple-leaf/defence/2021/01/surgeon-general-caf-vaccine-rollout-message.html>.

directed that non-compliant employees be placed on leave without pay. Accommodation measures were available to employees who could demonstrate that they were unable to get vaccinated for reasons related to protected grounds of discrimination.<sup>10</sup>

On 8 October 2021, the CDS issued the first directive on CAF Covid-19 vaccination.<sup>11</sup> It introduced mandatory vaccination as a requirement for all CAF members to perform work-related duties. It explained that vaccines are effective at preventing severe illness, hospitalization, and death from COVID-19, and that the number of outbreaks decreases with increased vaccination coverage in the population. The directive announced that DND and the CAF implemented a layered risk mitigation strategy relying on public health measures such as physical distancing, mask-wearing, hand-washing, and work from home. The directive stated that the early implementation of this strategy enabled a safe workplace with minimal transmission of the virus.

The directive affirmed that the CAF's voluntary vaccination campaign was "highly successful" with 91% of all members being fully vaccinated with two doses. It explained that vaccination is not a substitute for following public health measures; rather, it adds an additional layer of protection. The directive explained that, at the time, the Canadian population had not achieved sufficient vaccination uptake and that the need for public health measures would be ongoing until sufficient widespread immunity is attained in Canada. It stated there were indications that "vaccine mandates" may be effective in increasing vaccine coverage rates in the population, and that the Government of Canada announced its intent to require vaccination across the federal public service. The directive also stated that, to demonstrate leadership, the CAF abides by the general spirit of the federal policy.

The directive divided members into three groups: the "fully vaccinated," the "unable" to get vaccinated and the "unwilling" to get vaccinated. Members had to attest to their vaccination status in the Military Monitor Administrative Support System (Monitor MASS) by 15 November 2021. The directive stated that accommodation under the *Canadian Human Rights Act*<sup>12</sup> (CHRA) for those individuals who were unable to be vaccinated should not be punitive and should be provided up to the point of undue hardship. The directive provided that those accommodation measures include remote work / telework arrangement if operationally feasible, testing if access to the workplace was required and alternative workplace or work schedule.<sup>13</sup> It stated that a CAF member's unvaccinated status may have additional career implications, including loss of opportunities contributing to promotion, such as inability to attend career courses, deployments, domestic and international travel restrictions. It stated that CAF members unwilling to disclose their vaccination status or those who are not accommodated under the CHRA may be subject to remedial or alternative administrative measures. The directive also stated that it was a

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<sup>10</sup> Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police (tbs-sct.gc.ca) available at <https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32694>.

<sup>11</sup> CDS Directive on CAF COVID-19 Vaccination - Canada.ca available at <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/dm-cds-directives/dm-cds-directive-covid-19-vaccination-policy.html>.

<sup>12</sup> R.S.C., 1985, c. H-6.

<sup>13</sup> The directive applies to members employed under telework arrangements (para 20(b)(7)), 20(c)(3)(a).

“temporary measure” that “will be terminated once the domestic transmission rate of COVID-19 in Canada no longer poses a risk to the national healthcare system”.<sup>14</sup>

On 3 November 2021, the CDS issued a second directive on the CAF COVID-19 vaccination policy. It set out the requirements for requesting an exemption or accommodation on medical, religious or other protected grounds of discrimination.<sup>15</sup> Directive 002 reiterated the CAF’s engagement to abide by the Government of Canada’s policy on vaccination. It stated that adherence to the policy was an expected behaviour applicable to all CAF members and those who do not comply are considered to be in breach of the DND and CAF Code of Values and Ethics. It also provided that unvaccinated members - unless exempted for operational reasons or accommodated where feasible - would not be employed or undergo training on Royal Canadian Navy vessels, Royal Canadian Air Force aircraft or an Army fighting or field vehicle; be posted outside Canada, be deployed on international or domestic operations; or participate in in-person collective training.

Directive 002 emphasized the chain of command’s (CoC) obligation to initiate administrative action towards members who refuse vaccination or refuse to disclose their vaccination status. CAF members that have not complied will be placed on recorded warning and counselling and probation for misconduct for a period of 14 days, to allow them to “overcome their conduct deficiency” by getting vaccinated. Members who remained unwilling to be vaccinated would be subject to administrative action. Directive 002 explained that members cannot request leave without pay, and clarified that it also applied to members authorized to work remotely.

On 8 November 2021, the Director Military Career - Administration issued the “Aide-Memoire - CDS Directive 002 on CAF COVID-19 Vaccination Implementation of Accommodations and Administrative Action, providing direction and templates to the CoC for the issuance of remedial measures and release procedures for non-compliance with the CDS directives.”<sup>16</sup>

On 22 December 2021, the CDS issued CDS Directive 002 - Amendment 1 that reiterated the Directive 002 provisions, albeit with a few modifications and clarifications.<sup>17</sup> The directive stated that unvaccinated members could elect to initiate a release on a voluntary basis or transfer to the supplemental reserve.<sup>18</sup> These members were not exempt from remedial measures until

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<sup>14</sup> Paragraph 17(a) of the first CDS directive (October 2021).

<sup>15</sup> CDS directive 002 on CAF COVID-19 vaccination – Implementation of Accommodations and Administrative Action - Canada.ca available at <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/dm-cds-directives/cds-directive-002-caf-covid-19-vaccination-implementation-of-accommodations-and-administrative-action.html>. The CHRA makes it illegal to discriminate on a wide range of grounds including but not limited to race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics.

<sup>16</sup> Available at [http://roryfowlerlaw.com/wp-content/uploads/2021/12/DMCA-2-Aide-Memoire-.COVID\\_Final\\_.pdf](http://roryfowlerlaw.com/wp-content/uploads/2021/12/DMCA-2-Aide-Memoire-.COVID_Final_.pdf).

<sup>17</sup> CDS Directive 02 on CAF COVID-19 Vaccination – Implementation of Accommodations and Administrative Action – Amendment 1 - Canada.ca available at <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/dm-cds-directives/cds-directive-02-amend-1-covid-19-vaccination.html>.

<sup>18</sup> QR&O 2.034(b) explains that the Supplementary Reserve consists of officers and non-commissioned members who are not required to perform military or any other form of duty or training, unless placed on active service by the Governor in Council under section 31(1) of the *National Defence Act* (NDA).

they were released from the CAF (paragraph 13(f)(5)). The directive also applied to members in the process of being released for medical or other reason, including to members on periods of retention and undertaking the vocational rehabilitation program for serving members. The directive stated that unvaccinated members in those situations were not exempt from remedial measures and administrative review for non-compliance with CAF's vaccination policy and could see their release be expedited under *Queen's Regulations and Orders for the Canadian Forces* (QR&O), Section 15.01, item 5(f)<sup>19</sup> (paragraph 13(f)(4)).

In February 2022, the Chief Military Personnel issued [Canadian Forces General Message (CANFORGEN)] 012/22 - APPLICATION OF [Defense Administrative Orders and Directives (DAOD)] 5019-2 - ADMINISTRATIVE REVIEW IN RESPONSE TO CDS DIRECTIVES ON CAF COVID-19 VACCINATION. It reinforced CDS Directive 002, reiterating the direction to the CoC to initiate administrative reviews towards all members who remain non-compliant. It states that the requirement of DAOD 5019-2, Administrative Review to consider the totality of the member's career and other criteria do not apply to administrative reviews where a member is being released solely as a result of non-compliance with CDS Directive on CAF vaccination.

On 21 March 2022, the CAF issued the [Canadian Forces Military Personnel Instruction] 01/22 - Changing a Place of Duty and the Use of Postings to Enable Remote Work Options<sup>20</sup> that establishes CAF's framework for authorizing postings to remote work and telework for periods of up to two years.<sup>21</sup>

On 14 June 2022, the Government of Canada announced that the vaccination requirement for the Core Public Administration, including the RCMP, was suspended effective 20 June 2022. During the suspension, employees were not required to be vaccinated as a condition of employment. Employees who were placed on administrative leave without pay for non-compliance with the Policy were returned to regular work duties.<sup>22</sup>

On 16 June 2022, the CAF acknowledged the suspension of the vaccination policy for the public service and stated that the CAF was assessing the need for an amendment to the CDS directives on COVID-19 Vaccination. The message also stated that the CDS Directives remain in effect until further notice.

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<sup>19</sup> The item applies 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" as provided in the version of the QR&O that applied at the time.

<sup>20</sup> Appendix 5: CF Mil Pers Instr 01/22 - Changing a Place of Duty and the Use of Postings to Enable Remote Work Options.

<sup>21</sup> Also see Defence Team COVID-19 - Working remotely - Canada.ca.

<sup>22</sup> COVID-19 vaccination requirement for federal public servants - Canada.ca available at <https://www.canada.ca/en/government/publicservice/covid-19/vaccination-public-service.html>.

On 11 October 2022, the CDS issued CDS Directive 003.<sup>23</sup> It supersedes all previous directives on vaccination and ends the requirement that all CAF members be vaccinated, unless accommodated, effective as of 11 October 2022. It provides that the requirement to be vaccinated against COVID-19 is now driven by operational necessity. Vaccination is required for employment in certain positions and on certain operations. The requirements focus on high-readiness, deployable, or core missions or tasks where an illness would create risk to an individual and/or the mission. The directive states that best scientific evidence has indicated that a COVID-19 primary series vaccination protects against severe illness and hospitalization, and limits the likelihood of operationally high impact events requiring medical evacuation. It mentions that vaccination is no longer a prerequisite for enrollment. Attestation of vaccination status via Monitor Mass remains a requirement under Directive 003.

Directive 003 states that members who have not received the primary vaccine series no longer require accommodation, but may not be eligible to perform certain duties. It encourages all CAF members to be fully vaccinated and current. Directive 003 requires members assigned to specific units or positions to be vaccinated: members assigned to high readiness units and members that could be employed in isolated areas where access to medical care is limited or where vaccination is a prerequisite of entry. Vaccination against COVID-19 is no longer required for all other personnel.

Directive 003 states that the change in CAF vaccination policy is not retroactive. The administrative reviews for which a release decision was rendered will still be actioned; those not yet completed will be closed. Any remedial measures will remain on files as a record of non-compliance with a lawful order, but monitoring periods are to be concluded. Members employed in positions or functions requiring vaccination who have not completed their primary vaccination series and choose not to, shall be reassigned to roles or units designated as not requiring a vaccination (para 14(d)). It states that the policy will be reviewed and updated as the pandemic situation evolves. It also directs the review and consideration of cancellation of CANFORGEN 012/22 stating that the provisions of DAOD 5019-2, Administrative Review do not apply to CAF members being released under the CAF's vaccination policy.

## **POSITION OF THE CAF**

### The Vice Chief of the Defence Staff

In order to assess the constitutionality of the disputed provisions of the CDS directives, the Committee sought input from the CAF, to understand what information and considerations played a role in developing its approach, particularly in respect of members who refused vaccination. The Committee explained that it received several grievances from CAF members, disputing the constitutionality of the CDS Directives on COVID-19 Vaccination, particularly the portions concerning members “unwilling” to be vaccinated. The Committee also explained that several grievors contend that the requirement to be vaccinated in order to remain employed,

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<sup>23</sup> CDS Directive 003 on CAF COVID-19 Vaccination for Operations and Readiness - Canada.ca available at <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/dm-cds-directives/cds-directive-003-covid-19-vaccination-operations-readiness.html>.

without further consideration, infringed on their rights to life, liberty and security of the person. In response, the Vice Chief of the Defence Staff (VCDS), who was identified as the Office of Primary Interest in the CDS Directive 002, explained to the Committee that no CAF member was forced to receive medical treatment. She stated that the CAF maintained the members' right to refuse medical treatment, but that their right is distinct from the potential loss of employment for failure to comply with the CDS orders to be vaccinated. She explained that the purpose and intent of [Director Medical Policy Instructions] 4030-57 (MSI 4030-57, Consent to Medical Treatment) is to allow members to freely choose whether they receive medical treatment, but that "This does not mean that there are no consequences for refusing".<sup>24</sup>

In her comments, the VCDS referred the Committee to the Attorney General's memorandum in *Wojdan* concerning the Government of Canada's vaccination policy,<sup>25</sup> including all the experts' affidavits that were presented from the CAF and public health officials. The Committee compiled all of those documents as forming part of the CAF's position.<sup>26</sup> The Attorney General in *Wojdan* argued that the federal policy did not engage the public servants' security of the person interest because it did not force them to get vaccinated. He made the distinction that "Rather, it requires them to choose between getting vaccinated and continuing to have an income on the one hand, or remaining unvaccinated and losing their income on the other". The Attorney General also argued that property or economic rights are not generally protected under section 7 of the *Charter*, stating that the protection does not apply to the economic consequences the appellants faced if they chose not to get vaccinated.<sup>27</sup>

The VCDS explained that the CAF was directed to impose a vaccination mandate equivalent to the Government of Canada's policy for the public service and the RCMP. The VCDS explained that the CAF was unable to place non-compliant members on leave without pay. She explains that the CAF leave policy manual, at chapter 8, precludes the CDS from directing members on leave without pay. She explained that there was no time for the CAF to amend its leave manual in time to follow the timelines in the Government of Canada's vaccination policy. She also said that relieving members from duty in accordance with QR&O 19.75 would require the CAF to keep paying the members, "which would defeat the intended purpose of the [leave without pay] option in the public service".

The VCDS explained that "the CAF considered all possible avenues when determining the most effective method of complying with the government of Canada direction regarding public servants [*sic throughout*]". She noted that all public servants who did not comply with the directive were to be placed on leave without pay, with the intent that their employment would eventually be terminated. The VCDS stated that until such time as amendments are made, the

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<sup>24</sup> Appendix 1: Comments from the VCDS to the Committee - 15 March 2022.

<sup>25</sup> The Federal Court of Appeal found that the appeal was moot given the Government of Canada's decision to suspend the effects of the policy, in *Wojdan v Canada (Attorney General)*, 2022 FCA 120.

<sup>26</sup> Appendix 3: Motion Record of the Respondent, the Attorney General of Canada in Response to Applicants' Motion for Interlocutory Injunction and Appendix 4: Memorandum of Fact and Law of the Respondent, Attorney General of Canada.

<sup>27</sup> Referring to *Irwin Toy Ltd.* [1989] 1 SCR 927 and *Canadian Constitution Foundation v Attorney General of Canada*, 2021 ONSC 2117 and 2021 ONSC 4744 concerning the requirement that air travellers quarantine at a government-approved hotel while awaiting Covid-19 tests results.

CAF would remain compliant with the direction from the Government of Canada. She noted that any amendments to the policy should not be expected to apply retroactively and the consequences of non-compliance with the CAF COVID-19 vaccination policy would remain in effect until and if any future amendments should be issued.

#### Strategic Joint Staff Director General, Plans

The Committee also sought clarification from the Strategic Joint Staff Director General of Plans, responsible for the development and implementation of the CDS directives, to assess whether the CAF considered other options than ordering all CAF members to get vaccinated in order to remain employed. The Committee asked whether the CAF considered the possibility of employing the “unwilling” members under alternatives and restrictions, as allowed for unvaccinated members who were accommodated. He answered:<sup>28</sup>

No. CDS made it clear in his policy that the importance of being vaccinated in order to protect the Force was based on solid medical grounds that justified the mandatory aspect of this policy to all CAF members without any exceptions. As with every policy, accommodation process has been put in place for those members who had pre-accepted conditions that would not allow them to comply even if willing to. That said, being unwilling was never an option and the policy even made COVID-19 vax a permanent condition of employment to be enrolled in the CAF.

In the affidavit filed in *Neri*,<sup>29</sup> the Director General, Plans also explained the content of the CDS directives on CAF Covid-19 for which he is responsible. He explained that the CAF has enabled a safe workplace with minimal transmission of the virus through the diligent application of public health measures prior to vaccination being made available in Canada. The CAF’s strategy relied heavily on public health measures, such as physical distancing, wearing nonmedical masks, hand-washing, and dispersed (mix of home and workplace) or work from home postures where operationally feasible. With respect to the latter measure, the Director General explained that the pandemic has demonstrated how much can be accomplished through a dispersed and remote workplace. However, he also explained that many CAF tasks cannot be successfully accomplished this way. He specified that CAF members completing critical missions or working in situations where physical distancing is not possible may be required to take additional safety measures, such as operational testing for COVID-19. He finally noted the CAF’s contribution to the Government of Canada’s Covid-19 response and vaccine roll-out operations.

Concerning vaccination, he explained that the CAF encouraged vaccination of its members once Health Canada approved four COVID-19 vaccines for use in Canada. He explained that the CAF’s healthcare system was allocated a quantity of COVID-19 vaccines in April-June 2021 to vaccinate all individuals entitled to CAF medical care. The CAF COVID-19 Immunization Campaign was successful as the CAF reached a 91% vaccination rate (with an additional 2% of members partially vaccinated) by the beginning of October 2021. This uptake rate provided an important level of force protection to CAF members, enabling the relaxation of public health

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<sup>28</sup> Appendix 2: Comments from the Director General, Plans, Strategic Joint Staff to the Committee - 12 May 2022.

<sup>29</sup> *Neri v Canada*, 2021 FC 1443.



measures in some locations, as well as facilitating the commencement of the reconstitution of the CAF. The Director General Plans, Strategic Joint Staff explained that the CAF has a general duty to ensure, where possible, the health and safety of all its members in the workplace. He explained that the CAF vaccination policy development process was informed by the scientific evidence provided by the Public Health Agency of Canada, and that it was an evergreen document. He explained that vaccination is an important complement, not a substitute, to the recommended public health measures.<sup>30</sup>

### Public Health Agency of Canada

The Public Health Agency of Canada (PHAC) advised that COVID-19 vaccines are critical to improving the functioning of society and to achieving widespread immunity. The evidence indicates that the vaccines are very effective at preventing severe illness, hospitalization and death from COVID-19 and that the number of outbreaks decreases with increased vaccination coverage in the population.

The PHAC's draft report dated 17 August 2021 indicates:<sup>31</sup>

Most recent modelling and forecasting studies indicate that with the current vaccination coverage levels, although very good, the healthcare capacity could be exceeded during this [fourth] wave. To minimize this possibility, 80% or more of all eligible age groups would need to be fully vaccinated. However, overall 2-dose coverage for the eligible general population in Canada is 71.3% and much lower in the lower age groups (51% in the 18-29 year olds) as of mid-August 2021..."

...

Being unvaccinated has become an important risk factor for hospitalization. Since May 1, 2021 the COVID-19 hospitalization rates among unvaccinated populations are considerably higher than the hospitalization rates for both partially and fully vaccinated populations.

...

Presently, those who are unvaccinated are at greatest risk of infection and severe outcomes. Spread in areas with low vaccination coverage presents an ongoing risk for emergence of, and replacement by, new variants.

Regarding the risks of transmission of the virus, the report notes that earlier studies had shown that vaccination helped reduce transmission, as vaccinated persons were "less infectious".<sup>32</sup>

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<sup>30</sup> Appendix 3: Motion Record of the Respondent, the Attorney General of Canada in Response to Applicants' Motion for Interlocutory Injunction in the Affidavit of Brigadier-General Erick Simoneau, affirmed December 9, 2021 referring to "Exhibit A - Draft PHAC public health rationale for a Federal COVID-19 Vaccination Policy, August 17, 2021".

<sup>31</sup> Appendix 3: Motion Record of the Respondent, the Attorney General of Canada in Response to Applicants' Motion for Interlocutory Injunction in the Affidavit of Brigadier-General Erick Simoneau, affirmed December 9, 2021 at "Exhibit A - Draft PHAC public health rationale for a Federal COVID-19 Vaccination Policy, August 17, 2021".

<sup>32</sup> A 30% lower risk of transmission by vaccinated healthcare workers was reported at the time.

However, the affidavit refers to more recent studies pertaining to the Delta variant, showing that “the possibility of high viral loads in some breakthrough cases in fully vaccinated people which can be as high as in unvaccinated people”. The report also explains that the benefits of vaccination outweigh any safety risks when compared to the possible side effects. The agency strongly recommends that all eligible Canadians receive a full course of vaccines as soon as possible. The PHAC’s report also explains that workplaces have been a frequent setting for outbreaks, mostly in settings where physical distancing was difficult, working remotely not possible and public health measures challenging to implement. It also notes that several workplace settings have succeeded in minimizing transmission with proper infection control measures in place. The PHAC explains that vaccines, when paired with other measures such as wearing masks, hand-washing, ensuring good ventilation indoors, physically distancing and avoiding crowds, can protect the health and wellbeing of employees.

Concerning the implementation of vaccine mandates, PHAC’s draft report referenced by the CAF in their response to the Committee stated that:

Vaccine uptake has plateaued and other countries are facing this challenge. To stimulate uptake, an increasing number of countries as well as provinces and territories are implementing or contemplating vaccine mandates or passports for specific sectors. The impact of these vaccine policies on vaccine uptake will be better known as they roll out.

For non COVID-19 vaccines, vaccine mandates exist and they can be effective to increase uptake. This strategy is mostly effective for individuals that are complacent or not prioritizing vaccination in their day to day life. Other strategies that are more dialogue based are effective to motivate vaccine hesitant individuals. Combination of strategies are most effective to optimize uptake.

... This highlights the importance of continuing efforts to increase vaccine uptake in Canada, with at least 80% of the all eligible age groups fully vaccinated, given that the Delta variant is much more contagious than previous strains/variants circulating in Canada and a complete two-dose series of COVID-19 vaccine provides substantial protection against the variant.

At the time of the report, it was expected that only 51.3% to 73.1% of the federal public service employees would be fully vaccinated. The report explains that vaccine requirements in daycare settings, schools and colleges/universities could increase vaccine coverage by 18%. It stated that the effectiveness of these requirements is impacted by the ease of obtaining exemptions, the consistency of the enforcement and “is less clear when the baseline immunization rate is already high”. The report also noted that vaccine mandates generally have exemptions and don’t require the exclusion of the unvaccinated, unless there is an outbreak.

#### Health Canada

In another affidavit filed in the *Neri* injunction case, the Director General, Biologic and Radiopharmaceutical Drugs Directorate, Health Products and Food Branch, Health Canada

presented information about the COVID-19 vaccination development and approval process.<sup>33</sup> She explained the functioning of mRNA vaccines and reiterated that the benefits associated with the authorized vaccines outweigh the risks of reported side effects.<sup>34</sup> She also explained that studies have revealed that the virus is most frequently transmitted when people are in close contact with others who are infected (either with or without symptoms) and that most transmissions occur indoors. Individual, social and occupational factors affect vulnerability to the COVID-19 illness, for individuals such as healthcare workers, emergency workers who have a high degree of social contact, and for international business travellers.<sup>35</sup> She explained that the goal of Canada's COVID-19 pandemic response and recovery was to minimize serious illness and overall deaths, while minimizing societal disruption using a risk management approach. To maximize mitigation efforts, a layered approach should be used by applying multiple measures together aimed at reducing the risk of COVID-19 spread.

In her affidavit, the Director General also explained that it is reasonable to take active measures to control the spread. For example, by reducing the potential for the spread of the COVID-19 virus in Government of Canada's facilities, Canada will protect Canadians, including those in the employment of the Government of Canada. This will help reduce the burden that individuals infected with COVID-19 place on the provincial acute and emergency care medical systems. Additionally, Canada will help ensure continued operation of those facilities despite continued public transmission of COVID-19 and its variants by reducing the likelihood of transmission at those facilities among staff.

## **ANALYSIS**

The Committee has received numerous grievances in which the grievors challenge the legality of the CDS directives on CAF Covid-19 vaccination and their application. As noted above, the CDS earlier directives were superseded by directive 003 on 11 October 2022, significantly narrowing the scope of the CAF's vaccination policy. To clarify, the content of the CDS directive 003 is not under review by the Committee at this time. Rather, the Committee is reviewing the constitutionality of the previous CDS directives - the first directive, directive 002 and directive 002 amended - since their consequences are still applicable and valid for most grievors. As such, remedial measures already issued remain in place and the release processes initiated are still proceeding. The following analysis is relevant to the majority of similar grievances before the Committee. Therefore, the use of this Annex, addressing a common issue, is intended for consistency, clarity and streamlining of the review process for all relevant cases.

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<sup>33</sup> Appendix 3: Motion Record of the Respondent, the Attorney General of Canada in Response to Applicants' Motion for Interlocutory Injunction in the Affidavit of Celia Lourenco, affirmed December 7, 2021.

<sup>34</sup> She explains that more than 58 million vaccines doses were administered in Canada and that 22,231 people reported mild and serious side effects. The rate of adverse side effects reports is different among different age groups and sexes. Possible side effects include thrombosis, Guillain-Barré Syndrome; capillary leak syndrome, inflammation of the heart, facial paralysis and reported deaths that were still under investigation at the time.

<sup>35</sup> Appendix 3: Motion Record of the Respondent, the Attorney General of Canada in Response to Applicants' Motion for Interlocutory Injunction in the Affidavit of Celia Lourenco, affirmed December 7, 2021 at Exhibit H - *Regulations Amending the Food and Drug Regulations (Interim Order Respecting the Importation, Sale and Advertising of Drugs for Use in Relation to COVID-19: SOR/2021-45.*

## CDS Jurisdiction to Address Questions Pertaining to the *Charter* and Constitutionality

The *Charter* at paragraph 24(1) provides that anyone whose guaranteed rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction to obtain appropriate and just remedy. A court of competent jurisdiction is one that has jurisdiction to grant redress.<sup>36</sup> The underlying principle is that “Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts”.<sup>37</sup>

The Committee and the Final Authority addressed questions pertaining to CAF members’ fundamental rights protected by the *Charter* in prior grievances.<sup>38</sup> Subsection 18(1) of the NDA states that the CDS is “charged with the control and administration of the Canadian Forces”. CAF members who believe they are aggrieved can submit grievances against “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”. The courts noted that the scope of section 29 of the NDA is “the broadest possible wording that accommodates any and every wording, phrasing, expression of injustice, unfairness, discrimination, what-not”.<sup>39</sup> The Federal Court also explained that an order from the CDS has to be consistent with the Constitution to be legal.<sup>40</sup> Although the CDS directives are not “regulations” per se,<sup>41</sup> the *Charter* and its values apply to binding policies of a general application and to individual administrative decisions.<sup>42</sup>

Recently, the Federal Court reiterated the principle that members of the CAF must exhaust the grievance process. It stated that the grievance process can address the CAF members’ *Charter* claims against the CDS directives on CAF COVID-19 vaccination.<sup>43</sup> While his authority to grant financial compensation is limited, the CDS has the authority to cancel and modify the directives on vaccination, as directed by paragraph 52(1) of the Constitution, if he finds that they are unconstitutional. The CDS can also cancel remedial measures, overturn decisions to release CAF

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<sup>36</sup> *R. v Hynes* [2001] 3 S.C.R. 623 and *Mills v The Queen* [1986] 1 S.C.R. 863.

<sup>37</sup> *Canada (Attorney General) v Telbani*, 2012 FC 474; *Nova Scotia (Workers’ Compensation Board) v Martin*; *Nova Scotia (Workers’ Compensation Board) v Laseur*, [2003] 2 S.C.R. 504; *Weber v Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929 and *Northern Regional Health Authority v Horrocks*, 2021 SCC 42.

<sup>38</sup> *In Byrd v Canada (Attorney General)*, 2016 FC 1380; *McBain v Canada (Attorney General)*, 2011 FC 745; *Giolla Chainnigh v Canada (Attorney General)*, 2008 FC 69; *Canada (Attorney General) v Buffett*, 2007 FC 1061; and *Liebmann v Canada (Minister of National Defence)* 2001 FCA 243.

<sup>39</sup> *Ibid* referring to *Jones v Canada*, (1994) 87 FTR 190 and *Bernath v Canada*, 2005 FC 1232.

<sup>40</sup> *In Canada (Director of Military Prosecutions) v Canada (Office of the Chief Military Judge)*, 2020 FC 330.

<sup>41</sup> The NDA grants the authority to make regulations to the Governor in Council, the Minister and Treasury Board at section 12. The CDS directives are “orders and instructions to the Canadian Forces” issued under his authority provided for at paragraph 18(2) of the NDA.

<sup>42</sup> *Canada (Director of Military Prosecutions) v Canada (Office of the Chief Military Judge)*, 2020 FC 330 and *Doré v Barreau du Québec*, 2012 SCC 12 where the Court explained that the tests as to whether an administrative decision respects the *Charter* or as to whether a policy (or some of its provisions) respects the *Charter* are not the same although they are similar and compatible. In both cases, the question is whether there is an appropriate balance between rights and objectives to ensure that the rights at issue are not unreasonably limited. Also *Canada (Attorney General) v Robinson*, 2022 FCA 59.

<sup>43</sup> *Neri v Canada*, 2021 FC 1443 at paragraph 42; *Murphy v Canada (Procureur général)*, 2022 CF 146; *Wojdan v Canada (Attorney General)*, 2021 FC 1341 and *Jones v Canada (Chief of Defence Staff)*, 2022 FC 1106.

members and direct re-enrolment when feasible. Therefore, I find that the CDS has jurisdiction to determine whether the CAF's vaccination policy is constitutional.

### **Protected Interests under Section 7 of the *Charter of Rights and Freedoms***

To show an infringement to the right to liberty and security of the person, the grievors must satisfy two criteria. They must show that: (1) one of the three protected interests (life, liberty, and security of the person) is engaged and (2) that the deprivation is not in accordance with the principles of fundamental justice.<sup>44</sup>

As explained in the following analysis, the CDS' order that all CAF members must be vaccinated to remain employed in the CAF engages the grievors' right to liberty and security of the person, as protected by section 7 of the *Charter*.

#### The Right to Liberty

The right to liberty protects the freedom of all capable adults to make their own choices concerning their medical care and treatment, including decisions to refuse vaccination. The *Charter* does not protect all activities that a person defines as central to his or her lifestyle.<sup>45</sup> The protection of the right to liberty under section 7 commonly applies to criminal and immigration matters where the state can physically restrain individuals through imprisonment or deportation.<sup>46</sup> However, the right to liberty is not restricted to mere freedom from physical restraint.<sup>47</sup> The right to liberty also protects personal autonomy and dignity that includes the right to make inherently private choices such as accepting or refusing medical treatment.<sup>48</sup> Courts have recognized a common law right of patients to refuse consent to medical treatment, or to demand that treatment, once commenced, be withdrawn or discontinued. This freedom was found to be protected even in cases where the medical care or treatment could have been beneficial to the person's health and when the refusal was likely to lead to death.<sup>49</sup>

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<sup>44</sup> Charterpedia - Section 7 – Life, liberty and security of the person (justice.gc.ca).

<sup>45</sup> "As examples ... a taste for fatty foods, an obsessive interest in golf and a gambling addiction are not afforded constitutional protection.... By analogy, the ability of the lawyers — for two to three weeks per year — to attend operas or piano lessons, or to train for a triathlon without having to keep a pager nearby are not protected by s.7". in *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55.

<sup>46</sup> For example, in *R. v Smith*, [2015] 2 S.C.R. 602, the Supreme Court found that the prohibition on possession of medical marijuana infringed upon the rights protected under section 7 of the *Charter*.

<sup>47</sup> *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, concerning the parents' right to choose medical treatment for their children; *R. v Morgentaler*, [1988] 1 S.C.R. 30 concerning women's right to abortion and *Godbout v Longueuil (City)*, [1997] 3 S.C.R. 844 where a minority of judges found that a person's right to choose where to establish a home is a personal choice protected under section 7. In a case concerning freedom of conscience and religion, the Court Martial reiterated that "Freedom in a broad sense embraces both the absence of coercion and constraint ..." in *R. v Scott G.D. (Lieutenant(N))*, 2003 CM 290.

<sup>48</sup> *Carter v Canada (Attorney General)* 2015 SCC 5, in a decision pertaining to the *Criminal Code* provisions prohibiting physician-assisted dying. Also see *A.C. v Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, concerning the refusal of a minor to receive blood transfusions for religious beliefs.

<sup>49</sup> In *A.C. v Manitoba (Director of Child and Family Services)*, *supra*. The right to accept or refuse medical treatment is also recognized in Québec - Consentir à des soins de santé ou les refuser | Éducaloi (educaloi.qc.ca).

The CDS orders and directives impose vaccination against COVID-19 as a service requirement for all members of the CAF, unless they can demonstrate that they are “unable” to get vaccinated based on one of the prohibited grounds of discrimination. The members who do not comply are considered in breach of the CAF and DND Code of Ethics for refusing to follow an order. In those cases, the directives direct the CoC to issue remedial measures and use release procedures without any other consideration than the member’s refusal to get vaccinated, despite being placed under remedial measures for 14 days.

In *Lavergne-Poitras*, the Court found “some authority for the proposition that engaging a liberty or security of the person interest as a condition of employment may constitute a deprivation of that right for the purposes of the section 7 analysis”.<sup>50</sup> In a recent Court decision, the Cour supérieure du Québec also found that the vaccination requirement imposed by the Minister of Transport engaged the employees’ right to liberty and security of the person. The courts did not accept the Attorney General’s argument that the employees were not forced to being vaccinated stating “[translation] Admittedly, the treatment is not imposed on them and they theoretically retain the choice to accept it or not. But the consequences of a refusal are such that this choice is not really a choice”.<sup>51</sup> Arbitration decisions also recognized that a requirement to be vaccinated in order to remain employed engages the employees’ bodily autonomy including the right to make decisions regarding medical treatment.<sup>52</sup> Accordingly, I find that the vaccination requirement ordered through the CDS Directives to remain employed by the CAF engages the grievors’ right to liberty to make their own decisions towards medical treatment.

### The Right to Security of the Person

The right to security of the person protects physical and psychological integrity. Like the right to liberty, the right to security of the person protects bodily integrity, dignity and autonomy that can also include interruption or refusal of medical care.<sup>53</sup> The right to security of the person is engaged by state interference with a person’s physical or psychological integrity. Section 7 does not protect the right to practise a regulated profession or exploit commerce described as “purely economic interest”. The courts rejected claims that the disputed regulations caused anxiety and stress to the point where they threatened the right to the security of the person. The courts found that the interests involved in those cases were purely economic and not protected by the *Charter*.<sup>54</sup> The courts recognized the stress and anxiety related to the possibility of losing one’s career in a chosen profession, but found that it was not the type of suffering protected under the right to the security of the person. Having said this, the Supreme Court of Canada stated that: “This is not to declare, however, that no right with an economic component can fall within

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<sup>50</sup> Referring to *Alberta (Aboriginal Affairs and Northern Development) and Association of Justice Counsel, supra*. The Court also accepted the argument in *Neri, supra*, at paragraph 56.

<sup>51</sup> *Syndicat des métallos, section locale 2008 c Procureur général du Canada*, 2022 QCCS 2455.

<sup>52</sup> In *Power Workers’ Union v Elexicon Energy Inc.*, 2022, 7228 (ON LA) at paragraph 92 and *Electrical Safety Authority v Power Workers’ Union*, 2022, 343 (ON LA) at paragraph 64.

<sup>53</sup> In *Carter and Morgentaler, supra*.

<sup>54</sup> *Tanase v College of Dental Hygienists of Ontario*, 2021 ONCA 482; *Walker v Prince Edward Island*, [1995] 2 S.C.R. 407, concerning the condition to be a member of a provincial institute of chartered accountants; *Siemens v Manitoba (Attorney General)*, [2003] 1 S.C.R. 6, concerning the alleged right to operate video lottery terminals at a place of business.

“security of the person”.<sup>55</sup> In that decision, the Supreme Court suggested that the right to the security of the person may protect against the deprivation of economic rights fundamental to human survival. The distinction is that the regulation of economic activity that can have the effect of limiting profit or earnings will not engage section 7 whereas the complete deprivation of a person’s livelihood may engage the right to the security of the person.<sup>56</sup>

In *Métallos* concerning the constitutionality of Transport Canada’s vaccination policies, the Court stated that the employees’ statements showed the seriousness of the infringement and that “[translation] It would be wrong to minimize or trivialize the pressure thus caused” by the threat of termination. The Court found that the vaccination requirement engaged the employees’ right to the security of the person. Of note, imminent harm is sufficient for a claim under section 7.<sup>57</sup>

The consequences for CAF members who are “unwilling” to be vaccinated can impact their livelihood, physical and psychological integrity and therefore engage the grievors’ right to the security of the person. The CDS directives apply to members who are in the process of being released for medical reasons and who are no longer deployable, including members serving in a period of transition. Some grievors in that situation alleged that they were abruptly left without a residence and without medical care as a result of being expeditiously released for not wanting to be vaccinated against COVID-19. Therefore, I find that the grievors’ right to the security of the person is also engaged in some cases.

### Conclusion

Following the review of precedent court cases, I conclude that two of the three protected interests under section 7 of the *Charter* are engaged, which is sufficient to pursue further analysis under section 7. The requirement to be vaccinated in order to remain employed by the CAF engages the grievors’ right to liberty and the consequences of non-compliance can also engage some grievors’ right to the security of the person. This deprivation is only permissible if it is in accordance with the principles of fundamental justice.

### **Principles of Fundamental Justice under Section 7 of the *Charter of Rights and Freedoms***

The rights protected by section 7 of the *Charter* are not absolute and can be limited in accordance with the principles of fundamental justice, notably in a manner that is not either arbitrary, overly broad or disproportionate. Courts have noted that these principles consider whether there is a rational connection between the disputed policy or rule, and its impact on the person. Arbitrariness, overbreadth and gross disproportionality can all be established based upon

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<sup>55</sup> In *Irwin Toy Ltd. v Quebec (Attorney General)*, 1989 SCC 87.

<sup>56</sup> Charterpedia - Section 7 – Life, liberty and security of the person (justice.gc.ca) referring to *Irwin Toy Ltd.* and *Gosselin v Québec (Attorney General)*, 2002 SCC 84. Of note, courts also stated that work is a fundamental aspect of a person’s life and pertains to a person’s dignity In *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, concerning to the right to association, the Supreme Court noted that “Work is one of the most fundamental aspects in a person’s life”. Also see *Chapman v Canada (Attorney General)*, 2019 FC 975, *Adair v Canada (Canadian Armed Forces)*, 2004 CHRT 28 and *El-Helou v Courts Administration Service*, 2012 FC 1111.

<sup>57</sup> *Association of Justice Counsel v Canada (Attorney General)*, 2022 FC 1090.

the impact on a single person and a finding that at least one of these principles is infringed leads to the analysis under section 1 of the *Charter*.<sup>58</sup>

### Arbitrariness

An arbitrary policy or rule is one that has no rational connection to its purpose. The implementation of a CAF vaccination policy is not in itself arbitrary in the context of the global COVID-19 pandemic. The science shows that the COVID-19 vaccines are effective at reducing the likelihood of becoming seriously ill or dying from this disease. In the context of the pandemic, the Federal Court stated that "... 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*".<sup>59</sup> Considering the severity of the COVID-19 pandemic, the possible consequences of infection from the virus, the social and economic impacts, the conditions of military service and the role of vaccination in preventing severe illness, there is clearly a rational connection between the implementation of a vaccination policy and its objective to ensure health and safety. There is no doubt that CAF members can be called upon to serve in various conditions and locations, including in settings with high risks of transmission and infection from COVID-19. In that context, it is justified to implement a vaccination policy. Thus, the issues before the Committee are whether some aspects of the CDS directives impose limits and measures that are carefully tailored and proportionate to their objective, or not.

The Federal Court recently explained that a policy can be arbitrary if it treats two groups of people who pose similar risks differently, by subjecting them to different restrictions on their liberty.<sup>60</sup> In that case, the Court found that the difference in treatment was justified by scientific information showing that the two groups of travellers posed different levels of risks regarding the transmission of the COVID-19 virus. The Court considered evidence showing that air travellers were more inclined to use public transportation that augments the risks of transmission, whereas land travellers were more often using their personal vehicles and were going straight home with limited contacts.

The CDS directives also treat two groups of unvaccinated members differently (the "unable" and the "unwilling"). Members unwilling to be vaccinated receive administrative actions leading to release, while members deemed unable to be vaccinated are provided with alternatives (remote work, telework, testing, alternative work place, alternative work schedule). The CDS directives and the CAF do not explain why these alternatives could not be made available to the unwilling and were limited to members who could show that their decision to refuse vaccination was based on a protected ground of discrimination. It is insufficient to say the CAF abides by its obligation to accommodate under the CHRA and that being unwilling was not an option because it does not show how the distinction is connected to the objective of the vaccination policy. There is no scientific evidence or operational considerations showing how the division of unvaccinated members into two groups is connected to the objectives of the vaccination policy or why the

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<sup>58</sup> *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770.

<sup>59</sup> *In Neri*.

<sup>60</sup> *Spencer v Canada (Attorney General)*, 2021 FC 361, at paragraphs 72 and 73 and *Spencer v Canada (Health)*, 2021 FC 621 on the merits.



CAF had to limit the accommodations to the “unable”. Therefore, while I find the CAF vaccination policy itself not arbitrary, I find the distinction in its implementation between “unable” and “unwilling” to vaccinate to be arbitrary.

### Overbreadth

To avoid overbreadth, policies must be tailored using the least restrictive reasonable means to achieve their purposes, selecting amongst the reasonable options available. A policy is overbroad when it includes some conduct that bears no relation to its purpose, making it arbitrary in part. Overbreadth addresses the situation where there is lack of rational connection between the purpose of the policy and some, but not all, of its impacts. This can happen when the state uses means that are broader than is necessary to achieve the objective, when only some effects of the policy are arbitrary.<sup>61</sup>

For instance, what explanation did the CAF provide for the requirement that *all* CAF members be vaccinated within 14 days in order to remain employed, regardless of the tasks, location and occupation in which they serve? In the employment jurisprudence, the basic framework for analysis regarding the reasonableness of vaccination policies is “a highly contextual matter involving the balancing of interests that will vary from workplace to workplace, and will be fluid, potentially changing as circumstances change”.<sup>62</sup> In some arbitration cases, arbitrators found that mandatory vaccination was reasonable where it was required to reduce the risks of absenteeism and its impact on essential operations where employers showed significant disruption to their operations caused by outbreaks and infection among employees in high risks settings, such as schools and long term care homes.<sup>63</sup> On the other hand, arbitrators found that the requirement to be fully vaccinated was unreasonable in cases where employees were mainly teleworking, working outside and in an environment with little transmission and infection in the workplace.<sup>64</sup> The information from Health Canada and PHAC relied upon by the CAF in the development of the vaccination policy also shows that the virus is most frequently transmitted when people are in close contact with others who are infected (either with or without symptoms), that most transmission occurs indoors and that individual, social and occupational factors affect vulnerability to the COVID-19 disease, such as for healthcare workers and emergency workers who have a high degree of social contact.

The challenge in the CAF is that depending on their occupation, locations and duties, CAF members could be exposed to all or some of these settings to various degrees at different times in their military careers. In this context, a “one size fits all” approach to vaccination would seem like an overly simple option. As the jurisprudence explains, overbreadth cannot be justified on the basis that it makes enforcement more practical should the rule deprive the liberty of even one

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<sup>61</sup> *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101; *R. v Seaboyer*; *R. v Gayme*, [1991] 2 S.C.R. 577; *R. v Appulonappa*, 2015 SCC 59; *Carter v Canada (Attorney General)* 2015 SCC 5; and *R. v Ndhlovu*, 2022 SCC 38.

<sup>62</sup> In *Power Workers’ Union v Elexicon Energy Inc.*, 2022, 7228 (ON LA)) and *Electrical Safety Authority v Power Workers’ Union*, 2022, 343 (ON LA).

<sup>63</sup> *Canada Post & Canadian Union of Postal Workers* (unreported decision of T. Joliffe dated April 27, 2022) and *Chartwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v Healthcare, Office and Professional Employees Union, Local 2220*, 2022 CanLII 6832 (ON LA).

<sup>64</sup> *Electrical Safety Authority and Elexicon Energy Inc.*, *supra*.

person in a way that does not serve its purpose.<sup>65</sup> Since the CAF members serve in a broad range of occupations, location and circumstances, the order that all members get vaccinated within 14 days to remain employed affected some members in a way where there was no rational connection to the objective of the policy. For example, not all CAF members, such as members with temporary medical employment limitations, are deployable at any given time, despite the members' overall obligation to be deployable. The CAF is a very large employer that provides various accommodation measures and work alternatives to its members prior to considering a release when a member no longer complies with the Universality of Service principle. This is reflected in the content of the CDS directives, showing that unvaccinated members "unable" to vaccinate were accommodated and remained employed under certain restrictions and arrangements, while respecting the health and safety of other members and the public. Given the high rate of vaccination within the CAF and within Canada, it is not clear why the members "unwilling" to vaccinate could not be similarly accommodated when exercising their protected right to refuse a medical treatment.

When the CAF launched its voluntary vaccination campaign,<sup>66</sup> the CAF's Surgeon General anticipated that vaccination could be made a requirement for an operation or a position by operational commanders in consultation with their medical advisors, in order to operate in certain high-risk environments or with vulnerable populations to protect CAF members and others and maintain operational effectiveness. In an affidavit filed in *Neri*, the Director General - Plans, Strategic Joint Staff of the Canadian Armed Forces explained that the CAF has enabled a safe workplace with minimal transmission of the virus through the diligent application of public health measures prior to vaccination being made available in Canada. The CAF's strategy relied heavily on public health measures, such as physical distancing, wearing nonmedical masks, hand-washing, and dispersed (mix of home and workplace) or work from home postures where operationally feasible. I note that the October 2022 CDS Directive 003 now aligns the CAF COVID-19 vaccination policy with the January 2021 Surgeon General's vaccine rollout message. However, when the CAF implemented its vaccination policy in 2021, vaccination was made a requirement for all CAF members, regardless of the settings in which they serve.

The order that all CAF members get vaccinated to remain employed was too broad because, for example, it applied to members who were already successfully performing their duties through remote work / telework arrangements where it was operationally feasible. It also applied to members serving in settings allowing other unvaccinated members to undergo weekly rapid testing to access the workplace. The mandatory vaccination requirement similarly applied to members who were deemed non deployable and in the process of being released for medical reason. In those cases, it is difficult to see a rational connection between the requirement to vaccinate and the policy's objective to limit the spread of COVID-19 virus, reduce its transmission and minimize negative effects caused by the pandemic on public health, the society and the economy. Having carefully reviewed the interpretations provided by the courts and with full appreciation of the complexity of challenges presented by the pandemic, I cannot lose sight of the notion that to avoid overbreadth, a policy should be tailored and use the least restrictive option in achieving its purpose. Since the CAF vaccination policy applied to all members, even

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<sup>65</sup> *R. v. Ndhlovu*, 2022 SCC 38.

<sup>66</sup> Surgeon General CAF Vaccine Rollout Message - Canada.ca.

those in the process of release for medical reasons, I conclude that it was overly broad and not using the least restrictive option in its implementation.

### Disproportional

The rights protected by section 7 of the *Charter* can be limited in a manner that is not arbitrary, overly broad or disproportionate. According to the CAF vaccination policy, members were given 14 days to comply and receive the vaccine against COVID-19 or arrange for vaccination. Those who remained “unwilling” to comply were subject to remedial measures for misconduct, starting with a Recoded Warning and progressing to a Counselling and Probation in case of continued non-compliance. Members who remained unvaccinated despite the remedial measures were subject to an administrative review for the purpose of release from the CAF. Recognizing that CAF members could not be ordered on leave without pay under the existing policies, as the public servants, the question still remains whether termination of their service was a proportionate response to their non-compliance with the vaccination policy. The fact that a vaccination policy foresees a possibility of termination of employment or military service does not automatically make it disproportionate in itself. For example, arbitrators have found that vaccination policies directing that unvaccinated employees who refused to comply with reasonable alternatives such as testing be terminated were reasonable.<sup>67</sup> They also found that the vaccination policies “where discipline or termination is a possible but not inevitable outcome of non-compliance” after a period of leave without pay were reasonable.<sup>68</sup> However, arbitrators found that policies directing the inevitable termination of unvaccinated employees were unreasonable in light of the constantly changing and evolving situation with COVID-19 pandemic. They noted the lack of evidence as to the necessity of expedited termination when compared to alternatives such as teleworking, alternative testing where feasible or a period of leave without pay.<sup>69</sup> The arbitrators stated that employers had to demonstrate “just cause” for termination in every case based on the particular circumstances of each case. The simple fact that an employee is unvaccinated does not automatically justify termination and it does not justify termination in every case. In my view, this is also relevant when analyzing the proportionality of a vaccination policy under the *Charter*.

Similarly, the fact that the CDS directives instruct the CoC to issue remedial measures and initiate release procedures after 14 days towards all unvaccinated members who are “unwilling” to comply, without further consideration, is a disproportionate response, in my view. In the administrative context, a release from the CAF is the most serious administrative action that the CoC can take in response to a perceived shortcoming. While a release for non-compliance with the vaccination policy could be justified in some cases, it does not necessarily justify a release for misconduct in every single case on this basis alone. The CAF must still show that the decision to release is reasonable, justified and in accordance with policies in every case.

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<sup>67</sup> *Ontario Power Generation and Canadian Union of Public Employees v Allan Klippenstein*, 2022 44759 (SK LRB).

<sup>68</sup> *Chartwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v Healthcare, Office and Professional Employees Union, Local 2220*, 2022 CanLII 6832 (ON LA), *Unifor Local 973 v Coca-Cola Canada Bottling Limited*, 2022 CanLII 25769 (ON LA) and *Electrical Safety*.

<sup>69</sup> *Electrical Safety Authority and Chartwell Housing Reit*, *supra*.

As explained above, section 7 of the *Charter* guarantees individuals the right to make decisions regarding their medical treatment. The characterization that members who are “unwilling” to get vaccinated are displaying misconduct is in contradiction with the CAF’s own pre-existing policies and statements that also guarantee their members’ choice towards medical treatment.<sup>70</sup> Despite all this, the CAF vaccination policy prescribes the release of members who exercise their protected right to refuse medical treatment and declares them in contravention of the Code of values and ethics. It is understood that CAF members are expected to follow orders given by the CoC but such orders are also expected to be in-line with the rights guaranteed and protected by the *Charter*.

In the analysis of proportionality, I acknowledge the reality that from the start, it was understood that public health measures will remain in place while the COVID-19 pandemic continued to challenge the capacity of the health care system and present a real threat to the health and safety of Canadians. It was also understood that some public health measures would be temporary and would be relaxed once the situation improved. While the CAF vaccination policy reflects this understanding to some extent, relaxing the requirements pursuant to CDS directive 003, it remained inflexible with regards to members unwilling to vaccinate, releasing them from the CAF with practically permanent impact on their lives and livelihoods. Based on this analysis, I find that termination of service for some members was a disproportionate response to their non-compliance with the vaccination policy.

### Conclusion

In light of the analysis detailed above, I conclude that the limitation of the grievors’ right to liberty and security of the person by the CAF vaccination policy is not in accordance with the principles of fundamental justice because the policy, in some aspects, is arbitrary, overly broad and disproportionate. Therefore, I conclude that the grievors’ rights protected under section 7 were infringed.

### **Is the Deprivation of Grievors’ Rights under Section 7 of the *Charter* justified under Section 1?**

As we saw in the analysis of section 7 of the *Charter*, section 1 also recognizes that fundamental rights are not absolute and that the Government can limit them when necessary to achieve an important objective, as long as the limits are proportionate.<sup>71</sup> The onus of proof under section 1 is on the government entity and requires persuasive evidence. Under this analysis, the CAF have an opportunity to demonstrate that the limitations imposed under section 7 are justified. The

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<sup>70</sup> Sections 83 and 126 of the NDA provide that a member who “willfully and without reasonable excuse” disobeys an order to submit to vaccination commits an offence under the Code of service discipline and is potentially liable to imprisonment or a lesser punishment. In *R. v Kipling*, 2002 CMAC 1, the member was repatriated for not being vaccinated. QR&O 103.58 explains that “The main purpose of [section 126] is to ensure that members of the Canadian Forces will not evade important service by refusing to submit to inoculation, etc., when failure to be inoculated would mean that they could not be sent on duty to a particular area”. Also see Appendix 6: MSI 4030-57, Consent to Medical Treatment.

<sup>71</sup> *R. v Oakes*, [1986] 1 S.C.R. 103 and Charterpedia - Section 1 – Reasonable limits (justice.gc.ca).

purpose of the infringing rules must be of significant importance and be consistent with the principles integral to a free and democratic society.

The applicable test was set out in the *Oakes*' decision. Section 1 applies to limits on rights or freedoms that are "prescribed by law". Under section 1, the "law" includes government entities' policies that are not acts or regulations when they establish a norm or standard of general application enacted pursuant to a rule-making authority. The Supreme Court explained that "[where] a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law".<sup>72</sup> The CDS directives are "orders and instructions to the Canadian Forces" issued under his authority provided for at paragraph 18(2) of the NDA. They are not "acts or regulations".<sup>73</sup> However, they set out a general standard for members of the Canadian Armed Forces and, as such, are considered to be legislative in nature under the section 1 analysis.

The constitutionality test asks two questions: first, whether the policy's goal is "pressing and substantial" and whether there is "proportionality between the objective and the means used to achieve it". The second part has three elements: rational connection, minimal impairment and final balancing. The test should be applied with flexibility and considering the factual and social context. The analysis is similar to the analysis under section 7. Under section 1, however, the CAF must show that the broader public interest justified the infringement of individual rights.<sup>74</sup>

The causal relationship between the limit and the objective should be demonstrated, where possible, by scientific evidence. Minimal impairment asks whether the government entity carefully tailored the restrictions on the fundamental rights and freedoms. The deprivation must impair the right or freedom "as little as possible". Having said this, the government is not held to a standard of perfection and can show that the measures adopted fall within a range of reasonable options.<sup>75</sup> The test for minimal impairment is whether the government can demonstrate that among the range of reasonable alternatives available, there is no other less-impairing means of achieving the objective in a real and substantial manner. The limitation must impair the right no more than reasonably necessary, having regard to the practical difficulties. There should be evidence as to why less intrusive and equally effective measures were not chosen. In determining whether a scheme is reasonably minimally impairing, courts may also look to laws and practices in other jurisdictions.<sup>76</sup> Minimal impairment imposes similar obligations on the CAF as the duty to accommodate up to the point of undue hardship.<sup>77</sup>

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<sup>72</sup> In *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295.

<sup>73</sup> The NDA grants the authority to make regulations to the Governor in Council, the Minister and Treasury Board at section 12.

<sup>74</sup> Charterpedia - Section 1 – Reasonable limits (justice.gc.ca) and *R. v. Ndhlovu*, 2022 SCC 38.

<sup>75</sup> *Oakes*, *supra*; *R v Sharpe*, 2001 SCC 2; *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 S.C.R.; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37; and *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1.

<sup>76</sup> Charterpedia - Section 1 – Reasonable limits (justice.gc.ca) referring to *Carter and JTI-MacDonald*, *supra*; and *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9.

<sup>77</sup> *Hutterian Brethren*, *supra*.

## Application to the Facts

Courts have found that public health measures aiming at reducing the risks of infection and transmission of the COVID-19 serve a pressing and substantial objective.<sup>78</sup> I agree and note that the parties do not dispute that the CDS directives serve a pressing and substantial objective to ensure the health and safety of CAF members and the public they serve in the context of a pandemic. The main issue with the disputed measures of the CAF vaccination policy concerns its proportionality, more specifically, whether it constitutes minimal impairment on the grievors' right to liberty and security of the person. As stated above, the Committee sought representations from the CAF on these questions.

I have found that the broad order for *all* members of the CAF to be vaccinated within 14 days in order to remain employed and the direction to issue remedial measures up to release for misconduct of all the members who were deemed "unwilling", without further considerations, infringed upon the members' rights to liberty and security in an overly broad and disproportionate manner. Under section 1, I must consider whether the broad public interest justifies this infringement on the fundamental individual rights protected under section 7. On this aspect, the CAF referred the Committee to evidence from the PHAC and Health Canada.

The PHAC, in its report dated August 2021, anticipated that the healthcare capacity could be exceeded during the fourth wave. To minimize this possibility, it was stated that 80% or more of all eligible general population in Canada would need to be fully vaccinated; whereas the overall 2-doses coverage for the general population in Canada was 71.3% and lower in certain age groups. At the time of the report, it was expected that only 51.3% to 73.1% of the federal public service employees would be fully vaccinated. The document stated that unvaccinated persons were at greater risk of infection and severe outcomes. The report also explained that workplaces have been a frequent setting for outbreaks, mostly in settings where physical distancing was difficult, working remotely not possible and public health measures challenging to implement. It also noted that several workplace settings have succeeded in minimizing transmission with proper infection control measures in place. The PHAC explained that some provinces and territories were contemplating or implementing vaccine mandates to stimulate vaccination uptake in the general population since it had plateaued. It stated that the effectiveness of vaccine mandates is impacted by the ease of obtaining exemptions, the consistency of the enforcement and "is less clear when the baseline immunization rate is already high". The PHAC's report also noted that vaccine mandates generally have exemptions and don't require the exclusion of the unvaccinated unless there is an outbreak.

In my view, the consideration of the public interest as depicted does not justify the overbroad and disproportionate response from the CAF. As stated above, the CDS directives and affidavit from the DG Plans, SJS explained that the CAF has enabled a safe workplace with minimal transmission of the virus through the diligent application of public health measures prior to vaccination being made available in Canada. The CAF's strategy relied heavily on public health measures, such as physical distancing, wearing nonmedical masks, hand-washing, and dispersed (mix of home and workplace) or work from home postures where operationally feasible. The

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<sup>78</sup> *Spencer and Syndicat des métallos, supra.*

PHAC stated that the effectiveness of vaccine mandates was less clear in such context and that they were mainly useful to increase vaccination uptake. Therefore, it is difficult to understand why the CAF determined that it was necessary to impose such requirement on all of its members when it knew that 91% of members were voluntarily vaccinated. The CAF also reported having been successful at mitigating transmission and infection in the workplace. In *Métallos*, the Cour supérieure du Québec observed that an infringement to the rights protected under section 7 could be justified under section 1 in a context where a sector was seriously impacted by infection and transmission of the virus and where the employer could not know how many workers were vaccinated. This was not the case for the CAF.

The CAF did not demonstrate that the broad order for all members to get vaccinated and the blanket exclusion of all the “unwilling” members from the CAF is the less impairing measure to achieve the objective of the CAF vaccination policy. The CDS directives show that the CAF has possibilities to provide alternative work arrangements and allow one group of unvaccinated members to serve under restrictions. The VCDS explained that the CAF sought an equivalent to the Government of Canada’s policy.<sup>79</sup> She explains, however, that ordering non-compliant members on leave without pay or to relieve them from duty were not considered viable options for the CAF given that they would have to amend their policy. The VCDS explained that the CAF considered all possible avenues to determine the most effective method of complying with Treasury Board’s vaccination policy. However, the federal policy does not apply to the CAF and does not exempt the CAF of their obligations under the *Charter*. As the content of the CDS directives show, including the most recent CDS directive 003, the CAF has more options available to minimize the risks of infection and transmission among members who are not vaccinated. Leave without pay under QR&O 16.25 and relief from performance of military duty under QR&O 19.75 were not the only reasonable and less impairing options. Also, QR&O 16.25 gives the authority to the CDS to prescribe the circumstances under which leave without pay may be granted.

The Committee also asked the SJS Director General, Plans, responsible for the development and implementation of the CDS directives, whether the CAF considered other options. He answered that the CAF did not consider the feasibility of employing the “unwilling” members under alternatives and restrictions, as allowed for unvaccinated members who were accommodated, because the CAF determined that “being unwilling was never an option”. These statements do not show that the disputed measures imposed by the CAF vaccination policy were carefully tailored and constituted minimal impairment. The CAF did not invoke practical difficulties in explaining why less intrusive and effective measures were not chosen.

The CDS directives provide less impairing measures in the form of accommodation limited to the members who are “unable” to get vaccinated. However, the CAF did not justify why these

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<sup>79</sup> In *Wojdan v Canada (Attorney General)*, 2021 FC 1341, departments reported 90 grievances. The constitutionality of the policy was also challenged in injunction requests in *Murphy* and *Lavergne-Poitras*, *supra*. The Federal Public Sector Labour Relations and Employment Board denied two grievances concerning a union’s refusal to file a policy grievance against the Government of Canada’s policy based on the *Charter* in *Musolino v Canada Revenue Agency*, 2022 FPSLREB 47 and *Musolino v Professional Institute of the Public Service of Canada*, 2022 FPSLREB 46.

measures were limited to only one group of unvaccinated members. Nor did the CAF invoke operational concerns with the health and safety of the remainder of the workforce and the public.

It is pertinent to note here that the October 2022 CDS Directive 003 only requires the vaccination of specific CAF members based on operational requirements, which is what was envisioned by the CAF Surgeon General in January 2021. I have difficulty seeing the reason why such a policy could not have been promulgated from the start. Even in anticipation of a new possible variant, the release of unvaccinated members for non-compliance, regardless of their occupation, duties and place of work, was not always necessary or minimally impairing.

### Conclusion

The obligation to limit fundamental rights only when necessary and within proportional limits rests with the CAF. The CAF has the obligation to ensure minimal impairment in the implementation of its vaccination policy, demonstrating that there are no less impairing measures to attain the objective than releasing the members. Similar to the duty to accommodate, minimal impairment requires the CAF to demonstrate that among the range of reasonable alternatives available, there is no other less-impairing means of achieving the objective in a real and substantial manner. I conclude that the CAF has not met its obligation to ensure minimal impairment.

### **Adequate Remedy**

The appropriate remedy for an unconstitutional rule is a declaration of invalidity. The CAF mandatory vaccination policy has been amended when CDS directives 001 and 002 were superseded on 11 October 2022 by the CDS directive 003. The requirement that *all* CAF members be vaccinated in order to remain employed was cancelled and vaccination is no longer a condition of enrolment. Therefore, the remedy sought by several grievors - the cancellation of the CAF's vaccination policy as stated in the first CDS directive and subsequent directives 002 and 002 amended - has already been implemented, at least in part. The cancellation of the previous versions of the policy constitutes partial remedy considering my finding that portions of the policy were unconstitutional. However, CDS directive 003 maintains the administrative actions issued under CDS directive 002. Given my finding that portions of the policy were unconstitutional, all administrative actions taken against members as a result of the application of the first CDS directive and directives 002 and 002 amended on COVID-19 vaccination should be rescinded.

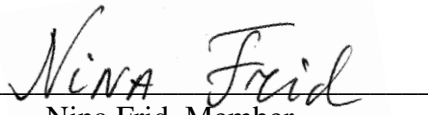
Some grievors also request apologies from the CDS for the infringement on their fundamental rights. I note that the Committee cannot compel the CDS, or anyone else, to apologize to a grievor given that the issuance of apologies is linked to freedom of expression and cannot be forced. Having said this, it is left to the CDS to issue such apology, if he believes it is appropriate to do so.



## **FINDING**

I find that the disputed provisions of the CAF vaccination policy are unconstitutional and, therefore, invalid.

Dated at Ottawa, this 29<sup>th</sup> day of May 2023



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Nina Frid, Member

### **Appendices:**

- Appendix 1: Comments from the VCDS to the Committee - 15 March 2022;
- Appendix 2: Comments from the Director General, Plans, Strategic Joint Staff to the Committee - 12 May 2022;
- Appendix 3: Motion Record of the Respondent, the Attorney General of Canada in Response to Applicants' Motion for Interlocutory Injunction;
- Appendix 4: Memorandum of Fact and Law of the Respondent, Attorney General of Canada.
- Appendix 5: Canadian Forces Military Personnel Instruction 01/22 - Changing a Place of Duty and the Use of Postings to Enable Remote Work Options (21 March 2022); and
- Appendix 6: MSI 4030-57, Consent to Medical Treatment.