

NEWS FLASH

Manitoba judge dismisses constitutional challenge to COVID-19 restrictions

On October 21, 2021, Chief Justice Glenn Joyal of the Manitoba Court of Queen's Bench ruled that a ban on personal religious services and strict restrictions on other assemblies, including protests, were neither unconstitutional or an undemocratic delegation of power.

Joyal released the ruling in two decisions stemming from a *Charter* challenge brought by a group of seven churches, two church leaders, and a "hugs over masks" demonstrator who protested against the restrictions in place between November 2020 and January 2021.

In a 156-page decision, Joyal ruled that the restrictions were a reasonable response to COVID-19 based on credible science, stating: "the impugned public health orders do indeed limit and restrict the applicants' rights and freedoms" but that they are constitutionally justifiable as reasonable limits under s.1 of the *Charter*."

In support of the churches, Jay Bhattacharya, a Stanford University professor of health policy and one of the authors of the Great Barrington Declaration (a statement advocating for limited protections focused on those most at risk, i.e. the sick and elderly, while avoiding COVID-19 lockdowns) provided evidence from the Declaration that the public health orders were both inconsistent and extreme. In legal terms, the churches relied on the Declaration to show that Manitoba had limited the rights of Manitobans more than necessary to protect public health.

Joyal found the Great Barrington Declaration to be impractical and unethical. He found no convincing evidence that less intrusive measures might have been equally as effective in responding to the COVID-19 emergency and its impact on Manitoba's health care system. He relied on the fact that at least one-third of COVID-19 hospitalizations occurred in those under 60, and more than 44 percent of COVID-19 patients admitted to the ICU were under 60. He also pointed to the need to protect Indigenous peoples, who are disproportionately affected by COVID-19.

Joyal also concluded in a separate decision that the delegation of power to Manitoba's chief public health officer is both a constitutional and democratically legitimate way of responding to the rapidly changing pandemic, stating: "I am persuaded by the evidence of Manitoba's experts and I find that the credible science that they invoked and relied upon, provides a convincing basis for concluding that the circuit-break measures, including those in the impugned public health orders, were necessary, reasonable and justified."

The case is noteworthy because it is among very few in which COVID-19 restrictions have been challenged before a Canadian adjudicator, and it is the first Canadian court case dealing with the scientific evidence that public health officials relied on to implement public health orders. With so few decisions to date, Joyal's ruling reinforces the early judicial trend in favour of public safety measures for COVID-19, as seen in decisions such as *Ellis Don Construction Ltd.*, 2021 CanLII 50159, *Caressant Care Nursing & Retirement Homes*, 2020 CanLII 100531, and *Toronto International Celebration Church*, 2020 ONSC 8027.

While the ruling does not deal with vaccine passports or mandatory workplace vaccination policies, it nevertheless provides even more reason to expect that any challenge to COVID-19 vaccination mandates—which have now been introduced in some form across all ten provinces and various work sectors—will not succeed, whether before a court, arbitrator, or human rights tribunal.

Employment Minister announces those who lose their jobs because they refuse to be vaccinated may be ineligible for E.I.

On October 22, 2021, Employment and Social Development Canada issued a notice to employers enforcing vaccine mandates with guidance on filling out a record of employment ("ROE"), which will impact an employee's eligibility for E.I. benefits, the amount of E.I. benefits, and how long E.I. benefits will be paid.

Employment Minister Carla Qualtrough confirmed that if an employee does not report to work, is suspended, or is dismissed for refusing to comply with a vaccine mandate, the employer should indicate on the ROE that the employee quit, took a leave of absence, or was dismissed—potentially disqualifying them for E.I.

The move has not been considered Parliament, so its precise impact is not yet known, and the information subject to change. However, it seems likely that the assessment of E.I. eligibility will still be completed on a case-by-case basis, in light of the factors of that individual's employment, including whether or not COVID-19 vaccination was a necessary condition of employment.

In any event, the rule should not affect people with a legitimate human right to refuse the COVID-19 vaccine, including those with a pre-existing religious belief or medical condition that prevents them from being vaccinated. In other words, those who experience an interruption of earnings due to their inability to be vaccinated based on a human rights ground will still be eligible for E.I. benefits.

Note: *the information contained in this news flash is not intended to constitute legal advice. If you have any questions concerning a particular fact situation, we invite you to contact one of our lawyers.*

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