COVID-19 Employment and Labour case law updates that you need to know about

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DENTONS WEBINAR SERIES
COVID-19 - LEGAL UPDATE
FOR CANADIAN EMPLOYERS

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The mandatory vaccination caselaw (so far)…

- Andy Pushalik, Partner, Toronto

The current landscape

- Court injunction cases
  - Not decisions on the merits of the employer vaccination policies
- Labour arbitration cases
  - Decisions on the merits of the employer vaccination policies
  - Union employers

The current landscape

- Court injunction cases
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The injunction cases

- *Blake v. University Health Network*, 2021 ONSC 7139
- *Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System*, 2021 ONSC 7658
- *Wojdan v. Canada*, 2021 FC 1244

The injunction cases – key takeaways

- Unionized plaintiffs do not have standing to pursue the matter of the enforceability of an employer's vaccination policy before the courts
- Threatened termination of employment does not constitute irreparable harm
- Employer's policies are not forcing employees to get vaccinated; rather, the employers are being forced to choose between getting vaccinated and keeping their income or remaining unvaccinated and losing their income.
- Delay could be fatal to motion for injunctive relief

The labour arbitration cases

- *United Food and Commercial Workers Union, Canada Local 333 v. Paragon Protection Ltd. (Von Veh)*
- *Power Workers' Union v. Electrical Safety Authority (Stout)*
- *Power Workers' Union v. Ontario Power Generation (Murray)*

The labour arbitration cases – key takeways

- Enforceability of mandatory vaccination policies depends on the specific facts of the workplace and text of the policy
- Dismissal for non-compliance with vaccination policies may be warranted in certain situations

The mandatory vaccination caselaw from Québec (so far)

- Arianne Bouchard, Partner, Montréal

Union des employés et employées de service, section locale 800 et Services ménagers Roy Ltée, 2021 QCTA 570

FACTS

- Declaratory grievance issued at the joint request of a group of employers in the janitorial maintenance sector and the union representing the employees of these employers.
- Employers themselves do not require proof of vaccination as a condition of employment within their respective companies.
- However, some clients of these employers require that the latter certify in writing that all of their building maintenance employees are vaccinated.
- The employers' clients are not covered by the collective agreement and were not involved in the arbitration.
- Parties recognize that an employer's failure to comply with the clients' requirement is likely to result in the termination of the contract between the employer and that client and, incidentally, to the layoff of employees assigned to that contract.

Union des employés et employées de service, section locale 800 et Services ménagers Roy Ltée, 2021 QCTA 570

ISSUES IN DISPUTE

- Does the fact that an employer requires its employees to disclose their vaccination status infringe on the right to privacy, in a manner that violates the *Charter of Human Rights and Freedoms?*
- What are the applicable mechanisms of the collective agreement with respect to individuals who would need to be reallocated because of their refusal to provide their immunization status, when the client to whom they are assigned makes this requirement? *(not discussed – specific to this agreement)*
- This case **does not deal with the issue** of whether requiring, as a condition of employment, that employees be vaccinated against COVID-19 violates their right to integrity and/or may constitute just cause for dismissal.

Union des employés et employées de service, section locale 800 et Services ménagers Roy Ltée, 2021 QCTA 570

INFRINGEMENT OF THE RIGHT TO PRIVACY

- The arbitrator recognized that requiring an employee to disclose his or her vaccination status violated the employee's right to privacy as intended by section 5 of the *Charter of Human Rights and Freedoms*.
- A person’s vaccination status is considered to be confidential or personal information related to a person's health status and is therefore part of one's private life.
- The fact that the vaccination took place in public, open centers and that several individuals voluntarily reveal their vaccination status (e.g., by posting it on social media) does not negate or diminish the private nature of the information.
- However, some courts have recognized that while asking for an individual's vaccination status is an invasion of privacy, in certain contexts (e.g., jury selection), this invasion is relatively minimal. (see for example : *R. c Barnabé-Paradis*, 2021 QCCS 4147)

Union des employés et employées de service, section locale 800 et Services ménagers Roy Ltée, 2021 QCTA 570

SECTION 9.1 OF THE *CHARTER OF THE HUMAN RIGHTS AND FREEDOMS*

- **9.1** *In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, State laicity, public order and the general well-being of the citizens of Québec.*

  In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law

- The first paragraph of section 9.1 of the *Charter* recognizes that fundamental rights, including the right to privacy, are not absolute. (See for example: *Ward v Quebec (Commission des droits de la personne et de la jeunesse)*, 2021 SCC 43).
- The first paragraph of section of the *Charter* is independent of its second paragraph: a right may be limited otherwise than by law.

Union des employés et employées de service, section locale 800 et Services ménagers Roy Ltée, 2021 QCTA 570

SECTION 9.1 OF THE *CHARTER OF THE HUMAN RIGHTS AND FREEDOMS*

- Section 9.1 of the *Charter* involves reconciling the asserted Charter right with "opposing rights, values, and harms"; this right must not overshadow the rights of other stakeholders.
- It is up to the person who wants to assert a right protected by the *Charter* to demonstrate that the protection of that right is called for in light of section 9.1 of the *Charter*.
- Although no right is absolute, some rights hold more importance than others, as such the hierarchy of rights must be considered as part of the balancing exercise. Due to their quasi-constitutional nature, rights protected by the *Charter of Human Rights and Freedoms* carry more weight in the balance.

Union des employés et employées de service, section locale 800 et Services ménagers Roy Ltée, 2021 QCTA 570

SECTION 9.1 OF THE *CHARTER OF THE HUMAN RIGHTS AND FREEDOMS*

- Factual elements considered by the arbitrator in his balancing exercise:
  - Current scientific consensus that non-vaccinated individuals who get COVID-19 are both sicker and more contagious;
  - Obligations to protect workers' health and safety set forth by the relevant legislation, in light of the "precautionary principle";
  - Sector of employment and nature of duties of affected employees, including the "essential" nature of the work performed;

  Conclusion: the infringement of the employees' privacy is inconsequential compared to the major inconveniences, recognized by the "current scientific findings", resulting from the presence of unvaccinated individuals in the workplace → employers are authorized to collect information on the vaccination status of their employees.

Union des employés et employées de service, section locale 800 et Services ménagers Roy Ltée, 2021 QCTA 570

AUTHORIZED FRAMEWORK FOR COLLECTING INFORMATION ON VACCINATION STATUS

- Employers can only require employees assigned to a contract where there is a vaccination requirement to provide their vaccination status, not all their employees;
- The nature of the information that may be requested is limited to that which confirms that the employee is considered "adequately protected" by the government; the employer does not need to know the number of doses or when the employee received them;
- Collection should be done by the human resources department, rather than by the employees' supervisor;
- Information about one's immunization status can be retained by employers as long as the requirement remains relevant;
- Information about one's immunization status should not be shared with third parties, including the employers’ clients; the employer should only certify that employees assigned to a specific contract are "adequately protected“.

Lachance c. Procureur général du Québec, 2021 QCCS 4721

BACKGROUND AND CONTEXT

- The Plaintiffs, a group of health care professional, filed an application for a stay of proceedings in an appeal for judicial review on the legality of Executive Order 1276-2021 requiring mandatory vaccination for health care workers;
- The court decided to issue a ruling on the stay despite the government's announcement that it would forego requiring mandatory vaccination of health care workers (the decree had not been amended as of the date of the ruling);

Lachance c. Procureur général du Québec, 2021 QCCS 4721

FACTS

- A public health emergency, within the meaning of the *Public Health Act*, was declared on March 13th, 2021, and has been in force since that time;
- During a public health emergency, the *Public Health Act* authorizes the Government and/or the Minister of Health to order any measure “necessary to protect the health of the population”;
- On September 24th, 2021, the government issued an order in council (the “**Order**”) providing that as of October 15th, 2021 (later extended to November 15th), all health care workers would have to 1) be "adequately protected" in order to continue to perform their duties and 2) submit proof of this to their employer.
  - Workers failing to satisfy these requirements were to be suspended without pay until the end of the public health emergency.
- Being “adequately protected is defined as being doubly vaccinated (or having been infected with COVID-19 within the last few months).
  - People who have a medical contraindication to vaccination are also considered to be “adequately protected”.

Lachance c. Procureur général du Québec, 2021 QCCS 4721

ISSUES RAISED BY THE JUDICIAL REVIEW

- Does the legislative framework allow the government to adopt the measures set out in the Order?
- Does the Order, and where applicable the *Public Health Act*, respect the fundamental rights of applicants and members of the public under the *Canadian Charter of Rights and Freedoms* and the *Charter of Human Rights and Freedoms*?

ISSUES RAISED BY THE ANCILLARY APPLICATION FOR A STAY

- Should the application of the Order be suspended until a court decides the merits of the application for judicial review? / Could the implementation of the Order during the legal proceedings related to the judicial review jeopardize the Québec health care system?

Lachance c. Procureur général du Québec, 2021 QCCS 4721

EVIDENCE OF THE APPLICANTS

- Applicants are health care workers who are not vaccinated against COVID-19 and refuse to be vaccinated but are willing to be tested regularly.
- Applicants invoke the right to the inviolability of their person and the right to earn a living.
- Applicants do not provide specific reasons for their refusal to be vaccinated; instead, they argue that they do not need to justify their refusal.
- Applicants testify that the state of the health care system is degenerating, that resources in this sector are precarious and that the application of the Order will pose a serious risk to the health of the population.

Lachance c. Procureur général du Québec, 2021 QCCS 4721

CRITERIA TO CONSIDER FOR A STAY APPLICATION:

Applicants shall establish:

1. a situation of real and objective urgency, justifying the judge's immediate intervention rather than at a later stage of the proceedings;
2. an appearance of right or a question to be tried that appears serious after a preliminary study of the merits of the case;
3. serious or irreparable harm will be caused to the applicant if the stay order is denied;
4. that the balance of convenience, which involves deciding who will suffer the greatest inconvenience if the stay is granted or denied pending trial, favors them.

Lachance c. Procureur général du Québec, 2021 QCCS 4721

A SITUATION OF REAL AND OBJECTIVE URGENCY

- Considering the order provides that mandatory vaccination requirements will come into force as of November 15th, 2021 (Date of the judgment), this criterion is met.

APPEARANCE OF RIGHT / SERIOUS QUESTION TO BE TRIED

- The applicants raise several serious issues, including constitutional and quasi-constitutional issues, in their application for judicial review.
- The question raised by the stay, i.e., whether the implementation of the decree would jeopardize an already fragile health care system, is also serious.
- The plaintiffs have *locus standi* to act as parties in this case.

Lachance c. Procureur général du Québec, 2021 QCCS 4721

SERIOUS OR IRREPARABLE HARM

- Suspensions and loss of pay = not serious or irreparable harm, as the court could order monetary restitution if it grants judicial review.
- Collective harm: Nothing in the plaintiffs' evidence is sufficiently specific and detailed to establish the likelihood of serious harm to the beneficiaries of the public health system.

** Criterion not met**

BALANCE OF INCONVENIENCE

- Considering the scientific evidence presented by the Government, the Applicants have failed to demonstrate that the public interest would be better served by the issuance of the stay order. Therefore, it's preferable not to deprive the community of the public health measures set forth in the Order.

** Criterion not met**

A review of recent COVID-19 discrimination cases

- Cristina Wendel, Partner, Edmonton

What discrimination is (and is not) under human rights laws

- Discrimination is the differential treatment of an individual based on a protected ground under human rights laws.
- The protected grounds will vary from one jurisdiction to another.
- With respect to COVID-19, typically discrimination issues will arise relating to the protected grounds of disability (physical and mental), religion/creed, family status and political belief.
- Human rights commissions/tribunals do not decide questions involving alleged violations of an individual’s personal opinion, personal choice, privacy rights or Charter breaches.

The Worker v. The District Managers, 2021 BCHRT 41

- This was a screening decision regarding mask mandates. The respondents had not been notified or asked to submit a response.
- Facts:
  - The complainant had been contracted to do work at a facility.
  - When he arrived, a manager told him he had to wear a face mask. He refused, citing his “religious creed”.
  - The manager confirmed he could not enter without a mask. The complainant was subsequently sent a letter terminating his contract for failing to wear a mask.
- The complainant filed human rights complaints against several managers, alleging discrimination based on religion.
- The issue was whether the complaints alleged facts which, if proven, could be a contravention of the human rights legislation.

The Worker v. The District Managers, 2021 BCHRT 41

- The Tribunal did not accept the complaints for filing, based on the following:
  - The complainant had not set out facts that could establish that his objection to wearing a mask was grounded in a sincerely held religious belief.
  - His objection was based on his opinion that wearing a mask does not stop the transmission of COVID-19.
- The Tribunal confirmed that complaints like this must set out facts supporting:
  - The complainant's religious belief;
  - That the respondent's conduct had an adverse impact on the complainant regarding employment; and
  - That the complainant's religious belief was a factor in the adverse impact.

The Worker v. The District Managers, 2021 BCHRT 41

- It was not clear the complainant was an employee. For the purposes of the decision, the Tribunal assumed he was.
- Protection of religious beliefs or practices under human rights legislation is triggered when someone shows they have a sincerely held belief that the belief or practice has:

  (a) A connection with religion; and

  (b) Is “experientially religious in nature.”
- The complainant claimed, “To cover-up our face arbitrarily dishonours God” and that the mask requirement infringed on his “God given ability to breath”. He also did not believe that mask wearing was effective and thus he could not “live in that lie”.

The Worker v. The District Managers, 2021 BCHRT 41

- The Tribunal found the facts he provided, if proven, could not establish that his objection to wearing a mask was “experientially religious in nature”. He had not provided facts to support a finding that wearing a mask was prohibited by any particular religion.
- The essence of his complaints was his disagreement with the reasons for the mask wearing requirement; this was not a belief or practice protected from discrimination.
- The Tribunal was satisfied the complaints did not set out a possible contravention of the legislation and so they would not proceed.

Beaudin v Zale Canada Co. o/a Peoples Jewellers, 2021 AHRC 155

- Complaint alleged discrimination in the area of goods, services and accommodation on the ground of physical disability, related to a retail jewellery store's mask mandate.
- Facts:
  - The complainant had a disability that prevented him from wearing a face mask.
  - He attended the store without a face mask. The store employees told him he could not enter the store without a face mask because of the store's public health policy. He explained he was exempt for health reasons.
  - The employees offered him various alternatives, such as telephone and on-line shopping, with free delivery or curb-side pick up.
  - The complainant objected and was ultimately told to leave the store.
  - The respondent accepted the complainant's claim that he had a disability that prevented him from wearing a face mask. It also acknowledged that at the time, there was no public health requirement in place requiring individuals to wear masks in retail stores.

Beaudin v Zale Canada Co. o/a Peoples Jewellers, 2021 AHRC 155

- The Director of the Commission had dismissed the complaint, finding that the store's policy was justified and that the store had provided alternatives for those who could not wear a face mask for disability-related reasons.
- The complainant filed a Request for Review of the Director's decision. The question was whether there was a reasonable basis in the evidence for proceeding to a hearing before a Tribunal. This is a low threshold.

Beaudin v Zale Canada Co. o/a Peoples Jewellers, 2021 AHRC 155

- The Chief of the Commission and Tribunal upheld the Director's decision, finding:
  - The store's policy had an adverse effect on certain people with disabilities.
  - The fact that public health officials had not instituted a mask mandate at the time did not determine the question.
  - The policy was developed and introduced for a valid and legitimate business purpose, in good faith, and there were no alternatives available that would not result in undue hardship.
  - Human rights law requires a balancing of rights.
  - The respondent had developed a comprehensive and scientifically based policy.
  - There was no evidence to support the complainant's claims that the mask mandate was not necessary.

Szeles v Costco Wholesale Canada Ltd., 2021 AHRC 154

- Complaint alleged discrimination in the area of goods, services and accommodation on the ground of physical disability, related to the store's mask mandate.
- Facts:
  - The complainant identifies as having a disability that prevents him from wearing a face mask.
  - He attended at a store without a face mask. A store employee told him he could not enter the store without a face mask because of the store's public health policy. He explained he was exempt because of a disability.
  - The employees offered that he could use a face shield instead.
  - The complainant refused, an altercation ensued, police were called and he was removed from the store.
  - The complainant argued that the use of a face shield was not reasonable since it did not offer protection, was stigmatizing and would subject him to humiliation.
  - He also argued that the provincial and municipal requirements in place did allow for exemptions and so the respondent's policy was contrary to law.

Szeles v Costco Wholesale Canada Ltd., 2021 AHRC 154

- The respondent argued that:
  - Its policy was reasonable and justifiable in light of the severity and dangers of COVID-19.
  - Alternative accommodations were available for those who could not wear a mask: face shield, on-line, home delivery and pick-up options. To permit people to shop in person without a mask would constitute undue hardship.
  - Private businesses were entitled to institute mask and other safety policies, as noted in the government regulations.
  - While face shields are not as effective, they are an alternative where someone cannot wear a mask.
  - There was no information to suggest that the complainant could not wear a face shield.
  - The complaint was frivolous and vexatious and brought in bad faith, as supported by excerpts from the complainant's social media and on-line posts.

Szeles v Costco Wholesale Canada Ltd., 2021 AHRC 154

- Following an investigation, the Director dismissed the complaint.
- The complainant filed a Request for Review of the Director's decision.
  - He argued that denying access to someone who cannot wear a mask, but offering other options short of unrestricted entry, is not reasonable accommodation.
- The Chief of the Commission and Tribunal upheld the Director's decision, finding:
  - The store's policy had an adverse effect on certain people with disabilities.
  - There was nothing to substantiate the complainant's claims that the policy (face shields) was instituted in bad faith in order to single people out for humiliation.
  - Neither the provincial nor municipal public health regulations allowed the complainant to enter the store unmasked, nor did they prevent the store from having its own COVID-19 policy.
  - Even if the complainant was correct that face shields were not an appropriate accommodation, that did not mean he was entitled to enter the store without a mask.
  - It was not clear why on-line or telephone shopping would impose a serious limitation on the complainant.

Coelho v. Lululemon Athletica Canada Inc., 2021 BCHRT 156

- Complaint alleged discrimination in the provision of services on the basis of disability relating to the store's mask mandate.
- The respondent had applied to dismiss the complaint on the basis that there was no reasonable possibility it would succeed.
- Facts:
  - Store had a mask mandate in place even though masks were not yet mandatory in the province at the time.
  - Complainant claimed to have a medical condition, supported by her naturopathic doctor, exempting her from wearing a mask.
  - She attended the store without a mask. A manager approached her and told her she needed to wear a mask in order to shop in the store.
  - She informed the manager she was exempt and that she could not be refused entry.
  - The manager offered her the ability to shop online or outside but she refused.
  - The complainant eventually left the store.

Coelho v. Lululemon Athletica Canada Inc., 2021 BCHRT 156

- The respondent had the burden to show that it is reasonably certain that it would establish a defence at a hearing.
- The Tribunal granted the application to dismiss, finding:
  - It was reasonably certain that the respondent would establish the validity and non-discriminatory nature of the mask mandate in light of the health and safety concerns. The fact there may have been other approaches did not undermine the respondent's evidence about the mask mandate's rational connection to its goal of providing a safe work and shopping environment.
  - It was reasonably certain that the respondent would establish that it adopted the mask mandate in good faith.
  - It was reasonably certain that the respondent would establish that it discharged its duty to accommodate the complainant.
    - A complainant who establishes they experienced a disability related adverse impact (ex. being barred from a store due to being unable to wear a mask) is not entitled to simply do what they please.
    - The complainant was not allowed to disregard the mask mandate or "enjoy unfettered, mask-less physical access" to the store. The respondent had to provide reasonable accommodation to the point of undue hardship – not perfect accommodation.

Complainant obo Class of Persons v. John Horgan, 2021 BCHRT 120

- This was a screening decision relating to the Government of British Columbia's requirement to provide proof of COVID-19 vaccination to access various services.
- The complainant filed the complaint on behalf of people opposed to being forced to get vaccinated and alleged discrimination on the ground of political belief, in relation to employment.
- The Tribunal determined that the complaint would not proceed as it did not set out facts that could violate the legislation.
  - Political belief has been held to include "public discourse on matters of public interest which involves or would require action at a government level".
  - The Tribunal accepted that a genuinely held belief opposing government rules regarding vaccination could be a political belief within the meaning of the legislation.
    - However, protection from discrimination does not exempt a person from following provincial health orders or rules – it protects the person from adverse impacts in their employment based on their political beliefs.
  - The complainant had failed to identify how the government's requirements had affected her in her employment and thus could not establish a breach of the legislation.

Discipline for COVID-19 related misconduct

- Emily Kroboth, Associate, Toronto

False reporting on COVID-19 screening = termination of employment

- *Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183 v Aecon Industrial (Aegon Construction Group Inc.)*, 2020 CanLII 91950 (ON LA)
- Facts:
  - Grievor 64 years old; 5 years of service; significant past discipline related to safety matters
  - April 9, 2020, Grievor calls foreman and tells him he is experiencing diarrhea and would "wait a couple of hours before attending work"
  - Foreman tells Grievor that he can't come to work because diarrhea is a symptom of COVID-19 and that company nurse would contact him
  - Grievor calls employer twice (at 10 AM and 12 PM) because he had not yet been contacted by nurse; Employer tells Grievor both times to stay home
  - Grievor not scheduled for work again until April 14, 2020
  - April 14, 2020, Grievor attends work

False reporting on COVID-19 screening = termination of employment

- Facts (continued):
  - Grievor responds in the negative to COVID-19 screening questions related to symptoms
  - Foreman asks Grievor if he has been cleared to return to work? NO
  - Employer terminates Grievor’s employment

False reporting on COVID-19 screening = termination of employment

- Grievance Dismissed / Termination Upheld
- Factors considered by the Arbitrator
  - The Grievor’s actions were a deliberate and total failure to follow instructions
  - He put his personal interest in returning to work before the risks he posed to his co-workers
  - He had a significant past disciplinary record (which included unauthorized naps in a cargo container)
  - The Grievor’s attitude toward COVID safety risks was deliberate and cavalier
  - The Grievor could not be trusted to avoid engaging in unsafe conduct in the future.

Threatening to give someone COVID = lengthy suspension

- *Ryam Inc. Forest Products Group Chapleau Sawmill v United Steelworkers Local 1-2010*, 2021 CanLII 61491 (ON LA)
- Facts:
  - Grievor 40+ years of service; no discipline
  - Grievor gets into an argument with supervisor - yelling, use of derogatory language
  - During argument, Grievor removes his mask at a distance of less than 6 feet and threatens to give supervisor COVID by pretending to spit at supervisor
  - Employer issues Grievor with a 3-month suspension

Threatening to give someone COVID = lengthy suspension

- Arbitrator exercises discretion and reduces suspension from 3 months to 2 months
- Threat that was made needs to be considered in the context of the COVID-19 pandemic
- During hearing Grievor expressed willingness to apologize
- But for the Grievor’s long service and willingness to apologize, the Arbitrator would not have varied the length of the suspension

Failure to follow isolation procedures = termination of employment

- *Garda Security Screening Inc. and IAM, District 140* (Shoker), Re
- Facts
  - Employer communicated public health guidelines to employees confirming that employees are required to isolate if waiting for results of a lab test for COVID-19
  - April 12, 2020, Grievor informs Employer that she had tested positive for COVID-19
  - Grievor initially told Employer that she did not work on April 6, 2020; Employer subsequently determines that Grievor did work on April 6, 2020
  - Employer terminates Grievor's employment

Failure to follow isolation procedures = termination of employment

- Grievance Dismissed / Termination Upheld
- COVID-19 was the number one news item at the time – making it less plausible that the Grievor "did not know to isolate"
- The Grievor's doctor sent her to get the test (the fact that she was tested per Medical advice made the risk greater)
- She put her colleagues and the general population flying in and out of Pearson at risk
- Her behavior violated employer and public health guidelines
- She did not show remorse or concern about the potential consequences of returning to work
- Given the notoriety of the COVID-19 situation and the wall-to-wall reporting, the Grievor's excuse that she did not know to isolate or understand the consequences of her actions was not accepted

Thank you

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