

# Alberta Doctors' Digest

## The right to refuse and right to life

Readers will remember March 2020, when the world – as they knew it – shut down and remained more or less closed for almost two years due to the COVID-19 pandemic. During that time frame, medical officers of health across Canada struggled with various challenges, not the least of which was the distribution of vaccines (once available) and the application of vaccination standards and requirements. Restrictions were placed on several key public institutions including hospitals, with vaccinations becoming mandatory for health professionals working in many of those facilities.

Those mandatory requirements subsequently became the subject matter of several legal challenges from unions and individual physicians. However, a recent Alberta Court of Appeal case, *Lewis v Alberta Health Services*, marks one of the first times a patient challenged a mandatory vaccination requirement.

The facts of the case were these: Ms Annette Lewis, an Alberta resident, required an organ transplant to address an otherwise terminal condition. (Neither the physicians, their medical specializations, the specific organ, nor the location of the transplant program were disclosed in this case due to a publication ban). In the applicable transplantation program, individuals are referred to a specialist after a consultation with their physician. Patients are not automatically placed on the transplant list. A series of consultations and evaluations results in the initial specialist consulting with a committee of peers to decide whether a patient is ultimately accepted into the program. Rejection is typically based on balancing the patient's risk of death with a meaningful chance of increased quality and length of life. If the patient is accepted to the program, they are placed on a waitlist.

The program's waitlist is also ranked based on various factors, but if the patient presents any contraindications, such as an inability to follow medical advice, the patient would be ranked lower or possibly be denied the transplantation. Despite all of this, there is no guarantee that the patient will even receive an organ transplant, as several other metrics come into play such as compatibility between the donor and patient and the availability of an organ.

While such specialized matters are normally not reviewed by the courts, Ms Lewis's case was presented as unique as she had refused to be vaccinated against COVID-19, which was a specific requirement of the program (the "Policy"). The committee had concluded that her refusal to follow the Policy and their medical advice to obtain the vaccine constituted a contraindication for the procedure. The decision by the committee to remove Ms Lewis from the waitlist was based on various factors:

- Transplant recipients faced higher risk of death without the vaccine.
- Unvaccinated patients presented higher risk to other patients during post-transplant care.
- The COVID-19 vaccine presented negligible risks to transplant candidates.
- Published scientific research showed the benefit of the COVID-19 vaccination before transplant vs after transplant.

The Policy further aligned with a statement from the Canadian Society of Transplantation [organ name omitted] Section, which stated that there was a “25-30% mortality rate in patients who [were] infected with COVID-19 post-[organ name omitted] transplantation.”

Ms Lewis filed a lawsuit declaring that the program’s Policy violated her section 2(a), 7 and 15 *Charter* rights. The application eventually led to the Court of Appeal after the Chambers Judge denied her initial application.

In rendering its decision, the Court of Appeal specifically noted that this case was not about Ms Lewis’s decision to remain unvaccinated, as she had the right to ultimately refuse the COVID-19 vaccine as a competent adult. Instead, the Court of Appeal focused on the narrow issue of whether the requirement by the program to have a COVID-19 vaccination affected Ms Lewis’s *Charter* rights.

### **What actions violate the *Charter*?**

In the first step, the Court of Appeal stated that only “government action” violated the *Charter*. As such, the Court was required to review the specialists’ actions and determine whether they were engaging in a government function or activity. The Court of Appeal concurred with the Chambers Judge, stating that the program’s decision to require the COVID-19 vaccine as a precondition to a transplant was not a government function or activity.

In reviewing the program, the Court of Appeal noted that it was not a part of a government policy, nor was it a requirement of the program that any of the specialists report to any government authority. While the Court noted that Alberta Health Services (AHS) was subject to the *Charter*, AHS was not the body establishing the medical criteria and policies the specialists were required to follow.

Ms Lewis, however, argued that since all physicians operated under a legislative public health care regime, their actions possessed a government function. The Court of Appeal disagreed, stating that to follow such logic would render every physician’s actions subject to a *Charter* review.

Overall, the Court concluded the decision by the committee was made by various experts and medical personnel attempting to “maximize the best use of a scarce resource ... with the greatest chance of a life free from life-threatening complications, through science-based and medical consensus-based management of all possible identifiable risks.” As such, Ms Lewis’s claim failed. However, the Court of Appeal nonetheless reviewed Ms Lewis’s *Charter* arguments.

### **Section 2(a)**

Section 2(a) of the *Charter* relates to an individual’s freedom of conscience and religion. Ms Lewis claimed her decision to remain unvaccinated was not due to a religious belief but rather felt that the requirement to take an “experimental medical treatment” was an “affront to [her] conscience and [her] belief in free will.” The Court disagreed, stating that the belief in bodily autonomy was not the same as the right to bodily autonomy, and that such a right was protected under section 7 of the *Charter*, not 2(a).

## Section 7

In order to prove a breach of section 7, a claimant must show that the law in question interferes with the claimant's life, liberty and security of person, followed by establishing that such interference was inconsistent with the principles under section 7.

### Life

With respect to the right to life, Ms Lewis argued that by the committee refusing to provide the transplant because she was unvaccinated, she was being essentially sentenced to death. The Court of Appeal explained that section 7 of the *Charter* was engaged when government action imposed or increased the risk of death on the individual, directly or indirectly. The government action would also need to be causally linked to the risk; in other words, the government's specific actions could result in the individual facing a risk of death.

The Court clarified that Ms Lewis was dying because of her terminal illness, not any government action. Moreover, neither the government nor the committee were preventing her from accessing the health care she needed. Instead, the COVID-19 vaccine was part of the medical treatment she was entitled to receive should she qualify, but instead she chose not to.

### Liberty

As for liberty, Ms Lewis argued that the COVID-19 vaccine protected a patient's "informed consent." As she was required to take the COVID-19 vaccine to live, any consent would ultimately be under duress. The Court clarified that the right to liberty granted Ms Lewis the ability to choose what medical care she wanted to receive, which included the choice to decline the vaccine. As Ms Lewis had consented to receiving other vaccines but specifically *not* the COVID-19 vaccine, Ms Lewis's argument did not hold weight.

Lastly, Ms Lewis argued that the Policy violated her right to security of person due to the severe emotional stress it caused. The Court disagreed, stating that the medically necessary COVID-19 vaccine requirement did not amount to a "serious state-imposed psychological stress" as Ms Lewis was the one ultimately refusing the vaccine. As such, the Court rejected Ms Lewis's argument of a section 7 violation.

## Section 15

Finally, Ms Lewis argued that her section 15 rights were violated, which protects the right for every individual to be equal before and under the law with the right to equal protection and benefit without discrimination based on the enumerated grounds of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The Court noted first that Ms Lewis's claim was not based on any enumerated ground or distinction. However, in looking at whether "COVID-19 vaccination status" could be a new enumerated ground, the Court explained that vaccination status was not "who" Ms Lewis was. It was not a characteristic that was immutable, nor changeable at an "unacceptable cost to personal identity." Instead, Ms Lewis's decision boiled down to her own personal choice.

## Conclusion

While this is not the first time the Court has had to weigh between medical resource allocation and competing needs, the situation represents a reiteration of the medical ethics and their correlation to the *Charter* during unprecedented times. While the situation is genuinely tragic, the Court of Appeal's final remarks provide insight: "In the circumstances of this appeal, while Ms Lewis has the right to refuse to be vaccinated against COVID-19, the Charter cannot remediate the consequences of her choice."

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Editor's note:

The views, perspectives and opinions in this article are solely the author's and do not necessarily represent those of the AMA.

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