

November 29, 2021

Sent Via **EMAIL**
Private and Confidential

Dear 

Re: COVID-19 Vaccine Exemption Request Adjudication Panel - Notice of Decision

Background

The Government of Alberta (“**GoA**”) instituted the *Proof of COVID-19 Vaccination Policy for the Alberta Public Service* (the “**Policy**”), effective September 30, 2021. The Policy requires, in part, as follows:

By November 30, 2021, all employees must provide proof of full vaccination, in a form satisfactory to the GoA, as per the GoA’s designated process for the APS.

[...]

Any employee who believes they are unable to be vaccinated on the basis of any ground protected by the Alberta Human Rights Act (AHRA) must apply for an exemption by requesting the option through IGX, and must do so no later than October 29, 2021 for the application to be considered by Public Service Commission.

[...]

For as long as this Policy remains in effect, any employee who fails to comply with this Policy may be placed on an unpaid leave of absence until they choose to comply.

In support of Alberta Public Service (“**APS**”) employees and the Policy, the GoA established the COVID-19 Vaccine Exemption Request Adjudication Panel (the “**Panel**”) to review requests put forward by APS employees for exemption from the Policy pursuant to the rights and protections afforded by the *Alberta Human Rights Act* (the “**Act**”).

On or about October 29, 2021, you submitted an exemption request from getting fully vaccinated or participating in mandatory PCR testing based on religious and/or other protected grounds (the “**Request**”). The Request provided, in part, as follows:

Your concerns are as follows but not limited to:

- Employee states mental/physical grounds
- Employee states religious grounds related to the Christian faith

- The use of fetal cell lines and/lab replicated fetal cells lines that may have its origins in an abortion.

Reasons for Decision

For the following reasons, although you have requested an accommodation on religious grounds, it is the Panel's determination that "religious beliefs" ("freedom of religion") is not engaged and that your request is based on a personal preference, which is not a protected ground under the Act, or otherwise and therefore has been denied.

In rendering our decision, we are guided by the decision of *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), [2004] 2 SCR 551 ("**Amselem**"), which provides, in part, as follows:

56 Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered. **[1. The individual must show sincerity of belief and the religious belief must be sincerely held]**

57 Once an individual has shown that his or her religious freedom is triggered, as outlined above, a court must then ascertain whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) Charter. **[2. The impact/interference of the belief must be more than trivial]**

[...]

62 Freedom of religion, as outlined above, quite appropriately reflects a broad and expansive approach to religious freedom under both the Quebec Charter and the Canadian Charter and should not be prematurely narrowly construed. However, our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises. **[3. The religious practice cannot have the potential to cause harm or interfere with the rights of others]**

We are also guided by the decision of *Barker v. St. Elizabeth Health Care*, 2016 HRTO 94 (CanLII), which qualifies *Amselem* when novel religious claims are asserted, which the Panel believes to be the case here with the extant request:

[31] In *Amselem*, above, the Supreme Court of Canada stated (at para. 39) that "only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion." The Supreme Court also stated on at least three separate occasions that the practice or belief at issue must have a "nexus with religion": see paras. 46, 56 and 69. While

these statements were couched in the context of the right to “freedom of religion”, I find that they are equally applicable under the Code in terms of defining the scope of the protection against discrimination because of creed.

[32] The evidence before me consists of the applicant’s assertion of his belief that the Rastafarian faith prohibits a man, including a male PSW, from bathing a Rastaman. He was unable to provide any written text or documentation to support this assertion. While I appreciate and accept that some religious faiths, including Rastafarianism, rely heavily on oral traditions and teachings, the applicant also failed to provide any evidence or documentation from an elder of the Rastafarian faith to confirm that his personal belief forms part of the Rastafarian religion, whether from Jamaica or from the Rastafarian communities in Toronto or Montreal. Further, the applicant failed to call any evidence or provide any documentation even from his Rastafarian community in Ottawa to confirm that his personal belief forms part of the Rastafarian faith.

[33] I am cognizant of the Supreme Court’s admonition in Amselem that expert evidence to demonstrate that a claimant’s belief is consistent with the practices and beliefs of other adherents of the faith is not required or necessary, although it may be relevant to an assessment of the sincerity of the claimant’s belief: see para. 54. However, this statement was made in the context of a case where there was no issue as to the practice at issue being “rooted in religion” or having a “nexus with religion” as required by the Supreme Court’s own test. On the facts of Amselem, there was no question that there was a Biblical basis for the claimants’ belief that they required their own succah in order to properly celebrate the Jewish holiday of Succot, despite there being a dispute in the evidence between two Rabbis as to whether this was strictly required by the Jewish faith.

[34] In my view, where there is an issue as to whether a particular practice or belief is “rooted in religion” or has a “nexus with religion”, there is a need for an applicant to bring forward at least some objective evidence, beyond her or his own say so or subjective belief, to prove a link or connection between the practice or belief and the specific religion at issue. This is not about doubting the sincerity of an applicant’s personal, subjective belief, but is about having some basis in the evidence to support a conclusion that the belief is rooted in religion or has a nexus with religion, as required by Amselem. This is what I find to be lacking in the instant case.

[35] My conclusion in this regard is supported by the decision of the Federal Court in *Bennett v. Canada (Attorney General)*, 2011 FC 1310, in which it is stated (at para. 8):

The court in *Amselem* . . . held that courts need not accept that a practice is religious (as opposed to non-religious or secular) just because a claimant says so. To the contrary, Justice Iacobucci suggested that an objective inquiry into it is appropriate “since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion”.

[36] In the instant case, I have no textual or documentary support for the applicant’s personal belief that no man, including a male PSW, should bathe a Rastaman. Nor do I have any written or oral evidence from a Rastafarian elder or even another adherent to Rastafarianism to support that the applicant’s personal belief is rooted in the Rastafarian religion or has a nexus with the Rastafarian religion.

[37] Still further, the applicant was unable to explain to me any underlying tenet, principle or basis in the Rastafarian faith which informs or supports his personal belief that no man can bathe a Rastaman, apart from the general tenet that a Rastaman’s body is his temple.

[38] Not only does the instant case contrast with the situation in *Amselem*, where there was a Biblical source for the practice or belief at issue despite conflicting interpretations within Judaism, but it also contrasts with the situation in *R. v. N.S.*, 2012 SCC 72 (CanLII), [2012] 3 S.C.R. 726, which addressed the issue of whether a witness was entitled to wear a niqab while testifying at a criminal sexual assault trial. While not all Muslim women

wear a niqab or agree that this is a requirement of Islam, Muslim women who do choose to wear a niqab are able to point to support for this practice in the Quran, which speaks to the need for women to dress modestly. In contrast, in the instant case, I have insufficient evidence before me to connect the applicant's belief that no man, including a male PSW, should bathe a Rastaman with any underlying religious text or principle of Rastafarianism.

In the extant case and reviewing the Request, the Panel is unable to come to the conclusion, on the Request presented, that the applicant's religious belief and/or other protected grounds is engaged or violated. In other words, the Panel is not doubting the applicant's beliefs; rather, is unable to find, on the information before it, that the additional practice or belief against COVID-19 vaccines is "rooted in religion" or has a "nexus with religion" and/or other protected grounds as per Alberta Human Rights.

This decision does not foreclose you from submitting further information in the future. If you have new information or evidence that was not available at the time of your original application and which is significant to the decision, you may submit for reconsideration of this decision. Note that any reconsideration requests are discretionary and subject to GoA timelines and reconsideration parameters. As such, further information may be met with questions or further requests for information such as, but not limited to, whether the applicant's belief is the same for other vaccinations and other similarly developed medicines. If you have any questions or would like the decision to be reviewed please notify vaccinationexemptionrequests@gov.ab.ca by **December 6, 2021** and provide applicable rationale to support your request.

You are required to update your vaccination status intention in IGX by November 30, 2021 as per the *Proof of COVID-19 Vaccination Policy for the Alberta Public Service*. Please note effective December 14, 2021 all APS employees who have not provided proof of vaccination are required to produce a negative PCR (molecular polymerase chain reaction) or rapid test result, date-stamped within 72 hours of every scheduled work day/shift, on an ongoing basis. This testing requirement remains applicable to you regardless of the exemption decision. However, since your exemption request was denied, the employer will not be covering the cost of testing on your behalf. You will be required to pay for the required testing and complete it on your own time.

The Panel notes that the application for accommodation/ exemption could have also included claims under international, criminal, and constitutional law (including the Canadian Charter of Rights and Freedom). The Panel does not have jurisdiction to address those matters and as such, the Panel's decision is restricted to claims for accommodation under the *Alberta Human Rights Act*.

Decision of the Panel dated this 8th day of November, 2021

Adjudication Panel Representatives