

**Derpak White Spencer LLP**  
**Barristers and Solicitors**

**Memo**

TO: Treena Duncan, Executive Minister, Pacific Mountain Regional Council of The United Church of Canada

FROM: Cameron G. White

RE: **Proof-of-Vaccination Policy**

DATE: November 28, 2021

---

You have asked me to provide you with a legal opinion as to the enforceability of a proof of vaccination policy for indoor worship services. Specifically, whether the Church's B.C. congregations can require persons who attend indoor worship services to provide proof that they have been fully vaccinated<sup>1</sup> against COVID-19.

**I. Facts & Context**

The United Church of Canada ("UCC") ministers to over 2 million Canadians of all ages in roughly 3,000 congregations. Many UCC churches have a large in-person capacity (100+). Indoor worship services are often attended by UCC members aged 65 and older. The faith and religious teachings of UCC do not prohibit any of its members from receiving vaccinations for COVID-19 or otherwise. In addition to indoor worship services, many UCC congregations are currently offering worship services online.

COVID-19 has given rise to an unprecedented global pandemic. Despite high levels of vaccination in British Columbia, the pandemic is not over and new variants of concern continue to be identified.<sup>2</sup> Between the end of March 2020 and mid-May 2021, Canadians aged 65 and older accounted for roughly 80% (283,227) of COVID-19 related deaths in this country.<sup>3</sup>

By order ("Order") of B.C.'s Provincial Health Officer ("PHO"), proof of full vaccination is required to access some events, services and businesses until January 31, 2022 and could be extended.<sup>4</sup>

**II. Brief Answer**

It is my opinion that, amidst the current level of risk of COVID-19 and variants of concern, and, considering the capacity of UCC churches, the attendance levels of indoor worship services, the ages of participants, the widespread access to online worship services as an alternative, and key statements made

---

<sup>1</sup> "fully vaccinated" means the individual has received the full series of a COVID-19 vaccine authorized in Canada at least 14 days prior. <https://immunizebc.ca/covid-19-vaccine-frequently-asked-questions>

<sup>2</sup> <http://www.bccdc.ca/health-info/diseases-conditions/covid-19/about-covid-19/variants>

<sup>3</sup> Statistics Canada (2021a) <https://www150.statcan.gc.ca/n1/pub/75-006-x/2021001/article/00008-eng.htm>

<sup>4</sup> <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/covid-19-pho-order-gatherings-events.pdf>

by B.C.'s Human Rights Commissioner, UCC can justify a policy requiring persons who attend indoor worship services to provide proof that they have been fully vaccinated against COVID-19.

### III. Legal Considerations for Proof-of-Vaccination Policy

#### A) Occupiers Liability

In B.C., property owners and occupiers can be held responsible when a person is injured on their premises. This area of law is governed by the *Occupiers Liability Act* (“OLA”). An owner/occupier owes a legal duty to take “reasonable care” that persons are “reasonably safe” while visiting their premises.<sup>5</sup> While I am not currently aware of any OLA cases in B.C. that involves a COVID-19 outbreak, it is possible that an owner/occupier could be held liable for failing to take reasonable steps to address COVID-19 should visitors to their premises contract the virus at their premises. For example, a \$17 million dollar class action lawsuit was filed in 2021 against a Calgary restaurant linked to a COVID-19 outbreak for failing to ensure adequate safety protocols were in place at the premises.<sup>6</sup>

#### B) Occupational Health & Safety

Workplace health and safety is one of the primary legal issues concerning COVID-19 vaccination policies and mandates in B.C. workplaces. UCC employs individuals and volunteers throughout its congregations. B.C.'s Occupational Health and Safety Regulation (“OHSR”) provides that: “... all work must be carried out without undue risk of injury or occupational disease to any person.”<sup>7</sup> Employers have a duty under B.C. law to provide safe workplaces and that duty includes ensuring adequate procedures are in place to reduce the spread of various communicable diseases including, without limitation, COVID-19 and seasonal influenza.

#### C) Violation of Human Rights

Human rights is another area of law that intertwines with the implementation of COVID-19 vaccination and proof-of-vaccination policies and mandates. In B.C., the applicable legislation that protects human rights is the *Human Rights Code* (“HRC”). The HRC sets out a list of personal characteristics that are protected in the areas of employment, housing, receiving services and publications. These characteristics include race, colour, ancestry, place of origin, religion, sex, gender identity or expression, sexual orientation, physical disability, mental disability, marital status, family status, age, political belief and summary or criminal conviction.<sup>8</sup>

In September 2021, the Ontario Human Rights Commission was the first to issue a policy statement on whether or not vaccine mandates were a violation of human rights. In asserting that vaccine mandates are generally permissible they stated:

While receiving a COVID-19 vaccine remains voluntary, the OHRC takes the position that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the *Human Rights Code (Code)* as long as protections are put in place to make sure people who are unable to be vaccinated for Code-related reasons are reasonably accommodated. This applies to all organizations.

---

<sup>5</sup> [OLA, s. 3\(1\)](#)

<sup>6</sup> <https://calgary.ctvnews.ca/joey-eau-claire-restaurant-facing-17m-class-action-lawsuit-over-covid-19-outbreak-1.5390896>

<sup>7</sup> [OHSR, s. 2.2](#)

<sup>8</sup> <http://www.bchrt.bc.ca/human-rights-duties/characteristics.htm>

Upholding individual human rights while trying to collectively protect the general public has been a challenge throughout the pandemic. Organizations must attempt to balance the rights of people who have not been vaccinated due to a *Code*-protected ground, such as disability, while ensuring individual and collective rights to health and safety.<sup>9</sup>

[emphasis by the author]

The B.C. Human Rights Commissioner quickly followed suit and on October 14, 2021 updated its policy guidance to include the following statements:

It is the position of B.C.'s Human Rights Commissioner that the proof-of-vaccination requirement is justified from a human rights perspective and will result in increased protection for those among us who are most vulnerable to the virus,<sup>10</sup> and

A person who chooses not to get vaccinated as a matter of personal preference - especially where that choice is based on misinformation or misunderstandings of scientific information - does not have grounds for a human rights complaint against a duty bearer implementing a vaccination status policy.<sup>11</sup>

Personal characteristics protected by the HRC that are most relevant to the implementation of a proof-of-vaccination policy by UCC are religion and physical disability i.e. medical exemption.

i) Religion

The faith and religious teachings of UCC do not prohibit any of its members from receiving vaccinations for COVID-19. Consequently, it is my opinion that any HRC challenge to a UCC proof-of-vaccination policy on the basis of a religious prohibition on vaccination will not be successful.

The strongest challenge to a UCC proof-of-vaccination policy may argue that such a policy excludes unvaccinated individuals of faith engaging in religious practices in a communal and collective setting. The level of risk of COVID-19 and the extent to which UCC congregations provide unvaccinated individuals with alternative ways to participate worship services will be important factors in defending such a challenge.

ii) Genuine Medical Exemption

Medical exemptions are an important accommodation to avoid potential discrimination on the basis of disability, however, demonstrating that discrimination has occurred under the HRC requires more than evidence of a disability and a decision not to be vaccinated. There must be an established connection between the two, such as the disability preventing the individual from being able to get vaccinated.<sup>12</sup>

The B.C. Centre for Disease Control (“BCCDC”) has explained that it is rare that a disability prevents an individual from being able to get vaccinated. The BCCDC says: “In

---

<sup>9</sup> [http://www.ohrc.on.ca/en/news\\_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates](http://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates)

<sup>10</sup> <https://bchumanrights.ca/wp-content/uploads/COVID-19-vaccine-guidance-Oct.-2021-update.pdf>

<sup>11</sup> *Ibid*

<sup>12</sup> [Complainant v Dr Bonnie Henry 2021 BCHRT 119](#)

nearly all cases, vaccination is strongly recommended in order to protect against a higher likelihood of severe symptoms if COVID-19 is contracted. [...] Doctors and researchers have looked at the evidence. They agree that unless you have a very serious allergy to any of the vaccine ingredients, you should strongly consider getting the COVID-19 vaccine.”<sup>13</sup>

In fact, as recently as November 16, 2021, the BCCDC has confirmed that there are no medical exemptions for the COVID-19 vaccines.<sup>14</sup>

D) Canadian Charter of Rights and Freedoms (the “Charter”)

The Constitution is the supreme law of Canada; all other laws must be consistent with the rules set out in it. The Charter is one part of the Canadian Constitution; however, the rights and freedoms in the Charter are not absolute - they can be limited to protect other rights or important national values. It is also important to keep in mind that the Charter only applies to government and the actions of government, not private interactions between individuals or private businesses or organizations. Nevertheless, how section 2(a) of the Charter is treated in the context of COVID-19 provides valuable insight into factors and considerations that would be relevant to defending a UCC proof-of-vaccination policy.

Section 2(a) of the Charter states that all Canadians have freedom of religion.<sup>15</sup> Freedom of religion has been defined as “the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practise or by teaching and dissemination”<sup>16</sup>

The Supreme Court of Canada (“SCC”) has stated on many occasions that freedom of religion can be limited where it interferes with the fundamental rights of others: “Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.”<sup>17</sup>

[emphasis by the author]

i) Test concerning infringement of Charter Right

The Supreme Court has adopted the following test for determining whether there has been an infringement of section 2(a) of the Charter. An infringement of section 2(a) will be made out where the claimant sincerely believes in a belief or practice that has a nexus with religion; and the impugned measure interferes with the claimant’s ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.<sup>18</sup>

a) Nature of the belief or practice

Under the first step, freedom of religion will only be triggered where the claimant shows that they have a sincere practice or belief that has a nexus with religion, “which calls for a particular line of conduct, either by being objectively

---

<sup>13</sup> *Supra*, note 12

<sup>14</sup> <http://www.bccdc.ca/health-info/diseases-conditions/covid-19/covid-19-vaccine/vaccine-considerations>

<sup>15</sup> <https://laws-lois.justice.gc.ca/eng/const/page-12.html>

<sup>16</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para 72

<sup>17</sup> *Ibid*

<sup>18</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para 32

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.”<sup>19</sup>

b) Nature of the interference

The Charter shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. Claimants must provide objective proof of interference, not just cite subjective belief of interference.<sup>20</sup>

#### IV. Notable Case Law regarding COVID-19 and violation of Charter Rights

A) *Lavergne-Poitras v. Canada (Attorney General)* 2021 FC 1232 (“*Lavergne-Poitras*”)<sup>21</sup>

The case of *Lavergne-Poitras* is a decision of Canada's Federal Court that was released on November 13, 2021. In this case, “a healthy 35-year-old with a family history of heart disease,” opted to not get vaccinated out of a concern “about the potential complications, side effects, and risks associated with available COVID-19 vaccines.” This individual argued that a particular government-mandated vaccination policy breached his rights to liberty and security of the person guaranteed under section 7 of the Charter and that it was “arbitrary, overbroad and grossly disproportionate to its objective.” The interim injunction sought by this individual was dismissed by the Court.

In dismissing the application for an interim injunction, the Court stated:

- i) The harm to Mr. Lavergne-Poitras of losing his employment must be balanced against the risks of harm to federal government employees of having increased risk of transmission of the SARS-CoV-2 virus that causes COVID-19, including its variants; and
- ii) The Government of Canada has implemented a measured approach to the protection of its employees that includes reducing the risk of transmission by requiring personnel of suppliers who may come into contact with federal government employees, and only such personnel, to be vaccinated. Material harm to the public interest would arise if the requested injunction is issued, both in the form of increased health risks to federal employees and in the form of undermining a considered policy implemented by the federal government as employer.

B) *Beaudoin v British Columbia*, 2021 BCSC 512 (“*Beaudoin*”)<sup>22</sup>

The case of *Beaudoin* is a March 2021 decision of B.C.'s Supreme Court. In this case, the Honourable Chief Justice Hinkson dismissed a legal challenge to the province's restrictions on in-person religious gatherings. In a 60-page decision, Justice Hinkson found that, while the PHO's ban on in-person worship did constitute an infringement on religious groups' charter rights to freedom of religion, the infringement was reasonable based on the range of options open to the province.

---

<sup>19</sup> [Syndicat Northcrest v. Amselem](#), [2004] 2 S.C.R. 551 at para 56

<sup>20</sup> [S.L. v. Commission scolaire des Chênes](#), [2012] 1 S.C.R. 235 at para 32

<sup>21</sup> <https://www.canlii.org/en/ca/fct/doc/2021/2021fc1232/2021fc1232.html?resultIndex=1>

<sup>22</sup> <https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc512/2021bcsc512.html?resultIndex=1>

Key statements from Justice Hinkson in *Beaudoin* include:

- i) The religious petitioners have given evidence that gathering in-person for worship provides benefits in addition to the fulfillment of the religious beliefs described above. These benefits include:
  - a) accommodating members who do not have the means to use technology;
  - b) identifying specific needs of vulnerable persons in the church community;
  - c) providing physical, mental and emotional care; and
  - d) providing comfort and encouragement and reducing loneliness, depression, anxiety, and fear.The respondents accept that the religious petitioners' practice of in-person worship is fundamental to their religious beliefs.<sup>23</sup>
- ii) The religious petitioners contend that Dr. Henry's G&E Orders are an outright forbidding of all British Columbians from the free exercise of the fundamental right to engage in sacred religious practices in a communal and collective setting. In my view, this assertion is greatly overstated.<sup>24</sup>
- iii) [...] I find that [the ban on in-person worship was] based upon a reasonable assessment of the risk of transmission of the Virus during religious and other types of gatherings;<sup>25</sup> and
- iv) I have concluded that Dr. Henry's reasons, both in the preambles to the orders and in the media events, do not exhibit a failure of internal rationality. Gatherings and events are a route of transmission. Whether measures less intrusive than prohibition are effective depends on the prevalence of the Virus in the community and behavioural factors. Dr. Henry responded to evidence of accelerating transmission when she made the orders, and she has explained her reasoning.<sup>26</sup>

## V. Duty to Accommodate

The existence of a genuine personal characteristic protected by the HRC may give rise to a duty to accommodate that particular individual. Further, accommodation measures put in place by the UCC are likely to bolster the defensibility of a proof-of-vaccination policy, if challenged. Such accommodation measures could include:

- A) Offering worship services online;
- B) Offering to assist members of congregations who struggle with technology and access to online worship services;
- C) Allowing unvaccinated individuals to participate in indoor worship services upon producing a negative COVID-19 test taken no more than 72 hours prior; and/or
- D) permitted individual prayer, reflection, and other forms of religious activity at UCC places of worship for unvaccinated individuals<sup>27</sup> at specified times and with appropriate personal protective equipment such as masks.<sup>28</sup>

---

<sup>23</sup> *Ibid*, at paras 154-155

<sup>24</sup> *Ibid*, at paras 166-167

<sup>25</sup> *Ibid*, at para 233

<sup>26</sup> *Ibid*, at para 238

<sup>27</sup> *Ibid*, at para 245

<sup>28</sup> *Supra*, note 6

## VI. Other Considerations

### A) Privacy Law

In B.C., the *Personal Information Protection Act*<sup>29</sup> (“PIPA”) governs the collection, use, disclosure, protection of and correction of a person’s private information. In general, organizations are required to obtain express consent to collection, use or disclosure of an individual’s personal information. Nonetheless, consent may be implied in the following circumstances:

- i) is clearly in the interests of the individual and consent cannot be obtained in a timely way;
- ii) is necessary for the medical treatment of the individual and the individual does not have the legal capacity to give consent; or
- iii) is required or authorized by law.

As a matter of best practice, organizations should:

- iv) obtain express consent to collection, use and disclosure of personal information where possible;
- v) minimize collection, use or disclosure to that which is necessary to achieve the purpose of the collection, use or disclosure;
- vi) use adequate safeguards to protect unauthorized access to personal information; and
- vii) pay attention to the rapidly changing COVID-19 context and tailor their approach accordingly.

## VII. Conclusion

While it is my opinion that UCC congregations in B.C. can, at this time, justify a policy requiring persons who attend indoor worship services to provide proof that they have been fully vaccinated against COVID-19, the COVID-19 global pandemic is unprecedented and this is a novel and evolving area of law. In this circumstance, it is integral that UCC be mindful of the related legal issues, such as occupiers’ liability, workplace safety, human rights and privacy protection when implementing such a policy and further that such a policy align with up-to-date public health recommendations and current medical and epidemiological understanding of the specific risks that the policy aims to address.

The level of risk of COVID-19 may increase or decrease from time to time on a local or regional level or within a particular congregation. If a proof-of-vaccination policy were to be challenged at law, the level of risk of COVID-19 at the particular time of challenge may affect the enforceability of such a policy.

Factors specific to UCC that, in my opinion, currently support the implementation of a proof-of-vaccination policy include the:

- A) current level of risk of COVID-19 and variants of concern;
- B) capacity of UCC churches;
- C) attendance levels of indoor worship services;
- D) the percentage of COVID-19 related deaths in Canadians aged 65 and older;
- E) the widespread access to online worship services as an alternative, and

---

<sup>29</sup> [https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00\\_03063\\_01](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_03063_01)

- F) key statements made by B.C.'s Human Rights Commissioner in their October 2021 update to policy guidance.

Should you have any further questions pertaining to the drafting and implementation of a proof-of-vaccination policy, we would be happy to assist you.