And as things stand currently, we only have public health orders mandating vaccinations for healthcare workers across BC. So as many of you might know, there was an initial order that Dr Bonnie Henry announced earlier on in August. And that public health order made it mandatory for all long-term care and assisted living workers to get vaccinated.

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And the deadline given for that, under that order, was October 12th. So that deadline is coming. That order applies to workers, including volunteers and personal service workers who are required to enter long-term care and assisted living facilities to perform services in those facilities. Not only does that order mandate vaccinations but there is also an obligation to provide information to the Ministry of Health with respect to the vaccination of staff and residents.

And really, the collection of that information is aimed at assessing risk and outbreak potential as we know that these facilities during the pandemic have been hard hit with COVID-19 outbreaks. So it really is for legitimate purposes of assessing those sorts of risks. Of course, prior to October 12, healthcare workers working in these facilities who are not vaccinated will be required to continue complying with the usual COVID-19 safety measures and be required to mask.

That was the initial order that was announced in early August. And about a month later, early September, Dr Bonnie Henry announced that the order requiring vaccinations for healthcare workers will be extended essentially to all healthcare workers across BC. And that essentially is applicable to anyone really working in a healthcare facility across the province. That can include students, physicians, residents, contractors, volunteers and really any other healthcare professionals working in healthcare facilities. And under that order, mandatory vaccination is set for October 26th.

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That’s really the only mandatory vaccinations order we have, a public health order, currently in BC. We don’t currently have any public health orders mandating vaccinations for employees generally. But the BC government did make an announcement with respect, as we know, with vaccine passports that came into effect. And I’m going to hand over to Dianne who will be discussing that order and what we think the implication of that order might be for employers who are impacted by that order.

As Michelle said, although British Columbia has not mandated vaccinations for employees generally, there are public health orders relating to vaccination passports. And those orders may have an impact on an employer’s ability to actually mandate vaccination for its employees.

As of September 13th, people in British Columbia who are age 12 and older are required to provide proof of vaccination to attend a number of different social and recreational events. So things like indoor ticketed sports events, indoor concerts, theatres, dances, sympathy events, restaurants and nightclubs, both indoors and outdoors on the patios, and movie theatres, fitness centres and organised indoor events. And by September 13th, the requirement was that people must have one dose of an approved vaccine, and then by October 24th, fully immunised against COVID-19.

The government describes the settings where the vaccination passport is applicable as discretionary, meaning that they’re not essential to people’s lives. So the order does not apply to things like grocery stores, pharmacies, retail settings, libraries or in public transit. And it also won’t apply to things like food banks, shelters, social services or healthcare services or exercise therapy programmes. So I think they’ve tried to carve out non-discretionary events from general things that are needed in someone’s life.

Importantly, from a human rights perspective, the government’s original announcement said that there was not going to be any exemptions for people who aren’t able to receive the vaccine for medical or religious reasons.

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And I think one of the things that we can say about vaccinations is ever since there’s been talk about vaccinations, particularly in the workplace, there is always a discussion about human rights considerations for people who aren’t able, for whatever reason, to obtain the vaccination. The final order that was published actually does contain a process by which you can request a reconsideration of the order on the basis of a medical exemption, but those exemptions are very limited. So it is there, although very limited.

Now, the other interesting thing, I think, about the vaccine passport order is that it specifically says it does not apply to workers at their workplace when they are engaged in their work activities, including staff meetings. In other words, the requirement does not apply to workers who are entering the workplace to perform their work duties. And that’s the case even though all of the people that the workers will come into contact with have to show a proof of vaccination to enter the workplace for social reasons.

In the circumstances, although the order does not apply to workers or employers, I think that what it does really is provide, I’ll call it a hook for employers who are participating in those business activities to which the order applies, where an employer could hang its hat on that to say, because of this order, it’s reasonable in the circumstances that we also require our employees to be vaccinated.

And so we will discuss shortly the risks associated with a purely mandatory vaccination policy. But really, in terms of whether or not a mandatory vaccination policy is appropriate, it’s really going to come down to whether or not it’s reasonable in the circumstances to protect the health and the safety of the workplace, the workers and the patrons of the workplace.

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And I think employers to whom this particular order applies may be justified in mandating vaccination for the sole reason that there are so many people coming through these types of establishments. The public health officer has made it clear that in order for the protection of the public, these vaccine passports are necessary. I think it’s not that far of a jump to also say that it would be necessary for your employees in that instance as well. So although nothing has been published on that, that’s my take. And I think every circumstance is going to have to be evaluated on its own facts. But I do think that there is an avenue there for employers.

As things stand right now in British Columbia, vaccinations, as Michelle said, are only required for healthcare workers. The government has not mandated vaccinations for employees generally. And so the question that we really have been receiving a lot is whether employers can mandate vaccination for employees in the absence of a public health order to that effect.

Thanks, Dianne. So I’ll jump in here and address that, the question that I think is probably on everyone’s mind, and that is whether an employer can mandate employees to get vaccinated. Certainly from a strictly legal standpoint, employers in a non-unionised context… And I say non-unionised because if you’re in a unionised environment, there are slightly different considerations that would be applicable. When we express some views shortly, these are applicable to employers in the non-unionised context.

If you’re an employer in the non-unionised context, of course you have the right to manage your workplace as you see fit. And that would include implementing employment policies and procedures as you would do in the normal course for your employees and potential employees.

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And we know that Canadian employers across Canada have legal obligations with respect to health and safety, and specifically a legal obligation to maintain the health and safety of the work environment for employees. So in this context, and purely from a legal perspective, we would like to say there is nothing legally prohibiting you as an employer from establishing and implementing a mandatory vaccination policy, specifically seen within that context.

But of course, implementing a mandatory vaccination policy does come with significant risks. And so in considering whether you are going to adopt and implement a mandatory vaccination policy, if you believe it’s reasonable and necessary in the context of your workplace, it does require consideration of, well, what are the risks associated with implementing such a policy.

Of course there are significant privacy concerns, there are human rights issues that Dianne alluded to, potential constructive dismissal claims by mandating employees to get vaccinated as a condition of either coming to work or their continued employment, as well as potential class-action complaints if it ultimately turns out that the COVID-19 vaccine has long-term side effects.

These are some of the risks that we have been advising employers on. Depending on the nature of your business and the need for mandatory vaccinations, some employers are willing to take on some of that risk or all of that risk because they believe it is absolutely necessary for the workplace. And in many situations, there is a real health and safety need, or perhaps it’s required or being mandated by customers with respect to employees accessing customer sites.

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It really does require consideration of the particular workplace, but those are generally some of the risks to think about, of course bearing in mind that in implementing such a policy, that some employees might not be able to get vaccinated for valid human rights-related reasons, so either religious or medical reasons.

Really, it could be on any ground protected by the BC Human Rights Code. And so in appropriate cases, an employee might request an accommodation, to be exempted from the requirement to get vaccinated. And in appropriate cases, as an employer, you would have an obligation to accommodate that employee.

Now, the form and the shape that that accommodation can take really depends both on the nature of the workplace as well as the employee’s role, and so it’s difficult to say exactly how employees can be accommodated. But certainly ways in which employees can be accommodated might include requiring those employees to continue working remotely, or if they’re going to be required to come to the office, to wear a mask and to comply with other COVID-19 safety measures, or an unpaid leave of absence. Those are some of the options available to you if an employee has a legitimate human rights reason for not getting vaccinated.

In terms of what shape should a mandatory vaccination policy take, well, certainly we don’t really have any case law to guide or assist us and there really hasn’t been any human rights decision regarding mandatory vaccination policies. But we can say that the BC Human Rights Commissioner has weighed in on the issue and has provided some indication of how the Human Rights Tribunal, certainly or at least from a human rights perspective, might look at a mandatory vaccination policy, at least in British Columbia.

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What the BC Commissioner indicated was that employers can, in very limited circumstances, implement a mandatory vaccination policy where there are no less intrusive means preventing COVID-19 transmission, so where those less intrusive measures are inadequate in the particular workplace. So really, it does require consideration of the nature of the particular workplace. There’s no hard and fast rules. It really would require consideration of the workplace and the risk exposure in the workplace, in that specific workplace.

What we also know is that a policy like that would have to be specific to the workplace and the context. It would have to be time-limited, with respect to the risk of COVID-19 and transmission in the workplace being an actual risk and concern. A policy like that would have to be regularly reviewed. The measures that you implement should be proportional to the risks that you seek to address in the workplace. There should be a consideration of less intrusive measures and how those less intrusive measures are inadequate in the context of the workplace.

It’s clear that with these vaccination policies, we believe that, at least from a strictly legal point of view, there’s nothing legally prohibiting you, but there are some risks. And if you are going to adopt a policy like that, you definitely want to consider a number of things that I’ve just spoken about in formulating your policy, to make sure that it really is tailored to your workplace and well thought through.

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The one aspect is it would be nice to, or preferable, to have good scientific evidence to support the necessity of a mandatory vaccination as a means of limiting or reducing the transmission of the virus in the workplace. We have some doubts, and arguably, the current medical data does not necessarily support that.

But we should say that the medical information and data is continually evolving. There’s new information coming out all the time. And we are assessing the information as it becomes available. And we will continue to provide regular updates on any information from the government on this sort of medical data to potentially support mandatory vaccination policies as well.

Other than the question of whether you can mandate mandatory vaccination and implement mandatory vaccination policies in the workplace, another question which is closely related to the first and that we are getting often is whether an employer can also compel an employee to disclose their vaccination status, which is also a tricky one. And I’ll hand over to Dianne to address that question.

Thanks, Michelle. In British Columbia, unlike a lot of the other provinces in Canada, there is privacy legislation which actually governs the collection and disclosure of employee personal information. Essentially, as an employer, you can only collect private, personal information about an employee with their consent. And the consent must be informed and voluntary consent.

And so in the case of vaccination status, it is personal information and it’s sensitive medical, personal information. As a result of that legislation, there are significant privacy implications of actually compelling the disclosure of the vaccination status without proper consent. I will say that I think it’s an easier option to get the disclosure in the case of new employees coming into employment because you can seek their consent for doing so.

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And I think, in that context, a consent to disclosing vaccination status is voluntary in the sense that the employee can choose not to apply for employment there. But with current employees, employers are finding themselves in a difficult situation on how to actually obtain consent for the disclosure of this sensitive information.

The Privacy Commissioners have released some statements regarding privacy implications of vaccination passports. And they essentially define a vaccination passport very broadly and it includes anything that compels an employee to disclose their vaccination status in order to enter the workplace.

The Commissioners have really strongly cautioned that the potential benefits of any type of that programme really has to be weighed against the invasion of the privacy rights of the individual. And so I think with everything, I think you’ll probably hear us saying again and again, it’s all really about weighing up reasonableness and whether, in the circumstances of a particular workplace, it’s reasonable for the employer to ask for this information.

But the Commissioners have basically said it appears that an employer would need to be able to show a couple of things in order to actually compel vaccination status. The first is that there must be evidence to support that the vaccination passport is necessary and likely to be effective at achieving the public health purpose for which it’s intended. And so in that instance really, the public health purpose for which you’d be seeking the information is the safety of the workplace and, as Michelle discussed earlier, there is an obligation of all employers to maintain the safety of the workplace for the employees.

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There has to be no less privacy intrusive means of getting that information that is equally effective at achieving that same public health purpose. The privacy risks associated with the vaccine passport have to be proportionate to the public health purpose they are intended to address. And you need to collect, use and disclose the least amount of personal information possible to achieve that purpose.

In other words, really we’re looking at the necessity of the information, the effectiveness of that information for the purpose and the proportionality of the vaccine passport to what we’re trying to do. That’s going to be really crucial in assessing the overall assessment of whether a mandatory vaccination policy is lawful and whether you can compel disclosure.

I will just say, on a practical level, we have been drafting a number of mandatory vaccination policies for employers, and for employers who have operations oftentimes across other countries. And given the privacy legislation in British Columbia, a lot of employers are opting to do something that’s voluntary as opposed to mandatory.

We’ve had some employers opt to have a policy that makes it a voluntary option for the employee to disclose their vaccination status. And then with that vaccination status, the employer is really looking at how to manage its workplace. And if an employee chooses not to disclose their vaccination status, they’ll effectively be treated as an unvaccinated employee, pursuant to the policy. And we’ll talk about the implications of failing to follow a policy or failing to disclose your vaccination status a little bit later.

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It is apparent that asking an employee to disclose their vaccination status though does raise privacy concerns. I think one of the questions that we receive a lot is really what is the practical effect of that risk, and what can an employer expect if they are found to have breached privacy legislation with respect to securing vaccination information. I’m just going to pass it to Michelle to talk about the implications of a privacy breach.

Thanks, Dianne. Yes, so I’ll talk a little bit about the risks that you may face for a potential privacy breach. But before I do, I should preface the discussion on saying that BC has, of course, its own privacy legislation. And it is fairly unique and specific to BC in the sense that if you look at Ontario, they don’t have the similar privacy legislation. So when we talk about the risks that you may face as a result of a privacy breach, we are of course focusing on BC, and specifically, in BC, the Personal Information Protection Act as well as the Privacy Act, which provides recourse for individuals when a privacy breach has occurred.

Starting with BC’s Personal Information Protection Act, under that Act, there is potential recourse if an organisation uses deception or coercion to collect personal information in contravention of the Act. And if that is established, so there has to be some form of deception or coercion, the organisation may be liable for a fine of up to $100 000.

And so the Act also goes a bit further to say that a person affected by the privacy breach can seek damages for the actual harm suffered as a result of the breach, particularly the organisation’s obligations under the act. And so the PIPA certainly provides recourse in, I would say, fairly limited circumstances in the sense that it would require some form of deception or coercion on the part of the organisation in the process of collecting the information.

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Then there’s the potential liability for a fine. Outside of circumstances involving a deception or coercion, as the Act currently stands, a failure to give notice or to obtain consent in collecting personal information such as vaccination information would not necessarily attract a fine under the act in its current form.

The more likely outcome in that situation is if an employee were to complain about a privacy breach, then the privacy regulator could make a finding and a decision that there has been a breach of the Act, then publish a potentially public decision around the organisation or the employer’s failure to comply with Act and acting in breach. So really, that is, on a practical level, your risk exposure, absent deception or coercion.

And then under BC’s Privacy Act, that Act provides that it is a tort that is actional without having to prove any damages for a person to violate the privacy of another wilfully and without a claim of right. Now, we don’t currently have any case law around exactly what a claim of right means. But certainly, there is an argument that processing vaccination information to comply with occupational health and safety legislation is a claim of right. That’s an argument that could be made but we certainly don’t have any case law, any decisions that could assist us in understanding how the privacy regulators might apply that particular provision and what would be considered a claim of right.

If we’re looking a little bit beyond BC to other provinces, courts in other provinces have recognised a common law privacy tort such as a public disclosure of private facts. Again, these issues have not been tested by the courts, so whether or not anyone will bring a claim based on this common law tort or a different common law tort remains to be seen.

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But certainly in BC, on a practical level, there is definitely the potential for a fine if there is deception or coercion. And under the Privacy Act, there is a tort actionable, even if no damage has been proven. On a practical level, that is your risk exposure where you are collecting personal information and there’s a failure to give notice or a failure to get consent in collecting that information.

Another question we get asked often is what an employer can do if an employee refuses to comply with a vaccination policy. Because it’s all good and well to implement a mandatory vaccination policy, but what do you actually do if an employee says, I’m just not going to comply? And we’re not necessarily talking about a situation in which an employee is requesting to be accommodated because they have a valid human rights’ reason for not getting vaccinated. We’re more looking at a situation where an employee is just refusing to comply with the policy. And I’m going to hand over to Dianne to talk us through that.

Thanks, Michelle. I think what can be said, at least I think what we’re seeing, is that despite the legal risks associated with implementing a mandatory vaccination policy, there is really a clear step in that direction by a lot of employers, particularly after a lot of the big businesses announced that they were moving in the direction of a mandatory vaccination policy.

And so I think that in light of that, what that’s inevitably going to mean for employers is that they’re now going to have to deal with employees who refuse to comply with those policies because there are a number of people out there who are opposed to the vaccination for whatever reason. And I think really, the big question on most employers’ minds is, can we terminate an employee who refuses to get vaccinated in light of a mandatory vaccination policy?

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The answer is not necessarily straightforward. I will mention that United Airlines this morning announced that they actually terminated over 200 employees as a result of a failure to follow mandatory vaccination policy. Most of those employees were in the United States, so different rules apply. But I think there is a clear sign there that employers will take steps to deal with failure to follow these types of policies.

As Michelle said, I think the first thing that you really need to be aware of as an employer when determining what to do for a failure to comply is to know and understand the reason why the person is not complying. And so if there is a reason that’s protected under the human rights legislation, then there’s going to be an obligation there to accommodate that person to the point of undue hardship.

So that’s the first step, is really finding out why the person is not complying. And I think it’s important to remember that personal preferences are not going to cut it when it comes to protected rights under the Human Rights Code, so it has to be something more than a personal preference of not wanting to get the vaccination. If it’s somebody who is really relying on personal preference, then what does an employer do? I think this really is unprecedented in terms of the pandemic. There’s no case law really to guide us on this issue. I think it’s probably going to take years for any types of claims to go through the courts.

But what we do know is, in most Canadian jurisdictions, aside from Quebec and federally, an employer is entitled to terminate an employee at any time and for any reason, other than reasons connected to human rights legislation, as long as the employer provides appropriate notice and pay in lieu of notice.

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And we also know that if an employee engages in serious misconduct, then the employer can dismiss that employee for just cause and is not required to pay any notice or payment in lieu. And I think when we’re talking about whether we can terminate someone for failure to comply with vaccination, the real question that everybody wants to know is, can we terminate somebody for just cause and not pay them anything?

Just cause has really been described as a capital punishment of employment law, meaning that the threshold is so high to uphold a termination for just cause. In normal circumstances, I would say that an employee’s violation of a company policy in and of itself would very rarely justify just cause for termination, although there have been instances where a failure to comply with a policy that puts the health and safety of other people at risk can constitute just cause.

I think it’s really going to come down to the circumstances of each particular case and what the employee has done in the circumstances, and whether the failure to comply to the policy actually impacts other people in the workplace. Of course, if an employee also disregards or lies about their vaccination status, then I think you could terminate somebody for just cause, if they attend the workplace and falsely reported their vaccination status.

But I think the more likely scenario really for employers is that they’re going to be looking at termination without cause for a failure to obtain vaccination or be vaccinated. And then the employer is going to have to look at what’s the reasonable notice or pay in lieu of notice they need to provide that employee.

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One thing to keep in mind in that respect is I think we are seeing a lot of cases or even demands these days, during the pandemic era, that people who have been terminated and offered severance packages are coming back and saying, actually, because of the pandemic, I require more notice. So just something to keep in mind. If you’re terminating people and paying them out pay in lieu of notice, that that’s likely going to become an issue down the road if there’s no contract that’s governing what the employee gets.

But I think outside of the termination without cause, which is something that’s very viable for an employer to do, an employer can also opt for some lesser forms of discipline, such as placing an employee on unpaid leave until it’s safe to return to work, requiring that the employee work remotely, as Michelle had mentioned earlier. And those types of lesser forms of action by the employer is most likely to be seen as reasonable in the current state of the pandemic. And so when we talk about putting someone on leave, it will be an unpaid leave of absence instead of something that would actually be paid.

I think that the employer’s ability really to terminate, and whether the termination is for cause or without cause, is really going to be dictated by the status of any government orders affecting the workplace. If there is a government order mandating vaccination for your particular workplace and an employee refuses to be vaccinated, I think an employer will have a strong ground to say that the employee has to be terminated for cause. Or there is potentially an argument for frustration of contract. It’s something else that’s a possibility for the employer in those particular circumstances.

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So again, the other option, of course, is just to continue people to work remotely. And different we do that, I think it’s important to really establish the parameters of the remote work, either in an employment agreement or in an employment policy, to ensure that you are complying with all applicable legislation. I think that’s really where we stand in terms of vaccination policies in British Columbia.

I think to really sum it up, I would say that there’s nothing legally preventing an employer from implementing a mandatory vaccination policy. There are a number of risks associated with it and I think an employer really just have to weigh those risks against its obligations and responsibility for maintaining a safe workplace. A lot of employers are opting to proceed with mandatory vaccination policies and I think that as time goes on, we’re going to see more and more case law coming out of mandatory vaccination policies.

And so to conclude our session today, we are going to talk about some recent decisions from the British Columbia Human Rights Tribunal relating to masking and vaccine passports. So although we haven’t had anything yet on mandatory vaccination policies, I’m sure those will be coming in the next months and up to the next year.

But the Chair of the Tribunal recently published a statement about the fact that they are actually receiving a significant number of complaints relating to masking, vaccination and vaccination passports. And they’ve been completely inundated with complaints, even before the actual public health orders went into effect.

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So far, none of those complaints have succeeded and the Tribunal has actually taken the unusual step of publishing decisions that are what we call screening decisions, which are decisions before they actually get into the stream of being accepted as complete, which typically they wouldn’t publish. But we anticipate that more complaints are going to be filed and we’re going to see more decisions coming out of the Tribunal in the coming months and probably years. I’m going to turn it over to Michelle to talk about the first masking case.

Thanks, Dianne. The very first screening decision that the Human Rights Tribunal published was called The Customer versus The Store. And essentially, it involved a customer who was asked to leave a store after refusing to wear a mask. And the Tribunal in that case had to consider whether a grocery store discriminated against the customer by requiring the customer to wear a face mask in the store, specifically whether that was a contravention of Section 8 of the BC Human Rights Code.

Now, Section 8 of the Code prohibits discrimination in the provision of an accommodation, service or facility customarily made available to the public. And so this particular discrimination complaint was brought on the basis of physical and mental disabilities. And so the incident in question occurred when it wasn’t a legal requirement that face masks be worn inside public spaces. However, that particular store, as part of its safety plan, did implement a policy that mandated all customers to wear a face mask when inside the store.

And essentially, this particular complainant had entered the store without a face mask. A security guard approached the customer and requested that she wear a face mask, as mandated by the store’s policy. The customer or the complainant advised the security guard that she was exempt from wearing a mask.

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But other than saying she was exempt, she did not provide any medical information to really support the fact that she was exempt. And I believe the information she did provide is that she had breathing difficulties. But other than that, there was no real medical or other information provided to the security guard in support of why she was exempted from the requirement to wear a mask.

And so the security guard asked the customer to leave, which the customer then did. And that then resulted in the customer filing a human rights complaint against the grocery store, pursuant to Section 8. And specifically, the discrimination complaint alleged that she was discriminated against on the basis of physical and mental disability by requiring her to wear a face mask.

And so as Dianne mentioned, these are really screening decisions in which the Tribunal really had to undertake an initial assessment of whether the facts disclosed in the complaint, if accepted as proven, could constitute discrimination under the Code. And the Tribunal member found that it did not, and the complaint was dismissed.

But central to the decision was the fact that the customer refused to comply, and she indicated that she had breathing difficulties, but really, she provided no medical information to establish that she actually had a disability that would be protected by the Code. Saying that you have breathing difficulties in and of itself is not enough to establish that you actually have a disability protected by the Code. And secondly, there was also no way to determine from the information, because there was none, how those disabilities would have interfered with her ability to wear a face mask.

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So it’s, one, establishing that you have a disability protected by the Code, and then two, if you do establish that you have a disability protected by the Code, how does that prevent you from complying with the masking requirement that the store had mandated? And so that really was ultimately what was fatal to the complaint, was a complete lack of medical information concerning the disabilities and how those disabilities prevented the customer from complying with the requirement to wear a face mask.

And as Dianne alluded to earlier, the Code does not protect complainants who have a personal preference with respect to masking or who have a personal view or opinion on how effective the masking is at reducing or transmitting the virus. That is not enough to establish a complaint under the Human Rights Code.

And so, ultimately, this complaint was dismissed. And it really just reinforces the need for proper medical information. If an employee, for example, had to bring a complaint, a discrimination complaint would have to be supported by sufficient medical information to establish, to actually engage one of the grounds protected under the BC Human Rights Code.

And so I’m going to turn it over to Dianne to discuss the second masking decision from the Tribunal that involved an employee who was terminated after the employee refused to wear a mask in the facility where they worked. Dianne, I think you might be on mute.

Sorry. Thanks, Michelle.

You can try again.

The second decision, as Michelle said, dealt with masking in the context of employment and a person being terminated when he or she used to wear a mask. The basis of the complaint was a religious belief. And he specifically claimed that his religious belief was that we are all made in the image of God, and a big part of our image that we identify with is our face. And so he felt that covering up his face was arbitrarily dishonouring God.

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He felt that it was freedom of expression to be able to show his face in public, and his religious liberty to identify his face to others. He thought that the mask requirement infringed on his God-given ability to breathe, and that the mask requirement was not effective against COVID-19, and that God makes truth of high importance and that I must follow ethically and morally. And forced mask-wearing does not protect anyone and he couldn’t live with that lie. So those were the allegations that were made in the complaint.

And the Code does protect workers from discrimination on the basis of a religious belief or practice. In order to trigger that protection under the Code, an individual has to establish that something is objectively required by a religion, that the individual subjectively believes that it was required by the religion, or that he or she has a sincerely held belief, endangers a personal, subjective connection to the divine.

And so in this decision, the Tribunal ultimately found that the facts alleged by the complainant couldn’t establish that the worker’s objection to wearing the mask was connected to any real religious belief. The Tribunal found the worker had really not pointed to any facts that could support a finding that wearing the mask is objectively or subjectively prohibited by any particular religion or that not wearing a mask endangered a personal, subjective connection to the divine.

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And so after analysing the complaint, the Tribunal said that the worker’s objection really was based on his opinion that wearing a mask was arbitrary and did not stop the transmission of COVID-19, and that was the real basis for the complaint. And the Tribunal really emphasised in that decision that again, the Code does not protect personal preferences or people not wanting to wear a mask because they believe that wearing a mask is pointless or because they disagree that wearing a mask can protect the public. In order to be protected by the Code, it really has to have a legitimate connection to some religious belief. And in this case, it didn’t.

It’s apparent from this case, as well as the previous masking case that Michelle discussed, that employees’ personal preferences or opinions on effectiveness on masking is not going to be sufficient to ground a discrimination complaint. And I think it’s important to remember that because I think there will be employees who will raise issues under the Human Rights Code. And just because somebody raises something doesn’t necessarily mean it’s protected or that you have to accommodate that. Really looking behind what the person is saying to determine whether or not it actually is something protected by the Code is going to be important.

Just four days prior to the vaccine passports taking effect, the BC Human Rights Tribunal dismissed two complaints that alleged discrimination on the basis of the vaccine passport. Michelle will discuss the first complaint that was filed against Dr Henry.

Thanks, Dianne. Yes, so the first complaint, the case was called Complainant versus Dr Bonnie Henry. And this complainant filed a discrimination complaint, alleging discrimination on the basis of a physical disability in contravention of Section 8 of the Code. As I mentioned earlier, Section 8 prohibits discrimination in the provision of an accommodation, service or facility customarily made available to the public. So it was brought under Section 8.

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And in the complaint, the complainant alleged the following. He said that he had asthma and had pneumonia as a child. He also stated, in the following exact words, he does not want your experimental COVID vaccine. And he also stated that in a news conference, it was announced that the experimental vaccine is being made mandatory, and he does not want services limited as a result of an experimental vaccine.

And so the Tribunal member again had to undertake an initial assessment of whether the complaint disclosed facts which, if proven, could constitute discrimination under the Code, and ran through the usual assessment and the test to establish discrimination. So, did the complainant establish a characteristic protected by the Code? Has the complainant experienced adverse treatment as a result of that protected characteristic? And is there a nexus between the characteristic and the adverse treatment?

And so in going through each of the elements of the test, on the first element as to whether there was a protected characteristic, the Tribunal member found that asthma could constitute a physical disability protected by the Code. So for purposes of that initial assessment, the Tribunal member found that the first element was satisfied.

The second element requires a complainant to establish that they’ve suffered some form of adverse impact. And with respect to that element, the Tribunal member found that the complainant did not actually allege facts that would establish that he experienced an actual adverse impact as a result of having a protected disability.

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At most, the facts instead supported potentially a prospective adverse impact by alleging that he did not want services to be limited because of an experimental vaccine. So he was talking ahead, in the future. This is not something that I want to have happen. He didn’t actually establish that he in fact suffered an adverse treatment.

And so the Tribunal member found that since there was no actual adverse impact, the second element of the test had not been satisfied. Of course, after finding that the second element of the test was not satisfied, the Tribunal member really didn’t need to undertake an assessment of the third element of the test.

But the member nevertheless said that in the context of this complaint, even if the complainant could establish that there was an actual adverse impact, such as being denied a service because he was not fully vaccinated, the complainant would also have had to allege facts that could establish a connection between having asthma and not being fully vaccinated, such that his disability prevented him from being able to get vaccinated.

The Tribunal member stated that an ideological opposition to, or distrust of, the vaccine would not be enough, again just going back to reinforcing personal preferences and personal opinions around these issues would not be enough to necessarily establish a discrimination complaint under the Code. And so I’m going to hand over to Dianne to discuss the last decision, involving BC’s Premier, John Horgan, and arguably, of all of these decisions, the most important one, I think.

Thanks, Michelle. This decision was a complaint that was filed as actually a representative complaint on behalf of a class of people. And they defined themselves as people who are opposed to being forced into getting the COVID-19 vaccination and getting our basic human rights and freedoms stripped from us. And that’s how the class was actually defined in the complaint.

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The complaint alleged discrimination on the basis of political belief, contrary to Section 13 of the Code. And Section 13 of the Code prohibits discrimination in employment on the basis of political beliefs. I will say that this claim is somewhat unique to British Columbia in the sense that most jurisdictions do not have political beliefs under their Code. And so I think there’s only British Columbia and perhaps Quebec that actually protects political beliefs under the Human Rights Code.

Ultimately, the claim was dismissed. And the reason for the dismissal really was that political belief in British Columbia is only protected vis-à-vis employment. So a complainant needs to really be able to show adverse treatment in employment and just not a general adverse treatment outside of the employment context.

In the complaint… I’ll just read what the complaint alleged and then get into what the Tribunal member said. But the complaint alleged that the British Columbia government has made a very aggressive and unjustified move that goes against our basic human rights to bodily autonomy and medical freedoms. The government has no right to tell us what goes into our body or threaten us into getting vaccination by taking away our basic rights and freedom.

The Tribunal member looked at Section 13, political belief under the Code, and stated that it includes public discourse on matters of public interest which involve or would require action at a government level. The Tribunal member concluded that a genuinely held belief opposing a government rule regarding vaccination could be a political belief within the meaning under the Code. So the first element of establishing a protected characteristic was actually found by the Tribunal member.

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But the Tribunal member cautioned that the Code’s protection against discrimination in employment on political belief does not exempt a person from complying with the law. The Tribunal member said that employees still have to follow laws despite opposition to them, but the opposition to them cannot be the basis for the adverse treatment, subject to a bona fide occupational requirement under the Act.

On the second element of the test, and this is really where it fell, which is the complainant did not allege any facts that indicated that there was any adverse treatment with respect to his employment. So there was nothing here to establish that the vaccine passport adversely affected him vis-à-vis his employment. And so that’s really where the decision fell on that.

I think why Michelle said this one is probably the most interesting, I think it’s a little bit concerning in that the Tribunal acknowledged that beliefs opposing government rules can be a political belief under the Code. It’s worrisome that it really could open the floodgates for people who are opposed to vaccination and people who are opposed to employment policies relating to vaccination.

That being said, I think in previous decisions, the Human Rights Tribunal has said with respect to political belief, human resources and labour relations policies are not political, and that to confer human rights protections on individuals who actually disagree with employers’ decisions would be overly expansive and an untenable interpretation of the ground of political belief.

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But I think the issue that we’re going to see, and I think we’ll probably see some cases on this in the coming months or year, is that mandatory vaccinations probably fall somewhere in between those two extremes. It’s not dealing with an employer policy that’s based just on the employer’s decisions to mandate or regulate its workplace, but it can also be based on government rules relating to vaccination.

And so I think mandatory vaccination policies fall somewhere in between. And whether or not the Tribunal will conclude that an opposition to a mandatory vaccination policy falls within Section 13 of the Code remains to be seen really. But there definitely is an opening there, I think, for the complaints to be made, and I think we definitely will see them in the next little while.

I see that we’re out of time, and so that concludes our session for today on Vaccinations in British Columbia, and where we stand right now. I think that, as I have mentioned, in the coming months and the coming years, we’re going to see a number of decisions coming out of particularly the Human Rights Tribunal with respect to mandatory vaccination policies. The Tribunal has stated that they’ve been inundated with complaints and so I think we can expect to receive some more decisions from them and some more guidance really in the next coming months on mandatory vaccination policies.

Michelle and I will keep you updated on any decisions that do become available. And we expect to also see other developments as people push forward with mandatory vaccination policies generally. And again, anything pertinent to that, any legal updates, we will also post as they become available. Thank you so much for joining us today. And hopefully, we will see you coming up in our Breakfast series in November and December. Thanks so much.

Thanks, everyone.

00:56:21