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Not intended to be legal advice

Town Hall: The Law & Vaccine Mandates

ACTRA hosted a virtual Town Hall on Wednesday, June 8, 2022, during which legal experts discussed employer considerations in balancing safety with employee privacy and other legal obligations.

Below is a transcript of this Town Hall discussion.

If you have a question or concern specific to your individual circumstances, please [contact your ACTRA Branch office](#).

Alistair: Hello and welcome. The room is beginning to fill up. Thank you for your patience as we get going here. We're just going to allow the room to fill just a little bit more before we officially get going. Thank you again for being able to attend tonight. We know a lot of you are taking time out of a busy schedule in order to be here. We have some great information to be able to share with you this evening.

Lots of learning to come from our legal counsel. As we begin, I am going to introduce you to ACTRA National President Eleanor Noble. Eleanor's currently sitting in an airport, so we will have to forgive any loudspeaker announcements that happen in the background. At this point, the room is starting to level off. Eleanor, so over to you, please.

Eleanor Noble: Great. Thanks a lot, Alistair. Hi. Again, I'm Eleanor Noble. I'm president of ACTRA National. Welcome, and thank you for joining us for this special membership information meeting on vaccination in the workplace. We'll be sharing some information with you and answering your questions in the time available. We'll hold opening questions for just a little while so that we can focus on the information being presented by our guests. Once that's done, you may use the Q&A button at the bottom of your screen to ask a question.

Before we get going, I want to take this opportunity to acknowledge UBCP/ACTRA for initiating the first ACTRA membership forum on the conversation around vaccine policies and how they are affecting performers in our industry. They held a special membership information meeting back in April of this year, laying the foundation for today's town hall, which will allow us to continue the conversation at a national level. Thank you, BC, for that. As with all ACTRA meetings, we'll begin with a reading of the land acknowledgment and equality statement. Now, I'd like to introduce Keith Martin Gordey, Vice President of ACTRA National to share the land acknowledgment with us. Thank you, Keith.

Keith Martin Gordey: Thank you, Eleanor. We acknowledge that we live, work, meet, and travel on the traditional territories of Indigenous Peoples that have cared for this land, now called Canada since time immemorial. These lands are either subject to First Nation self-government under modern treaty, unseated and unsurrendered territories, or traditional territories from which First Nations Métis and Inuit people have been displaced.

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We recognize that we are all treaty people and seek to work toward redressing the injustices from which settlers of this land have benefited. In the spirit of upholding our ongoing commitment to truth and reconciliation, I would like to share. I'm in Toronto right now, so it's the land of the Dish With One Spoon, the Haudenosaunee, the Mississaugas of the Credit, and the Anishinaabe, but my home is in BC in the land of the Coast Salish people, specifically the Musqueam Nation.

It's a bit of a journey for me. I went through my library at home and I have a list of the books I've been reading. Thomas King, *Journey of Crazy Horse*, *Black Elk Speaks*, *21 Things You May Not Know about the Indian Act*, *Indigenous Relations: Insights, Tips & Suggestions to Make Reconciliation a Reality*, *An Indigenous Peoples' History of the United States for Young People*. Interesting book.

First Nations of British Columbia: An Anthropological Overview and another book called *At the Bridge*. It's a book about a guy who ended up being a guide and then a white fellow but spoke many of the native languages fluently in British Columbia around 1900 into the 1920s. He worked with the First Nations people to go to Ottawa to try and get their rights upheld and acknowledged. In the land acknowledgment, it says, "We are all treaty people." In British Columbia, that's not the case.

A very small percentage of the land and of the nations in British Columbia have treaties. People just came in. Settlers came in and just took the land. We're working that through now, but it's a different situation there. Anyway, this is part of my journey. I do the decolonization workshops now and again and that sort of thing. I think it's important, so that's my sharing. Thank you for listening. I'm going to turn it over to Theresa Tova, who's going to do the equality statement.

Eleanor: The equality statement. Thanks for that, Keith. Thank you for sharing that information. That's part of the reconciliation asked from the Indigenous People. Now, yes, we'll hand it over to Theresa Tova, our treasurer of ACTRA National. Thank you.

Theresa Tova: Thank you, Eleanor, and welcome, everyone. So glad to be here with you. The equality statement. Union solidarity is based on the principles that all union members are equal, mutual respect, cooperation, and understanding our goals. We embrace an open and inclusive environment and encourage respectful behavior that affirms the dignity of all individuals.

We neither condone, nor tolerate behavior that undermines the dignity or self-esteem of any individual, or creates an intimidating, hostile, or an offensive environment, discriminatory speech or conduct based on gender, gender identity, sexual orientation, race, disability, age, class, language, religion, ethnic origin, membership, region, or work category, or family status hurts and divides us.

Discrimination can take the form of harassment, defined as using real or perceived power to abuse, devalue, or humiliate. Discrimination and harassment weaken our solidarity, reducing our capacity to work together on shared concerns such as decent wages, safe working conditions, and justice for all. ACTRA's constitution, bylaws, practices, and collective agreements reflect our commitment to equality and respect.

Complaints of harassment and discrimination are taken seriously by ACTRA and should be directed to the president or their designate. All will be investigated and

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those substantiated will result in action by the union. ACTRA activities are to be harassment-free zones, where our members' dignity and equality are respected. Thank you, Madam President.

Eleanor: Thank you so much, Theresa. I will now hand things over to Keith, our national vice president, as I'm afraid that there'll be announcements overhead and you won't hear me speak anymore. He will guide you through the rest of this town hall. I'll be here in the background because I'm boarding a plane to Toronto. I am on Jouvouthèque, Montreal. That's where I live. I will be boarding a plane to Toronto for our national council meeting, but I'll be listening to this town hall this evening. Thank you very much for being here, everyone, and over to you, Keith. Thanks.

Alistair: Can we get you to unmute there, Keith, please?

Keith: [laughs] How many times have I done that? [laughs] Sorry. Thank you, Eleanor. It's been approximately 27 months since we started discussing the impact of COVID-19 in film and television industry. Many measures were put in place as we all work collaboratively in our provinces to get the industry open again as quickly and safely as possible. Some regions were impacted harder than others as each provincial government worked in different ways to address the situation.

Many performers have seen a drastic reduction in work. Others have worked more than they ever had worked before. Today, we are gathered to provide information regarding the law and how it pertains to vaccine mandates in Canada. We are not going to be debating issues today, nor will we be discussing science. The focus of today is to provide you, the ACTRA membership, with a clear and concise understanding of the considerations an employer is allowed to make when balancing safety in the workplace and the role of the union to fairly represent the members.

There isn't a simple answer to this and the myriad of provincial and federal regulations in respect of workplace safety, human rights, and privacy demand that we take a deeper dive into the relationship between these competing forces in the environment of employee vaccination status. As you will hear today, there is the consideration of numerous factors, including, one, the nature of the workplace, two, occupational health and safety requirements, three, the applicability of privacy legislation, and four, the potential impact of human rights.

That is why we are here today. Joining us are Tony Glavin, Michael Mandarino, and Raj Shoan. Tony has practiced labor and workplace law since his call to the British Columbia Bar in 1994. He became a partner in 1997 and remained with the same firm, which ultimately became Glavin Gordon Clements and now Koskie Glavin Gordon. Tony is outside counsel for UBCP/ACTRA.

Michael is an experienced litigator in Ontario with Cavalluzzo. He provides strategic legal advice and advocacy in labor arbitrations and mediations, Ontario Labour Relations Board proceedings and professional regulatory college proceedings. Michael is outside counsel for ACTRA Toronto. Raj, as ACTRA National's general counsel, is a lawyer and executive with 18 years of experience in the communications and media industries within the public and private sphere.

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Raj focuses on policy analysis and development, business development, relationship building in the context of stakeholder government relations, and the drafting of legal and regulatory documents. We will now have a presentation from our guests. After which, we will open the Q&A portion of the session. Let's begin on the West Coast. Over to you, Tony.

Tony Glavin: Thank you, Keith. Good evening, everyone. It's a pleasure to be able to present with you along with Michael and Raj. I thank them and our team effort in putting this slide presentation together. We hope that it's helpful and informative to you. I'll be asking Alistair to move the slides. I'll ask you to start by moving this slide to slide 2, please. Thank you.

This is a very high-level look at what we're going to be discussing this evening. I think it's very important that you get a good understanding of the law on vaccine mandates. Discrimination and human rights issues will come to bear on these decisions and the way in which employers implement these policies across Canada and the workplace. We'll finally get into, what is the role of the union in this complex legal landscape?

We'll talk about the union's duty of fair representation to its members, what the union's role is regarding vaccination mandates, how the union has been supporting its members, et cetera. Then we'll engage in some questions and answers from you. I thank you all for participating. I see there's 280 people, so that's not a bad showing. We can skip over now to slide 3 and move it along.

We'll start the first part of the presentation on the law and vaccine mandates. We can go, thank you, Alistair, at slide 4. First and foremost, as workers, as employees, there's occupational health and safety legislation in all provinces. In the federal jurisdiction, every employee, and this is really true of every jurisdiction, is entitled to a right to work in a safe work environment.

In British Columbia, we have WorkSafe. We have other workers' comp agencies in other provinces in Canada. In the federal jurisdiction, it requires employers to protect their workers and the occupational environment. In British Columbia law under the Workers' Comp Act and the occupational health and safety regulation, workplace health and safety law, you have basically three workplace health and safety rights. This is very high level, of course.

The right to know. As a worker, you have a right to know the hazards that are present in your workplace. You have a right to participate in your workplace and in keeping your workplace healthy and safe. That's generally on occupational health and safety committees where there are worker designates. Then there's the right to refuse unsafe work. That is pursuant to the regulations for the legislation that we see in the various provinces. These are the rights that we should be immediately familiar with when it comes to safety and your health in the workplace.

The next slide will discuss the obligations that employers have in order to make sure that you have a healthy and safe workplace. Under the Workers' Comp Act in BC, and you'll have similar provisions in other jurisdictions and other provinces under their workers' compensation legislation, every employer is obligated to ensure the health and safety of all workers working for that employer and others that come into

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their workplace and also, obviously, to comply with the occupational health and safety provisions, regulations, and any applicable orders.

I sort of pause here to note that these are the bare minimums for employers. For example, if there are occupational health and safety edicts that come from, say, WorkSafe British Columbia or other WorkSafe agencies in other provinces, these, of course, are bare minimums that employers are required to maintain for their workers. Nothing prevents an employer for going above and beyond the bare statutory minimums with their own safety policies and COVID policies in this context.

In British Columbia, I'll just make this point that we have a communicable disease plan that was in place at the height of COVID. That's been downgraded now to a COVID-19 safety plan requirement of all employers. That doesn't mean that employers and, in your industry, producers aren't entitled to invoke their own unilateral management policies that address workplace safety as part of their obligation to ensure the health and safety of their workers under the legislation. Let's move to the next one and I'll pass it over, slide 6, to, I think, Michael.

Raj Shoan: Actually, before Michael jumps in, can I quickly just go through the Prairie provinces before we get to Ontario? Because we're moving from west to east. Very quickly, for the benefit of our members on the call, similar rules that exist in BC exist in other provinces across Canada. I'll very quickly go through the occupational health and safety principles at a high level that exists in Alberta, Saskatchewan, and Manitoba before we get to Michael in Ontario.

In Alberta, employers have a general duty under their occupational health and safety laws to provide a safe and healthy work environment for the workers as well as for clients, customers, suppliers, and/or any contractors or others physically present or attending their premises. Under Alberta law, they're referred to as patrons. That authority is primarily found in their Occupational Health and Safety Act.

The standard in that act is reasonably practicable. In terms of what the obligation on the employer is, is that it is reasonably practicable to do the thing necessary to ensure the environment is safe and healthy for its workers and the other patrons. In Saskatchewan, employers have the right to implement any reasonable occupational health and safety policy in their workplace.

There, the applicable regulation is the occupational health and safety regulations 2020. Under that regulation, employers must take every reasonable precaution to protect the health and safety of workers. There are other variations in Saskatchewan regime, including the fact that employers must have a competent person conduct a hazard assessment to determine if they're required to develop a COVID-19 exposure control plan for their workplace.

Then, finally, in Manitoba, the applicable legislation is the Workplace Safety and Health Act. Again, similar principles. Employers must do everything reasonably practicable to protect their workers. Just in terms of at a high level, the standard of reasonableness is the standard that applies for most of these regimes. That really tends to give the employers a lot of leeway in deciding what's appropriate for the workplace. I'll turn it over to Michael to discuss Ontario.

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Michael Mandarino: Thanks, Raj. Good evening, all. Thank you for the invitation and opportunity to present on this topic here tonight. Moving to Ontario, similar to the other provinces in Canada, every employee has a right to a safe working environment. The health and safety laws in Ontario are governed by the Occupational Safety and Health Act.

I'm just going to ask if we can go to slide 7, the next slide. The key provision in the Occupational Safety and Health Act is Section 25(2)(h), which outlines, an employer shall take every precaution reasonable in the circumstances for the protection of a worker. In Ontario and throughout Canada, but in Ontario specifically as interpreted by the courts, this is referred to as the precautionary principle.

It applies where health and safety are threatened even if it cannot be established with scientific certainty that there is a cause-and-effect relationship between the activity and the harm. The entire point of the precautionary principle is to take every reasonable precaution against even the yet unknown. This has been interpreted as you will see by arbitrators to require employers to take a strict approach to ensuring health and safety of workers and, of course, especially in the context of COVID. Like British Columbia, the Ontario Act outlines some additional rights, the key ones being similarly the right to know, the right to participate, and the right to refuse work.

Those provisions are outlined for you. If there is unsafe workplace, as a worker, you have the right to refuse or stop work. You have the right to know about the hazards. You have the right to participate in the training and investigations of such hazards. Similar to the other acts, you have the right to participate as a worker's designate or representative on the joint health safety committee. These essentially all speak to the underlying interest of employees to have a safe workplace as required by law. I'm going to turn it back over to Tony now.

Tony: Thank you, Michael. As workers, and this is certainly the case in British Columbia and I'll defer to Raj and to Michael on the application of these first two bullet principles that we have on this slide here as to their application and the other provinces, but I would be surprised that they didn't have application. In WorkSafeBC, you can have coverage for an injury that is caused from an adverse reaction to a work-related COVID-19 vaccination.

For example, if you're required by virtue of a mandatory vaccination policy to be vaccinated to come into work and you become ill as a result of it and maybe significantly ill, in British Columbia, you can file a claim with WorkSafeBC. Once it's established that the COVID vaccine was a requirement of the workers' employment, any injury or death that resulted from the vaccination would be considered to arise out of or in the course of the workers' employment, so then there's adjudication through WorkSafe.

Now, the federal government has started a program that-- and in recent days, actually, we've had the application of that program. If you want to look at it, it's under vaccine injury support. The federal government put aside a fund for individuals who were required to take vaccines. In particular, one individual in British Columbia took the AstraZeneca vaccine, had a very serious and permanent injury, although he is recovering now as a result of that injury.

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There have been, I think, some 400 claims under what is known as the Vaccine Injury Support Program, VISP. That website there will take you to it. If anybody is interested in learning more about it, there's some data on there on the claims and the successful adjudication of claims. One in particular, one individual in British Columbia, there was a media report of it.

It's been followed now extensively for the last week of a person who made a claim and was successful in getting a claim. He was required as part of his work to get a vaccine. For a time, he was seriously injured. Now, he's up and walking and he's doing much better, but he will be compensated. There's a cap on the compensation, by the way. It's like, I think, about \$280,000, but that doesn't preclude an individual from taking personal injury action in the courts in relation to it.

Anyway, I just make mention of that because those are the unfortunate circumstances that you would find actually with any vaccine. There are adverse impacts to people who take vaccines, whether it's measles, rubella, or whatever it might be. Some people just have serious reactions to them. In this particular case, because we were in a pandemic, the government saw fit to put a fund aside and to allow people to claim on it. People are doing that now. That's for your information.

Next slide is nine. This is basically just a summary of the rights and obligations and duties that we've just gone through. In the interest of time, I think I'm going to just skip past that quickly. It was simply a summary. I'm on number 10 as well. This is a labor law 101 principle, underlying principle, is that we have legislation and then, of course, we're all fortunate enough to be governed by collective agreements that are negotiated on our behalf by our unions whether they're provincial or ACTRA National.

Collective agreements obviously set out rights of employees and obligations of employers. When a collective agreement is silent in respect of a particular issue, there is a legal presumption that the right for management to fill that gap is reserved to them. It's known as a reserved management right. They're entitled in those circumstances where the collective agreement doesn't speak to an issue to unilaterally impose policies on their workplace.

When I say "unilaterally impose," they're subject to a pretty stringent test and the test has been around for about as long as I've been alive. The case of KVP from 1965 has been followed. Labor lawyers who are on this call will have argued KVP and the principles in it that we set out here in this slide that arbitrators will look at, and which we look at as lawyers when determining whether or not to challenge a particular policy.

The principles are these, that a unilateral rule, it must meet the KVP policy. It must be consistent with the collective agreement. Conversely, it cannot be inconsistent with the collective agreement. It must be reasonable. You're going to hear that word, "ad nauseam," in this presentation. It's the favorite word, of course, of legislators and of lawyers. A lot of arguments over the centuries have been made by legal practitioners on the term reasonable. Importantly though, such rules need to be clear and unequivocal.

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They need to be brought to the attention of employees before the employer attempts to act on them. You've got to give notice to employees that this is what you're intending to do before you can take action on them. This is important because we'll see some of the cases shortly, the next point, which is where the rule invoked is to justify, discharge-- the employee must be notified that the breach of such a rule would result in a discharge.

This is critical and is one of the fundamental elements of the KVP test. Then the employer must have enforced the rule consistently since its introduction. We'll argue as lawyers if the particular production, say, in your case isn't applying the rule consistently, then it's hard for the employer to rely on that rule. It then becomes unreasonable and challengeable. That's the legal framework that we would look at and the lens through which we would look at various employer policies related to mandatory vaccinations.

Next slide, please. I think we can zip through this quickly and just simply say, ultimately, that first bullet, I think, is important. It really comes down to an assessment of the reasonableness of the policy, given those particular elements that I've just described in the previous slide. We can go to 12 now. Let's talk about some of the recent decisions that we've had.

Most of them have come in 2021 and even in late 2021. We've even had more recent decisions now in 2022. The law is really fleshing out how arbitrators are applying the KVP test and considering privacy issues and considering occupational health and safety issues in the context of mandatory vaccination policies in various and different jurisdictions and workplaces.

We can go over to 13. This was the first case that came out in 2021. It came out of Ontario and it was assessing the legality of the employer's mandatory COVID vax policy. The employer here was Paragon Protection, Ltd. They were this massive company that employs 4,400 security guards who are dispersed to hundreds and hundreds, 450 client sites. Most of the clients of Paragon had adopted mandatory vaccination policies.

The employer required that all of its guards provide proof of vaccination regardless of their assigned work sites. The reason for that was that these individuals could be assigned to a whole bunch of different work sites. Some of which might have had clients who had mandatory vaccination policies, some which did not. The fact that there was an interchange of employees that they could be assigned to these different places, it was necessary or seen as necessary by the employer to impose mandatory vaccination.

The union UFCW challenged it. It went to arbitration. The arbitrator found that the policy was consistent with the employer's duty under occupational health and safety. Again, arbitrators are going to look at occupational health and safety laws. They're going to look at privacy laws. They're going to look at human rights laws possibly and also the KVP items that I've described earlier.

In any event, in this case, the arbitrator said that it was consistent with the employer's duty under Occupational Health and Safety Act to take every precaution reasonable in the circumstances for the protection of its workers. Followed public

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health guidelines was consistent with the human rights code and was adopted to meet client requirements. That was successful. Before I go further and I'll pass this next slide shortly, I'll just say this.

Invariably, in fact, almost every single case that has been decided in Canada since mandatory vax has been challenged have upheld the reasonableness of the policies subject to possible applications of the policy that are very particular to that certain workplace where the grievance was arbitrated. We'll delve into those shortly and get into some of these different fact situations. I'm going to pass it over, slide 14, to-- We can start with Raj if you want to go west to east and then into Ontario. Michael can comment maybe on Maple Leaf Sports & Entertainment.

Raj: I'll let Michael continue on with Maple Leaf Sports & Entertainment. Most of these cases are applicable nationally, and so I've actually been relying on them when dealing with cases in other provinces as well. These are the leading cases and I'll let Michael proceed with them. I do want to convey to our viewers tonight that this information or what we're conveying tonight is for information purposes only, for educational purposes, and shouldn't be construed as legal advice. Every situation is different. Every circumstance is different. If you have a particular situation that you'd like more information on with very specific circumstances and facts, you should seek independent legal advice. I just wanted to make that clear as well, but over to you, Michael.

Michael: Thank you. Yes, so the question has really become the balancing of competing interests. That's the interest between employers to maintain a healthy and safe environment for employees through vaccination policies and a variety of personal or individual interests, whether related to privacy or bodily autonomy or consent of employees and individuals who are unvaccinated or refused to disclose their vaccination status.

Moving on to the Maple Leaf Sports & Entertainment case, this case is related to Scotiabank Arena. Some may be familiar with it. Formerly, the Air Canada Centre. The employer here, Maple Leaf Sports & Entertainment, introduced a disclosure and vaccination policy, which provided that non-compliant workers would be placed on an indefinite unpaid leave of absence and, like we're going to see in many of the policies, may be subject to the termination of their employment.

We'll get into it in a little bit more detail. Whether it will automatically result or may result in termination is one of the nuances in the law. Anyway, looking at the arbitrator's finding here, one of the key issues was the question of disclosures, the question of privacy. The employer found in the context of it being a reasonable policy, that employer cannot enforce a mandatory vaccine policy without requiring disclosure of vaccine status. Therefore, it was reasonable to require the disclosure.

In that regard, he notes arbitral authority makes it clear that employers are indeed entitled to seek disclosure of an employee's vaccine status to the extent necessary to administer a vaccine policy in the workplace, particularly if the information is secured and protected from unnecessary disclosure. There was some discussion in this case about privacy laws, HIPAA, and how that limits the use of the information.

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The takeaway from this case is that in the balancing of interest, privacy rights are not absolute. It was justified here when balanced with health and safety obligations to place employees at Scotiabank on leave if they refused to disclose. It was necessary for the safe operations of their work. One of the prevailing considerations in this case was that the employees were required to work in close proximity of one another. That really militated towards advancing the health and safety over the privacy considerations.

We can move to the next case. As you'll see in this case, that principle has been applied similarly. In this case, the union, Unifor, challenged the vaccination policy at the Coca-Cola bottling plant in Brampton. An interesting point from this matter is one common in the decision that states when looking at these policies outside of a valid human rights exemption or an entitlement to accommodation, an employee's personal belief however strongly held must give way to the health and safety concerns that animate the policy.

In this context, in the context of this case in employees, as the arbitrator held, an employee's personal beliefs cannot override the employer's interest in doing everything possible to maintain a healthy and safety workplace as prescribed by the Occupational Health and Safety Act. The arbitrator in this case also touched on privacy rights and cited an earlier case dealing with vaccination policies where, first, there was acknowledgment that these are difficult decisions, given the choice of employees essentially choosing between their livelihood and their bodily integrity and autonomy.

The reasoning for the arbitrator was those interests have to be balanced to maintain the public interest, to maintain the workplace, the health and safety requirements in a workplace. The arbitrator noted there, unvaccinated employees have a right to privacy and bodily integrity. Again, those rights are not absolute. They also share with their colleagues an obligation to keep the workplace safe and not to risk harming their colleagues.

On that basis, the policy here was also found to be reasonable. Just before I move on, a general tenet in all these cases that's worth noting is a person does not park individual rights at the door when they enter the workplace. You carry those rights with you, but it really becomes a balancing act of the various interests. You're going to see is that's what really underlies the reasoning behind a lot of these decisions. Moving on to the next slide. This is another case that simply reiterates the balancing of interest.

Again, employees may have legitimate interests in privacy, but they're considerably outweighed when there's this enormous public health crisis that is COVID and the steps that have to be taken to ensure a safe workplace. Again, in this case, the policy was held to be reasonable. The arbitrator, again, looked at individual rights such as consent and privacy and bodily integrity and balanced that with, as I was saying earlier, the precautionary principle and the significant obligations that that creates for employers who manage workplaces. I think that in the next case, Tony is going to speak to that. I'll pass it back to you, Tony.

Tony: Thank you, Michael. Well, you've heard Michael speaking of the intersection between privacy issues and employer policies and occupational health and safety

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legal issues. This next case, Chartwell housing, is a case that sees the intersection between the implementation of a mandatory vax policy and discipline of employees. Really, the question is to whether or not if employees refuse to take a vaccination or become fully vaccinated in order to work whether the employer could take the extraordinary step of terminating their employment.

This is a bigger employer and this is an important element to bear in mind in a smaller bargaining unit or employment setting. The decision might have been different so that employers who have six or seven people in their workplace in their bargaining unit and five of them refuse to take and to get vaccinated. It may not be unreasonable for them to terminate the employment of those individuals in order to gain other workers to come in and do the work.

Although another way of achieving their objective might be to say, "Look, we're just going to put you on an unpaid leave, but we're going to hire some people to get in here and do the work." In this particular case, the arbitrator was faced with that issue. First of all, what did the arbitrator say about the mandatory vaccination policy itself? Generally, the policy was fine. It was the non-compliant aspect of the policy where the employer purported to be able to terminate.

The arbitrator found, "No, no." In the circumstances of this case, termination was too harsh. You can place these people on unpaid leave and get other people who have been vaccinated to do the work in question. Again, the size, I think, of the employer and its workforce was relevant in that case. The arbitrator found that termination was just simply too coercive. To Michael's point, you don't park your rights at the door.

Your rights don't also extend to the point where you can say, "I'm not going to be vaccinated and I'm coming to work and you can't stop me." The balancing of the interests that arbitrators look at with respect to mandatory vaccination policies is to say, "Look, no one's holding you down and putting a needle in your arm and saying that you have to be vaccinated. That's your personal choice not to be vaccinated, but I have a duty under the law to ensure to the best of our ability as an employer to maintain the safety for all workers."

Mandatory vaccination policies have been found to be reasonable in that regard. What is the outfall of a refusal to get vaccinated? To terminate is harsh. To keep the mud of work, to keep individuals out of work who aren't prepared to get vaccinated is a better outcome and a better balancing of interest. That's what happened in this particular case. I just wanted to see if-- did you want to talk about-- Raj, anytime you want to jump in, I just don't want to be holding you.

Raj: Tony, at this point. I actually wonder if we can throw it to Michael because there has been one that has come back where the test was found to be unreasonable at first. I just wonder if we want to talk about that one, please.

Tony: Is that Power Corp?

Raj: It is, sir.

Tony: Do you want to talk to that, Michael?

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Michael: Sure, I can speak to that. There was one case where the policy, the mandates were found to be unreasonable. In that case, arbitrator Stout made that finding because, at that time, there was reasonable alternative measures, whether it be the ability to work remotely, the accessibility and efficacy of testing. What happened following that case was a couple of things. You have the rise of Omicron. You have a slow return to the workplace and, in some cases, the requirement to be at work.

There were cases then that looked at that case and said, "At this point in time, what was a reasonable alternative measure at one point doesn't really apply because of how highly transmissible Omicron is, what we're learning about the rapid test primarily, about not being the most efficient, not giving a clear and early indication of actually having COVID when it's transmissible. The case lock started in a place where, "Let's look at other ways to deal with this." Of course, as the crisis grew and circumstances changed, the law really has been following this line of vaccination is the way to go as per arbitrators' interpretations. I don't know if Raj or Tony have anything to add to that.

Tony: No, that's--

Raj: That was a good summary there. Thanks, Michael.

Michael: Thank you. We're going to slide 18. I think I'm speaking to this one as well. A variety of my clients have brought to me the question of, "Oh, well, our members are saying that mandatory vaccination policies violate the charter of rights and my right, in particular, Section 7, to life, liberty, and the security of the person." For most of them at least, I respond to the private sector employers or, sorry, not employers, unions that are representing employees in the private sector as opposed to the public sector that the charter has no application.

The charter has application to the public sector. It has application to legislation that's passed by governments. It also has application to actions taken by public bodies, including in the case of the Toronto District School Board case, a charter argument was raised as to whether or not the mandatory vaccine policy was a violation of the charter. Then the second question in this case was whether the policy was reasonable.

The arbitrator concluded on the first issue that whether it violated Section 7 of the charter that the arbitrator concluded that the policy didn't violate Section 7 and that it was while enforced an entirely reasonable exercise of management rights subject to valid exemptions. We'll come to the exemption discussion a little later when we talk about human rights and accommodation.

This case is important if you have an interest in understanding the application of the charter in the context of mandatory vaccination. Again, it has to be a public body, so it's not going to have application to private producers who do film and television, for example. The case is interesting nonetheless. I'm on slide 19 now where the arbitrator said Section 7 of the charter protection individual's right to decide whether or not to be vaccinated.

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That was my point earlier, which is this. If there's a mandatory vaccination policy, no one's holding you down, putting a needle in your arm and saying, "Okay, off you go to work." You have a right to decide. The arbitrator obviously restated that and then said that the policy doesn't require mandatory vaccination. The policy does not violate anyone's life, liberty, or security of the person. It does not mandate a medical procedure or seek to impose one without consent.

You don't have to consent to vaccination. An employer policy can't make you consent to a vaccination. It can just simply say you're not going to be able to come to work unless you are vaccinated. That's what the law is and the law is settled on it. The union in this particular case acknowledge that Section 7 doesn't protect economic interests. Individuals have no charter right to pursue or maintain a chosen profession.

That's the application of a charter in that case. Dismissing the charter challenge in that case, then the arbitrator went on to say that the policy was otherwise reasonable by looking at the KVP test and applying it in the circumstances. The next slide is 20. I'm going to do this slide and then I'm going to throw the next decision shortly over to my colleagues. Slide 20 is back to the issue of discipline.

This is a case that my firm did, which involved the employees of BC Hydro in British Columbia. The arbitrator found that the policy was reasonable, but the policy also said that, "If you don't get mandatory or if you don't get vaccinated, we're not going to hold you out. We're going to fire you. We're going to discipline you." The arbitrator found that employers are not required to wait until the negative consequences of COVID-19 are felt before implementing an appropriate policy.

That was one of the arguments in the case that was dismissed, but the importance of this case is relating to the ability of employers to do everything reasonably practicable. Those were the words that Raj raised with you. This is really what it's boiling down to. The employer's obligated to do everything that's reasonably practicable to keep their employees safe and to keep the operation running, particularly where, as in the case of BC Hydro, it gets involved in essential service.

The arbitrator found in that case that discipline was not appropriate. Again, another big, big, big employer, BC Hydro. They could hold out those individuals who are saying, "Look, I have a right not to have you enforce my consent to put something in my arm. I'm not going to take it." Then the arbitrator said, "Okay, well, in the discipline side of things, you can hold these people out, but to discipline them would not be reasonable." Then that's where they landed there. Again, a large employer. Slide 21 is, now, we've got some recent decisions--

Raj: Tony, can I just pop in very quickly?

Tony: Sure.

Raj: Just on that point, reasonably practicable is also the standard in Newfoundland. In the rest of the Maritime provinces, I believe it's the precautionary principle, reasonable precaution that Michael mentioned earlier. I did want to stress for our Maritime members who may be watching that the decisions that we're referring to here are largely applicable out east as well. The rationale for the decisions very

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much applies to the occupational health and safety regimes applicable and the Maritimes as well.

I wanted to make that clear. To my earlier point about taking this information for an educational basis and not using it strictly as legal advice, if in reading or any of this information in taking this information, you feel it applies to your situation and it raises some concerns, take the information you hear today with your personal information and circumstances. Contact your local branch. Your local branch representative will be happy to work with you closely to address your specific concerns. Thanks very much.

Tony: Okay. Thank you, Raj. This really is the emerging principle that Raj has stated that, is it reasonably practicable in all the circumstances? All circumstances will mean that we've got to consider the workplaces themselves. There's a couple of decisions that have come out of the federal jurisdiction. I'm at slide 21. This is federal jurisdiction, federal mandatory vaccination policies. There's a couple of decisions that have come out. Those, I'm going to throw, I think, to Michael to talk about the two Ontario or federal decisions, one coming out of Ontario, but having application to all federal employees, or maybe Michael wasn't prepared to speak to these. I'm not sure.

Raj: Just need to unmute there, please, Michael.

Michael: Yes, I wasn't planning to speak to these. I thought this was someone else, but I could easily have--

Tony: I don't mind, Michael. I'm sorry if I threw you under the bus.

Michael: Oh, no, no problem.

[laughter]

Tony: If you want to do the first one, I'm happy to comment on Canada Post.

Michael: Sure. I'll talk about the Teamsters case. Again, this is another case where the arbitrator upheld the mandatory vaccination policy in the context of a federally-regulated freight and delivery operation, where Purolator drivers and delivery individuals were required to have a vaccination. The arbitrator here looked at certain risk factors. The first is the work was performed indoor, in shipping facilities, in close proximity, and in enclosed vehicles.

Keeping employees safe affected a variety of customers and the general public. Of course, the couriers were, in many cases, taking packages to homes, speaking to homes and individuals in businesses and the major clients that used Purolator. We saw this one in the earlier cases where the clients and the larger customers required vaccination policies. Similarly here, the major clients required vaccination for anyone coming on their premises to deliver packages.

The arbitrator found, again, looking at all the circumstances of the type of work, the workplace, and various other considerations that this was an industry in a workplace where it was crucial for the health and safety of workers. Again, it was performed indoors, close proximity to other coworkers and the transient work because they

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were coming in and out of buildings, tending homes, et cetera. I'll pass that back to Tony.

Tony: Thanks, Michael. I appreciate you. I know you know the case, but I threw the slides at you. I apologize for that. A quick comment on it is on this case and also on the next case that we're going to discuss, which is a Canada Post case, these are really recent decisions. Context is really important. The unions thought it's important to test the policies in the Purolator case and in the Canada Post case because you have workers who-- Some of them are working outside. Some of them are working in a truck, part of their job anyway.

Some of them are delivering the mail, for example. One would think, "Well, how much contact can they have with people?" The Purolator case, of course, there's the workplace or the workers in the workplace do a variety of indoor and outside and in vehicles, I'm sure, work. It was the fact that they were involved in all of these different areas that made it risky work from an infection point of view. The employer is, importantly, in this case, frankly, places where the employer's major clients were, they insisted because they had mandatory vax policies that Pelletier's workers also have them, and that was actually a significant factor. I raise the facts of this case because all of these cases are context-specific, and I think it's just so obvious to me, working in film television with UBCP/ACTRA, that you are probably the most vulnerable workers in the age of COVID.

In my workplace when I leave my office, I go down the hall, I have a mask on, I can socially distance from people. When you're in front of a camera, you don't have that opportunity. You're exposed, you're vulnerable. Social distancing and masking just aren't options. That's really important to consider and give context to your particular industry.

Just going over then to slide 24. I want to just go through Canada Post quickly. This has application to all postal workers, right across 42,000 employees. CUPW decides, well, we've got to look at this policy and see whether or not it's reasonable in all of the circumstances. Actually, Michael, I think Paul Cavalluzzo took this case, so you should be speaking to this one, but that you probably worked on it, but I'm happy to summarize it quickly.

The arbitrator looked at, again, a very diverse workplace of many, many thousands of workers that did letter carrying, mail service carriers, postal workers, mail handlers, dispatchers, and the emphasis was placed on the fact that employees who are responsible for mail delivery regularly travel in the community and frequently interact with members of the public. Even someone who's got a bag with mail-in it, they're going door to door. There is frequent interaction with members of the public.

It dawned on me, after the fact when I considered this case that, oh, okay, now I can see why the arbitrator decided it because, in the first blush, I'm thinking, hmm, I'm just walking down the street, I don't have any contact with anyone. I'm throwing letters in door slots and what have you, but no, that's not it. You're knocking on doors, sometimes you got to get signed for stuff or you're going to apartment blocks and what you have you.

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The arbitrator said about Canada Post's Vax Policy, that it's been and continues to be a reasonable exercise of management rights and responsibilities under the collective agreement and pursuant to the obligations under the Canada Labour Code. The Canada Labour Code has its own set of occupational health and safety requirements for the Regs.

Jolliffe also rejected the Union's argument that the emergence of the Omicron variant could be taken as suggesting a decrease in the need for vaccination. The arbitrator looked at the science somewhat and looked at the context of the workplace in making their decision rather than. Rather, arbitrator Jolliffe stated that he was satisfied that the best evidence suggests that abandoning mandatory vax requirements and moving into a testing regime has never been shown to be a better approach to protect the workplace and the corporation's employees in dealing with this pandemic.

Then just the next slide is at 25. Again, this is what changed my mind, because I was thinking, hmm, this might be a possibly successful challenge, but no, and really, it just says it here, the third line in the quoted paragraph there on the right-hand side. Members of the bargaining unit perform work involving high levels of interaction with customers who may or may not be vaccinated, physical distancing is not always possible. Literally, thousands need to go into a wide variety of locations to perform job-related duties. Additionally, thousands of bargaining unit employees work within large mail processing operations. There's no opportunity to do remote working or work in isolation, et cetera, et cetera.

Those were the factors that were really pertinent for the arbitrator to consider. Again, all of these cases are considered in the context of the workplace in which the policies are imposed and they will help you understand how arbitrators are looking at these cases, even in the case of Canada Post, for example, where you might think, hmm, maybe, but no, no, arbitrators are almost right across the board in almost every case are saying the reasonableness of the policies are upheld. They're deferring to employers' ability to ensure that their obligation under the law to maintain a healthy and safe workplace is maintained.

Even in the context, say of Canada Post, mandatory vax was upheld. You contrast that with what we have with performers as I just described, and it's not even something that's comparable. It's almost the end of the other spectrum, sorry. Enough of that commentary, that was slide 25. 26 is we're going to get in to talk about human rights and I'm going to just hit the first couple of slides unless there's any summary that Raj or Michael wanted to do on that last segment.

Raj: Not for me, but I might have a comment after the human rights portion. Thanks.

Tony: OK. Same, Michael?

Michael: Same. Yes.

Tony: Thank you. Okay. Now we're moving into the next segment, which is discrimination in human rights. Slide 27 is what is discrimination, and discrimination in the context of an employer policy is one that we look to the Human Rights Code to. What are the protections against discrimination? What is discrimination? Here's

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the definition, it's the unfair or harmful treatment of people and groups based on recognized protected characteristics. Policies cannot have a discriminatory effect where they offend these protected characteristics.

Now, they're subject to significant limitations, the protections against discrimination, where an employer policy is invoked. There's something called a bona fide occupational requirement. I won't get into it but that is a justification for allowing policies that on their face seem to be neutral, may have an adverse discriminatory effect on individuals, but it's also subject to employers too having to consider when they do discriminate, whether they can accommodate individuals who are being discriminated against, so we'll get into that.

I'm going to take you to slide 28. Here are those protected grounds in British Columbia. We're going to see the Ontario protected grounds, which are virtually identical to British Columbia, but my point just in setting these out is unless you can point to how one of these grounds is impacted by a mandatory vax policy applied to you, then you don't have a case for discrimination, and here are all the various protected areas.

I think I've highlighted, I don't know if you can tell on this slide, but I've bolded physical disability and religion because I think there's a consensus emerging that there's a real potential, certainly for physical disability, to be impacted by mandatory vaccination policies. Meaning that if someone is known to have an adverse reaction to these - and we know from the press clipping that I described for you earlier, some people had significant adverse effects from the AstraZeneca vaccine that that person took, or he might have some other physical ailments and disabilities that don't permit you to take such a vaccination - the question then is, and religion might be the other one I was going to mention, but I think really the one that is probably most potentially triggered is a physical disability.

Let's say that I am a background performer. I have this aversion to either, generally, to vaccinations, or, specifically, to a COVID vaccination, I say to my employer, look, you're requiring me by a mandatory policy to get vaccinated, I can't do that. The effect of that is to discriminate against me on the basis of physical disability, which on its face, it does.

Then the employer has to look at two things. Number one, well, is the policy and the requirement that that person is vaccinated a bona fide occupational requirement? Let's just say and assume for a second, it isn't, okay, the next question is, if it is having a discriminatory effect on me, using me as the example, on the basis of physical disability, can that employer accommodate my disability? Can I work as a background performer and not be discriminated against? Maybe and maybe not.

Again, given the context in which you folks, actors and performers, find themselves, particularly in the vulnerable states that you find yourself in, meaning you can't social distance and you can't wear masks, it may be that accommodating even someone like myself isn't possible, or it's an undue hardship on the employer and the employer's not required to accommodate.

That's, in a nutshell, how those protections work and then how accommodation works in the workplace in relation to those. I'll just pass over to Michael to make

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comment on the Ontario Human Rights Code if you'd like, Michael. That's on the next slide.

Michael: Yes, just a few comments because you're quite right. The protected grounds are materially similar, almost identical, I should say. Just to reiterate some of Tony's comments, because I think it's important. When we look at the case law, it looks a bit bleak because all these policies are being upheld as reasonable, but if there's valid considerations related to these grounds, then there should be consideration of individual circumstances for a code-based exemption to vaccination policies. It's not just the policy and the policy alone, there's these other considerations that are very important. Then, as Tony said, if there are those grounds, then it's a question of accommodation, it's a question of undue hardship, and how an exemption would work.

I also want to point out because, again, the case law, for those who are against these vaccination policies and as a problem generally, but when you look at the case law and they're being upheld as reasonable, the arbitrators have identified these human rights considerations, and they specifically stated a policy is reasonable subject to these human rights exemptions, and of course medical exemptions. I just wanted to highlight that just because it's not always the most prevalent points when we look at these policies. I think this is going back to--

Speaker: To me now?

Tony: Yes, it is. Although I'd like Raj, if he wants an opportunity here to chime in.

Raj: Yes, absolutely. I did, and I appreciated the points you were making, Tony, about the physical disability and the religion. Those are obviously two aspects we've been keeping a close eye on at ACTRA. To your point about physical disability, it really is very much context-specific and circumstance-specific. We've been keeping a very close eye on that.

Obviously in every province, there were different rules with respect to medical exemptions and the type of medical information you need to justify that physical or disability. That's something we've been trying to ascertain and clarify. Obviously, sometimes that can be a little bit difficult because it's a bit of a moving target. I did very quickly want to touch base on the issue of religion.

Religion as an exemption was something we've been keeping a close eye on, and largely for the duration of this pandemic, it hasn't really been-- Exemptions on the basis of religious belief haven't really taken hold in any meaningful way but I did want to bring up the case of Pelletier and the Community Natural Foods, which is a November, 2021 decision of the Alberta Human Rights Commission. The Alberta Human Rights Act is largely similar to BC's and all the human rights acts are largely similar. There's a few areas where they differ but they're largely similar.

In the Pelletier case last November, the complainant alleged that he was medically exempt from wearing a mask and secondly, that the mask infringed his religious beliefs. For the purposes of this Town Hall, I just want to focus on the religious infringement portion of his claim. In his complaint, he alleged that his rights to freedom of religious thought and conscience had been violated. He claimed that as

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part of his faith where government health provisions conflicted with his personal conscientious convictions, he was to follow his personal convictions. He also claimed that the wearing of face masks encouraged others to think that wearing of face masks was safe, which was contrary to his religion.

I think it's important to note that in that case, the Alberta Human Rights Commission ultimately rejected that complaint. In its decision, the Commission commented that the complainant didn't identify which religion or faith tradition that he was following. He did reference passages from two books of the Bible, but the passages didn't solve, didn't appear to relate to any specific tenet or practice of not covering one's faith.

The Human Rights Commission also noted that while the legal test doesn't require an adherence to mainstream religious faith or to demonstrate that all persons of that faith share the same beliefs, there was still a requirement to explain how the belief about not wearing a mask, or perhaps not taking a vaccine, was tied to a religion, how it was religious in nature, and how the requirement to cover one's face or potentially take a vaccine restricted one's ability to practice their faith. They essentially said there had to be a sufficiently objective base to establish that a belief was a tenet of religious faith.

That was an interesting decision in terms of its application in Alberta. I've been keeping an eye out for other decisions, but I thought it might be of interest to our members who have been contemplating raising religious-based concerns to contest these policies.

Michael: Yes, and if I can answer that, Raj, I understand that there are actually some challenges coming up on the question of the application of a vaccination policy and the context of a termination on the basis of sincere held belief and--

Raj: That's right.

Michael: We're definitely monitoring those decisions. We'll have those updates.

Raj: Great.

Tony: Excellent points. I would underscore what these two gentlemen have just said, which is, and we are all always on top of cases that are coming out. We were aware of those federal cases having been grieved, and your unions too. Leslie Brady actually sent me the two decisions that had come up before I even had my hands on them. Everyone's monitoring these things very carefully in order to gauge how we are responsive to it as unions.

Can I suggest that this slide, which in my program is slide 30 and 31, really are just the statutory protections that we've been talking about for British Columbia, and this slide that's up now for Ontario? Is that okay, Michael, if I just roll through it? Okay. Thanks, and Raj, thank you.

Raj: The only thing I would add is, of course, section five, which applies to employment, same protection in a workplace.

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Tony: Yes, for sure. Okay. Now the next slide is, and this is really, we'll go to the next slide which is 32. Thank you, Alistair. This is the agency in British Columbia, the Human Rights Commission, that is involved in educating the public, and of course, administering its statute for the protection of human rights in British Columbia. This is what the BC Human Rights Commissioner says on the BC Human Rights webpage. This is the commissioner speaking, "In my view, a person who chooses not to get vaccinated as a matter of personal preference does not have grounds for a human rights complaint against a duty bearer implementing a vaccination status policy."

A duty bearer, in this case, is would be an employer who has a statutory duty to ensure a safe workplace. Those are strong words coming from the BC Human Rights Commissioner. A personal preference isn't going to cut it. If you are able to show that the vaccination policy is impacting you, as we've said, on physical disability and/or, and Raj really broadened this out, that to religious grounds, then we want to look at those, but even having said that, you still, an employer would only have to accommodate to the point of undue hardship, and this is, of course, the remainder of this slide.

It's mentioned possible grounds, disability and religion, only to the point of undue hardship, so that accommodation of your physical disability or your religious belief in not being vaccinated is only one that the employer is required to take to the point of undue hardship. Once an employer says, look, I cannot have this person in here with their physical disability or their religion if it's still exposing the remainder of the workplace to health and safety concerns. That's a significant issue, particularly in the context of film and television production. As Raj eloquently said earlier, the Union will want to assess each case individually on its merits. This is all contact based. I'll flip the next slide over to Michael to comment on.

Michael: Thanks, Tony. This next slide is essentially a summary of the Ontario Human Right Commission's position related to vaccine mandates. I just want to give you a summary of what the position is without getting into the question of whether I agree with it or not. Their current position is that mandating and requiring proof of vaccination to protect people in the workplace is generally permissible under the Ontario Human Rights Code unless there's a code-related exemption that is properly supported by applicable written documentation. Raj talked about this a bit and it's a little bit murky on what exactly is needed to have appropriate documentation. The only comment I can make on that is I think there would have to be some particulars that outline the details of the request for exemption.

People who are unable to be vaccinated for code-related reasons should be reasonably accommodated. Of course, Tony just talked about that and how an accommodation works. What is the point of undue hardship? The interesting position here is with respect to personal preferences and singular beliefs, they're not protected by the Code. As per the Ontario Human Rights Commission, personal preferences or singular beliefs do not amount to a creed for the purpose of the Code and do not establish a basis for accommodation.

The OHR's position is that a person who chooses not to be vaccinated based on personal preference does not have the right to accommodate under the Code. The only thing I'll say to that is, and I think this is what's coming out or what we hope to come out in some of the case law, is the extent to which singular and genuinely held

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beliefs tie into creed and religious belief. Again, something that we're monitoring. Moving on back to Tony or Raj, I'm unsure.

Tony: Any comments, Raj?

Raj: I think it's over to you, Tony.

Tony: Okay. Thank you. We're now going to move into the third segment and it's shorter, and we are going to move this through fairly quickly so that we can address any of- if there are any big questions that are brewing in the chats in the Q&A. We're now into the role of the Union. What is the role of the Union in considering employer mandatory Vaxs policies in the law in Canada, in each jurisdiction?

This is slide 35 and the next slide will be the Ontario example of what's in their Labour Relations Code. I can summarize it very quickly by saying that a union when dealing with its members must not act in a manner that is arbitrary, discriminatory, or in bad faith in their representation of employees in the union. That's virtually identical to slide 36 if we can go there quickly. Did you want to comment on 36 at all, Michael?

Michael: No. The standard is exactly the same in Ontario.

Tony: Right. Then slide 37 really just fleshes out what is meant by arbitrary, discriminatory, or bad faith conduct. This is the standard that the Union is held to. The Union determines whether to grieve and has carriage of grievances, that's point number one. Then whether a union proceeds with a grievance in the context, let's say mandatory vaccination, is considered if someone is complaining about it against the standard of, well, was it arbitrary, discriminatory, or bad faith if the Union acted in a certain way? What does arbitrary mean? It means if the Union makes a decision that's not been properly investigated and has no basis and reason.

I can tell you from my experience with both UBCP/ACTRA and ACTRA National, and I know in Toronto as well, because Michael's incredibly involved in this as well, this is being monitored all the time. The Union is looking at all the decisions that are coming in. They're looking at what government policies are in place and may not be in place. There's no question that the unions that govern your terms and conditions of employment in Canada are doing full investigations and their decisions on whether to grieve or not these mandatory vax policies are based in reason, in my opinion.

Discriminatory conduct. Is the Union discriminating? The standard would be that the decision that the Union takes would have to violate one of those protected grounds under human rights legislation that we've been speaking about earlier. Whether it's religion, physical disability, age, sexual orientation, gender, all the way down all those protected grounds. Bad faith is just if the Union is acting with an improper purpose or motivation.

Ultimately, at the end of the day, unions are obligated to consider the circumstances of a particular situation, consider the law as it applies to that set of circumstances, and is not required to advance grievances that are not to the benefit of the majority of its members. There may be cases where the Union you've got a small but local group - and I'm just speaking generally now, not about your industry - and they want

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to advance a grievance and they say, well, it's impinging on my rights and I don't think I need to have a mandatory vax policy imposed upon me. The Union needs to consider those concerns. Also in light of what and how any decision that they take might impact all of its members, that's the duty of a Union. I make that point at 37.

What does it all mean, is slide 38. Just summarizing basically what we've all been saying about what the Union's duty is, is to look at it reasonably, objectively, consider the relevant and conflicting factors, come to a thoughtful judgment about what to do. That's what unions do on a daily basis when they're confronting problems. Now we've got some recent decisions that relate to...

Raj: Tony, do you mind if I jump in very quickly?

Tony: Please do.

Raj: I understand from the Q&As, there was a question about the application of the Charter. There's a number of people asking why the Charter doesn't zoom in here and apply to these situations. It's a great question. I thought just before we move to the next decisions, that part of the presentation, I would make clear to the members that the Charter of Rights and Freedoms applies to Federal and Provincial Governments only. Through the courts, it's been extended to apply to a few entities which are considered close to government, but for the most part, the Charter of Rights and Freedoms applies only to public institutions, not private companies.

It's very important that you understand that as a viewer. The option here in terms of protecting yourself really at a provincial level falls to Human Rights Legislation, not the Charter of Rights and Freedoms. It's an important distinction to make and I think we need to make it clear for everyone. I don't know if you have anything to add on that point, Tony or Michael, but I just thought our members should know.

Tony: Michael.

Michael: No, I think that was succinctly put, Tony and Raj.

Tony: Thanks, Raj, for monitoring the Q&A or the chatline, or whatever it is that you're looking at while I'm rambling on through these slides. Thank you. We're going to look at some decisions, though, that have come out one in particular, actually. I think that there's going to be commentary from my colleagues here, Raj and Michael, on cases where members of a union have challenged the Union's decision not to pursue a grievance contesting a mandatory vaccination policy.

This Watson case here involved an individual who was an Air Canada flight attendant and a member of the flight attendants union that is CUPE for Air Canada. The Union had decided, once it had considered the policy itself, the workplace in which its members were working, and the entire workplace context, whether it was prudent or advisable to try and challenge a mandatory vaccination policy that had been imposed by Air Canada. It came to the conclusion that it didn't and wouldn't even grieve it.

This member, Watson, brought a complaint that the Union was not, or had breached its duty of fair representation to that individual and members of CUPE who are flight

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attendants with Air Canada. Then the Labour Board that deals with these complaints found that there was not a breach of the duty of fair representation. In fact, the Union had sought two legal opinions, as the slide says, on whether there would be a chance of success with respect to the grievance of Air Canada's vaccination policy.

This is interesting because not only is the workplace context of an airline particularly different - this is a summary of the decision - not only is the workplace context of an airline particularly different and distinct from that of most other industries but the federal government's clearly indicated that its intention was to direct all employers in air, rail, and marine transportation to implement these things.

First of all, we had and we have had, since that decision, the government has imposed regulations pertaining to air, rail, and marine transportation industries and the need for mandatory vaccination policies. The context of flight attendants may not be so different than performers in that they're in close proximity. They're working in an airplane, perhaps that's not completely analogous to performers but at least the flight attendants were able to and the public traveling on airlines were required to wear masks. That's not something that your members are able to do when the camera is rolling. The Board said that this was not a situation where the Union had breached its duty of fair representation.

I think the next slide has a couple of important points that I just want to make and then we're going to move through it. This is right. A quote right out of the decision, "The Board's repeatedly stated that it's not necessarily a breach of the duty of fair representation when a union makes a decision that favors one group of employees over another." There's plenty of law about that. Unions get to decide on the basis of reason, context, the law, et cetera. Sometimes some employees are going to be disadvantaged by that. Sometimes, the larger group of the majority is going to be advantaged but those difficult decisions require a balancing and that's what the Union's required to do. That's what was done in this case and that's recognize that principle in this decision.

Then just the second bullet, which is the Union took a stance that's aligned with the evidence. A large majority of the membership supports the vaccination policy, as demonstrated by the high vaccination rate among the employees in the bargaining unit. There's simply no evidence to suggest that the Union acted in bad faith in adopting a position that supports some favors vaccination for its members. The Union can't take that position. That was the finding in that case. I think we're at slide 42. I think, Raj, the next few slides, you were going to take on?

Michael: If I may before Raj jumps in, I just want to add similar to the Watson case, I just want to note a case in Ontario out of the Ontario Labour Relations Board. It's called Bloomfield, Harding, Louis, Bezo, and Wagner versus the SEIU that came out late January, I believe. It's essentially the same principle that reiterates a lot of the same findings. In that case, a group of the individuals wanted the Union to pursue a grievance on mandatory vaccination policy. The difference here is that the Union had actually filed a grievance and had asked for it to be held in abeyance.

Pending the outcome of the emerging case law, they went, they got an opinion from their legal counsel, were advised the prospects of success at this point based on the case law, it wasn't likely. The Board, on that basis and just doing a very high-level

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overview of this case, found that they had in fact acted in good faith and not arbitrarily when making that decision. They actually put in the work to make sure it was a reason decision. Just want to point out that there's an Ontario case on that as well.

Tony: Thank you.

Raj: Thank you for that, Michael. I'll try to get through these next two slides relatively quickly, being cognizant of the time. In terms of the Union's role in vaccination policies, as Tony mentioned, the Union does have the discretion to decide whether to grieve a policy. In doing so, it conducts its due diligence and it takes a look at the financial impact of that decision. The Union is obviously obliged to consider the relevant case law, the relevant arbitral law, and evaluate the chances of success before pursuing a grievance. The case law has been quite clear that that's an entirely appropriate analysis to conduct.

It's also worth noting that when the vast majority of members are not opposed to the policy, and there's really no chance of successfully challenging the policy, there have been decisions which state it would be irresponsible for the Union to advance such a case in a grievance. If there are concerns with an employer's policy, the Union generally consults with legal counsel to ensure that members' rights are not being violated. We have two excellent lawyers here we've often consulted and will consult going forward.

Employees who are requiring accommodation under any provincial human rights law should seek the help of the Union in protecting their rights. I've spoken to a few members over the last couple of months and I've made clear to them that if any of them have information which will support an enumerated human rights ground, the Union stands ready to assist them and to fight on their behalf. I certainly want to reiterate that today as well. Please, if you feel like you do have the situation and the circumstances are such that you can avail yourself of an enumerated ground under human rights legislation, please contact your local business rep and we'd be happy to work with you.

Alistair, could you flip to 43? Thank you. How the Union has been supporting members. The union has been promoting improved occupational health and safety on set. We've been doing this in a variety of ways across the country. In certain jurisdictions, we've been very active in terms of working with government representatives and producers. In Quebec, for example, the body that applies occupational health and safety standards is an entity known as CNESST. CNESST, during the pandemic, certainly at the height of the pandemic, put out a set of guidelines applicable to the production industry. They put those guidelines out after consultation with ACTRA Montreal and producers. Those guidelines worked exceptionally well for Quebec during the pandemic.

Those guidelines have been taken down but certainly, ACTRA has been reaching out to government bodies in Ontario as well, and in my understanding, is in BC as well. We will continue to do so to ensure that any approaches with respect to Occupational Health and Safety have the input of the Union. That obviously goes to working with industry partners on pandemic rise, which we obviously did during the pandemic.

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We are continually monitoring employer policies and their applications to members to ensure they're compliant with the law and ensuring that accommodations are made where appropriate as per human rights law. I'll reiterate again, if anyone feels like they qualify for an exemption under human rights law, please contact a local business rep. We'd be happy to work with you.

We've negotiated financial supports and sick pay for members including payment for undergoing COVID testing and both the PCMPA and the IPA. We've been very stringent about ensuring our members are protected in that way. We've been providing COVID updates on all of our websites. ACTRA Toronto has done a fantastic job of that in terms of supporting its members as well as UBCP/ACTRA. We are continually monitoring legal updates and using these excellent gentlemen on this webinar for assistance as well. We've been encouraging members to apply if they've been experiencing hardship due to the pandemic to the AFC.

Tony: That's great. Michael, do you have anything to add? I wanted to answer a question that is related to Raj's last point about legal counsel and the unions themselves staying on top of decisions, but I'll leave it to Michael to have a comment if you want before I say that.

Michael: No, you can go ahead, Tony.

Tony: There have been in British Columbia, at least, there's - and with all due respect, union members have a right to consider their rights and to hire their own legal counsel, to raise questions about these things. No one would question their ability or right to do that. We've got a group in British Columbia that has retained a lawyer that has been in contact with me and has suggested that there have been several decisions where mandatory vaccinations have been successfully challenged, and on the third time that I asked that in that lawyer to provide me with the cases because he didn't mention them in his communications to me, he finally gave me the cases, all of which, frankly, I'm fully aware of and several of them we've discussed here today.

Now, two issues or two grievances were mentioned in some of the discussions that I had with that lawyer. Those two grievances that he asked me to take note of were the two recent federal decisions that just came down which both found those vaccination policies, the Pelletier and the Canada Post, were reasonable in the circumstances, so we're not just highlighting the cases where mandatory vaccination policies have been upheld to be reasonable, we've canvassed all of the law, folks, I can tell you. Michael, Raj, myself, and we do it on a daily basis to make sure-- and we're monitoring cases.

Michael's mentioned that and Raj as well on religious exemptions, we're keeping our eye on some grievances or hearings that are underway and we're looking for those decisions. We're on top of this law and so I don't know if there are any cases that we don't know about that have been published to date, so we're-- Your unions are being very diligent in making sure that their legal counsel is right on top of this.

That's all I have to say and are we at the Q&A portion if there are any other Q&As. I know that there have been a lot that have been addressed by folks in the Q&A

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sections of this zoom and I don't-- I'll throw it back to Alistair if you want to tell us what we're doing next.

Alistair: Thanks very much. Thanks very much. I'm just going to stop this sharing here for a moment while we get you back onto the screen. We do have a couple of questions that we've not been able to answer because they definitely require a lawyer's touch here, and you may not be able to answer them as well unless you have every Act memorized.

How has the Immunization Act played into any of production mandates? Then they go on to quote, such as Section 14-1 of the Act. They're not sure if that is the correct section, where a person has a right to reject a treatment that enters the body. I believe this is the Act that discusses the genetic discrimination as well. You seem to be nodding Tony, so I'll-- [crosstalk]

Tony: Yes, I'm happy to take that. Arbitrators have considered the rights of individuals. Michael underscored this point in his discussion where he said you don't park your rights at the door. No one is forcing you to take a vaccination. Employers are imposing these policies for health and safety reasons. There are actually several producers in British Columbia that don't have mandatory vaccination policies where work is available to those individuals who do not have their vaccination status up to date or haven't had any vaccination.

I just don't see that as being relevant because no one is saying we're going to hold you down and it's not about you giving consent or not. That's not the issue here, it's whether you come into a workplace that's governed by a producer that has a policy and whether that policy is reasonable. That's the legal test here, not the Immunization Act or otherwise.

Alistair: Great. Thank you. Sorry.

Raj: Sorry. I just want to add one more thing to that because I think-- Thank you for that answer, Tony. It was very fulsome. I also wanted to note that a member did raise the Genetic Non-Discrimination Act with me and I did do some work on that regard and I will continue to do some work on that regard. I did want to note a couple of things.

There were a couple of DFR decisions issued by the Ontario Labour Board in the last couple of months where someone had filed DFR complaints against their union, and in both of those cases, they had raised the Genetic Non-Discrimination Act as something the Union should pursue. In both those cases, the Labour Relations Board dismissed the DFR complaint. They recognized the Genetic Non-Discrimination Act but they didn't find it to be sufficiently compelling to justify even commenting on the application of that particular Act in their decision, which I think is interesting.

The other thing I would say is I've spoken with some of my legal colleagues and other unions about the Genetic Non-Discrimination Act. One of my legal colleagues who's a little further ahead in their work on that potential issue than I am mentioned to me that their union's position is that the Genetic Non-Discrimination Act actually would not apply because in this case, the vaccination treatment is modifying the

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genetics of the virus, not the human being, so technically it's not the human being that's being impacted here, it's the virus that's being impacted genetically and thus the virus itself has no rights under the Genetic Non-Discrimination Act.

Now, that's something I'm investigating further, but that was a legal position suggested to me by a colleague. I will continue my work on that front. I'm obviously not an expert on the Genetic Non-Discrimination Act, but certainly, I can commit to the members here to continue looking at that issue going forward.

Michael: Yes, and I was just going to add to Tony's comments that in Ontario, there's also the Health Care Consent Act which is rights to give consent for certain health procedures, immunization would be included, and arbitrators have actually looked at that Act and have still balanced it with health and safety. The nuance of you have your rights to consent, you have that right to withhold and not get vaccinated. This goes into the Kaplan decision in District School Board where he gets into personal rights and Charter rights and what it boils down to.

You have the right to make that decision, we don't take that decision away from you, but what the impact is sadly, is the economic consequences that flow from that, so that's, again, the balancing interest and some of the nuances that are coming out of the case law on these various interests and I just wanted to add that.

Alistair: That's great, thank you. Earlier we did receive some emailed-in questions. One of them, and I just want to provide some clarity that you can help with, and then we will get to a question that's in the Q&A window. A member believed that ACTRA is using OSHA, O-S-H-A, the Occupational Safety and Health Administration, which they then go on to say is a US entity. I just want to be able to clarify that that's not what was being discussed tonight. What we were discussing was O-H-S-A, which is OHSA, not OSHA.

In regards to O-H-S-A Section 25, and Michael, you talked a little bit about this, given what was mentioned about employers being required to have consistent policies, is a producer allowed to have a strict vaccine policy on one of their shows and no policy on another, assuming that those shows are similar in size and scope?

Michael: That's an interesting question. I guess, from the perspective of the Occupational Safety and Health Act, and I actually-- I always referred to it as OSHA, so that might have been me. My bad. I apologize. I was definitely referring to the Occupational Safety and Health Act, but to get to your question, so from the perspective of the Occupational Safety and Health Act, I suppose that at an employee on the set or the production without a vaccination policy could actually raise a complaint to the Ministry of Labour and/or Health because that employer's not meeting their statutory obligations, so I suppose it could happen.

Alistair: A caveat to that, Michael, or sorry, not a caveat, a further question to that, when it comes to the film and television industry, what we tend to see are parent organizations that then open individual production entities, they call them prodcos. Season one of the show will be prodco XYZ season one, and then we'll have another show that will have a completely different title, but it wouldn't be the same parent company. What does that relationship look like? If two different prodcos who have

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the same parent company have different vaccine policies, is it tie-able back to the parent company?

Michael: Well, I guess there's some questions that they do have vaccination policies, but they're different.

Alistair: Correct.

Michael: Are they, in effect, accomplishing the same thing, which is you have to get vaccinated, or is one, we'd like you to get vaccinated, it's permissible and not mandatory and you can just get tested? I guess just need a little bit more--

Alistair: Let's say Company A has a vaccine policy that is looking for vaccinated performers, and they will also be tested. Production B, which is a separate production company but has the same parent company, also has a vaccine policy, but it is completely at the whim of the performer to be vaccinated or not. They do not have to disclose. They are free to disclose but they do not have to, but there is still a testing requirement in place.

Michael: I think that would fall - and I'll pass this on to Tony and Raj after - I think that would still fall squarely within the producers' management rights. They have the right to create whatever policy they deem fit for their workplace and could implement it unilaterally. Then the question is, to the extent the same company or subsidiaries of one another have different policies, then again, they would have the right to do it. I guess the question is, which one is more onerous, and is that one not reasonable through this management rights lens?

Tony: I agree with you, Michael. There's really two issues. One is, is that the employer, strictly speaking, and certainly strictly speaking, from a collective agreement, point of view is going to be the production, the producer. It may be, even though it's Netflix is the Mother Corp or Warner, or whoever it might be, but the production does ultimately bear the responsibility of implementing the policy in the workplace. You'd have to consider whether there were exigent circumstances that made them differentiate over here as opposed to on some other productions. That would be the first question, though.

If it's just while they're just telling us we've got to impose it, and one production does and the other one says, "Well, yes, we'll get around to it when we can," sure, that's probably going to raise some questions for the Union to consider as to whether or not it's a valid policy where they've imposed it as a mandatory policy, where they haven't down the block on some other production. Ultimately, the adjudicator is going to look at the employer. Whether Netflix or Warner has some other production that isn't doing it, that's not really relevant.

The relevance for an arbitrator is I have a collective agreement. I have an employer here, I have a policy that's been implemented. Let's go through KVP. Let's look at the legislation if that's impacted, and is this a reasonable policy or not? I think that's how they would do it.

Michael: Just to add to that, and looking at the particular circumstances, the production that has the more relaxed vaccination policy, maybe the production is just

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set up where people can social distance or they're not in the same room at the same time so mandatory vaccination is not necessary. That ties into what Tony was saying when we were talking about the cases about how important the context is.

Alistair: Great, thank you so much. I see by the reappearance of Vice President Keith Martin Gordey. Over to you, Keith.

Keith: Thanks, Alistair. I've been listening along, of course, and watching and also reading a lot of questions and answers, over 150 of them. Alistair, do you feel that the team has done a great job answering questions as they've been coming in?

Alistair: We tried to get to as many as we possibly could, that is for certain, and we are sure that there are likely still some questions out there. Anyone that registered for this event does have the email address in order to send in additional questions that we can, of course, try to answer or pass along to the representatives on the screen today to help us provide answers.

At the end of the day, Keith, everything we're trying to do here is what we hope to be in the best interest of the membership; to keep the film industry open, keep it thriving. We all know that 2020 was an incredibly difficult year. As you said in your opening remarks, 2021 was a banner year for many individuals with productions up from coast to coast to coast. Thank you to the team behind the scenes tonight who are answering questions. Thank you, Keith, for being able to host this.

Keith: Well, I didn't do much except listen and read. Very informative, very well thought out. Thanks, Tova, for reading the Equality Statement. Thank you, Tony, Michael, and Raj. Gosh, what a lot of stuff to go through. Thanks, Alistair, and the whole team, and Leslie, answering questions on the fly like that. That's been something quite amazing.

We've been recording this, and we will have a transcript of the evening available soon. I don't know what the procedure will be to get that out there but that's the intent. I think that's it. If you have any more questions, please feel free, send an email or contact your local branch and we'll try and get to it, of course. I think that's about it for now.

Alistair: It is. Thank you. Thank you so much for you all, Raj, Tony, Michael, thank you for your time this evening. We know that we're not done with this. We know that we still have many miles to go on all of this, and we hope everyone remains healthy and connected with their local branch. Thank you all.

Keith: Thanks to the members for showing up and asking their questions, being interested in knowing how things work. Thank you.

Raj: Be safe, everyone. Thank you.

Keith: Okay. Bye, everyone.

Tony: Bye-bye.

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