

August 24, 2021

AND NOW, ANNOUNCING THE 2021 MVP: MANDATORY VACCINATION POLICIES!

All of a sudden, every day's headlines contain news of MVP announcements. The spate of announcements is spreading almost as fast as COVID-19. Government employers, venue operators, universities and colleges, large, medium, and small businesses ... the list of organizations requiring proof of vaccination against COVID-19 as a pre-requisite to access, employment, attendance, etc. is growing exponentially.

There is also an emerging trend at the provincial legislative level, requiring proof of vaccination to participate in certain activities like dining at restaurants or attending indoor events. Currently, Quebec and British Columbia have announced their intentions to implement these limited MVPs. But there is no countrywide statutory framework imposing mandatory vaccination.

Presumably, all of the organizations that recently declared MVPs in the absence of a statutory framework obtained legal advice to support the step. What factors would they have considered? Practical considerations affect the implementation of any MVP (which at present, can only apply to people over the age of 12). They must be announced well in advance to allow time to come into compliance. Concerns about the "proof" to be produced by the individual are being expressed. Policing and privacy concerns are also in play.

What about commercial landlords and tenants, can MVPs be lawfully introduced to their relationship?

Occupiers' Liability and Occupational Health and Safety

Across Canada, laws require property occupiers and employers, respectively, to take appropriate care to ensure that persons entering on the property, and workers, are reasonably safe. Clearly, any sort of indoor gathering engages some level of danger from COVID-19. Our current situation indicates that the vaccination methods utilized in Canada diminish the risk of severe symptoms or hospitalization, and possibly transmission. It would therefore appear that property occupiers

and employers would be acting responsibly by making vaccination a pre-requisite to accessing premises. There is little doubt that an MVP is designed to fulfill that legal responsibility.

Human Rights Legislation

However, all individuals are protected from discrimination on various protected grounds, pursuant to human rights statutes across the country. One protected ground is religion. Disability is another. Ontario's *Human Rights Code* prohibits discrimination based on "creed" (akin to religious belief). Individuals cannot be denied goods, services, facilities, employment, accommodation, contracts, or membership in unions, because of a protected ground. Preventing access in a discriminatory manner may violate human rights laws.

Most MVPs provide exemptions and accommodations to comply with human rights laws. These entail the alternative of demonstrating proof of recent negative COVID-19 test results. This is a prudent way to avoid categorically denying access to the unvaccinated while attempting to satisfy occupiers' liability and health and safety laws.

Generally, Canadian human rights legislation allows some exceptions to permit discrimination for *bona fide* requirements. (Recall that courts upheld masking requirements recently implemented by businesses, independently of local by-laws and regulations, to counteract the spread of COVID-19.)

Lease Terms and other "Lease Law"

If a commercial landlord or tenant wishes to announce an MVP that affects the other party (e.g. denying access to the leased premises absent proof of vaccination), they must consider more than just occupiers' liability, occupational health and safety, and human rights law. As with all commercial tenancy questions, no analysis can be complete without consulting the lease that governs the landlord-tenant relationship.

All leases contain a mix of rights, restrictions, and obligations. These must be scoured for relevance, to determine if the lease permits or prohibits an MVP. Any common law (or in Quebec, *Civil Code*) that may have bearing must also be considered.

Many leases allow landlords to access the premises to inspect, to perform services and repairs etc. Some leases grant the landlord the right to impose rules and regulations, to establish security and other protocols for the property. Sometimes leases curtail the landlord's ability to impose behaviours. Occasionally a lease is completely silent on issues of access. Some leases prevent the introduction or presence of pollutants at the property, where the definition of "pollutants" might reference bio-hazards. Most of these definitions do not capture a virus - proving how a virus came to exist at a property would certainly be challenging. Some leases explicitly contemplate health emergencies and may allow the landlord or tenant to condition admission to the property on participation in their security and/or health screening measures.

It is important to recognize that a grant of a leasehold interest is a conveyance of property. "Property" is essentially a set of rights. Whether the subject of the leasehold interest is land, air, or part of a building, the conveyance of a leasehold interest is a grant of exclusive possession. The holder of exclusive possession has the right to exclude all others, including the landlord. Therefore, most leases contain a right of access or entry to the leased premises; otherwise, the landlord would have no right. Furthermore, the exclusive possessory right is supported (in the common law provinces) by the covenant for quiet enjoyment. This assures the tenant that its exclusive possessory right will not be disturbed. The modern view of this covenant

is that it extends to "any conduct of the landlord ...[that] interferes with the tenant's freedom of action in exercising [its] rights as tenant ... [and] it covers ... any acts calculated to interfere with the peace or comfort of the tenant". However, not every interference is a breach that warrants redress. The question of whether a landlord's MVP for a property might offend the covenant for quiet enjoyment is novel.

Compliance with Laws

Most leases contain a covenant to comply with laws. If not, then one could possibly be implied, to the extent that in all Canadian contracts, there is an implied covenant for the parties to exercise rights and perform obligations in *good faith*.

If a shopping centre landlord maintains that to comply with occupiers' liability law, for the safety of all occupants and visitors, it will deny unvaccinated individuals access to common area/mall space, then so long as its MVP allows exceptions to prevent human rights violations, it is difficult to predict that the landlord would be punished. Likewise, if an industrial tenant who operates a densely occupied facility where the employees are subject to an MVP, maintains that to comply with occupational health and safety law, it will deny unvaccinated representatives of the landlord access to the areas of the leased premises that the landlord must maintain or repair, then so long as its MVP allows exceptions to prevent human rights violations, it is difficult to predict that the tenant would be punished.

Bottom Line

In the absence of legislation requiring everyone to get vaxxed, the predominant issue for landlords or tenants wishing to impose an MVP on the other is whether the lease gives sufficient control to either party.

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward.

The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

MARY ANN BADON
416-598-7056
mbadon@dv-law.com

FRANCINE BAKER-SIGAL
416-597-8755
francine@dv-law.com

CANDACE COOPER
416-597-8578
ccooper@dv-law.com

HEATHER CROSS
416-591-3046
hcross@dv-law.com

DENNIS DAoust
416-597-9339
ddaoust@dv-law.com

ALLISON FEHRMAN
416-304-9070
afchrman@dv-law.com

GASPER GALATI
416-598-7050
ggalati@dv-law.com

MICHAEL HOCHBERG
416-597-9306
mhochberg@dv-law.com

WOLFGANG KAUFMANN
416-597-3952
wolfgang@dv-law.com

LYNN LARMAN
416-598-7058
llarman@dv-law.com

MIMI LIN
416-597-8493
mimil@dv-law.com

MELISSA M. MCBAIN
416-598-7038
mmcain@dv-law.com

ROBBIE MOSES
416-479-4354
rmoses@dv-law.com

PORTIA PANG
416-597-9384
ppang@dv-law.com

JAMIE PAQUIN
416-598-7059
jpaquin@dv-law.com

BRIAN PARKER
416-591-3036
bparker@dv-law.com

DINA PEAT
416-598-7055
dpeat@dv-law.com

MANEET SADHRA
416-479-4357
msadhra@dv-law.com

JACK SARAIVA
416-597-1536
jsaraiva@dv-law.com

CHRISTINA SONG
416-597-6824
csong@dv-law.com

LUCIA TEDESCO
416-597-8668
ltedesco@dv-law.com

NATALIE VUKOVICH
416-597-8911
nvukovich@dv-law.com

PHILLIP WALLNER
416-597-0830
pwallner@dv-law.com

DEBORAH WATKINS
416-598-7042
dwatkins@dv-law.com