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Forward

On 8 April 2022 the Vaccine Passport Mandate system will finally be removed in the Province of British Columbia, the *last* province to do by a very generous margin. Today, on 5 April 2022 at a press conference the current Provincial Health Officer, Dr. Bonnie J. Henry, fielded a number of questions from those members of the press present. However, it was one particular response to a question on the removal of the vaccine mandate that restaurant and venue owners throughout B.C. should be very careful to listen to, or rather listen to at their own risk (found [here](#), emphasis added):

"So B.C. will no longer require vaccine cards to be shown at public venues starting April 8, though each business or service can choose to keep asking for them if that suits their clientele and their comfort level."

This article describes and warns B.C. venue owners (I include anyone that runs a bar, club, restaurant, arena, theatre, etc... as a venue owner) of the risk they are taking if they choose to accept this statement as accurate and then go forward with unilaterally attempting to enforce a vaccination system for their business after 8 April 2022.

Before I get into this discussion two things I need to note. One, I am writing this in one draft as I am attempting to get ahead of the 8 April 2022 deadline, and as such a follow-up article when I have more time may come containing more citations, more detail, better language/grammar and would be in a proper article form (not as a LinkedIn article). Secondly, I had expected this comment on businesses having this option, so while this article may be rough it is based on forethought and research dating back about two months.

The Problems With a Unilateral Vaccine Mandate Imposed by a Venue

There are two specific reasons that in British Columbia venue owners can neither (1) demand personal information as a condition of rendering or entering into a transaction for a good or service; and (2) favour one group of actual or potential clients over another. Contrary to what one may expect I am not talking about the Human Rights Code, although there could be pitfalls there too. On the first point, the demand for personal information as a condition for rendering a good or service, the venue owner runs up against a piece of legislation unique to British Columbia, that legislation is the [Personal Information Protection Act \[SBC 2003\] Chapter 63](#) ("**PIPA**"). Other provinces, like the Province of Ontario, have similarly [suggested](#) venue owners could choose to unilaterally enforce a proof of vaccination requirement. However, unlike other provinces, British Columbia is unique in having the **PIPA** act that applies to businesses

and prohibits such conduct as I will explain below (I cannot find any similar statute in Ontario if others exist in other provinces I have yet to evaluate such, although I believe Alberta has something similar). On the second point, the favouring of one group of actual or potential clients over another group, the venue may run up against complaints or proceedings under the [Business Practices and Consumer Protection Act \[SBC 2004\] Chapter 2 \("BPCPA"\)](#). The two acts would not necessarily be applied exclusively as one or the other but a venue owner could be liable under either or both. However, for the sake of this hastily assembled article, I will primarily focus on the liability under *PIPA* with only a token highlighting of potential problems under the *BPCPA*. With that, I jump into the *PIPA*.

PIPA Section 7(2) - Prohibition on Condition of Providing Good or Service

It is [section 7\(2\)](#) of *PIPA* that a venue owner, some days after turning away a potential patron for a failure to provide them with a proof of vaccination, may find her or himself receiving an unwelcome letter from the Office of the Information Privacy Commissioner ("**OIPC**") which could very well include a monetary [damages award](#); a more intimidating Information for breach of a provincial offence under the [Offence Act](#); or potentially some sort of other action. Section 7(2) of *PIPA* reads:

Provision of Consent

7(2) An organization must not, as a condition of supplying a product or service, require an individual to consent to the collection, use or disclosure of personal information beyond **what is necessary to provide the product or service.**

Four things probably stick out in this section. (1) what an 'organization' means; (2) what 'collection, use, or disclosure' of personal information means; (3) what is 'personal information'; and (4) what does "beyond what is necessary to provide the product or service".

(1) What 'Organization' Means

On point (1), the definition section of *PIPA* defines (I am simplifying here) an organization as

"a person, an unincorporated association, a trade union, a trust or a not for profit organization, but does not include [some listed public and government bodies are listed after as exceptions]".

A person of means both a venue owner operating under corporate personhood (like an incorporated company) or as a sole proprietor under their own name. The takeaway is that if you are a restaurant, hall, theatre, sports venue, etc... you're an organization caught by this law.

(2) What 'Collect, Use, and Disclose', Mean

On point (2), 'collect' is not directly defined in *PIPA* but its meaning can be discerned from its use in the act. Collect can be seen as any time the organization uses its own efforts to find and retrieve/possess the personal information of another for their use, the asking/demanding/requesting of this information from, say, a host or hostess of a potential patron at a restaurant would count as 'collecting'. Similarly, the term 'use' is undefined but its meaning can be discerned by its use in the act. 'Use' is defined by *Black's Law Dictionary* as (I am paraphrasing here) the application or employment of something beyond mere temporary possession. Likely by scanning, evaluating, storing, linking etc... 'use' is also triggered where a venue tried to validate the vaccination proof. On 'disclose' this would be if you or your employees store such personal information and then publish it or send it to the public or some third party. In our cases, a unilateral vaccine mandate by a venue would qualify as a collection and also a use, and perhaps negligent action could cause unintentional disclosure to close the trifecta.

(3) What 'Personal Information' Means

On point (3) what personal information means; the act defines personal information widely by defining some things that are *included* (meaning the definition is larger than the act) as:

"information about an identifiable individual and includes employee personal information... [certain employment or contact information is then listed as excluded]".

The vaccine mandate system requires the matching of a person's full name with identification like driver's licenses which include home addresses, sex identification, birthdates, and other very much identifiable individual information. Indeed the **OIPC** in charge of administering *PIPA* includes "[name, home address, telephone numbers, email address, SIN, gender](#) . . ." in its guidance to organizations of things that will constitute personal information. Given a recent [Supreme Court of Canada case](#) on the application of the criminal law on genetic health data and the criminally protectable privacy concerns found in health information, it would also certainly be the case that the very vaccination status itself is personal information. One should not expect it to be easy to anonymize the information as the **OIPC** has found the very ability to *potentially* piece together information as to make it identifiable will [make it personal information](#). The takeaway on this point is that using the vaccine card system as it functions will certainly, and by a wide margin, qualify as providing personal information.

(4) What 'Necessary to Provide the Product or Service' Means

On point (4) what "beyond what is necessary to provide the product or service" means has been identified not as being a subjective evaluation but rather quite a narrow objective meaning that the subjective fears and concerns of the venue owner (or even more so some insistent patrons demanding a venue mandate) are not part of the equation with whether one will be able to demand vaccine proof as a condition of providing a product or service. Two prior and precedent-setting **OIPC** decisions have dealt with what "necessary" means in this circumstance. In [the one](#), even during the

height of gang war problems in B.C. that specifically affected clubs and bars, it was found that clubs and bars that were keeping driver's license data where/after it was not *legally necessary* meant that the organization was collecting information that was not necessary, despite the venue's pleaded concern as to "guest safety". In [the other](#), the very point of the necessary information has been identified quite narrowly (emphasis added):

... s. 7(2) of PIPA meant personal information that is indispensable "in the sense that it is not possible to supply a product or service without the personal information or because it is legally required for the supply."[21] I acknowledged that there will "be cases where personal information is 'necessary' even though it is not, when considered in a searching yet reasonable manner, indispensable in the sense that it is not possible to supply the product or service without the personal information. when considered in a searching yet reasonable manner, indispensable in the sense that it is not possible to supply the product or service without the personal information."

What should be taken from the above **OIPC** discussion of "necessary" is that the personal information must *actually* be required to accomplish the provision of that good or service, and the vaccine information of a person does not affect how well the chicken cordon bleu will come out. As an addendum and specifically regarding our Dr. Henry quote about "suit[ing] their clientele" the **OIPC** has already previously found that "customer satisfaction" certainly [is not something](#) that makes the collection of personal information necessary. Presumably, that means whether such conduct satisfied one customer at the discomfort of another is not an acceptable reason under **PIPA** to deny services or goods to potential patrons, despite the remark by the current provincial health officer.

Conclusion under PIPA

B.C. is unique with **PIPA** in a way that other provinces are not or may not be. **PIPA** puts obligations on private venues that prohibit them from collecting, using, or disclosing private information from potential patrons as a condition of providing a good or service. This prohibition is a strongly worded prohibition and does not allow venues to deny publically available goods or services because of a subjective fear or preference that their clientele have a green coloured app on their phone. The information must be truly necessary for the very good or service to actually be rendered. For instance, in one of the earlier cases the idea that a rental car agency actually *must know* that the renter is lawfully allowed to drive does make the collection of driver's license information necessary. But there is nothing necessary about the private and identifiable information of a potential patron that will render the restaurant incapable of making a Monte Cristo sandwich, or offering a seat for the viewing of a show. On 8 April 2022, the requirement to have a proof of vaccine no longer becomes *legally necessary* as the earlier **OIPC** decisions would require, and by being optional a venue owner no longer has a necessary reason for collecting, using, or disclosing private information from the potential patron as a condition of providing a good or service. A venue that decides to pursue a unilateral vaccine mandate outside of

a lawfully required necessity thereby runs a substantial risk of breaching section 7(2) of **PIPA**.

Defenses to a Section 7(2) Complaint

One may be tempted to initially shrug their shoulders and go "But the public health officer said I could" but this would also be at your own risk. For the reasons regarding "necessary" above, this would invalidate the defense already. However, even further the current provincial health officer cannot advise persons that they are allowed to breach a section of a provincial enactment. Without outlining every example of the [Public Health Act \[SBC 2008\] CHAPTER 28](#) there is one notable limitation to what the public health officer can order, and that is that an order can only be prohibitory it cannot grant a right. Essentially, the provincial health officer might be able to tell you that you *cannot do something*, but the provincial health officer cannot tell you that you *may do something* (and by implication be immune from legal repercussions). Rights cannot be created by the executive (the government as opposed to the legislature or parliament) at all, let alone to empower someone to exclude one group for the benefit of another as such rights can only be expressly given by an act of a legislature or parliament (subject to a constitutional challenge of course). So, the current public health officer cannot anoint upon you a right to operate in contravention of a supervening statute, let alone to do so in a way that discriminates between groups of persons.

Then one might think "Well if I have to go to the **OIPC** or the court I can just say that it was the provincial health officer's fault, that will work". No, it almost certainly will not. While in Canada there is a defense known as "officially induced error" which is essentially a defense saying you did something wrong because an official told you you were allowed to do that wrong thing, but it does not apply here. The Supreme Court of Canada has dealt with the defense of officially induced error and what is required for someone to avail themselves of that defense is that they must get the lawfully incorrect instructions [directly from an officer who is in charge of administering the regulatory scheme](#) that you end up breaching. The Commissioner of the **OIPC** administers the scheme under **PIPA** and not the provincial health officer, no defense as to the words of the current provincial health officer will avail in such a defense that results in your breaching obligations under **PIPA** or the **BPCPA**.

However, there is one thing you can try to do whether it works or not. Nothing stops a venue owner who is facing complaints detailed in this article from trying to join the Province of British Columbia to their defense on the grounds that they would not have done what they did except for the fact the government negligently said they could.

Consequences to a Section 7(2) Finding

The **OIPC** takes its job seriously, it administers several acts and takes action on thousands of complaints a year. Unfortunately for a venue owner, the **PIPA** provides for the chance that the venue owner could face [monetary damages](#) ordered to be paid by him or her to the complaining potential patron, so a complaint is nothing to ignore. Perhaps more concerning is that the **PIPA** act under [section 56\(1\)\(a\)](#) makes it an offence to (emphasis added):

"(a) use *deception* or *coercion* to collect personal information in contravention of this act".

While in most circumstances demands for personal information will [not amount to a coercive demand](#) venues that bribe, threaten, or lie to patrons on the necessity of the collection or use of the information may find themselves not just in simple breach of section 7(2) but actually committing an offense under **PIPA**. For instance, one would be deceiving a patron if they told that patron that it was lawfully required for them to share the information when it was not lawfully required. Where an offense against an act is alleged/committed the offended party could further decide to lay an information and charge the venue with a breach of British Columbia's [Offence Act \[RSBC 1996\] Chapter 338](#) at least if the facts show the venue owner used deception or coercion. This does not require a police officer to do and the offended person could do it themselves with the unfortunate venue owner being served a summons to court. It is stressful enough for many persons to comply with **OIPC** procedures and legal costs would likely be incurred there, however, a provincial information which lays a charge is a significantly more serious issue and could cause significant cost and hardship to such venues and persons facing a charge. Lawyers are not cheap and dealing with either of these issues may result in hundreds to thousands of dollars of cost to a venue or person just to respond, regardless of the outcome in the end.

Further Liability Under the BPCPA

This article being lengthy for a LinkedIn article I will only add a final consideration about further or alternative liability under the **BPCPA** (if you recall that is the Business Practices and Consumer Protection Act). Several provisions under the **BPCPA** prohibit venues from participating in [deceptive acts or practices](#), or [unconscionable acts or practices](#). I will not go into depth as I have above with **PIPA** but it suffices to say that a venue could find itself committing a deceptive act or practice if it deceives or misrepresents to patrons that their vaccine mandate is somehow required by law. Similarly where a venue represents that their vaccine mandate is endorsed or supported by the government that too could be a breach. Furthermore, representing that a patron has a legal obligation or liability to provide a proof of vaccination (when they do not under **PIPA**) as a condition of providing goods or services would be yet another prohibited practice but under the **BPCPA** rather than just the **PIPA**. Also, it may be inequitable to set terms of conditions for a transaction based on the wants and desires of certain clientele as against potential clientele. And, lastly, it may be argued as grossly inequitable as a condition of entering the transaction for a restaurant to essentially demand that a patron enter into and give up their Section 8 *Charter* rights of being free from unreasonable search and seizure by telling them they must enter into a

contract providing vulnerable personal information to the B.C. government and its *commercial data storage contractors* in exchange for a martini at the bar. So too under the **BPCPA** a venue may face alternative or additional liability.

Conclusion

Venues that seek to rely upon the current provincial health officer's comments that they may continue to utilize a proof of vaccination requirement as a condition for them to enter into a transaction for providing goods and services are setting themselves up for liability under the **PIPA** section 7(2) and the various provisions of the **BPCPA**. This could at the least, cost time, and peace of mind, at the worst, one could see thousands of dollars in legal costs, fines and face an Offences Act information charge. A venue will not be able to point to the words of the current provincial health officer as a defense if these circumstances were to happen as that officer does not administer the **PIPA** or the **BPCPA**. British Columbia is not like other provinces in Canada and has robust protection of patrons and privacy and they are set up in such a way that cannot be altered by an order of the ministry of health, especially one that purports to give a *right* of exclusion. If a venue seeks to unilaterally maintain a vaccine mandate it should be prepared for the liabilities mentioned above.

A note in closing, in expectation of all of this happening I contacted the Attorney General's office and the Office of the Information Privacy Commissioner on this very issue.