

Civil Litigation

Newsletter February 2022



Message from the Editor

David Milosevic



As litigators, we are trained to look at all sides of an issue. It does not trouble us to consider an opposing party's position on disputed issues. In fact, the more we do so, the better our understanding of a matter and the issues it raises.

In that spirit, the current issue of the Insider features interviews with lawyers who have raised questions regarding policies undertaken in response to the COVID-19 pandemic, particularly policies requiring proof of vaccination to enter many public and private spaces.

So-called "vaccine passports" have been adopted throughout Canada and were designed to encourage vaccination and help reduce the spread of COVID-19 in our communities. The questions surrounding these proof of vaccination policies, and their potential infringement on civil liberties, have not received a particularly robust public debate.

In the spirit of fostering discussion concerning public policy responses to COVID-19, this issue of the Insider features interviews with three lawyers who have been challenging the reach of these policies.

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Message from the Editor

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Cara Zwibel is interim general counsel at the Canadian Civil Liberties Association (CCLA) and Director of the CCLA's Fundamental Freedoms Program. Cara discusses the CCLA's position on various COVID-19 policies undertaken in Canada and reflects on which of those may be "constitutionally vulnerable."

Christine Van Geyn is litigation director at the Canadian Constitution Foundation (CCF). The CCF has launched a number of challenges to COVID-19 policies enacted in Canada, most prominently, a challenge to the constitutionality of the British Columbia proof of vaccination regime, which allows few medical exemptions from vaccination for citizens of British Columbia.

Ryan O'Connor is a civil litigator who has handled numerous injunctions and employment matters involving vaccine mandates. Ryan discusses mandatory vaccination requirements in schools and workplaces in Ontario and discussed the approach courts have and may take in the future to challenges to such policies.

Finally, Cameron Fiske has contributed a thoughtful article on the joys of in-person courtroom appearances expressing his and our hope that in-person advocacy will soon return.

Thank you for reading this issue of the Insider. I hope you enjoy our new, more readable format. Our next edition will feature interviews with senior policymakers, lawyers and public health professionals, discussing the need for the broad range of public policy responses that have been adopted to respond to COVID-19. I am confident that the Bar can lead the way in showing that challenging legal and public policy issues can be discussed in a spirit of vigorous, but respectful debate.

David Milosevic
(January 24, 2022)

INTERVIEW WITH

CARA ZWIBEL



Cara Zwibel is the Interim General Counsel and Director of the Fundamental Freedoms Program at the Canadian Civil Liberties Association (CCLA). Her work at the CCLA involves providing legal opinions with research, coordinating litigation and interventions, representing CCLA before the courts, preparing submissions to legislative bodies and assisting with the CCLA's public education work. Cara was called to the Ontario bar in 2005. She earned her undergraduate degree in Political Science from McGill University and law degrees from Osgoode Hall Law School (J.D.) and New York University (LL.M.).

David Milosevic:

Good morning, Cara. Thank you very much for joining the OBA Civil Litigation section today.

Cara Zwibel:

Thank you for the invite.

David Milosevic:

As I had mentioned to you, our general discussion today is on constitutional questions that are raised by the public policy response to the COVID-19 pandemic. Before we get into some of those issues, I was hoping you could introduce yourself and the work of the Canadian Civil Liberties Association.



Cara Zwibel:

I am the director of the Fundamental Freedoms Program at the Canadian Civil Liberties Association (CCLA), which means that I do work related to freedom of expression, freedom of association, peaceful assembly, and freedom of religion. We are a relatively small organization, so there are often issues that do not fall neatly into anyone's particular area. I often end up doing work on some of the democratic rights and information issues. Further, a colleague and I do national security work together. The CCLA is a charitable organization, a non-profit that does work across Canada to protect and promote the rights and freedoms of people in Canada by litigating, by going to speak to legislators, going to address committees, and doing other forms of advocacy.

David Milosevic:

Before I ask you about a few of the specific responses to COVID-19, can you tell us a little bit more from a broader perspective, what is the CCLA's response or position generally to public policy interventions for COVID-19?

Cara Zwibel:

We have been paying close attention to what governments have been doing.

"We have also pushed back when the state has taken more of a punitive approach rather than an approach sort of focused on public health."

Cara Zwibel (cont'd):

We have spoken out and expressed concerns particularly when we see either an approach that will have disproportionate impact on certain groups, or groups that tend to already get the short end of the stick on many policy questions. We have also pushed back when the State has taken more of a punitive approach rather than an approach focused on public health. We did a lot of work early on when people were being ticketed for walking in parks. We have also been paying attention to the way that the government has been taking care of the people that are in its custody.

We have also raised concerns about people in correctional institutions where there are unfortunately a lot of COVID-19 outbreaks, the treatment of the homeless, and whether governments have done a good job in getting those people in shelters and in shelters that are safe in terms of minimizing the risk of transmission of the virus. Like with many other things, we are always recognizing that there is a balance to be struck and that we do not have the scientific expertise that public health experts and epidemiologists bring to the table. So when people say that certain things are necessary, we recognize that and can be deferential to that, but we are still always considering whether there are less restrictive ways to go about doing things and whether there are ways that things can be done where the impacts won't be so harshly felt.

David Milosevic:

So the CCLA takes a broad view of the impact of COVID-19 policies across many areas. If I could ask you, what is CCLA's position on the constitutionality of vaccine mandates?

Cara Zwibel:

It is always hard to assess the constitutionality of something that is hypothetical and theoretical. The Federal Health Minister suggested this idea of provinces starting to talk about mandating vaccinations. It is not exactly clear what that would look like.

Cara Zwibel:

Obviously, our starting position is that individuals have autonomy over their body and the State generally should not be able to force you to have a medical intervention that you do not want. Having said that, like every other right, there are reasonable limits that can be imposed. I think a lot would depend on what kind of evidence the government can bring forward and also what their objective is. I think one of the things that has been really challenging during the pandemic is that we assess all rights violations in relation to the objective that the government is trying to achieve and it has not always been clear what that objective is.

I think at the outset, the objective was framed as maintaining healthcare capacity. But at some point, the objective might have shifted to defeating COVID-19 or beating the virus. So that kind of slippage has been difficult to manage. It is not clear to me what exactly the objective would be with a vaccine mandate, because we are not in a situation where we have a significant portion of the population that would not get vaccinated. It is a relatively small minority, we have had very good vaccine uptake. So I think when you look at that, there are some risks that come along with forcing people. I think most people do not contemplate actually strapping someone down and putting a needle in their arm, but fining them or imposing some other form of penalty, to me, would be essentially mandatory vaccination.



Cara Zwibel:

We would have a lot of questions for the government about that. I do not think I can say it is unconstitutional, but I can say it is very vulnerable to a challenge and the government should have to meet a very high bar in justifying a measure like that.

David Milosevic:

Well, perhaps we are talking about mandates, which, as you rightly point out, are theoretical at this point. But looking to the more actual policies, how about the issue of vaccine passports? What is the CCLA's position on vaccine passports for the purposes of accessing a wide variety of public venues?

Cara Zwibel:

I think our starting position is always trying to push the government to justify exactly what they are trying to accomplish and why this is necessary. I think that the place where these vaccine passports are generally used are discretionary places where you arguably do not have a need to go. They are not essential, although I know in some provinces there are some grocery stores and things like that, where they're required, which raises some concerns. I think if we keep it to the discretionary places, it is much harder to raise a strong, constitutional argument.

Cara Zwibel:

But there are questions around implementation, and then, enforcement. We have privacy concerns about what this means. A lot of people give the example of, you need to disclose your vaccination status to go to public school, right? You give your child's vaccine record to the school. The difference between providing your child's vaccination record for school and a vaccine passport is that this is not about sharing information with an institution that you have a long-term on-going relationship with. It is sharing it with a bunch of institutions that you may have only a fleeting sort of interaction with.

So, we have a lot of questions about how the data is collected. How is it kept? How is it disposed of? What kind of use is that information put to - especially because, at least in Ontario, when the vaccine passport first came out, you either have had to show it at a restaurant or if you had a medical exemption, you had to show a medical note from a physician or a nurse. Also, it could not just say that you had a valid medical exemption, it actually had to spell out why you were exempt, which is very unnecessarily invasive.

I think there are questions about ways that we can implement these things. We think about whether there are necessary ways that they can be implemented that are less invasive of privacy, more protective generally of privacy, and less likely to lead us down a surveillance-type of road.

"The difference... [with] a vaccine passport is that this is not sharing information with an institution that you have a long term ongoing relationship with. It is sharing it with a bunch of institutions that you may have only a fleeting sort of interaction with."

There are also valid questions to ask about exemptions. I know that I have certainly spoken to some people who say they are not anti-vaccine. They have complicated medical histories, they have spoken into their physician, who they have had for years and who they trust. And, their physician has said: I actually wouldn't recommend the vaccine for you. But they don't fall into the categories that the government has decided are valid kind of medical exemptions. So I really do think those people are facing a very difficult situation and one that may run afoul of human rights codes. Similarly, I think there are questions around religious or conscientious objections to vaccines that we need to think through.

The other big picture thing is that most people who were in favor of these measures were treating them as temporary measures. The understanding was that this is something we need to get to some next step when we will not need them anymore. We have gotten really used to living under a lot of restrictions. I worry that these things will become permanent features and I am not comfortable with Canada turning into that kind of society, where in the ordinary course, you have to flash a healthcare credential to get into public places.

David Milosevic:

Limitations on constitutional rights have to be demonstrably justifiable. If we look at vaccine passports, for example, passports were implemented as a way to ensure that people were vaccinated. So as to reduce this spread of COVID-19 in public places. As evidence changes, it appears that with new variants vaccination does not necessarily reduce spread, although it does appear to prevent more serious outcomes for the individual who is vaccinated. How does this changing science behind COVID-19 affect whether some measure is demonstrably justifiable or not?

Cara Zwibel:

I have thought about this quite a bit, but there might have been cases where if a law was challenged in May of 2020, it would have been found to be a reasonable restriction on rights. And I think it's entirely possible that if that same law was challenged today, it might be much harder to make that justification. I am not a medical expert, what I have been told or what I understand about the vaccines is that – when we are talking about efficacy of the vaccines, we are mostly talking about making sure people do not get very sick and die, which is obviously really important.

We do know that you can still get the virus even if you are vaccinated and you can still transmit it. My understanding is that the risk of transmitting it and of getting it are much lower. You could argue that it is really more about a false sense of safety in a public place, than it is about actual safety.

Just like we have a lot of kind of health theater going on with plexiglass and hand sanitizer everywhere, I think the truth is that, some governments were a little bit more forthcoming about this than others. The truth is that for governments, the vaccine passports were really about incentivizing vaccination and trying to make it much less convenient for people to not be vaccinated. I have not seen the evidence, but I know that there were generally some spikes in booking appointments after some of these measures were introduced. So it is possible that those things were effective in encouraging vaccination. Whether they could be justified as health measures is much more questionable. It is interesting to think about whether a court would accept incentivizing vaccination as a pressing and substantial objective for the government. I am not sure.

David Milosevic:

To summarize this part of our discussion, Cara, neither of us are scientists and we are not wading into the scientific evidence on these measures. But what I think that the changing science tells us is that if these issues were to be examined by a court, the changing evidence is relevant and should be examined in the context of whether the measures are reasonable and justifiable.

Cara Zwibel:

Yes. I also think that – when looking at the cases that have actually made it to court during the pandemic, about pandemic restrictions, which are relatively few and far between. We [at CCLA] have an ongoing challenge to treatment of federal inmates and federal correctional institutions. We, with a coalition of other organizations, were involved in a challenge to the City of Toronto's approach to homelessness at the outset of the pandemic. That one I think has settled and there were some orders put in place for the government to comply with.

We also challenged inter-provincial travel restrictions that were in place and we brought that challenge in the Newfoundland and Labrador court. We did not succeed. We are appealing that case and it will go to the Newfoundland and Labrador Court of Appeal.

"We have gotten really used to living under a lot of restrictions, and I worry that these things will become kind of permanent features."



Cara Zwibel:

But interestingly, I consider it a partial victory because the province had taken the position that their travel restrictions were not violations of the charter mobility rights – the right that citizens and permanent residents have to move to and reside in any province or to earn a living in any province. The province said, these are about these rights of people moving to and working in provinces. They are not a general right to move freely around Canada. We thought that was wrong. Surely part of being a citizen of a country is that you have the right to move around within that country. So, we were successful in establishing a violation of Section 6, but the court found that it was a reasonable restriction. It was a reasonable limit on mobility rights.

There are also other organizations and people that have brought challenges to some of the orders that have restricted gathering and houses of worship. So, freedom of religion and freedom of association and peaceful assembly claims.

There have been unsuccessful challenges to the use of quarantine hotels at the federal level. I am aware of cases brought by a number of individuals, I think maybe represented by or in conjunction with the Canadian Constitution Foundation to the vaccine passport rules in British Columbia that do not make adequate medical exceptions for some people.

There are two interesting things about litigation during one is that if you look at the United States, they have had a ton of COVID-19-related cases make it all the way to their Supreme Court. The OSHA case [PC1] [PC2] that we just saw recently and there were plenty of others. At one point, we had someone do a count and well over a dozen, maybe 20 or so, made it to that court. Our system is much, much slower. Unless a government decides to bring a reference, there is not a very direct route to get to the Supreme Court of Canada quickly. Because of how the rules change so frequently, that has frustrated many litigation efforts because you want to bring a challenge to something, but the next week the rules are different. So that the case becomes moot quickly.

The other thing is that our courts have been extremely deferential to governments and have said, this is a complicated policy question and defer to government. While I agree that it is a complicated policy question and that the government should benefit from some level of deference, I think that there does need to be a bit more rigor brought to the burden that governments should bear in justifying some of these restrictions, especially now that we are two years in, we do not know when, or if this will end.

Cara Zwibel:

I do think the deference that courts usually give because there is an emergency, that has to be tempered a bit when the emergency is an extended and the goal posts that we are trying to reach, keep shifting and changing because there are new variants and new factors. I hope that the courts will start to be a bit more demanding when it comes to the kind of evidence that the governments need to justify the measures that they are taking.

"The deference that courts usually give because there is an emergency, that has to be tempered a bit when the emergency is an extended and the goal posts that we are trying to reach, keep shifting and changing..."

David Milosevic:

Speaking of measures, we see that in some provinces, the measures that are being contemplated seem to become even more strict than they have been. And of course, I am speaking of Premier Legault's proposal on taxing individuals in order to ensure that they become vaccinated. Does that raise any constitutional concerns?

Cara Zwibel:

Yes, I think that it is a fine more than a tax and it has a punitive element to it. You have to figure out what is the purpose? Is it really to compel people to be vaccinated? And if so, is that a valid purpose? At this point, the adult population in Quebec is at about 90% vaccinated, or close to that, and I know the pressure on the healthcare system is significant. But this constant placing of blame on the unvaccinated for everything that has gone wrong really misses the fact that these are policy choices that – governments are making.

Cara Zwibel (cont'd):

Governments are choosing to go about things in a particular way and they should have to justify them, especially because our normal democratic "checks and balances" are not really working the way they would. This is because a lot of these decisions are being made at the executive level under emergency powers. There is no debate or discussion in legislative assemblies about these things. I would think that there is very likely to be challenges if Quebec does go ahead with that tax. What a court will do, I am not sure. It will depend a lot on how the government frames it. Like I said before, I think it is constitutionally vulnerable. I also think it is probably just a very poor policy idea. I do not think it will be effective at doing much of anything, except for shifting attention away from government decisions onto individual decisions.

David Milosevic:

And I take it that it goes without saying that the CCLA is in no way opposed to public health intervention, vaccinations, any required public health response to COVID-19 that protects the population.

Cara Zwibel:

No, not at all. We understand what is going on here. We, ourselves, I am talking to you from home, we are working remotely and been for a long time. We recognize the need for things to be done to address the public health situation. But we are always asking, is this necessary? Is it proportional? Are there less restrictive things we could be doing? At what point does this cease to be exceptional and start to be a part of our normal existence? This is because a lot of the things that we have done are things that I would have previously thought were not possible in Canada.

Cara Zwibel:

We have orders that tell you how many people you can have in your home. That is pretty extraordinary. This has been the case on and off for close to two years. So I do think that we need to start treating this public health threat as a part of the matrix of threats that we face in Canada as a society. We have to balance it with other things and other interest. We cannot be focused just on COVID-19 and we have left out a lot of other things. We know that some of the policy responses to COVID-19 have had negative impacts. They might have had a positive impact in terms of flattening the curve, but they have had other impacts on people's mental health, including the loss that some students are having, because they've been out of school for a long time. So I think we need to be better about balancing some of those.



David Milosevic:

I am a litigator by profession, so I am used to looking at both sides of an issue. I have been at least personally struck observing the conversation on COVID-19 - how there has been some lack of dialogue, perhaps even hostility to having dialogue, which I found to be unusual. As I look at what is happening now, it seems to slowly be shifting, things that would not have been raised even six months ago, now people feel a little bit more comfortable having a dialogue about.

I saw Rasmussen poll in the United States, and the degree of support for interventions that seemed alarming from a constitutional position, was quite significant. I am not sure if the public has yet caught up with the type of dialogue that maybe we need to be having to make sure that we are adopting the kind of public policies that we are going to be comfortable with. It strikes me that the position of the CCLA at this point in time, is not a popular one. If anything, perhaps the less popular a civil liberties association, the more likely that it might be onto something. But if I could have you reflect for a moment, how have you seen the dialogue and the balance (or lack thereof) to that dialogue as we have gone through the COVID-19 pandemic?

Cara Zwibel:

sophisticated level. There does seem to be a sense that if you are not completely supportive of everything, then you are anti (-vaccinations) and you do not want any public health interventions, or you do not believe that the virus exists, or you are one of these things. I think that is not true when you get down to talking to people about it. I actually think there are more people out there who have questions and who are skeptical of some of these things, but they are not speaking out quite as much as they might, because there are very negative associations with it. I recently got an email after I was doing some media on the idea of mandatory vaccinations that suggested that things I said were a clear and present danger to our healthcare system.

Cara Zwibel:

There are a lot of emotions wrapped up in this, which I understand. It has been a difficult few years for everyone, regardless of your views on things. I do think we need to be able to talk about these things and recognize that we are making decisions that might live beyond the pandemic, and really ask whether this is something that we are comfortable having these kinds of restrictions, are we comfortable having these things around? Are we happy with how the system has worked in terms of who has been invested with the power to make these decisions for so long? The executive branch in some provinces, just the chief medical officer of health, an unelected official, a single individual who makes a lot of pretty substantial decisions. I think those are all things that we should be talking about. I do think we are starting to become a bit more comfortable talking about it now, but there is certainly still a lot of animosity towards anyone that I think brings up or questions, whether these things are appropriate.

David Milosevic:

Well, let's hope that interviews such as this, especially to an audience of litigation lawyers who are more accustomed to looking at all sides of an issue, can advance that discussion. Cara, I really would like to thank you on behalf of the OBA Civil Litigation section, for taking the time to explain some of these constitutional issues for us on behalf of the CCLA. Thank you so much.

Cara Zwibel:

My pleasure. Thank you.



INTERVIEW WITH

CHRISTINE VAN GEYN



Christine Van Geyn is an advocate for freedom in Canada and was appointed the Litigation Director of the Canadian Constitution Foundation in 2020. She is also the host of a national television program called 'Canadian Justice,' which features legal commentary about Canada's most polarizing legal issues and cases. She earned her undergraduate degree in Political Science and Ethics, Society and Law at the University of Toronto, Trinity College. She completed her J.D. at Osgoode Hall Law School and studied at New York University, School of Law.

David Milosevic:

Thank you for joining the OBA Civil Litigation section today.

Christine Van Geyn:

Thank you for having me.

David Milosevic:

As you know, this edition of the Civil Litigation Insider will be focusing on the public policy response to COVID-19. I would like to ask you a little bit about the topic of vaccine mandates. Before I do that, I would like to know if you could tell our readers a little bit about yourself and your work at the Canadian Constitution Foundation (CCF).



Christine Van Geyn:

I am the litigation director for the Canadian Constitution Foundation (CCF). We are a legal charity that works on issues of fundamental freedoms in Canada. We do that through public litigation, public interest litigation, as well as working with individuals who are having their civil liberties and fundamental freedoms impacted by government action. We also do that through public advocacy and education. This includes writing for the newspapers, doing media interviews about some of these issues, and I am the host of a television program that deals with many interesting legal and constitutional issues called “Canadian Justice.”

David Milosevic:

Apart from issues surrounding COVID-19, which we will be speaking about, can you give our readers some idea of the other types of issues that the CCF has been involved in advocating for?



Christine Van Geyn:

We do work related to freedom of expression. We just did a small freedom of expression case here in Ontario related to a homeowner who wanted to display a political flag on her property. We do work related to Section 7 – life, liberty and security. We are involved in a major constitutional case in British Columbia related to how patients are able to make choices about accessing healthcare outside of the government monopoly system. It is called the Cambie case in British Columbia (BC). It is a major piece of litigation at the BC Court of Appeal right now. We are also interested in freedom of religion issues. We do many Supreme Court interventions as well. We were just at the Supreme Court last week as an intervener in the test for public interest standing. It is a really interesting hearing, a lot of interveners – as you probably guess

David Milosevic:

I think that it is to say that a lot of the public policy responses to the pandemic have been controversial, on both sides. Before we begin, I would take it that the CCF is not in principle opposed to vaccination or public health interventions, just so we get that position clear on the record before we go on.

Christine Van Geyn:

Of course, I am very supportive of vaccination, I am vaccinated. I encourage people to get educated about vaccines, to speak to their physician about vaccines, if they have got any questions. Everyone at the Canadian Constitution Foundation is vaccinated. We support that choice. We think that that it is a smart choice for people to make. I also think that there are a lot of reasonable health measures that the government can make and has made throughout this pandemic. I also think that there are a lot of things the government has done that have been unreasonable during the pandemic. I do not think that is a controversial position to hold.

David Milosevic:

Is it fair to say that just because our ends are good and we all agree on the ends we are trying to achieve, it does not mean that we may not have reasonable questions about the means that we are using to pursue those?

Christine Van Geyn:

I think whenever there is a crisis, there is a tendency for governments to expand and take new powers. We should look at that really critically and question how long they have a justification for these new powers, and if they have the justification for them at all, and including sunset clauses in a lot of these things that the government is doing, we don't want to live this way forever. If you do not have people like the CCF pushing back against some of these things, you may end up living like this forever. You need to look at this stuff critically.

David Milosevic:

Speaking of looking at it critically, I understand that the CCF has been involved in some challenges to British Columbia's vaccine mandate regime. Can you tell us a little bit about that?

Christine Van Geyn:

Yes, so we have done a few pieces of litigation related to COVID-19 throughout the pandemic and the challenge in British Columbia, the petition in British Columbia, is our newest one.

Christine Van Geyn (cont'd):

Like many provinces across Canada, British Columbia has a proof of vaccination policy, which a lot of people refer to as a vaccine passport policy. This is a policy where you need to show a piece of documentation that proves that you have two doses of an approved vaccine in order to enter certain public places. Right now, I think it is movie theaters, gyms, restaurants, bars, some community centers. I think museums are also on that list in British Columbia. When the government announced that policy in British Columbia, they said they would not include any religious or medical exemptions, which on its face, we should be really concerned by.

I mean, we all know that there are medical reasons why people cannot get vaccinated or cannot get fully vaccinated. Those include things like adverse reactions to the first dose. To pretend that there is no valid reason someone cannot get vaccinated is irrational. We know that there are people who cannot get fully vaccinated. We are working with three individuals in British Columbia who cannot get fully vaccinated for medical reasons.

The first is a teenager who developed pericarditis, which is a form of heart inflammation following her first dose of the COVID-19 vaccine. The second is a woman in her thirties who received a COVID-19 vaccine first dose and developed a neurological condition called brachial neuritis that has resulted in a partial paralysis of her arm and shoulder. It is a form of nerve damage that her physician and her neurological specialist and her physiatrist, which is a nerve specialist, have all indicated is related to the vaccine. So very rare, very rare condition. It's a very rare vaccine related condition. The third applicant is a woman who has a number of very complex, lifelong and overlapping disabilities. She is mobility impaired, and she has been contraindicated for many drugs throughout her whole life and had adverse reactions to many drugs throughout her whole life. She is not vaccinated because of her concerns that a person with her number of disabilities and drug contraindications has a really unknown risk profile related to the COVID-19 vaccine.

"I think whenever there is a crisis, there is a tendency for governments to sort of expand and take new powers."

David Milosevic:

With the British Columbia passport regime, there are some recognized exemptions for medical conditions, is that right?

Christine Van Geyn:

Yes. So when the government announced this policy, they said there would be no medical exemptions. And for all practical purposes, when they said that, they were telling the truth. They did create a system for reconsideration because without such a system, it would be too constitutionally vulnerable under Section 15 (Equality) for the government to say people with certain disabilities cannot enter public spaces, and we are not willing to consider any medical exemptions at all. So they did create a system, but the system is so inaccessible that for all practical purposes, it doesn't exist.

David Milosevic:

If I could ask you just so we have a better idea, could you tell us a little bit, what is the system that is in place now, if I have a concern about the potential health effects for myself, what can I do in British Columbia to seek an exemption? And am I likely to get one?

Christine Van Geyn:

So we actually do not know about the likelihood of getting one, because we have no information about how many have been granted. I did submit a freedom of information request to the government for them to disclose how many medical exemptions have been approved, but I have not received any response yet. I have not received the information yet, so the way it works now, and this we are recording this on January 17th. Therefore, this is the current system; and it has changed a number of times.

Christine Van Geyn (cont'd):

Originally, the way it worked was you could submit as an individual, a request for reconsideration that would go to a public health panel. They would review it based on your medical information. Now, in order to obtain an exemption, this changed in November, you need to be on a closed list of medical contraindications.

So the applicant that we have who is a teenager with pericarditis; that is one of the approved conditions. However, even if she wants to obtain a medical exemption, she can only obtain one on an activity –by–activity basis. So if she wants to attend dinner next month, she could apply for an exemption. You have to explain why she cannot do this activity from home, and she may or may not be granted the exemption. But if she wants to attend an event tomorrow, say a funeral or something that happens with very little notice, we do not have any information about how long that process would take. It is unlikely that she could obtain approval for something on short notice. So this is for the person with the clearest cut, simplest, and most obvious entitlement to a medical exemption, because she cannot get a second dose, right?

"To pretend that there is no valid reason someone cannot get vaccinated is irrational. We know that there are people who cannot get fully vaccinated."

Christine Van Geyn (cont'd):

She really cannot. She developed a serious heart condition as a result of her first dose. Her physicians and public health all agree that she is not eligible for a second dose, but in order to participate in society, she needs to go through this bureaucratic process. Every time she wants to go to a restaurant, go to a movie with her friends, go to a museum, go to a pool, she could theoretically. If she wants to go to a gym or a pool on a recurring basis, apply for a recurring, reconsideration for that activity. But for one-off activities, it would be activity-by-activity that she needs to do this application. That is not a reasonable process for our other applicants who have more rare and complex conditions. They are not on the closed list that public health considers. So they do not even have a way of accessing a reconsideration. The door is closed to them completely.



David Milosevic:

Is there any indication how long this system may last in British Columbia?

Christine Van Geyn:

When they originally implemented it, it was supposed to end on January 31st. We know that that is not happening, and they have extended it out into the future. I do not recall if this right now exactly what the new end date is, but I think we can rest assured it will not end on that date. That has been the story throughout this pandemic, that these new restrictions they keep getting extended. And for these applicants we are working with, there is no end in sight.

David Milosevic:

I do not want us to stray too far afield from our areas of some expertise when it comes to legal issues. But to the extent that you can comment on it, in British Columbia, what is the underlying logic, behind having proof of vaccination policies? What is the underlying goal with these policies?

Christine Van Geyn:

So it is actually a really interesting question because we know the government has said in internal documents that they have circulated to employees, that the purpose of the vaccine passport policy is actually to incentivize vaccination. It is not to prevent the spread of COVID-19. Now we know that the vaccines can help in reducing spread. Before Omicron, the evidence seemed to be that there was somewhat less likelihood of contracting and spreading, or at least contracting COVID-19, if you were fully vaccinated. That does not seem to be the case now. I am not a scientist. This is based on my review of what has been going on in the past month and a half while Omicron has become the dominant strain, but it seems that Omicron is not stopped by vaccination at this point, the way Delta was.

David Milosevic:

It is interesting. It is an issue that from a legal point of view raises challenging questions. I think we would agree there is a legitimate interest on the part of the community to limit the spread of a communicable disease. The community has an interest in that. At the same time, individuals clearly have an interest in their own bodily, autonomy and choices of medical treatment, and those two interests are coming together on the issue of COVID-19. How does the CCF see the balance? This is more of a theoretical question, but how does the CCF see the balance that should be struck between community interest and individual rights on the issue of COVID-19?

Christine Van Geyn:

So it all goes to Section 1 of the Charter as well, right? In our view, if the goal is reducing spread, which the government has said, not incentivizing vaccination, but say it is reducing the spread of the virus, allowing medical exemptions, which the government says are medical conditions that would make you ineligible for vaccination, are quite rare. So accommodating a few people with really valid and good faith medical conditions and disabilities that preclude them from being vaccinated does not create an undue risk in our submission of spreading the virus. That is assuming spreading the virus is even the purpose of the vaccine passport policy, which the government has said it is not. That is actually a valid way of achieving that goal.

With respect to the other goal of the vaccine passport policy, which is incentivizing vaccination, I agree with the government that incentivizing vaccination is a valid public purpose. However, you cannot incentivize a person who is ineligible medically for a vaccination. You cannot achieve that goal by forcing a person to take a vaccine that will make them sick by their own physician's admission. So I do not think that the lack of exemptions in British Columbia could pass constitutional scrutiny.

David Milosevic:

Would it be fair to say that the CCF position sees the vaccine mandate, the system in British Columbia as too blunt in instrument that needs some nuance to accommodate individual needs and vulnerabilities, is that really the problem as the CCF sees it?

Christine Van Geyn:

Our position is we take issue with the vaccine passport policy. Generally, I think throughout Canada, we are at a stage in the pandemic where this policy is not going to be able to achieve the goals the government has set out. We take issue with this, but our narrow concern and our urgent concern in this particular case in British Columbia is the Section 7 and Section 15 rights of people who are really medically, unable to access the vaccine. So in this particular case, what we are asking for is a change to the policy that would create a functional system of exemptions for these individuals and people who are like them.

David Milosevic:

I have heard the argument, Christine, on the other side to say, well, vaccine mandates really limit or prevent access to public space, entertainment, venues, restaurants. At the end of the day, these are discretionary activities that people can undertake for entertainment, but they are not essential activities. So is it really that much of an infringement on an individual's right that they are limited from attending these types of spaces in order to incentivize them to get vaccinated? What do you say to the idea that this is really not a particularly onerous infringement on a person's rights, to be limited in that way?

Christine Van Geyn:

I point to the example of our one applicant. Her name is Veronica. The one who I was explaining is not vaccinated due to her complex and overlapping disabilities.

Christine Van Geyn (cont'd):

Veronica is mobility impaired, and the way she gets exercise, the only mobility she really has every day is through three hours of swim therapy that she does a day, which sounds like a huge amount of swimming. But if that is the only mobility you have, if that is the only time you move your body, three hours is not a lot of time. Veronica takes nerve blockers for the pain that she lives with. When she does swim therapy, it dramatically, and meaningfully reduces the amount of nerve blocking that she needs to have done. Because of the proof of vaccination policy, Veronica has lost access to the pool that she uses to manage her disability on a daily basis. She has had to increase the amount of nerve blocking treatment that she gets. I would say that that is a necessary service that she is being denied access to as a result of her medical condition, because of the actions of this government in British Columbia.



David Milosevic:

And a little bit more about the case Christine, what stage is the case at, and when is the next hearing. Can you tell us a little bit about it, where it is at procedurally?

Christine Van Geyn:

We filed the petition on December 22nd. We announced this case back in September, but our applicants have voluminous medical records, which I am sure all your readers know, take some time to put all together. So we filed December 22nd. We are now awaiting for the government to file their response. We are hoping that this will be heard sometime in March, but we do not have a certain date yet. We are waiting for a date and I will be announcing that on our website (theccf.ca) once we have a hearing date.

David Milosevic:

Are there any other COVID-19 related challenges or activities that the CCF is engaged in?

Christine Van Geyn:

We have expressed some interest in what the Quebec government has proposed with this fine or tax for unvaccinated individuals in that province. It is hard to comment on. I mean, I obviously have some very of broad concerns, and I think that there is a serious question about the constitutionality of that proposal, as well as its compliance with the Canada Health Act's 'principles of universality'. But before we have the details of that law or regulation and how it will be implemented, it is hard to say what we would do on that. I really have serious concerns, not just legally, but also morally and from a policy perspective.

David Milosevic:

Is there anything else you want to tell us about the CCF position on the public policy response to COVID-19? Do you have any views on what the role of the legal community should be in times of public crisis and fast moving legislative and executive responses to such crises? What role should lawyers have?

"As this pandemic progresses, the rationale for a lot of measures and a lot of restrictions on our rights and changes to the way we operate as a society, loses their strength. As we progress further and further as this virus becomes a part of our life, that has the potential to exist for years, we really need to speak about what the end point is for all of this."

Christine Van Geyn:

I think that we all have sort of a public education role that we can play in times like this. Everybody has different areas of expertise and technical expertise, and the pandemic has engaged so many different areas of law. I really appreciate when my colleagues in the field publish their thoughts and opinions about these different issues. I think we need to not speak with one voice. That has been a problem throughout this pandemic, that there has been a real condemnation of people asking questions or thinking and speaking critically of some government measures. There have been a few occasions where that criticism has been there, but there have been successful pushbacks, For example, when Doug Ford created last April this stay home law that allowed police to stop people on the street and demand identification and explanation about why they were out of their house.

Christine Van Geyn (cont'd):

There was pushback on that. I think a lot of people viewed that rightly as we did at the CCF, it is going way too far. As this pandemic progresses, the rationale for a lot of measures and a lot of restrictions on our rights and changes to the way we operate as a society, loses their strength. As we progress further and further as this virus becomes a part of our life, that has the potential to exist for years, we really need to speak about what the end point is for all of this.

David Milosevic:

Well, Christine, those are some really thoughtful comments and the OBA Civil Litigation section appreciates you for taking the time to explain the work of the CCF, in particular, in this British Columbia case. We thank you very much for your time speaking with us.

Christine Van Geyn:

Thank you so much for having me. It was a pleasure, David.

INTERVIEW WITH

RYAN O'CONNOR



Ryan O'Connor is a Partner at Zayouna Law Firm. He is an experienced litigator and maintains a varied advocacy practice representing clients in areas such as personal injury, insurance, employment, libel and defamation, and appeals. Ryan also has an interest in public affairs and public policy and advises clients in regulatory and compliance matters involving federal and provincial legislation. He appears in the media, commenting on legal matters in relation to this areas of practice.

David Milosevic

Good evening, Ryan. Thank you for joining the OBA Civil Litigation section today. As I'd mentioned to you, our current edition of the Insider is focused on the topic of vaccine mandates. Before we get into our topic, can you tell me a little about your practice?

Ryan O'Connor

Sure. So I'm a civil litigator by training and practice. I've developed more of a general civil litigation practice for the last few years. I've started off practicing predominantly in insurance and personal injury, a little bit of commercial, but my practice has evolved to include both that as well as libel and defamation employment law.



Ryan O'Connor (cont'd):

I have a small business advisory practice, which is regulatory in nature, to advise businesses on their regulatory obligations. Also, I have a public policy practice that relates to election financing. So there are some niches in there, but I'm a civil litigator.

David Milosevic

And Ryan, when it comes to your experience with the topic of vaccination mandates for COVID-19, what experience have you had with your clients in that area?

Ryan O'Connor

Well, I've represented businesses who have challenged local health units in terms of the issuance of instructions that have restricted the operation of their businesses, argued injunctions against such instructions and mandates. I've represented individuals in the employment context where they've sought injunctive relief against their employers. I'm currently representing several students from across the province in cases involving the universities, challenging their mandates. Some are seeking injunctive relief, and others are just seeking exceptions to their policies. I represent a wide variety of clients across various industry groups challenging mandates in their employment. If they've been put on leave or ultimately and unfortunately have been dismissed.

"...a lot of individuals are obviously interested in not only challenging the mandates, but seeking recourse..."

David Milosevic:

Before I ask you more specifically about some of those injunctions that you've sought or some of the employment challenges, are you finding that you're being approached by a lot of clients requesting opinions as to the strength of any challenge to a vaccine mandate?

Ryan O'Connor

For sure. We get inquiries in my office; I'd say literally dozens a week from individuals interested in challenging mandates or seeking counsel about their rights as employees when a vaccine mandate has been imposed in the workplace. So we do get a lot of inquiries and a lot of individuals are obviously interested in not only challenging the mandates, but seeking recourse if unfortunately they're placed on leave effectively, constructively dismissed, or God forbid, they're terminated - potentially wrongfully dismissed.

David Milosevic

Taking those two issues separately, Ryan, the injunctions and potential redress for termination of employment. Can you tell our readers a little bit about the injunctions that your office has sought and how the courts have generally approached providing in relief in the circumstances of people seeking exemption from mandates or challenging the mandates?

Ryan O'Connor

Well, some of those injunctions still have yet to be heard. We're seeing those unfold in cases involving post-secondary institutions. As you probably know, it's difficult to seek injunctive relief in an employment context. To get injunctive relief would be very specific to the situation and courts rarely award it because one can simply be compensated in terms of damages if they're wrongfully dismissed. So, we have commenced actions against certain institutions with respect to their post-secondary mandates. We have an injunction hearing coming up later on in February involving one of them, but yet, to my mind, no judicial decision on the propriety, these mandates, or whether or not injunctive relief should ultimately be issued in these cases. So there's a lot still unfolding. We represent several individuals who are seeking that relief, but they haven't yet gone to the courts.

David Milosevic

Just to follow up, before I get to the employment context, I do recall a few months ago there was an interim injunction granted by Justice Dunphy in a case involving hospital workers and I believe ultimately that injunction was not granted.

David Milosevic (cont'd):

Do you know anything specifically about that case that you could tell us about?

Ryan O'Connor:

Yeah, so you're discussing *Blake v. University Health Network (UHN)* where Justice Dunphy had issued an interim injunction on behalf of six employees who had sought urgent relief to suspend the application of the vaccine or terminate mandate. The University Health Network is a large hospital network in downtown Toronto. That matter was brought urgently before the court. There was a mix of unionized and non-unionized employees, plus other individuals who were subject to the mandate who hadn't yet retained counsel.



Justice Dunphy felt that it was prudent to issue an interim injunction in the context. So that essentially froze the employment status of those individuals who brought the application, as well as dozens of others who were subject to it who were seeking legal counsel until such a time as it was heard more completely, with counsel for the relevant unions, etc.

In that case, Justice Dunphy, for what I would argue were jurisdictional reasons, declined to extend that interim injunction to a more temporary or even permanent injunction, given the involvement of unionized employees in the labour relations process. So, that was a unique case. It was certainly from our perspective, the first instance where an interim injunction was issued against an employer or even any other type of mandate, since the beginning of COVID-19.

David Milosevic

Have there been any other injunctions that have been heard on their merits? I mean, I know you said this one was dismissed, likely on jurisdictional grounds. Have there been any that have been heard on the merits?

Ryan O'Connor

There was a case involving the amalgamated transit union in the TTC, and also a case involving a union representing employees in Mount Sinai Hospital. Those injunctions were heard simultaneously before Justice Akbarali prior to the holidays. And again, there were jurisdictional issues in that case – Justice Akbarali elected to allow the grievance process to unfold as opposed to issuing injunctive relief. The Unions were involved, and grievances had been issued on behalf of the employees. Her Honour felt it was prudent to allow that process to run its course, as opposed to having the court intercede under its residual jurisdiction to issue injunctive relief.

David Milosevic

Apart from these cases, we don't have any as of today where an injunction has been granted to prevent the implementation of vaccine mandate policies in Ontario?

Ryan O'Connor

Not from our knowledge, and we would've heard about it. I think that's partly due to the fact that these mandates are only now just being implemented and actually being enforced. We're seeing with lots of the post-secondary mandates, students are now at the point where they're being deregistered. So we're expecting that there will be more cases of this sort unfolding and winding through the courts with respect to employment-related mandates. Again, there's limited scope for injunctive relief. That is very case-specific again because you're looking at a situation where someone might be entitled to monetary relief. So we'll see probably fewer of those cases, but I'm expecting, and I'm involved cases, more injunctive relief cases as it relates to post-secondary institutions.

David Milosevic

Going now the employment context, Ryan, in terms of employees challenging termination on the grounds of failure to be vaccinated. What can you tell us about those cases?

"If the objective of these mandates is to promote a safe workplace, whether it be under the obligation of the Occupational Health and Safety Act or otherwise, that's really undermined when you impose such a policy, ultimately putting someone on leave or terminating if they haven't seen one of their coworkers in approximately two years."

Ryan O'Connor

We're seeing individuals from across industry groups being either placed on leave or being terminated for and not being able to meet the requirements of vaccination policy. We're also seeing it in the context where individuals have sought accommodation under the Human Rights Code. For example, they may have a medical reason why they're unable to be vaccinated. It may be a disability that they experience preventing them from being vaccinated, or they may have sincere faith-based reasons preventing them from accepting vaccination. So we are seeing individuals now being dismissed for cause or being placed on leave. We expect to see more of those cases coming up as more of these deadlines come up.

David Milosevic

When I think about a vaccine mandate policy by an employer, I would presume that the intention of the employer is to provide a safe workplace for its employees. But that community safety goal comes up against an individual's right to choose what kind of medical treatment is appropriate. Where do you see the line between the necessity to protect public health and the ability of an individual to choose medical treatment? Where is that line?

Ryan O'Connor

Well, I think I see two issues. I can certainly understand perhaps a broader policy justification for this, in the context of the healthcare field or in long-term care. But what we're seeing is these mandates are being applied universally to even individuals who have worked from home the entire pandemic, and I've even seen circumstances where individuals had accommodations to work from home prior to the pandemic, and they're still being subject to these mandates. If the objective of these mandates is to promote a safe workplace, whether it be under the obligation of the Occupational Health and Safety Act or otherwise, that's really undermined when you impose such a policy, ultimately putting someone on leave or terminating if they haven't seen one of their coworkers in approximately two years.

Ryan O'Connor (cont'd):

And then there's the other question about whether or not these mandates even have the impact that they intend?

We've seen particularly with the Omicron variant in the latter part of last year, and it seems to be abundantly clear that individuals' vaccination status is not a proxy for whether or not they can contract or transmit COVID-19. If that's the case, then there are other measures that I would argue an employer could take to promote safety in the workplace beyond simply using vaccination as a proxy for viral transmission. For example, an employer could adopt a rapid testing mandate that applies to all employees who were required to go into the workplace and perhaps exempt those who are entirely worked from home and never once seen their colleagues potentially during the course of the entire pandemic.

I think there are a lot of issues with just adopting a very broad-based approach to a vaccination mandate whether it be by refusing exemptions or by applying it to those who never once ever see a coworker because the kitchen of their home is now their office workplace.

David Milosevic

You've mentioned how the emerging evidence on Omicron is that vaccination won't necessarily prevent transmission, although it does appear to prevent particularly severe outcomes for the individual who's vaccinated. But what this tends to suggest is that the vaccination is really a personal choice as opposed to a public benefit choice unless we're talking indirectly about the strain on the hospital system, but in the employment context directly, what does this tell us about the propriety of employers, for example, now requiring boosters, or maybe requiring regular vaccination or perhaps prohibiting employees from attending at work who might be married to somebody who's unvaccinated. How far does the employer's control over the employee extend in the context of these types of public health measures?

Ryan O'Connor

Well, I think the more evidence we gather to suggest that vaccination status is not necessarily a proxy for transmission, the stronger argument that an employer has is that they have occupational health and safety obligations to other employees in the workplace.

But again, if they're not adopting a testing mandate - we've seen that in some policies that I've reviewed, where there's only a testing mandate for those who are exempted from the vaccination policy on Human Rights Code grounds or otherwise granted an exemption or an accommodation. Broadly speaking, employees who are vaccinated, who have to go to a physical workplace, have not been subject to testing requirements in certain industries.

If the employer has a tool at its disposal to screen for symptoms, which obviously would be important - someone is sick, don't come to work, and if you are sick, please leave work immediately and do rapid testing - and they're not employing those, it undermines the argument that the policy is reasonable.

Then you use the example of someone who is married to someone who is unvaccinated. Well, that person might be COVID-19 recovered and have natural immunity. On that point, I've not seen a single employer's policy or a post-secondary policy, broadly speaking, that allows consideration for natural immunity. I mean, the argument is that the science might still be evolving in that case, but it's not evolving in Europe. Vaccination passports in Europe generally have exemptions for those who are COVID-19 recovered. We're seeing that in some American states, but it hasn't been widely adopted in Canada. I don't quite understand why when the rest of the developed world at least acknowledges that it might be suitable in terms of preventing viral spread, just as much as vaccination.

David Milosevic

Have we seen any judicial decisions on the issue of termination of employees for failure to vaccinate and whether that termination was wrongful?

Ryan O'Connor

Well, we wouldn't have seen a trial yet. Most of these actions are just commenced because a lot of the policy deadlines have only recently passed. We have seen some arbitral jurisprudence in the labor relations context. There's a decision from the power workers union brought in November where the arbitrator issued an award and effectively found that the vaccine mandate imposed in that workplace was not reasonable. I believe there's still going to be some further adjudication. So that was the first known decision where a vaccine mandate was successfully challenged in the employment context, albeit that's in the unionized employment context, which may have some limited application to wrongful dismissal and constructive dismissal actions that'll be proceeding. So that's the first known case, again, from a couple of months ago. With actions just being commenced, we're probably not going to see a decision for some time yet on these issues.



David Milosevic

And I would take it that it goes though saying that in our discussion of the legal issues surrounding these mandates and how they'll be seen by the courts, whether potentially there may have been some overreach, in how the mandates were adopted. I would take it that you don't disagree generally with the need for public health measures or for vaccination for individuals to protect themselves from COVID-19?

Ryan O'Connor

Well, I think we've seen the great reduction in hospitalization that has resulted from the vaccination program. We've also seen high public uptake for vaccination. So this issue really only impacts a very small portion of the population. And then the question is if it only impacts a very small portion of the population, the population of Ontario is broadly protected from COVID-19, at least for those who are eligible to be vaccinated. We've focused protection on those who are elderly and infirm, and they're receiving boosters as necessary. Is it really necessary to adopt policies that may very well just be punitive in nature based on an individual's personal health choice, which could be wide-ranging? I think there's an unfortunate stereotype that plays out in the media and the public discourse that an individual who is unable to be vaccinated is some stereotyped person who might be engaging in political protests every weekend.

Ryan O'Connor

But that's not what I see in my practice. I've seen individuals who, for example, experienced disabilities and received medical documentation that indicated that disabilities prevented them from being vaccinated. And those medical exemption requests were still rejected by the institution. I've seen instances where individuals who have sincere faith-based reasons as to why they cannot be vaccinated. I don't think it's for you and I to adjudicate that. The Supreme Court is clear. It's not for you and I to adjudicate sincere faith-based reasons grounded in that religious belief or creed. Those persons in my view ought to be accommodated. And then that's a longstanding principle of human rights law in this province. I don't think we should be casting judgment on individual's personal medical choices, but I also don't think we should be painting them all with the same brush.

Every story that I hear is a diverse one. Some of the stories I hear are quite sad from individuals who have sought assistance from the medical profession to obtain notes and have either had difficulty doing so, despite good faith health reasons or having those notes rejected. With so much of the population being protected from adverse, or severe, outcomes from COVID-19 given the wide vaccination program, there has been remarkable success in this province elsewhere in Canada. We have to question really the reasonableness of the measures for the remaining very small portion of the population that is sometimes being punished for a personal medical choice



David Milosevic

The purpose of this issue of the Insider is to feature interviews with lawyers who have had questions about policies related to dealing with COVID-19, in particular, the mandate issue. I'm hoping that in this issue, we can have that discussion. As I say, in my introduction, as litigators, we're used to look at all sides of an issue and controversy doesn't necessarily disturb us. The more we look at a position that's not our own, the stronger our position gets. So we're professionally trained to do this. But can you reflect a little bit on how you've seen the public dialogue regarding COVID-19 policies during the course of the pandemic?

Ryan O'Connor

I think we've gone from we're all in this together in March 2020, to blaming one another for why we're still in this. And I say that with respect to those who are not in a position necessarily to be vaccinated – for whatever reason hearing the vitriol against that segment to the community, during the federal election from some of our political leaders. I think the discourse has gone from a very community-oriented discourse to one that is vitriolic. That's upsetting. I think this has been one of the most of divisive issues politically in last decade and there's different ways to have approached it. It's unfortunate that it's devolved to that.

I think there are very diverse perspectives that need to be respected with respect to the extent to which we should have restrictions, the extent to which individuals should have to be vaccinated as a condition precedent of participating in society. And, I think good faith people exist on both sides that have those discussions.

Ryan O'Connor (cont'd):

But there's also an extreme edge to that debate, and it doesn't permit us to have a lot of nuances. I think we should be cognizant that any policy we adopt in the circumstances in response to COVID-19, if it restricts the operation of a business, for example, we need to reflect whether it is actually impacting public health or public safety. Why was it that earlier in the pandemic, regulations existed prohibiting small retail stores from being open to in-person service when large, big box stores have always had an exception and have always been permitted with capacity limits to be open to in-person service?



There has been real hypocrisy with some of the rules. Why does the vaccine passport policy only apply to certain small businesses but not others? Why, in the context of a public health crisis of pandemic, do we shut down access to gyms but allow access to junk food at the corner store? We're getting to the point in the pandemic where with high vaccination rates, we've been told that there's hope on the horizon, we'll go back to normal, but it seems we just continue to evolve into restrictions. I think the response from each side has been a lot more political and I will repeat vitriolic than it has been through the course of the pandemic. And I think that's a real issue.

David Milosevic

Ryan, I'd like to really thank you for joining the OBA and giving some thoughts on these issues to our readers. It was a real pleasure to speak with you. If there's anything else you wanted to add in closing by all means I would invite you to do so.

Ryan O'Connor

When I reflect on the policies that we discussed, I do see a light at the end of the tunnel and I think COVID-19 policies would be better informed by both lawyers, as well as public policy leaders and members of the public having a real discussion about the impact on civil liberty, on rights, on the Charter of Rights. A lot of that has been missed in this notion of public safety. Public safety always has to be balanced against individual rights and individual freedoms that are constitutionalized in our country. There hasn't been a lot of nuanced debate, and unfortunately, the courts haven't really had a lot of opportunities to weigh in with their perspectives and input on it. It's incumbent upon us as a profession to have that discussion, to talk about the balance, to talk about the importance of rights and freedoms, and also to talk about to what extent safety should trump those. I welcome a continued, ongoing conversation about that because I think that's the path to better public policymaking.

David Milosevic

Thank you very much for that, Ryan. Hopefully, interviews such as this will begin to shift the public conversation in a more inclusive direction so that we can all come up with policies that are going to serve the community best and take into account everybody's legitimate concerns. So I thank you very much for helping contribute to that conversation.

Ryan O'Connor

It was a pleasure, David. Thank you for having me.

REMEMBERING IN-PERSON ORAL ADVOCACY

Cameron Fiske, C.S.
(Milosevic Fiske LLP)



When it comes to court proceedings, as I stated in a previous OBA article, I am a strong advocate for a hybrid in-person and virtual model post-pandemic.[1] In the pre-pandemic world, wait times and travel times prior to hearings could waste entire days and were expensive. Further, there are obvious benefits to attending hearings from home. By avoiding lengthy and challenging commutes to work or to court, many lawyers and court staff have been able to enjoy the benefits of having more time to spend with their families, as well as satisfying their needs for self-care and cultivating their psychological well-being.

However, there is another side to the story.



I miss in-person oral advocacy. It is now two years into the pandemic and I have grown increasingly nostalgic. My consumption of recent legal memoirs does not help. I highly recommend *Decisions* by Justice Jack M. Grossman, Marie Henein's *Nothing But the Truth: A Memoir*, Jack Batten's *Ross MacKay: The Saga of A Brilliant Criminal Lawyer*, and in French, former Québec Court of Appeal Justice Louise Maihot's *Les première!* on the first female Judges in Canada.

I loved the pre-pandemic world and in-person oral advocacy. I enjoyed driving to motions, hearings, trials, parking the car, walking into the courthouse, robing, and pleading in front of a Judge. I enjoyed finding little restaurants near the courthouse to have lunch and read over documents during a recess in the proceedings. Small town courts were my favorite. There are so many beautiful courthouses in Ontario. Kingston and Welland instantly come to mind. Not to mention that I enjoyed the informal chats with other lawyers in the hallways and with clerks in the courtrooms. Some of my best clients have come out of the relationships that I built with fellow lawyers who were complete strangers as we chatted prior the commencement of a hearing.

As for this new virtual world, it goes without saying that convenience is important. It does cut down on costs for clients.

As for this new virtual world, it goes without saying that convenience is important. It does cut down on costs for clients. However, a great lawyer is not only diligent at his or her work, but also has a significant network of contacts. It is so much easier to get things done when one has established a reputation and goodwill. Much of that goodwill comes from in-person interpersonal relationships that have been developed over time. With respect to networks and reputation, in my experience, opposing counsel are simply easier to deal with if they know who you are.[2] Networking is still possible in the virtual world, but much less satisfying.

We are living in a bubble. We are unaware that American courts have returned to some form of in-person oral advocacy. As an example, in 2021, both Ghislane Maxwell and Kyle Rittenhouse went on trial in-person in highly publicized criminal trials. The United States Supreme Court is sitting in-person even during Omicron.[3] This is not to downplay the public health crisis in Ontario and government mandates, which require us to operate remotely for the time being.

"I enjoyed finding little restaurants near the courthouse to have lunch and read over documents during a recess in the proceedings."

In a post-pandemic world, I would suggest that all appeals before the Supreme Court of Canada and provincial/federal appeal courts should presumptively be in-person. All interlocutory motions before provincial/federal appeal courts should presumptively be remote (where the matter is not being decided in writing). At the Superior Court level, any trial should presumptively be in-person, as well as any motion that could be dispositive of an action on a final basis. Any interlocutory motion should presumptively be remote. All Assignment Court hearings or criminal court set dates should presumptively be remote. When Self-Represented Litigants are involved, in-person proceedings should be the norm for reasons that I discussed in my last OBA article.[4] This may well balance the benefits of pre-pandemic life with pandemic life in a post-pandemic world.



Double murder defendants Erik (R) and Lyle Menendez (L) during a court appearance in Los Angeles, Calif., in 1992
(Source: Getty Images)

I cannot put my finger on what it is that is missing with Zoom. Discoveries, mediations, hearings, and even trials seem to go well in a remote setting. It is almost easier to make a pro-Zoom argument over a pro in-person argument.

If I can make an attempt at an unrefined and colloquial in-person argument, I revert back to my favorite American example of in-person oral advocacy. The Los Angeles based trial lawyer Leslie Abramson became well-known throughout North America for her representation of Erik Menendez at his first double murder trial in 1993-1994. For those who do not remember them, the Menendez brothers killed their parents on the night of August 20, 1989 in Beverly Hills, California. Erik Menendez was 18 at the time and his brother Lyle Menendez was 21.

Their murder trial in 1993-1994 marked the beginning of cameras in the courtroom, and it provided a glimpse into how litigators operated in court. We never did allow court proceedings to be broadcast in Canada, subject to rare exceptions, and therefore, most of my earliest memories of lawyers come from the United States. The Menendez trial was covered gavel to gavel by Court TV and I recall seeing glimpses of it on the nightly news.[5] It was pure theatre. The brothers often wore sweaters over suits to appear more youthful and Ms. Abramson came off as both a protective mother figure, and fearless courtroom advocate for Erik Menendez.

At trial, the brothers alleged that they had been sexually abused by their parents. The defence seemed implausible at first. However, Ms. Abramson's advocacy and the brothers own tearful testimony turned a long-shot into a near victory. The brothers almost convinced two juries that they had acted in what is known in California as "imperfect self defence." Approximately 12 of 24 jurors voted for manslaughter over murder (and few opted for first-degree murder). While they were ultimately convicted of murder at a second trial involving a single jury, Ms. Abramson's tireless, sincere, dramatic, and compelling advocacy, at least allowed the brothers to avoid the death penalty.[6]

Imagine that trial by Zoom. Ms. Abramson's personality would have been reduced by half, at least. Murder or manslaughter notwithstanding, the Menendez brothers' testimony would have less compelling.

Why do I think in-person is better? It is very hard to put it in words. After all, with Zoom, judges can see witnesses directly on the screen. It is more convenient. It is cost effective for clients.[7] But something is missing. Human beings are social animals. Being physically present in the courthouse provides one with a sense of both connection to the legal process and the history of the law that mobilizes one's attention and sharpens one's focus. It also increases memory recall through the shared human experience. In other words, it is easier to relate to someone in-person over Zoom, even if they are lying to you. That feeling of having a sense of connection to something greater than oneself is important. As human beings, we sense things about each other when we are in-person that we do not pick up on in a remote setting.

Hopefully, in-person oral advocacy and witness testimony will return, at least in some form. I miss it. Yet, my biggest fear is that I am the only one who misses it.

[1] Cameron Fiske, *Self-Represented Litigants Before and After the Pandemic*, online: Ontario Bar Association
<<https://www.oba.org/Sections/Civil-Litigation/Articles/Articles-2021/October-2021/Self-Represented-Litigant-before-and-after-the-Pan>>.

[2] Ted Flett, *Saying Farewell to My Foray in Solo Practice*, online: Ted Flett Law
<<http://tedflettlaw.com/2020/01/29/saying-farewell-to-my-foray-in-solo-practice/>>.

[3] Supreme Court of the United States, *Press Release on December 6, 2021*, online:
<https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_12-06-21>.

[4] *Fiske*, *supra* note 1.

[5] *CA v. Menendez* (1993), online: Court TV
<<https://www.courtstv.com/trials/ca-v-menendez-1993/>>.

[6] *Menendez v. Terhune*, 9th Circuit 2005 (US):
<<https://caselaw.findlaw.com/us-9th-circuit/1136971.html>>.

[7] Pulat Yunusov, *The Yunusov Question: Interview involving the Honourable Justice Myers*, online: YouTube
<<https://www.youtube.com/watch?v=AbXjhWyG9aE>>.

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