

On the Legality of Mask Policies

Since the implementation of [BC's mandatory mask order](#), many have raised questions about whether such policies are a violation of our *Charter* rights.

Here is an overview of the rules of constitutional law in Canada [that lead us to believe that the current BC law does not infringe on *Charter* rights].

First, a bit on the Law:

- BC's current law is made pursuant to the government's power under the Emergency Program Act
- The law requires a mask to be worn in any "indoor public space," which is defined to include businesses open to the public, public or community spaces (such as churches and gyms), public transportation, and the

government buildings (such as hospitals and courthouses).¹

- The law contains a number of exceptions, including persons less than 12 years of age, those unable to wear a mask due to mental or physical conditions, and those unable to put on or remove a mask without the assistance of another.
- Persons are also permitted to remove their mask for the purpose of eating or drinking, identifying themselves, communicating with a person with a hearing impairment, or receiving a service where removing the face covering is necessary.

¹ Here is the full list of what is included within the meaning of "an indoor public space": a building or structure that is used as a retail business, a service business, a restaurant, pub, bar or other business that prepares and sells food or drink, a mall or shopping centre, a pharmacy, a health professional's office, a place of public worship, a sport or fitness facility, a place in which a non-profit organization provides goods or services to the public, a place that provides cultural, entertainment or recreational services or activities, including a theatre, cinema, concert hall, arcade, billiard hall, museum, gallery or library, or a conference centre, community hall or other place that hosts public events; the indoor common area of an office building, a hotel, a hospital, a courthouse, or a post-secondary institution; a taxi, limousine, perimeter seating vehicle, perimeter seating bus, vehicle used for a commercial ride sharing service or other vehicle for hire; a public transportation vehicle; the indoor or sheltered portion or a terminal, station or other location at which persons load onto or unload from a public transportation vehicle, or wait to load onto a public transportation vehicle; an airport, heliport or seaplane terminal.

People concerned with the legality of the government's mandatory mask policy generally emphasise two sections of the [Canadian Charter of Rights and Freedoms](#):

- Section 2, which protects freedom of conscience and expression (among other things).
- Section 7, which protects the right to "life, liberty, and security of the person" from unjust deprivation.

When a person who would otherwise not choose to do so is required by law to wear a mask, the above *Charter* rights are probably engaged. It is important to note, however, that this is not the end of matter. Section 1 of the *Charter* subjects all rights to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Since the introduction of the *Charter* in 1982, the courts have developed a test for when limits on *Charter* rights are permitted under Section 1:

- First, the law must be **rationaly connected** to a **pressing and substantial government objective**.
- Next, the law must be **minimally impairing** – it must do no more than is necessary to achieve the objective.
- Finally, the law must be **proportional** – it must not clearly cause greater harm than good.

[Although only the courts can say for sure, our view is that the current mask mandate passes this test].

Since there is [empirical scientific evidence](#) that public mask use reduces COVID-19 transmission, the rational connection test is passed. For minimal impairment the mask mandate is limited to indoor public environments where spread is most likely, and contains exceptions for those who cannot wear a mask or for situations where removing a mask may be necessary. Therefore, the law is probably as careful and limited as it can be while still achieving its underlying purpose. For proportionality, although many people feel that being required to wear a mask diminishes their expression or bodily autonomy, the impact of the mandate is small, and limited to specific situations. Compared to the widespread social harm caused by disease transmission, a court would most likely find that the proportionality requirement has been met.

It should be remembered that the above is **not** the same as saying that the *Charter* does not apply because of the COVID-19 pandemic. Rather, the rights listed in the *Charter* have always been subject to limits – as long as those limits can pass the strict test outlined above. [Although only the courts can say for sure, our opinion is that the **current** law in BC is justified **right now**. A different law, such as one that applied to

outdoor spaces or did not have exceptions, or even the same law once a high level of vaccination has been achieved, could have a harder time passing the *Charter* test].

Finally, persons may be concerned with the legality of a private business choosing to enforce a mask mandate on its own premises, beyond the legal requirements. In this case, the *Charter* would not apply, with the relevant law instead being the *BC Human Rights Code*. The *Code* requires business to reasonably accommodate the different needs of persons based on “**protected grounds**” such as religious beliefs or physical/psychological disabilities. A mask policy that discriminated against someone on the basis of a protected ground (such as refusing to provide a service to a person with asthma, and not making a reasonable effort to accommodate their need – say by offering them a curbside service) might be illegal. However, this protection would not apply to a person who chooses not to wear a mask for reasons other than those protected by the *Code*. [More information about this can be found from the [Office of the BC Human Rights Commissioner](#).]

MASK REQUIREMENTS IN PUBLIC INDOOR SETTINGS

Subject to a \$230 violation ticket if you:

- Do not wear a mask in an indoor public setting, unless you are exempt
- Refuse to comply with the direction of an enforcement officer, including the direction to leave the space
- Engage in abusive or belligerent behaviour in relation to the face coverings order

Violation tickets can be issued by:

- Police officers
- Community safety unit
- Liquor and cannabis inspectors
- Gaming investigators
- Conservation officers