

## **Statement of Principles regarding Proof of Vaccination Programs<sup>1</sup>**

The BCCLA is focused on the relationship between people and the state, and the ways in which the state can limit or advance human rights and liberties. Throughout the COVID-19 pandemic, we have been urging government officials to ensure that the human rights of the most vulnerable are protected and have been mobilizing to ensure the expansion of human rights and safety for all. We believe that addressing the social determinants of health, such as race, class, gender, housing, colonialism, disability, age, working conditions, immigration status, are essential for a meaningful public health response to COVID-19.

At this point in time, the COVID-19 pandemic in Canada has resulted in over 27,000 reported deaths, tens of thousands of hospitalizations, an unknown number of cases of long covid, as well as many other harms to individuals and communities. These harms include reduced access to healthcare, devastating isolation and loneliness of long-term care and other congregate living residents, exacerbated risk of harm and death for those who use drugs, economic harm, unemployment, and increased intimate partner violence.

The COVID-19 pandemic has also resulted in restrictions of fundamental human rights and freedoms across Canada including lockdowns as well as border, business, and school closures.

In part because of the arrival of three Health Canada approved vaccines demonstrated to be safe and effective for people in Canada aged 12 years and over, governments have started to adjust public health measures to allow greater freedoms across the country by reducing liberty-restricting policies (e.g., gathering limits). These include proof of vaccination programs.

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<sup>1</sup> Other terms commonly used to refer to a means of confirming a person's COVID-19 vaccination or immunity status are vaccine passport, immunity passport, vaccine or vaccination certificate or card.

This statement of principles is directly concerned with one such program - that is, a state-imposed requirement for people to provide some specified form of evidence to prove that they have been vaccinated against COVID-19 in order to, for example, access modes of transportation, premises, venues, and services. This includes as well proof of vaccination programs that may arise in the context of employment.<sup>2</sup>

Given the expectation that proof of vaccination programs will continue to emerge across Canada, and that they will likely vary in substance and scope, the BCCLA has developed a series of core principles that we will use to evaluate such programs in light of our core commitments to equality, liberty, freedom, and justice. These principles are situated within clinical and legal realities that are articulated further below.

Broadly speaking, given the widespread and devastating impact of COVID-19, the effectiveness and safety of COVID-19 vaccines, and the absence of an equally effective and less intrusive alternative, programs requiring proof of vaccination can be consistent with civil liberties and human rights principles.

However, the permissibility of any such program will depend on a fact-specific, case-by-case inquiry, and changing circumstances. Further, any proof of vaccination must ensure that there are accommodations or exemptions in place for the people who are unable to be vaccinated for rare medical reasons, which are currently limited to those with a confirmed severe allergy and those with a diagnosed episode of myocarditis/pericarditis after receipt of an mRNA vaccine. In those circumstances, other mandatory precautions, like regular testing or working remotely, may be appropriate. Where a vaccine is not medically contraindicated, however, proof of vaccination programs can be warranted to protect public health and save lives in the midst of a deadly public pandemic.

The BCCLA affirms the following *principles*:

1. Proof of vaccination programs can protect people and communities from the transmission of COVID-19 and consequently can protect against loss of life, serious illness, and disruption of our health care system, education system, and the economy. These are pressing and substantial objectives for governments to pursue. Proof of vaccination programs by their very nature impair a variety of

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<sup>2</sup> In the context of employment, program requirements can vary, and can include, but are not limited to, requiring employees who refuse to provide proof of vaccination to stay home or requiring employees to provide proof of a negative COVID-19 tests and/or reassignments to protect the health and safety of other employees or members of the public.

constitutionally protected rights and freedoms. These include the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, including the right to life, liberty and security of the person limited only in accordance with the principles of fundamental justice; along with freedom of religion and conscience; freedom of thought, belief, opinion and expression; freedom of peaceful assembly; and freedom of association. On the other hand, these same freedoms can be protected by proof of vaccination programs. In addition, *Charter* rights and freedoms are not absolute and can be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Governments must be transparent with the public about the evidence they are using to inform any public health measures that restrict fundamental rights and freedoms, including proof of vaccination programs.
3. Governments must provide justifications for proof of vaccination programs, in particular demonstrating that it is reasonable to conclude that they are necessary, minimally impairing, and proportionate. In particular, they must demonstrate that the programs' objectives cannot be met by reasonable alternatives which are logistically feasible and still achieve the objectives of the program, e.g., negative test requirements.
4. Vaccine education and awareness programs must be developed and delivered by governments supporting community-led initiatives, particularly among communities with a warranted distrust in the health care system.
5. COVID-19 vaccines must be free and accessible to all persons in Canada for whom the vaccine has been approved by Health Canada, regardless of provincial/territorial health insurance plan eligibility, immigration or residency status. Any barrier to access a vaccine must be eliminated.
6. Where logistically possible and still achieving the objectives of the program, governments must provide alternatives to proof of vaccination programs (e.g. proof of twice-weekly or daily negative COVID tests for a work-based program or negative tests prior to travel for a transportation-based program).
7. Proof of vaccination programs must not discriminate against people who are unable to be vaccinated for rare medical reasons (namely allergy to ingredients and peri or myocarditis after the first dose). Proof of vaccination programs must ensure that there are accommodations or exemptions in place for the people who

are unable to be vaccinated for rare medical reasons. In those circumstances, other mandatory precautions, like regular testing or working remotely, may be appropriate.

8. Proof of vaccination programs must be accessible to people without government identification documents, including photo ID, or smartphone technology. In particular, governments must ensure that undocumented migrants and unhoused people are not excluded.
9. Proof of vaccination programs must avoid requiring Two-Spirit, Trans, and Non-Binary individuals having to use government ID and legal documents that contain their deadnames or inaccurate gender markers.
10. Proof of vaccination programs must comply with applicable privacy laws, including meeting the established federal/provincial/territorial standards for the protection of personal health information. Safeguards must be in place to protect the privacy of people's personal information.
11. Proof of vaccination programs must be designed and used in ways that maximize their public health benefits while minimizing their privacy impacts. Special consideration must be given to what information is encoded in the proof of vaccination, what information is collected by the organization issuing the proof of vaccination at the time of issuance and what entities are permitted to issue and implement the programs. Consideration must also be given to the technological implementation of the programs in order to minimize the collection, storage and analysis of personal data.
12. Personal information collected through proof of vaccination programs must be deleted as soon as public health officials either declare that the pandemic is over or when the programs are no longer necessary, minimally impairing, and proportionate.
13. The necessity, minimal impairment, and proportionality of proof of vaccination programs must be monitored on a regular and timely basis to ensure that they only remain in place so long as they are necessary, minimally impairing, and proportionate. As COVID-19 and our understanding of COVID-19 evolves, so too will the justifications for the limits they place on rights and freedoms.

These principles are situated within the following *clinical and legal realities*:

1. *COVID-19 can cause grave harms to those who are infected.* COVID-19 carries the risk of serious health consequences including death, temporary or permanent disability, and a condition known as “long COVID”.
2. *Widespread COVID-19 can cause grave harms to the healthcare system as well as those harmed by the healthcare system being overwhelmed by COVID-19 patients.* In earlier waves, provinces/territories had to contemplate invoking triage protocols that would have resulted in patients with conditions other than COVID-19 being denied or removed from critical care beds. Some people have had their medical treatment for conditions other than COVID-19 delayed or denied because the system was stretched too thin responding to COVID-19.
3. *Vaccines are safe.* The potential side effects of the COVID-19 vaccines are very rare and largely treatable. Even when not treatable, the risks of the vaccines are dramatically less than the risks of COVID-19. There are only two medical contraindications to the current vaccines (allergy to ingredients and peri or myocarditis after the first dose).
4. *Vaccines are effective.* COVID-19 vaccines reduce risk of infection and serious disease in the individual who receives the vaccine. Unvaccinated persons are at a higher risk than vaccinated persons of transmitting COVID-19 to other people.
5. *Proof of vaccination programs are not new.* While requiring proof of COVID-19 vaccinations is new, there is a long history of vaccine requirements in our country, including in schools and health care facilities.
6. *Vaccines reduce harms secondary to infections.* COVID-19 vaccines reduce the spread of infection in community. By doing so, they reduce demand on the healthcare system (particularly ICU/CCUs). They also reduce the need for public health measures that can compromise other sectors of society such as the economy and education and reduce the need for civil liberty restricting public health measures (e.g., lockdowns, border restrictions, school closures, and capacity-limits on businesses).
7. *Not everyone can be (fully) protected by a COVID-19 vaccine.* At present, no vaccines are approved for children under 12 years of age. There are two medical contraindications to the current vaccines (allergy to ingredients and peri or

myocarditis after the first dose). In addition, some individuals who are fully vaccinated do not receive full protection as they are immunosuppressed.

8. *Vaccines are now widely accessible in Canada; however, some people who want a vaccine still face challenges in accessing them. Barriers to access include a lack of paid sick leave and inadequate clinical settings for medically complex individuals who require extra precautions and measures in vaccine administration.*
9. *Some people are hesitant to access a COVID-19 vaccine because of warranted distrust of the healthcare system (especially racialized communities).*
10. *Some people choose not to get a vaccine because of their religious or conscientious beliefs.*
11. *Proof of vaccination programs increase the rates of vaccination in society.*
12. *Proof of vaccination programs restrict fundamental civil liberties for some individuals while they protect and promote fundamental civil liberties for others. For example, requiring proof of vaccination as a condition of air travel restricts the expression of freedom of conscience of those who decide not to get the vaccine. Requiring proof of vaccination as a condition of working in a long-term care facility restricts the liberty of workers who decide not to get the vaccine. That said, requiring proof of vaccination as a condition of air travel protects the liberty of individuals who are not able to get a vaccine or live with someone who is not able to get a vaccine to travel without coming into contact with individuals who choose not to get a vaccine. Requiring proof of vaccination as a condition of working in a long term care facility protects the life, liberty, and security of the person and equality of individuals who live in such facilities from being in contact with individuals who chose not to get a vaccine.*
13. *Proof of vaccination programs reduce risk of infection for those who cannot get vaccinated or for whom vaccination is less effective (e.g., immunosuppressed).*
14. *Proof of vaccination programs protect the healthcare system and those who need it and reduce the other harms secondary to higher infection rates.*
15. *Proof of vaccination programs do not force medical treatment on anyone. We have long championed personal autonomy and bodily integrity, neither of which are at risk under these programs.*

16. *Proof of negative COVID-19 test programs reduce the risk of transmission for those who are vaccinated and for those who cannot get vaccinated or for whom vaccination is less effective (e.g., immunosuppressed).*
17. *Unless they can be demonstrably justified, state-imposed proof of vaccination programs must not breach the right to freedom of conscience and religion and freedom of thought, belief, opinion and expression, freedom of peaceful assembly, and freedom of association.*
18. *Unless they can be demonstrably justified, state-imposed proof of vaccination programs must not limit the right to life, liberty, and security of the person except in accordance with the principles of fundamental justice. This means that the limits must not be, for example, arbitrary or grossly disproportionate.*
19. *Unless they can be demonstrably justified, state-imposed proof of vaccination programs must not deny any persons' equal protection and equal benefit of the law without discrimination.*
20. *State-imposed proof of vaccination programs must be demonstrably justifiable in our free and democratic society. This means that they must be rationally connected to a pressing and substantial government objective (i.e. saving lives, preventing serious illness, etc.), be minimally impairing (it must do no more than is necessary to achieve the objective), and be proportional (it must not clearly cause greater harm than good).*
21. *There are some particular legal considerations that arise when the government implements proof of vaccination programs in workplaces. In the employment context, workers' economic interests are impacted. In analyzing the reasonableness of government-imposed proof of vaccination programs in workplaces, the same constitutional principles apply as set out above. It is understood that economic rights generally have not been granted constitutional protection, except in limited circumstances.*