



CITADEL LAW CORPORATION

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Philip J. Dougan
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File No. 1502-1

September 10, 2021

To Whom It May Concern

Dear Sirs/Mesdames:

Re: Enforcement of Order of the Provincial Health Officer, Dr. Bonnie Henry

Canadian Society for the Advancement of Science in Public Policy v. Her Majesty the Queen in Right of the Province of British Columbia et al, SCBC Vancouver Registry File No. S210831

We represent the Canadian Society for the Advancement of Science in Public Policy¹ in the above noted action.

We are advised that many businesses are enforcing masking requirements for patrons entering their premises in a manner contrary to the Provincial Health Officer's order *Face Coverings (COVID-19)*, September 2, 2021 (the "Order"), a copy of which is attached to this letter.

Section 3(1) of the Order provides some notable exemptions from the masking requirement, including the following:

Exemption from use of face covering - visitors

3 (1) Section 2 (2) does not apply as follows:

...

(b) to a visitor who is unable to wear a face covering because of

(i) a psychological, behavioural or health condition, or

(ii) a physical, cognitive or mental impairment;

¹ <https://www.covidconstitutionalchallengebc.ca>



(c) to a visitor who is unable to put on or remove a face covering without the assistance of another person;

...

(i) while communicating with a person for whom visual cues, facial expressions, lip-reading or lip movements are essential.

If you fail to abide by these exemptions, you are discriminating against members of the public based on physical disability, which is contrary to s.8 of the BC *Human Rights Code* and may be liable for damages for such discrimination through proceedings in the BC Human Rights Tribunal.

We trust you will not engage in such unlawful behaviour.

Yours very truly,

CITADEL LAW CORPORATION

Per: 

POLINA H. FURTULA



ORDER OF THE PROVINCIAL HEALTH OFFICER

(Pursuant to Sections 30, 31, 32, 39 (3), 53, 54 (1) (h), 67 (2) and
69 *Public Health Act*, S.B.C. 2008)

FACE COVERINGS (COVID-19) – SEPTEMBER 2, 2021

The *Public Health Act* is at:

<http://www.bclaws.ca/civix/content/complete/statreg/08028/?xsl=/templates/browse.xsl>
(excerpts enclosed)

TO: BRITISH COLUMBIANS AND VISITORS TO BRITISH COLUMBIA EXCEPT TO PERSONS TO WHOM *THE COVID-19 VACCINATION STATUS INFORMATION AND PREVENTATIVE MEASURES ORDER* APPLIES WHEN THE PERSON IS IN A FACILITY

WHEREAS:

- A. On March 17, 2020 I provided notice under section 52 (2) of the *Public Health Act* that the transmission of the infectious agent SARS-CoV-2, which has caused cases, clusters and outbreaks of a serious communicable disease known as COVID-19 among the population of the Province of British Columbia, constitutes a regional event, as defined in section 51 of the *Public Health Act*;
- B. The presence of virus variants of concern in the Province, in particular the Delta variant, has heightened the risk to the population generally due to the highly transmissible nature of the Delta variant.
- C. Vaccines, which prevent or reduce the risk of infection with SARS-CoV-2, have been and continue to be made available to persons in British Columbia;
- D. While substantial progress has been made in vaccinating the population of BC, there remains significant numbers of unvaccinated people, resulting in increases in cases, hospitalizations and intensive care unit admissions. The increase in cases, hospitalizations and intensive care unit admissions is primarily, although not exclusively, amongst the unvaccinated.
- E. A person infected with SARS-CoV-2 can infect other people with whom the infected person is in contact;
- F. Unvaccinated persons are at higher risk than vaccinated persons of being infected with SARS-CoV-2 and of transmitting SARS-CoV-2 to other persons.

- G. Most infections occur between unvaccinated people, however, due to the highly transmissible nature of the Delta variant, and in view of the substantial numbers of people in BC who remain unvaccinated, vaccinated people continue to be likely to be exposed to the SARS-CoV-2 virus and to contract COVID-19.
- H. Evidence is emerging that, although to a lesser extent than unvaccinated people, people who are vaccinated can contract the SARS-CoV-2 virus and be a source of transmission of the SARS-CoV-2 virus to others, further perpetuating the transmission chain.
- I. Unvaccinated people are at a much higher risk of serious complications of COVID-19, which can result in hospitalization, admission to intensive care units and death. In addition to serious impacts on the health of a person who contracts COVID-19, high numbers of seriously ill people can overtax the health care system to the extent that the health care system can be compromised in its ability to deliver health care to other seriously ill people, further endangering public health.
- J. With the onset of fall, the province is entering a period of time when people will be gathering indoors more frequently due to cooler weather and the resumption of school and post-secondary education. An increase in indoor gatherings and events is anticipated also due to the relaxation of restrictions on gatherings and events which were relaxed on June 30. The gathering of people indoors facilitates and is expected to accelerate the transmission of SARS-CoV-2 within BC.
- K. Properly worn, face coverings are one measure that has been shown to suppress the transmission of the SARS-CoV-2 virus and to reduce the risk of contracting COVID-19. The non-wearing of masks by people gathering indoors, some of whom might be infected and some of whom might be susceptible to infection, interferes suppression of the SARS-CoV-2 virus.
- L. I recognize the effect of the measures I am putting in place to protect the health of the residents of BC and, with this in mind, have engaged and will continue to engage in a process of reconsideration of these measures, based upon the information and evidence available to me, including infection rates, sources of transmission, the presence of clusters and outbreaks, particularly in facilities, the number of people in hospital and in intensive care, deaths, the emergence of and risks posed by virus variants of concern, vaccine availability, immunization rates, the vulnerability of particular populations and reports from the rest of Canada and other jurisdictions, with a view to balancing the interests of the people affected by the Order, including constitutionally protected interests, against the risk of harm to residents of BC created by the presence of unvaccinated persons in BC.
- M. I further recognize that constitutionally-protected interests include the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*. These rights and freedoms are not, however, absolute and are subject to reasonable limits, prescribed by law as can be demonstrably justified in a free and democratic society. These limits include proportionate, precautionary and evidence-based restrictions to prevent loss of life, serious illness and disruption of our health system and society. When exercising my powers to protect the health of the public from the risks posed by COVID-19, I am aware of my obligation to choose

measures that limit the Charter rights and freedoms of British Columbians less intrusively, where doing so is consistent with public health principles;

N. In addition, I recognize the interests protected by the *Human Rights Code* and have taken these into consideration when exercising my powers to protect the health of the public from the risks posed by COVID-19.

O. I have reason to believe and do believe that

- (i) the presence of the public, operators, workers, post-secondary staff persons and students, in indoor settings where they intermingle with each other without wearing a face covering a constitutes a health hazard under the *Public Health Act*;
- (ii) in order to mitigate the risk of the transmission of SARS-CoV-2 arising from the presence of the public, operators and workers, post-secondary staff persons and students, in indoor settings where they intermingle without wearing a face covering, it is necessary for me to exercise the powers in sections 30, 31, 32, 39, 53, 54, and 67 (2) of the *Public Health Act* **TO ORDER** as follows:

THIS ORDER REPLACES MY ORAL ORDER MADE ON AUGUST 24, 2021 WITH RESPECT TO MANDATORY MASKS IN INDOOR PUBLIC SPACES.

Definitions

1 In this order:

“classroom” means an inside area in which a post-secondary institution provides instruction in an educational or training program;

"face covering" means either of the following that covers the nose and mouth of a person:

- (a) a medical or non-medical mask;
- (b) a tightly woven fabric;

but does not include a small or large clear plastic face shield

“fitness facility” means a place used for fitness activities, including a gym, fitness studio or dance studio;

"hotel" includes a motel, inn, bed and breakfast, hostel or other place in which rooms are maintained for the accommodation of the public;

“indoor public space” means the indoor area of any of the following but does not include a working area

- (a) a building or structure that is provided for the common use of all occupants and invitees of the building or structure, including lobbies, hallways, public bathrooms and elevators, that is used as
 - (i) a retail business,
 - (ii) a service business,

- (iii) an office building other than office, cubicle or other room in an office building to which a member of the public has been invited by an operator or worker for the purpose of receiving a service;
- (iv) a hotel,
- (v) a restaurant, pub, bar or other business that prepares and sells food or drink,
- (vi) a mall or shopping centre,
- (vii) a pharmacy,
- (viii) a fitness facility or a sport facility,
- (ix) a place in which a non-profit organization provides goods or services to the public,
- (x) 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
- (xi) a conference centre, community hall or other place that hosts public events;
- (xii) a courthouse; or
- (b) a taxi, limousine, perimeter seating vehicle, perimeter seating bus, vehicle used for a commercial ride sharing service or other vehicle for hire;
- (c) a public transportation vehicle;
- (d) the indoor or sheltered portion or a terminal, station or other location at which persons
 - (i) load onto or unload from a public transportation vehicle, or
 - (ii) wait to load onto a public transportation vehicle;
- (e) an airport, heliport or seaplane terminal.

“operator” in relation to an indoor public space means an owner or operator of the indoor public space;

"perimeter seating" has the same meaning as in the Passenger Transportation Regulation;

"perimeter seating bus" has the same meaning as in the Passenger Transportation Regulation;

"personal service" means a service provided by a person to or on the body of another person, and includes services provided at a barbershop, beauty parlour, health spa, massage parlour, nail salon, tattoo shop, sauna or steam bath;

“physical barrier” means a barrier which is designed, installed and maintained in accordance with WorkSafeBC guidance at <https://www.worksafebc.com/en/resources/health-safety/information-sheets/covid-19-health-safety-designing-effective-barriers?lang=en>;

“post-secondary space” means

- (a) a building or structure that is operated by a post-secondary institution and provided for the common use of all students and staff of the post-secondary institution, including lobbies, hallways, public bathrooms,
- (b) classrooms and laboratories and;
- (c) vehicles supplied or contracted by the post-secondary institution for the transport of students, if more than one student is present in the vehicle

"post-secondary institution" includes an entity that provides any of the following programs:

- (a) an educational or training program provided under
 - (i) the *College and Institute Act*,
 - (ii) the *Royal Roads University Act*,
 - (iii) the *Thompson Rivers University Act*,
 - (iv) the *University Act*, or
 - (v) the *Private Training Act*;
- (b) a program provided in accordance with a consent given under the *Degree Authorization Act*;
- (c) a theological education or training program provided under an Act;

“post-secondary staff person” means an employee, faculty, or other person acting on behalf of a post-secondary institution;

"public transportation vehicle" includes a bus, train or ferry;

"retail business" means a business that sells retail goods, including a grocery store, department store, clothing store, liquor or cannabis store, or sporting goods store;

"service business" means a business that provides a service, including

- (a) dry cleaning or laundry services,
- (b) insurance services,
- (c) banking services,
- (d) funeral services,
- (e) personal services,

- (f) accounting, legal, engineering or other professional services, or
- (g) the services of a tradesperson;

“sport facility” means a place used for sport activities, including a gym, ice arena, pool, gymnastics facility or indoor field.

“student” means a person who participates in an educational or training program provided by a post-secondary institution;

“visitor” means a person who visits an indoor public space or post-secondary institution, but does not include the operator of the indoor public space, a worker, a student or post-secondary staff person;

“worker” means an employee or person acting on behalf of an operator of the indoor public space who works in a workplace;

“working area” means an inside area of a workplace which is accessed by workers of the workplace and to which the public does not have unrestricted access;

“workplace” does not include a worker’s private residence

Face coverings required in indoor public spaces – visitors

- 2 (1) Except as provided under section 3 a visitor must wear a face covering, in accordance with subsection (2), while inside an indoor public space or a post-secondary space.
- (2) A face covering must be worn in a manner that covers the nose and mouth.

Exemption from use of face covering - visitors

- 3 (1) Section 2 (2) does not apply as follows:
 - (a) to visitor who is less than 12 years of age;
 - (b) to a visitor who is unable to wear a face covering because of
 - (i) a psychological, behavioural or health condition, or
 - (ii) a physical, cognitive or mental impairment;
 - (c) to a visitor who is unable to put on or remove a face covering without the assistance of another person;
 - (d) if the face covering is removed temporarily for the purposes of identifying the visitor wearing it;
 - (e) while inside a courtroom;
 - (f) while the visitor is consuming food or drink at a location designated for those purposes by the operator of the indoor public space, or post-secondary space and while seated;

- (g) while the visitor is participating in exercise activity or sport at a fitness facility or sport facility;
- (h) while the visitor inside a vehicle on a ferry;
- (i) while communicating with a person for whom visual cues, facial expressions, lip-reading or lip movements are essential.
- (j) the visitor is delivering a presentation or lecture, if
 - (i) there is a distance of two metres separating the visitor and a person attending the presentation or lecture, or
 - (ii) there is a physical barrier between the visitor and the persons attending the presentation or lecture.

Face coverings required in indoor public spaces – operators and workers

- 4** (1) Except as provided under section 5 an operator or worker must wear a face covering while inside an indoor public space in accordance with subsection (2);
- (2) Whether provided in an indoor public space or a working area, an operator or worker must wear a face covering
- (a) when providing a personal service to a client
 - (b) serving a customer in a restaurant, pub, bar or other business that prepares and sells food or drink
 - (c) serving customers in a retail business.
- (3) A face covering must be worn in a manner that covers the nose and mouth.
- (4) An operator or worker who does not wear a face covering due to the application of an exemption in section 5 must not provide a face to face service to a visitor unless there is a physical barrier between the operator or worker and the visitor.

Exemption from use of face covering – operators and workers

- 5** Section 4 (3) does not apply to an operator or worker as follows:
- (a) If the operator or worker is unable to wear a face covering because of
 - (i) a psychological, behavioural or health condition, or
 - (ii) a physical, cognitive or mental impairment;
 - (b) if the operator or worker is unable to put on or remove a face covering without the assistance of another person;
 - (c) if the face covering is removed temporarily for the purposes of identifying the operator or worker;
 - (d) while the operator or worker is consuming food or drink at a location designated for those purposes by the operator of the indoor public

- space and while seated;
- (e) the operator or worker is participating in an exercise activity or sport at a fitness facility or sport facility;
- (f) while inside a vehicle on a ferry;
- (g) while inside a courtroom;
- (h) while communicating with a person for whom visual cues, facial expressions, lip-reading or lip movements are essential.

Face coverings required in post-secondary spaces – students and post-secondary staff persons

- 6** (1) Except as provided under section 7, students and post-secondary staff persons must wear a face covering, in accordance with subsection (2) while inside a post-secondary space
- (2) A face covering must be worn in a manner that covers the nose and mouth.
- (3) A student or a post-secondary staff person who is not wearing a face covering as provided in subsection (2) must not be inside a post-secondary institution space.

Exemptions from use of face coverings – students

- 7** Section 6 (2) does not apply to a student as follows:
- (a) If the student is unable to wear a face covering because of
 - (i) a psychological, behavioural or health condition, or
 - (ii) a physical, cognitive or mental impairment;
 - (b) if the student is unable to put on or remove a face covering without the assistance of another person;
 - (c) if the face covering is removed temporarily for the purposes of identifying the student;
 - (d) while the student is consuming food or drink and while seated;
 - (e) while participating in physical activity organized by the post-secondary institution or at a fitness facility or sport facility;
 - (f) while communicating with a person for whom visual cues, facial expressions, lip-reading or lip movements are essential;
 - (g) if the mask is removed temporarily to engage in an educational activity that cannot be performed while wearing a mask, for example while actively playing a wind instrument;
 - (h) if the student is behind a barrier separating the student from other persons, for example a divider or cubicle;
 - (i) if the student is in a room by themselves;
 - (j) if the student is in a post-secondary space and no other students, post-

- secondary staff persons or members of the public are present.
- (k) the student is delivering a presentation or lecture if
- (i) there is a distance of two metres separating the student delivering the presentation or lecture and students and other persons attending the presentation or lecture, or
 - (ii) there is a physical barrier between the student delivering the lecture and the students and the persons attending the presentation or lecture.

Exemptions from use of face coverings – post-secondary staff persons

- 8** Section 6 (2) does not apply to a post-secondary staff person as follows:
- (a) If the post-secondary staff person is unable to wear a face covering because of
 - (i) a psychological, behavioural or health condition, or
 - (ii) a physical, cognitive or mental impairment;
 - (b) if the post-secondary staff person is unable to put on or remove a face covering without the assistance of another person;
 - (c) if the face covering is removed temporarily for the purposes of identifying the post-secondary staff person ;
 - (d) while the post-secondary staff person is consuming food or drink at a location designated for those purposes by the post-secondary institution and while seated;
 - (e) while participating in physical activity organized by the post-secondary institution or at a fitness facility or sport facility operated by the post-secondary institution;
 - (f) while communicating with a person for whom visual cues, facial expressions, lip-reading or lip movements are essential;
 - (g) if the post-secondary staff person is in a room by themselves;
 - (h) if the post-secondary staff person is in an office or other indoor area of a building or structure operated by the post-secondary institution and if no students or members of the public are present,
 - (i) If the post-secondary staff person is delivering a presentation or lecture or teaching if
 - i. there is a distance of two metres separating the post-secondary staff person and students or
 - ii. if there is a physical barrier between the post-secondary staff person and students.

Signage

- 9** Operators of indoor public spaces and post-secondary institutions must post a signage at the entrance to all indoor areas covered by this order notifying that face coverings are required to be worn in accordance with this order.

Order does not prevent further requirements

- 10** Nothing in this order prevents an operator or post-secondary institution from having additional requirements in relation to face coverings.

This Order expires at midnight on October 31st, 2021.

Pursuant to section 54 (1) (h) of the *Public Health Act*, and in accordance with the emergency powers set out in Part 5 of the *Public Health Act*, I will not be accepting requests for reconsideration of this Order.

You are required under section 42 of the *Public Health Act* to comply with this Order. Failure to comply with this Order is an offence under section 99 (1) (k) of the *Public Health Act*.

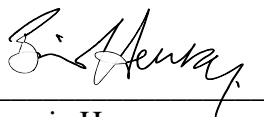
If you fail to comply with this Order, I have the authority to take enforcement action against you under Part 4, Division 6 of the *Public Health Act*.

You may contact me at:

Dr. Bonnie Henry, Provincial Health Officer
4th Floor, 1515 Blanshard Street
PO Box 9648 STN PROV GOVT, Victoria BC V8W 9P4
Fax: (250) 952-1570
Email: ProvHlthOffice@gov.bc.ca

DATED THIS: 2nd day of September 2021

SIGNED:



Bonnie Henry
MD, MPH, FRCPC
Provincial Health Officer

DELIVERY BY: Posting to the BC Government the BC Centre for Disease Control websites.

Enclosure: Excerpts of the *Public Health*

ENCLOSURE

Excerpts of the *Public Health Act* [SBC 2008] c. 28

Definitions

1 In this Act:

"health hazard" means

- (a) a condition, a thing or an activity that
 - (i) endangers, or is likely to endanger, public health, or
 - (ii) interferes, or is likely to interfere, with the suppression of infectious agents or hazardous agents, or
- (b) a prescribed condition, thing or activity, including a prescribed condition, thing or activity that
 - (i) is associated with injury or illness, or
 - (ii) fails to meet a prescribed standard in relation to health, injury or illness;

When orders respecting health hazards and contraventions may be made

30 (1) A health officer may issue an order under this Division only if the health officer reasonably believes that

- (a) a health hazard exists,
 - (b) a condition, a thing or an activity presents a significant risk of causing a health hazard,
 - (c) a person has contravened a provision of the Act or a regulation made under it, or
 - (d) a person has contravened a term or condition of a licence or permit held by the person under this Act.
- (2) For greater certainty, subsection (1) (a) to (c) applies even if the person subject to the order is complying with all terms and conditions of a licence, a permit, an approval or another authorization issued under this or any other enactment.

General powers respecting health hazards and contraventions

31 (1) If the circumstances described in section 30 [*when orders respecting health hazards and contraventions may be made*] apply, a health officer may order a person to do anything that the health officer reasonably believes is necessary for any of the following purposes:

- (a) to determine whether a health hazard exists;

- (b) to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard;
 - (c) to bring the person into compliance with the Act or a regulation made under it;
 - (d) to bring the person into compliance with a term or condition of a licence or permit held by that person under this Act.
- (2) A health officer may issue an order under subsection (1) to any of the following persons:
- (a) a person whose action or omission
 - (i) is causing or has caused a health hazard, or
 - (ii) is not in compliance with the Act or a regulation made under it, or a term or condition of the person's licence or permit;
 - (b) a person who has custody or control of a thing, or control of a condition, that
 - (i) is a health hazard or is causing or has caused a health hazard, or
 - (ii) is not in compliance with the Act or a regulation made under it, or a term or condition of the person's licence or permit;
 - (c) the owner or occupier of a place where
 - (i) a health hazard is located, or
 - (ii) an activity is occurring that is not in compliance with the Act or a regulation made under it, or a term or condition of the licence or permit of the person doing the activity.

Specific powers respecting health hazards and contraventions

- 32** (1) An order may be made under this section only
- (a) if the circumstances described in section 30 [*when orders respecting health hazards and contraventions may be made*] apply, and
 - (b) for the purposes set out in section 31 (1) [*general powers respecting health hazards and contraventions*].
- (2) Without limiting section 31, a health officer may order a person to do one or more of the following:
- (a) have a thing examined, disinfected, decontaminated, altered or destroyed, including
 - (i) by a specified person, or under the supervision or instructions of a specified person,
 - (ii) moving the thing to a specified place, and
 - (iii) taking samples of the thing, or permitting samples of the thing to be taken;
 - (b) in respect of a place,
 - (i) leave the place,

- (ii) not enter the place,
 - (iii) do specific work, including removing or altering things found in the place, and altering or locking the place to restrict or prevent entry to the place,
 - (iv) neither deal with a thing in or on the place nor dispose of a thing from the place, or deal with or dispose of the thing only in accordance with a specified procedure, and
 - (v) if the person has control of the place, assist in evacuating the place or examining persons found in the place, or taking preventive measures in respect of the place or persons found in the place;
- (c) stop operating, or not operate, a thing;
 - (d) keep a thing in a specified place or in accordance with a specified procedure;
 - (e) prevent persons from accessing a thing;
 - (f) not dispose of, alter or destroy a thing, or dispose of, alter or destroy a thing only in accordance with a specified procedure;
 - (g) provide to the health officer or a specified person information, records, samples or other matters relevant to a thing's possible infection with an infectious agent or contamination with a hazardous agent, including information respecting persons who may have been exposed to an infectious agent or hazardous agent by the thing;
 - (h) wear a type of clothing or personal protective equipment, or change, remove or alter clothing or personal protective equipment, to protect the health and safety of persons;
 - (i) use a type of equipment or implement a process, or remove equipment or alter equipment or processes, to protect the health and safety of persons;
 - (j) provide evidence of complying with the order, including
 - (i) getting a certificate of compliance from a medical practitioner, nurse practitioner or specified person, and
 - (ii) providing to a health officer any relevant record;
 - (k) take a prescribed action.
- (3) If a health officer orders a thing to be destroyed, the health officer must give the person having custody or control of the thing reasonable time to request reconsideration and review of the order under sections 43 and 44 unless
- (a) the person consents in writing to the destruction of the thing, or
 - (b) Part 5 [*Emergency Powers*] applies.

General emergency powers

54 (1) A health officer may, in an emergency, do one or more of the following:

(h) not reconsider an order under section 43 [*reconsideration of orders*], not review an order under section 44 [*review of orders*] or not reassess an order under section 45 [*mandatory reassessment of orders*];

(2) An order that may be made under this Part may be made in respect of a class of persons or things, and may make different requirements for different persons or things or classes of persons or things or for different geographic areas.

Offences

99 (1) A person who contravenes any of the following provisions commits an offence:

(k) section 42 [*failure to comply with an order of a health officer*], except in respect of an order made under section 29 (2) (e) to (g) [*orders respecting examinations, diagnostic examinations or preventive measures*];