What’s Your Status? 
A legal overview of a return to in-person singing
Land Acknowledgment
Disclaimer

This presentation is a general overview of the relevant law as of June 2021 and is for educational purposes only. It does not constitute legal or professional advice or opinion. Organizations are encouraged to seek specific legal advice on their specific legal issues.

Participation in this session does not create any solicitor-client relationship.
Purpose of Presentation
Outline

- Overview of the legislative framework
- Some legal history
- Predictions for the future
- Practical considerations
- Time for questions
CLINK! CLINK!

Yes, I agree...it takes courage to sail in uncharted waters.
Key assumptions

- Choral singing carries an elevated risk for transmitting Covid-19
- Some layers of protection against Covid-19 (distancing, masking) are difficult to implement in certain choral environments
- Vaccinations against Covid-19 are widely available and accessible
- Vaccinations are safe and effective
- Some people have bona fide health conditions or genuinely held* religious beliefs that would prevent them from getting vaccinated
- Rapid testing is not commercially available across Canada
- The science and guidance in this area is changing rapidly.
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<td>Economic vehicles</td>
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Invasiveness of Precautionary Measures

- Hand washing
- Distancing
- Masking
- Routine Testing
- Vaccinations
Legislative Framework

- Public Health Acts, Orders and emergency regulations
- Workers’ Compensation Acts
- Human Rights Codes
- Privacy & Protection of Personal Information acts
The Canadian approach

• “Health choices – to smoke, to exercise, to sleep, to take pills or see a doctor have traditionally been personal choices. Health care choices are generally viewed as private and personal, made with the assistance of individually chosen professionals within a relationship cloaked in privacy and protections for confidentiality. The choices that govern individual decisions may include the considerations the employer thinks appropriate, or they may not. This may be due to clear choices the employee makes, or to indifference, neglect, fear, lack of knowledge or a lack of resources.”

• Peace Country Health v United Nurses of Alberta, 2007 CanLII 80624 (AB GAA)
• “There is a special privacy interest which attaches to medical information. The doctor-patient relationship is one of the most private and medical information should receive no broader distribution than is reasonably necessary.”

• “Confidentiality of medical records is a basic right to human dignity. Restoring and supporting dignity and the accompanying personal confidence is a therapeutic part of recovery, rehabilitation and adapting to life with a disability.”
  - United Steelworkers of America, Local 7884 and Fording Coal Ltd., [1996] B.C.C.A.A.A. No. 94
• “An employer can only intrude upon the privacy of an employee if it has a legitimate business purpose tied to the employer-employee relationship which justifies the intrusion.”
  • Victoria Times-Colonist and Victoria Newspaper Guild, Local 233 (unreported decision, Feb. 12, 1986, Hope)
6 (1) An organization must not
   (a) collect personal information about an individual,
   (b) use personal information about an individual, or
   (c) disclose personal information about an individual.

(2) Subsection (1) does not apply if
   (a) the individual gives consent to the collection, use or disclosure,
   (b) this Act authorizes the collection, use or disclosure without the consent of the individual, or
   (c) this Act deems the collection, use or disclosure to be consented to by the individual.
PIPA – Consent & Reasonableness

• Individual giving consent must be told the purpose for the collection and the name and contact info for a person in the organization who can answer questions about the collection.

• Sometimes consent is implied – when the purpose is obvious to a reasonable person and the individual voluntarily discloses the information.

• Organizations may only collect information that a reasonable person would consider appropriate in the circumstances.

• Organizations must not, as a condition of providing a product or service require disclosure of more information than is necessary to provide the product or service.
Workers’ Compensation Act (BC)

• Employers must ensure the health and safety of all workers working for that employer and any other workers present at the workplace. That includes an obligation to remedy hazardous workplace conditions.

• Workers, too, must take reasonable care to protect their own health and safety and that of any others their actions might affect. Work must not pose “undue risk of injury or occupational disease” to any person.

• Workers have a right to refuse unsafe work.
Human Rights Code (BC)

8 (1) A person must not, without a bona fide and reasonable justification,
(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of the ...religion, ... physical or mental disability, ...of that person or class of persons.

(See also s. 13 re employment)
Vaccinate or Mask – healthcare cases

• Employers required employees to be vaccinated against influenza or wear masks during flu season

• Decisions vary, in large part due to the amount of scientific evidence presented

• In one case, purpose was to increase vaccination rates rather than to increase safety and there was limited data supporting masks as limiting virus transmission – policy not upheld

• In another case, evidence was that the vaccine was a complete mismatch in some years, providing little to no protection, but vaccinated workers still didn’t have to mask – policy not upheld.

• Conversely, where a medical officer of health recommended vaccines to control a known outbreak, the policy was upheld. In another case, the arbitrator was satisfied with evidence of some increased patient protection from the policy.
Precautionary principle

• “An important recommendation of the Commission of Inquiry chaired by Justice Archie Campbell in the wake of the SARS outbreak of 2003 - an outbreak of a virus related to COVID-19 - is that the precautionary principle is to be put into action in order to prevent unnecessary illness and death. As explained by Justice Campbell, this principle applies where health and safety are threatened even if it cannot be established with scientific certainty that there is a cause and effect relationship between the activity and the harm. The entire point is to take precautions against the as yet unknown...”

  • Ontario Nurses Association v. Eatonville/Henley Place, 2020 ONSC 2467
Precautionary Principle continued...

- The Board recognizes that we are in a dynamic and evolving situation where the facts and risks must be constantly reevaluated in light of new and emerging evidence and experience. Information on how to best control the virus is subject to constant revaluation and possible change but reasonable precautions must be taken based on the available evidence at this time. At present, it clearly appears that the risks of not masking at all would outweigh the risks of masking.

Drug testing cases, e.g. Irving (SCC)

- Random drug testing is only permitted:
  - Safety sensitive work environment AND
  - Demonstrated use/abuse problem in the workplace

- Reason is the significant invasion of privacy: In this case, the expected safety gains to the employer were found by the board to range from uncertain to minimal, while the impact on employee privacy arising from the taking of a breath sample was severe.
Predictions for the Future
Practical Application

The Australia Coronavirus Choir

And again!!
From the beginning!
But this time with looser restrictions.

Once more, with feeling...

Cartoon used with permission of Mark David
### Summary of considerations

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<th>GOOD FAITH</th>
<th>Your organization’s constituting / governing documents</th>
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<th>Bodily integrity / free consent</th>
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<td>Available relevant science</td>
<td>Rehearsal environment, availability and efficacy of less invasive means</td>
<td>Demographics – are your singers or audience members particularly vulnerable?</td>
<td>Your organization’s values and purpose</td>
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<tr>
<td>• About Covid-19 generally and specific to increased risks in choral singing</td>
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<td>• Right to sing or invitation to participate?</td>
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- **Community specific data**
- **Minimal intrusion to achieve a bona fide, legitimate, reasonable purpose**
So you are considering collecting vaccination status…

• What data do you want (Doses? Type? Date?) and in what form?
• Why?
• What will you do with the data?
• What if you don’t get the data you want?
• What will you do if individuals refuse to consent or revoke consent?
• How will you manage the data? (storage, destruction, security…)
• To whom, if anyone, will you disclose the data (either specific or in aggregate)?
• Consequences of not collecting (fear, etc)
• Timeframe for review of your plan/policy
• Resources to manage all of this
So you’re considering implementing a vaccination policy...

- Everything from the ‘collection’ slide PLUS...
- How will you address requests for accommodation? (proof, assessment, format of accommodation – masks, hybrid rehearsals...)
- What will you do about people who do not require accommodation but refuse to comply with the policy?
  - Are your members litigious?
- Are all aspects of the policy rationally connected to the reasonable purpose?
Implementing the policy - KVP Test

• Test applies in unionized environments but is a helpful guide for any policy

• For a rule unilaterally put into place by an employer:
  1. it must not be inconsistent with the collective agreement.
  2. it must be **reasonable**.
  3. it must be **clear and unequivocal**.
  4. it must be **brought to the attention** of the employee affected before the company can act on it.
  5. the employee concerned must have been **notified that a breach** of such rule could result in his discharge if the rule is used as a foundation for discharge.
  6. such rule should have been **consistently enforced** by the company from the time it was introduced.
Waivers

• Questionable whether they provide the protection you seek
• Clear, plain language
• Opportunity to review and consider before making decisions
• Optics / ethics
Venues

• Somewhat out of scope for this presentation BUT…
• Do not be content to let what a venue requires or permits be your guide.
The Aftermath

- Complaints
  - Human Rights
  - Workers’ Compensation
  - Privacy
  - Civil claims
- Legislated bars to recovery
- Publicity / Image
Insurance

• Difficult to make broad statements: READ YOUR POLICY
• Watch for ‘limitations and exclusions’ that reference known health risks, communicable diseases, acts of God / force majeure, or anything specific to Covid-19
Review

• Whatever decision you make, don’t forget to review it regularly. Everything is changing rapidly and what society used to accept, or not, may change based on calculations of risk and market conditions.

• Flexibility vs certainty