

Canadian universities must act now to protect their communities

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As COVID-19 infections continue to surge among unvaccinated populations, a large and growing number of [U.S. universities are requiring proof of double vaccination for students](#), staff and faculty returning to campus in September. With the notable exceptions of [Seneca College](#), and some university residences, Canadian post-secondary institutions have not mandated vaccinations.

The decision not to mandate vaccination appears to be based on an assumption that the [Canadian Charter of Rights and Freedoms](#) protects the rights of unvaccinated individuals to participate without restriction in the public realm. This assumption is based on a serious misunderstanding of the *Charter*. In fact, there is a sound constitutional basis on which universities can require proof of vaccination status, during a pandemic, as a condition of enrolment.

The culture fostered by the *Charter* has rightly heightened our appreciation of, and sensitivity to, individual choice and autonomy. It is understandable that people would assert the right to make such a personal decision as whether to be vaccinated. In a pandemic, however, one cannot expect that choice to be without consequence.

As a preliminary matter, it is unclear whether the *Charter* would even be engaged by a university policy requiring proof of vaccination. An [early Supreme Court of Canada decision](#) held that universities are not governmental actors and therefore the *Charter* does not apply to them. Subsequent cases muddy these legal waters. In any event, even if universities are bound by the *Charter*, that hardly settles the question.

There are several rights that could be on the table. Rights to liberty and security of the person could be implicated by a policy that seems to coerce people into getting vaccinated. Freedom of religion might be invoked, but only where the opposition to vaccination is rooted in genuine religious beliefs about vaccination per se.

The *Charter* also guarantees freedom of conscience. This is an underdeveloped area of *Charter* law, but it might be relevant where a person has a sincerely held belief that the vaccination is harmful to their health or, in some other way, deeply wrong. The *Charter's* privacy protections may be implicated, although this would require determining whether one has a reasonable expectation of privacy in one's vaccination status in all contexts.

Finally, the *Charter* guarantees equality linked to protection against discrimination on certain grounds such as race, gender, and sexual orientation. This right does not appear to be violated by a policy of proof of vaccination.

While there may be some residual issues with ensuring access to vaccination, there is little evidence that would suggest discrimination on the basis of protected grounds. If anything, most governments have tried to prioritize access. To comply with the *Charter*, such access issues could be remedied by having on-campus vaccination clinics — which a number of universities are already doing.

Except for equality, the implicated rights all involve an element of choice. There is little question that a policy of forced vaccination, per se, would conflict with at least some rights. It is far less obvious that the right to access campus without proof of vaccination is equally protected. That is particularly so where being unvaccinated poses a risk to universities' ability to curb the virus' spread. A bare right to choose not to be vaccinated — which the *Charter* likely does protect — does not also provide constitutional immunity against all consequences flowing from that decision.

The *Charter* does not protect absolute rights. All of its rights and freedoms are subject, through section 1, to reasonable limits that can be demonstrably justified in a free and democratic society. Protecting the life and health of community members in a pandemic, including those who are particularly vulnerable, is precisely the kind of “reasonable limit” that this section contemplates. Few things threaten any community more than contagion and disease or, in the case of COVID-19, the harsh public health measures they have necessitated. Situations posing a grave risk to public health and well-being represent a risk to the very community which the Constitution seeks to preserve.

Much remains unknown about the next phase of the COVID-19 pandemic, including the depth of impact new variants will have on already beleaguered peoples, economies, and communities. But here is what we do know. [Vaccination](#) is the most effective tool we have to save lives and get back to a semblance of “normal.” The pandemic now rages most fiercely amongst those who are not fully vaccinated, particularly those [aged 18-39](#).

Furthermore, the burden of serious illness and death from the spread of COVID-19 falls most heavily on those who are [immunocompromised](#) or otherwise vulnerable. Studies from the last two years increasingly show [shadow pandemics](#), with tentacles of harm that have had disproportionate impacts on [marginalized and racialized communities](#).

Simply put, we have yet to encounter a persuasive argument that universities do not have the authority to mandate vaccinations as a requirement of access, allowing for exceptions for those who cannot be vaccinated for medical reasons. Prioritizing the unfettered rights of unvaccinated individuals to, potentially, infect others is neither the right solution, nor one compelled by the *Charter*. Canadian universities must act now to protect their communities.

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