

November 14, 2022

Grounding the Alberta Human Rights Act and the Proposal to Protect Vaccination Status

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Legislation Commented On: *Alberta Human Rights Act*, [RSA 2000, c A-25.5](#)

The *Alberta Human Rights Act (AHRA)* has been in the news lately as a result of Premier Danielle Smith’s announcement – consistent with her platform for leadership of the United Conservative Party and its promise of no more lockdowns – that she would seek an amendment to the *AHRA* to add vaccination status as a ground protected from discrimination ([here](#), [here](#) and [here](#)). In her [mandate letter](#) to Minister of Justice Tyler Shandro, released on November 10, 2022, Smith included as her second priority – second only to a Sovereignty Act – the instruction to “take any necessary legislative or regulatory steps to prohibit discrimination on the basis of COVID-19 vaccination and/or booster status.”

If Minister Shandro decides that an amendment to the *AHRA* is necessary, and the amendment is passed by the legislature, people could bring complaints to the Alberta Human Rights Commission if they were denied employment opportunities, housing, or services customarily available to the public because they were not vaccinated against COVID-19. If the Commission found these complaints to have merit, it would refer the complaints to the Alberta Human Rights Tribunal to assess these claims of discrimination, and the likely response from those against whom the complaints are being made (i.e. respondents) that vaccination was a justifiable requirement for the workplace, facility, or service in question.

This post puts the question of COVID vaccination status as a basis, or ground, for protection from discrimination into its broader context by looking at the law related to grounds of discrimination in Canada, and the criteria that new grounds should meet. Although there are other protected grounds in Alberta and elsewhere in Canada that relate to various types of health matters, statuses, and political beliefs, our analysis shows that vaccination status is markedly different because it would be the only protected ground whose recognition and protection would cause great harm to others. At the outset, we note that we base our argument on the now overwhelming body of science showing that COVID-19 is a harmful and even deadly airborne virus and that vaccines help to prevent its spread, and/or its most harmful effects (see [here](#) for the Government of Alberta’s acceptance of this evidence). This approach to accepting the scientific evidence has been used by courts across Canada to address a variety of COVID-19-related claims, including our own Court of Appeal (see e.g. *Holden v Holden*, 2022 ABCA 341 (CanLII) at paras 99-108).

Our analysis of the law leads to the conclusion that there is no legitimate basis for protection of vaccination status under the *AHRA*.

The Law on Protected Grounds

The *AHRA* is anti-discrimination legislation rather than a broad guarantee of rights and freedoms like the [Canadian Charter of Rights and Freedoms](#). The preamble to the *AHRA* gives a sense of the purposes of the Act: “recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world.” It also contains the current list of grounds that are protected from discrimination in a preambular clause affirming that “as a matter of public policy... all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation” (emphasis added).

The *AHRA* is not a general guarantee against discrimination. It applies to private and public actors but only in relation to protected grounds and protected areas, including publications (s 3); goods, services, accommodation and facilities customarily available to the public (s 4); tenancies (s 5); employment (ss 6-8); and membership in a trade union, employers’ organization or occupational association (s 9).

The *AHRA* must also be distinguished from s 15(1) of the *Charter*, which guarantees equality and the right not to be discriminated against based on the listed grounds of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. The *Charter* is narrower than human rights legislation in the sense that it only applies to claims involving government actors and government actions. But the *Charter* is broader in that s 15 includes an open-ended list of grounds that can be supplemented by the courts in the case of grounds that they find to be “analogous” to those listed. Unlike the *Charter*, the list of protected grounds in human rights legislation is “closed” in the sense that human rights commissions and tribunals cannot add analogous grounds as they see fit. Grounds can be added to human rights legislation over time as understandings of discrimination change, but this requires legislative amendment.

The Supreme Court of Canada has provided criteria for identifying grounds which are analogous to those listed in s 15 of the *Charter*, and which should therefore also be protected from discrimination. The Court’s approach to identifying analogous grounds is helpful in thinking through what grounds belong in human rights legislation.

In *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999 CanLII 687 \(SCC\)](#), [1999] 2 SCR 203, Justices Beverley McLachlin and Michel Bastarache, writing for the majority, noted that the role of grounds in protections against discrimination is to “identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality” (at para 8). They defined an analogous ground as “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity”; as well as a characteristic “that the government has no legitimate interest in expecting us to change to receive equal treatment under the law” (at para 13). Whether the ground relates to “a discrete and insular minority” or “a group that has been historically discriminated against” was seen by the majority to “flow from the central concept of immutable or constructively immutable personal characteristics” (at para 13).

In concurring reasons on behalf of herself and three other judges in *Corbiere*, Justice Claire L’Heureux Dubé advocated a multi-factor approach to deciding whether a particular ground should

qualify as analogous. Under this approach, actual or constructive immutability is merely one factor, alongside whether the characteristic is important to identity, personhood, or belonging or relates to a lack of political power, disadvantage, or vulnerability to having one's interests overlooked. These considerations are not exhaustive, and are to be assessed from the perspective of a reasonable person in the position of the claimant (at para 60). Whether the ground is protected in human rights legislation is also a relevant factor under this approach. The Court unanimously agreed that once a ground is recognized as analogous under the *Charter*, it serves as a “constant marker of potential legislative discrimination” (at para 10).

The test for analogous grounds has also been considered by human rights scholars. For example, Joshua Sealy-Harrington, in “[Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach](#)” (2013) 10 JL & Equality 37 at 44-48 (“Assessing Analogous Grounds”), generally supports Justice L’Heureux Dubé’s multi-factor approach and notes that this approach has been accepted in case law both before and after *Corbiere*. Jessica Eisen, in “[Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds and Relational Theory](#)” (2017) 42:2 Queen’s LJ 41 at 84, advocates a relational approach to grounds that focuses on social relationships of power and oppression that make certain personal traits socially relevant, rather than a focus on categories of immutable characteristics (see also Jennifer Nedelsky, “[Reconceiving Rights as Relationship](#)” (1993) 1:1 Rev Const Stud 1 (arguing that rights should be viewed in terms of the kinds of relationships we need to foster in order to have a free and democratic society)).

To date, the Supreme Court has added four analogous grounds to the list in s 15: citizenship (*Andrews v Law Society of British Columbia*, [1989 CanLII 2 \(SCC\)](#), [1989] 1 SCR 143); marital status (*Miron v Trudel*, [1995 CanLII 97 \(SCC\)](#), [1995] 2 SCR 418); sexual orientation (*Egan v. Canada*, [1995 CanLII 98 \(SCC\)](#), [1995] 2 SCR 513); and “Aboriginality-residence” (*Corbiere*, 1999). In all of these cases, the personal characteristic was recognized to be actually or constructively immutable. Furthermore, all of these cases included evidence of the historical disadvantage of the group in question, or the disadvantage was so notorious that the Court took judicial notice of it (see Jonnette Watson Hamilton & Jennifer Koshan, “[Kahkewistahaw First Nation v. Taypotat: An Arbitrary Approach to Discrimination](#)” (2016), 76 SCLR (2d) 243 at 253-54).

The Court has not added any new analogous grounds since *Corbiere*, but in *Quebec (Attorney General) v A*, [2013 SCC 5 \(CanLII\)](#), the Court revisited its approach to discrimination based on marital status. According to Justice Rosalie Abella, writing for the majority on s 15 in that case, “the fact that marital status is not a real choice was the basis for designating marital status as an analogous ground” (at para 334; see also para 343). This suggests that in other cases, personal characteristics that are based on real choices may not meet the criteria for analogous grounds – a matter linked to the question of immutability.

Inclusion of analogous grounds in the *Charter* can influence the grounds in human rights legislation. In *Vriend v Alberta*, [1998 CanLII 816 \(SCC\)](#), [1998] 1 SCR 493, the Court held that the omission of sexual orientation from an earlier version of the *AHRA* violated s 15 of the *Charter*, and the legislature was required to add that ground to the Act.

As indicated above, the legislature can also add grounds to human rights legislation of its own initiative, as Alberta did with gender identity and gender expression in 2015. However, governments should ensure that new grounds meet the general criteria for analogous grounds and the broad purpose of human rights legislation, which is to protect members of vulnerable groups from discrimination.

The Law on Discrimination, Justification and Remedies

It is also important to note that bringing a human rights complaint or *Charter* challenge on the basis of a protected ground does not mean that a finding of discrimination will necessarily follow (in the *Charter* context, see *Corbiere* at para 9). In the human rights context, the complainant must meet the three part test for *prima facie* discrimination set out in *Moore v British Columbia (Education)*, [2012 SCC 61 \(CanLII\)](#) at para 33: (1) they have a characteristic protected from discrimination (i.e. they raise a protected ground); (2) they experienced an adverse impact with respect to a protected area (e.g. employment, services, etc); and (3) the protected characteristic (ground) was a factor in the adverse impact. If the complainant can make out a *prima facie* case of discrimination, the burden shifts to the respondent to justify their conduct or rules, either as a *bona fide* occupational requirement (*AHRA* at ss 7(3) and 8(2)) or as a reasonable and justifiable contravention (*AHRA* at s 11). In the case of vaccination status, it would fall to the respondent to show that vaccination against COVID-19, and proof of that vaccination, were justifiable requirements for the employment, service, or tenancy in question.

Even a successful claim of discrimination that the respondent cannot justify does not mean that the complainant will get or keep the job, apartment, or withheld goods or services that they sought, however. That is one possible remedy that the Alberta Human Rights Tribunal can grant, as are orders to stop the discriminatory conduct, compensate for lost income or incurred expenses, and any other action that would put the complainant in the position they would have been in but for the contravention (*AHRA* at s 32(1)(b)).

To summarize, protections against discrimination, and the grounds of discrimination that are legitimately recognized within anti-discrimination legislation, relate to personal characteristics that are impossible or difficult to change without unacceptable personal cost. The guarantee of substantive equality protects against the perpetuation of *historical* disadvantage (*Fraser v Canada (Attorney General)*, [2020 SCC 28 \(CanLII\)](#) at para 5), although the possibility of recognizing *new* forms of discrimination has been accepted by the Supreme Court (see *Ontario (Attorney General) v G*, [2020 SCC 38 \(CanLII\)](#) at paras 39, 47). Is vaccination status the type of personal characteristic that should be protected on the basis of these general principles?

The Proposal to Add Vaccination Status as a Protected Ground

Whether or not to be vaccinated is not an immutable (i.e. unchangeable) personal characteristic; rather it is a decision that people make for themselves (and often their children). Importantly, if a person's decision not to be vaccinated is based on particular religious beliefs or disabilities, it will already be covered by the *AHRA* under the existing protected grounds. The essence of Premier Smith's position is that the freedom to decide whether to be vaccinated should be protected as a discrete ground that would provide a right not to be discriminated against without a justifiable reason. According to the cases discussed above, whether this ground legitimately falls within the

scope of human rights protection depends on whether vaccination status is a constructively immutable characteristic, e.g. like religion, which is changeable only at great personal cost that the government has no reasonable expectation people should undertake.

To answer this question, it is useful to look at other grounds in the *AHRA* and in human rights legislation from other jurisdictions that could be seen as similar to vaccination status, or as including vaccination status. In this part, we first briefly compare vaccination status to other health-related grounds and then to other status grounds. We then consider whether vaccination status might be included in “political beliefs,” which is already a protected ground in many provinces and territories. Finally, we apply the many factors that have been considered by the Supreme Court of Canada and human rights scholars in identifying analogous grounds under the *Charter* to the potential ground of vaccination status, as well as – for comparative purposes – another potential ground that has been suggested by others and is associated with both health and “choice”, the ground of weight. We also briefly mention the Alberta Court of Appeal’s rejection of “COVID-19 vaccination status” as an analogous ground under s 15 of the *Charter* in *Lewis v Alberta Health Services*, [2022 ABCA 359 \(CanLII\)](#).

In Comparison to Health-Related Grounds

Human rights legislation protects some other health-related grounds. As already noted, disability is a protected ground in the *AHRA* and elsewhere in Canada and includes both physical and mental disability. Federally, there is protection against discrimination based on genetic characteristics (see *Canadian Human Rights Act*, [RSC 1985, c H-6](#) at s 2). The latter – which was added in 2017 – shows that new grounds related to health can be worthy of recognition, but both disability and genetics are typically immutable rather than based on personal decisions. Taking a relational approach, it is also difficult to see how protection of these grounds could lead to potential harms to others.

The disability-related grounds offer other lessons. Although “immutability” is part of the test for analogous grounds, we do need to be careful in using “choice” as a basis for saying that a particular personal characteristic should not be protected under human rights legislation. This type of argument has often been levelled at people relying on addiction-related disabilities, for example (see e.g. *Stewart v Elk Valley Coal Corp*, [2017 SCC 30 \(CanLII\)](#) at paras 38-39). The difference between those types of cases and vaccination status is that, in the former, our understandings of addiction allow us to question whether substance use is a real “choice”.

There is one other health-related ground to consider. Nova Scotia’s *Human Rights Act*, [RSNS 1989, c 214](#), protects against discrimination based on a person’s “irrational fear of contracting an illness or disease.” This protection is unique in the Canadian human rights context in its focus on the rationality of health-related concerns. Based on the scientific support for vaccinations we cited in the introduction, a fear of vaccinations could be seen as irrational, especially now that alternatives to the experimental mRNA vaccines are available. It would certainly be open to the Alberta government to frame its protection of COVID-19 vaccination status as “irrational fear of the harms of vaccinations.” But that would be a very different type of protection than the Nova Scotia legislation provides, as it would still protect the ability to cause harm to others by being unvaccinated.

In Comparison to Status Grounds

Other “status” type grounds – for example, family and marital status, and citizenship – are protected in most Canadian human rights statutes and/or as analogous grounds under the *Charter*. These grounds have been recognized as constructively immutable in the sense that the government has no legitimate basis for requiring people to change these statuses to receive benefits or avoid negative consequences (see e.g. *Andrews*; *Miron v Trudel*). They are legal types of status that are often difficult to change, and that have rights and obligations associated with them, such as providing necessities for one’s children. The recognition of these statuses in human rights legislation is protective of relationships to others or to the state itself. This differs from vaccination status, which (at least in the case of the unvaccinated) focuses on the individual without regard to others. Protection of vaccination status ignores the impact that being unvaccinated might have on potentially vulnerable others.

As noted above, marital status is another status where “choice” has been raised as a basis for defeating claims of discrimination in the past. However, it is now recognized that marital status is not always a matter of choice, particularly for women in relationships where there is a power imbalance (see e.g. *Quebec v A*). In contrast, where the status in question is purely a matter of choice that is not related to other conditions of disadvantage, this “status” is not a legitimate basis for human rights protection. This is also what distinguishes vaccination status from claims related to reproductive justice, even though people opposed to vaccine mandates have tried to [co-opt the slogan “my body, my choice.”](#) While the language of “mandatory vaccination” has been used, it bears mention that during the worst part of the COVID-19 pandemic, vaccines never amounted to a forced intrusion on bodily integrity. Rather, proof of vaccination was a condition for access to some employment, services, and tenancies.

Inclusion in “Political Beliefs”?

Political beliefs are protected to varying degrees in the human rights legislation of eight of the fourteen Canadian jurisdictions, despite usually being matters of personal (and even possibly secret) choice. Alberta, perhaps surprisingly, is not one of those eight jurisdictions. But the question still arises whether a political beliefs ground could be added to the *AHRA*’s list of protected grounds that would include beliefs about the political legitimacy of vaccine mandates. The question arises if the more vocal opposition to vaccine mandates is taken at face value. Amending the *AHRA* could protect a larger group than would be protected by a “vaccination status” ground because “political beliefs” could include those who have been vaccinated despite being politically opposed to vaccine mandates. However, “political beliefs” would protect more than anti-vaccination beliefs and activities, and that might make it less attractive to the new Premier. Traditionally, this ground has protected government employees from being fired on the election of a new government which suspects that public servants are supporters of the old government.

Aside from a restrictive definition in [Prince Edward Island](#) that targets only political patronage, the protected ground is undefined, whether it is called “political belief” as in [British Columbia](#) and the [Northwest Territories](#), “political belief or activity” in [New Brunswick](#), “political opinion” in [Newfoundland and Labrador](#), “political belief, affiliation or activity” in [Nova Scotia](#) and [Yukon](#), or “political convictions” in [Quebec](#). The New Brunswick Human Rights Commission offers a

definition of “political belief or activity” in their educational materials (available [here](#)) that has been endorsed by the courts (see *Doucet v Communications, Energy and Paperworkers Union of Canada*, [2015 NBQB 218 \(CanLII\)](#) at para 57):

belonging or working with a political party; being a member of an organized lobby group or association working in public advocacy; participating in or working with a political protest or movement; running for office; working for a political candidate; or because of the political belief of others.

The very few cases brought on this ground have usually involved the issue of political patronage being punished or rewarded with government employment or volunteer positions. However, British Columbia – despite being unique in restricting the scope of the protection of political beliefs to the employment context (*Human Rights Code*, [RSBC 1996, c 210](#), ss 11, 13, 14) – has read that ground more expansively.

In *Prokopetz v Burnaby Firefighters’ Union, Local 323*, [2006 BCHRT 462 \(CanLII\)](#), the tribunal summarized two principles from early decisions:

First, “political belief” is to be given a liberal definition; it is not confined to partisan political beliefs. Second, “political belief” is not unlimited; for example, views about matters such as business or human resources decisions an employer may make do not come within its ambit. (at para 31)

Adding to these two principles, *Fraser v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, [2019 BCHRT 140 \(CanLII\)](#) at para 59 held that political belief included “public discourse on matters of public interest which involves or would require action at a governmental level” (see also *Bratzer v Victoria Police Department*, [2016 BCHRT 50 \(CanLII\)](#) at para 271).

British Columbia appears to be the only jurisdiction that has examined whether refusing to be vaccinated is a political belief, although it has done so only in a preliminary manner. In *Complainant obo Class of Persons v John Horgan*, [2021 BCHRT 120 \(CanLII\)](#), the complaint was filed on behalf of “people who are opposed to being forced into getting the COVID-19 Vaccination and getting our basic human rights and freedoms stripped from us” and alleged that government conduct discriminated based on the ground of political belief. The decision was a preliminary screening decision, determining only whether the complaint alleged facts that, if proven, could be a contravention of the *Human Rights Code*. The complainant failed to meet that test because they did not allege any adverse impacts on employment. However, the tribunal accepted that the opposition to vaccine mandates alleged in the complaint could be the basis of a valid complaint on the ground of political belief:

I accept that a genuinely held belief opposing government rules regarding vaccination could be a political belief within the meaning of the Code. In saying this, however, I stress that protection from discrimination based on political belief does not exempt a person from following provincial health orders or rules. Rather, it protects a person from adverse impacts in their employment based on their beliefs. (at para 11)

The statement “could be a political belief” suggests that opposition to vaccination may or may not be a political belief in any one instance. However, the tribunal does not provide criteria apart from the point that the belief has to be genuinely held, which would rule out some opposition. There is nothing to indicate rational political beliefs are required, although the capacity for the beliefs to be held by law’s more objective “reasonable person” could be required if the phrase was defined. This quote also confirms that, in British Columbia, the protection of a person’s opposition to vaccinations as a political belief does not lead to protection of all actions that flow from that belief. For example, a person opposed to vaccines could not seek to overturn a vaccine requirement for access to services customarily available to the public; only adverse consequences related to employment are protected in British Columbia. Even in the case of employment-related vaccine mandates, it would still be open to employers to justify these as *bona fide* occupational requirements adopted to protect others from harmful exposure to the virus.

There are other difficulties with including vaccination status within a ground of political beliefs. Given the recognition of democratic rights in the *Charter* (at s 3) and more broadly as an unwritten principle of constitutional law (see *Reference re Secession of Quebec*, [1998 CanLII 793 \(SCC\)](#), [1998] 2 SCR 217 at paras 61-68), a “political beliefs” ground meets the criterion that it is constructively immutable because it is something the government has no legitimate expectation in having us change. The same cannot be said of vaccination status. Governments do have a legitimate expectation that people will get vaccinated in order to protect others who they are likely to come into contact with in accessing services, going to work, etc. Put another way, political beliefs do not typically lead to harms to others, but vaccination status might (e.g. the freedom to be unvaccinated while working with hospital patients, vulnerable senior citizens, or adults or children with disabilities).

Applying the Analogous Grounds Test

Does the proposed vaccination status ground satisfy the factors used by the Supreme Court of Canada to determine whether a ground is analogous to the grounds listed in s 15 of the *Charter*? As a somewhat similar ground related to health and often connected to personal choices, does the possible ground of weight meet those factors? On the emerging discrimination claim based on weight, we rely upon the analysis of Joshua Sealy-Harrington in “[Assessing Analogous Grounds](#)”, at 64-67. He also analyzes poverty as a possible ground, but poverty does not have the similarities to vaccination status that weight has.

The first question is whether weight or vaccination status are actually immutable. Emily Luther has argued in “Justice for All Shapes and Sizes: Combatting Weight Discrimination in Canada” (2010) 48 Alta L Rev 167 at 182-83, that weight is immutable. However, this is a difficult argument to make because of the variety and number of genetic, metabolic, medical and other causes that contribute to higher weight. Sealy-Harrington (at 64-65) concludes “it could be argued that it is permanent for some and potentially changing over time but outside the control of others” (see also Luther at 183). Vaccination status, on the other hand, is easily changeable from a physical perspective (excluding people with medical conditions or religious beliefs that prevent them from getting vaccines, who are protected on those already recognized grounds). All that is required to change vaccination status is consent. It is almost instantaneous.

If not actually immutable, can either proposed ground be seen as constructively immutable because they are changeable only at an unacceptable cost to personal identity? The connection of weight to identity is unclear, although there are significant personal and financial costs associated with weight loss (Sealy-Harrington at 65, quoting Paul R. Howard, “Incomplete and Indifferent: The Law’s Recognition of Obesity Discrimination” (1995) 17 Adv Q 338 at 340). However, it is difficult to argue that such costs make weight analogous to the role of race, gender, and religion in personal identity. Neither weight nor vaccination status have the cultural and historical significance to personal identity that marital status or Aboriginality-residence have. Some people may have recently seen fit, for a variety of reasons, to make vaccination status a part of their personal identity despite the costs of doing so, but claiming that vaccination status is tied to deeply personal questions about cultural practices and lifestyle is a difficult argument to make, as it is for weight (Sealy-Harrington at 65).

In *Lewis*, the Alberta Court of Appeal (Justices Frederica Schutz, Michelle Crighton, and Dawn Pentelchuk) discussed the need for a characteristic to be central to a claimant’s personal identity in order to be a constructively immutable ground. The claimant was denied a place on a waitlist for an organ transplant because she was not vaccinated against COVID-19, and the Court held that her claim did not engage the *Charter* as it involved science-based clinical decisions rather than government action (at paras 15, 24). Nevertheless, the Court went on to consider the claimant’s argument that she was discriminated against based on her “medical status”, contrary to s 15 of the *Charter*. The Court rejected “medical status” as being the relevant potential ground because it covered too many conditions and was not a precise description of the claim, substituting “COVID-19 vaccination status” as the appropriate ground (at para 66). They then found that the claimant’s COVID-19 vaccination status “is not who she is” but rather just a choice, and a choice that “remains fluid, made at a moment in time, based on available information and often in response to specific circumstances and influences” (at para 68, emphasis in original). Because COVID-19 vaccination status was not central to the claimant’s identity, it was changeable without too great a personal cost, and any consequences she suffered followed from what she did and not who she was (at para 67, quoting Peter W. Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2022) at §55:26). COVID-19 vaccination status was therefore not an analogous ground under s 15 of the *Charter* and there was no basis for a discrimination claim.

The majority in *Corbiere* also characterized constructive immutability as involving characteristics that, like religion, “the government has no legitimate interest in expecting us to change” (at para 13). This characterization overlaps with the *bona fide* occupational requirement and reasonable and justifiable contraventions allowed by the *AHRA*, and section 1’s “justifiable in a free and democratic society” in the *Charter*. The argument would be that if the employer’s interest in expecting vaccination or weight loss is always or almost always a legitimate one, or if the government’s interest is always or almost always justifiable, then neither warrants inclusion in a list of protected grounds. Vaccination status fares worse than weight on this understanding of immutability because lack of vaccination against communicable diseases increases harm to others through transmission. On the other hand, it is harder to see weight as causing harm to others.

Whether weight or vaccination status relates to a discrete and insular minority or a group that has been historically disadvantaged is a possible factor to consider in a multi-factor approach. Many disadvantages have been associated with higher weight and weight change (Luther at 184-188; Sealy-Harrington at 65-66). There have been recent legal disadvantages associated with

vaccination status, although all except those related to employment in some health care fields have disappeared. The fleeting disadvantages associated with vaccination status do not meet a historical disadvantage factor.

Justice Claire L'Heureux Dubé also considered whether the proposed ground related to a lack of political power or vulnerability to having one's interests overlooked. The amount of attention that government and media of all types have given to those who refuse vaccination, culminating in Premier Smith's promise to add their status to the *AHRA* after a very brief period of legal disadvantage, is ironically strong evidence that this factor is not a reason to make vaccination status a protected ground. It is a much stronger factor for recognizing and protecting against discrimination on the ground of weight, which has few champions and has attracted little attention over a much longer period of time.

Lastly, we should re-consider Justice Abella's statement in *Quebec v A*, "the fact that marital status is not a real choice was the basis for designating marital status as an analogous ground" (at para 334). If weight or vaccination status (unconnected to medical or religious grounds) are based on unencumbered choices, then they may not meet the criteria for analogous grounds. The conventional understanding of weight as being the fault of larger people and under their control solely as a matter of willpower poses a major problem for the recognition of weight as a ground, although we might hope that courts today would recognize the difficulties with this view of "choice" (Luther at 183; Howard at 340; Sealy-Harrington at 65). Vaccination status is an even less encumbered choice unless medical and psychological disorders play a role in refusals, as they do in some cases of weight gain and maintenance. Indeed, the argument of those opposed to vaccine mandates usually centres on choice.

Taking all of these factors into account, it seems highly unlikely that vaccination status would be determined to be an analogous ground for the purpose of the *Charter's* equality guarantee. Weight can make a better case for recognition, as can many other grounds, such as poverty and homelessness. This analysis also suggests that addition of "vaccination status" to the *AHRA* is not in keeping with the purposes of protections against discrimination, for which grounds serve as an important gatekeeper.

Conclusion

Premier Smith recently identified her political perspective as that of a "libertarian conservative": (Rick Bell, "[Danielle Smith – 'I'm not for turning'](#)," *Calgary Sun* (25 October 2022)). She described what that meant to her: "I believe in freedom. Freedom of the individual, freedom of conscience, freedom of religion, freedom of the press, freedom to act in your own interest. Liberty is at the heart of it." The conservative part, she said, comes from recognizing the importance of families and communities. It was a short interview so she apparently did not discuss how these two potentially contradictory values could be reconciled. For libertarians, the classic answer is John Stuart Mill's "no harm principle", which states that *the only reason for the state to restrict the actions of one individual is to prevent harm to other individuals* (see also Lisa Young, "[Opinion: Is Premier Smith calling for a constitutional right to harm](#)," *Calgary Herald* (3 November 2022)). The simple idea that your freedom ends at the point where it harms others requires Premier Smith to reconcile the "freedom to act in your own interest" with the recognition that families and communities are important. Can the Premier articulate where she

sees the freedom to refuse a vaccine that protects others' lives and health ending? Where does she see the importance of families and communities beginning?

As we have argued throughout this post, the no harm principle is implicit in the analysis of which grounds are legitimately included in anti-discrimination legislation. This framing is supported both as part of a relational understanding of grounds and in connection with the “legitimate expectations” factor for analogous grounds. Premier Smith’s [statement](#) that the “unvaccinated have been more discriminated against than any other group” she has seen in her lifetime suggests that she has no understanding of the role of grounds, or of human rights legislation more broadly, in protecting members of vulnerable groups. Her argument for inclusion of vaccination status is more about protecting personal choices or freedoms regardless of the harm they have on vulnerable others. We doubt that our post will influence the mandate Smith has now given to the Justice Minister, but we hope that our analysis helps inform the debate if this amendment to the *AHRA* is introduced.

This post may be cited as: Jennifer Koshan and Jonnette Watson Hamilton, “Grounding the Alberta Human Rights Act and the Proposal to Protect Vaccination Status” (November 14, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/11/Blog_JK_JWH_AHRA_Vaccination_Status.pdf

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