

VACCINE INS AND OUTS: AN EXPLORATION OF THE LEGAL ISSUES RAISED BY VACCINE PASSPORTS¹

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Executive Summary

A vaccine passport certifies that its bearer has received specific vaccines, for the purpose of granting certain privileges such as entry to indoor gathering places like restaurants and concerts, air travel and attendance at workplaces on preferential terms. This Working Paper offers a detailed look at the legal issues raised by implementation of vaccine passports, with a particular focus on issues in public law.

The paper first explores whether a vaccine passport regime would infringe Charter rights, including mobility rights, rights to liberty and security of the person, freedom of religion and conscience, and rights to equality and non-discrimination. Broadly speaking, we conclude that a well-designed vaccine passport regime, backed by an equitable vaccine distribution scheme, will likely withstand a Charter challenge.

The paper then turns to an in-depth discussion of privacy issues, first exploring key aspects of privacy compliance in the design of vaccine passports before turning to an analysis of their use conditions. Again, the paper's broad contention is that privacy issues raised by vaccine passports can be adequately addressed through careful design and regulation.

We next turn to a discussion of potential avenues for the implementation of vaccine passports, within the framework of Canadian federalism and its fragmented jurisdiction over healthcare and public health. As part of this discussion, we suggest some broad principles for the design of a vaccine passport regime, arguing that passport gating should be limited to non-essential services, and that wherever feasible, the unvaccinated should be accommodated with rapid testing.

Introduction

Broadly speaking, a vaccine passport certifies that its bearer has received specific vaccines, which may in turn grant certain privileges, such as permitting travel across a border or within a jurisdiction, entry to indoor gathering places like restaurants and concerts, air travel etc. Such certification requirements are not a new idea: during the smallpox vaccine campaigns, vaccine scars often served as this proof and were required before one could board a train. In Ontario, Manitoba and New Brunswick, proof of immunization is required for school entry. Internationally, proof of yellow fever vaccination is required for entry into countries where the disease is endemic, as outlined in Annex 7 of the International Health Regulations. What is unique with COVID-19 vaccines is, first, that proof of vaccination may be required more ubiquitously and, second, that this record-keeping will likely be digitized.

Drawing on the example of Israel’s “green pass,” implementation of vaccine passports might work broadly as follows. Having completed the required doses of a vaccination (generally two), individuals would be issued a physical badge or a digital record of their vaccination, displayable on a smartphone, with a scannable QR code.³ The badge would be downloadable from provincial/territorial immunization repositories through a government portal and could be stored on a smartphone like a boarding pass. At a gate of entry, the badge would be scanned, disclosing to whom the immunity badge was issued, along with a cryptographic digital signature confirming that the QR code was issued by a trusted entity. The system used to scan the QR code would then need the ability to check whether the immunizations contained in the record satisfy current public health guidelines on which vaccine products, dose intervals, and dose counts confer adequate levels of immunity based on the currently available science. As is the case with Israel’s green card, bearers would need to present photo identification like a driver’s licence or health card to confirm their identity. The individual would then be provided access or entry.

³ Israel also issued green passes to individuals who have developed natural antibodies by recovering from COVID-19. On June 1, 2021, Israel [ended its green pass regime](#), as new infections dropped to under twenty cases per day.

A key question is whether and how the verification of vaccine passports will be regulated. The province of Manitoba has recently launched an immunization ‘card’ system with essentially no accompanying regulation: the fully vaccinated individual receives a digital QR code displayable on their phone (and a physical copy if requested), which can be scanned by anyone who has downloaded the Manitoba Immunization Card App, revealing the bearer’s name (which can be cross-checked with photo ID) and that they have received a full vaccination (Manitoba 2021). Quebec has also begun issuing QR codes, containing identifying information and the vaccine received, but has yet to define how they will be used (Quebec 2021). Diverse nomenclature has been used in discussing this basic concept: *vaccine passports*, *vaccine certificates*, *immunization cards*, *green passes*, and so on. Nothing much turns on the choice of terminology, and their use in public discourse does not track any hard and fast rules. Still, the choice of terminology may have some political valence. For example, the word ‘passport’ used in this report, may connote a greater degree of information gathering and surveillance, though, as explained below (part 3), this technology can be designed and implemented in ways that minimize intrusions on privacy. Indeed, depending on choices around design and implementation, this technology might be more analogous — from a privacy and surveillance standpoint — to licence plates on cars, or to wearing a bracelet at an all-ages event that signifies that one is of the age of majority.

2. Legal Issues Raised by Vaccine Passports

The legal issues presented by this technology may vary depending on whether the vaccine passport regime is created publicly (by government or an arm’s-length entity carrying out government policy) or privately, and further whether the passport screening is carried out by public or private actors. This report focuses primarily on the government’s role in vaccine passports, and in this section we explore various grounds of potential legal challenge to a vaccine certificate regime under the headings of mobility rights, liberty rights, freedom of religion/conscience and discrimination/equity. To date, no Canadian jurisdiction has laid out detailed plans for vaccine passports, so our analysis involves some speculation as to their possible design and implementation.

2.1 Mobility Rights

Under s.6(1) of the Charter, citizens of Canada have the right to enter, remain in and leave Canada, and under s.6(2), both citizens and permanent residents have the right to (a) move to, reside in and (b) gain a livelihood in any province. Some have worried that a vaccine passport regime might serve as a predicate for limiting the mobility rights of the unvaccinated, limiting their opportunities for international and domestic travel. We consider international mobility and interprovincial mobility in turn.

International Mobility

A preliminary question is whether the establishment of a COVID-19 vaccine passport regime at Canada's borders constitutes a *prima facie* infringement of mobility rights. It is worth reiterating that there are historic and ongoing precedents for requiring that travellers be vaccinated for certain diseases. While International Health Regulations (IHR 2005), by default, prohibit states from requiring vaccination as a condition of entry, exceptions are allowed where necessary for public health purposes and, as mentioned, Annex 7 of the IHR explicitly permits countries to require proof of vaccination for yellow fever.

The notion that a vaccine passport regime violates international mobility rights is difficult to square with Charter jurisprudence. The Supreme Court of Canada has established that the “central thrust” of the Charter’s protections for international movement is to guard against “exile and banishment, the purpose of which is the exclusion of membership in the national community.” Thus, in *United States of America v. Cotroni* (1989), a majority of the court reasoned that even extradition “lies at the outer edges of the core values sought to be protected” by this Charter provision. If extradition is at the outer edges, it stands to reason that vaccine passports simply fall outside the scope of the Charter’s protections for international mobility.

A categorical requirement that Canadians present proof of vaccination upon re-entry to the country — with no accommodations for medical or religious exemptions — might amount to an imposition of “exile and banishment.” But this is not an argument for the wholesale rejection of vaccine passports. There are ways to accommodate groups unable to be vaccinated for health or religious reasons, e.g., with testing and quarantine requirements. Indeed, it is important to note that Canada and many other countries presently impose these requirements for *all* travellers.

The Supreme Court has acknowledged, in *obiter*, that generic passport requirements do not infringe Canadians’ mobility rights. Indeed, passports are essential in identifying those who can exercise the rights of citizens (*R v Nikal* 1996). The court adds the important caveat that a passport requirement could “constitute an infringement if it could only be obtained with great difficulty or expense.” As regards mobility rights and other Charter rights, the defensibility of a vaccine passport regime will depend on access and affordability.

This analysis must be viewed against the backdrop of other countries’ adoption of vaccination requirements at their borders. Section 6(1) of the Charter obviously does not give Canadian citizens any rights of entry to other countries. However, the courts have recognized that the s.6(1) right to enter and leave Canada encompasses a right to a passport (*Khadr v. Canada (Attorney General)* 2007). One might argue by extension that, as vaccine passports become the norm in international travel, the Canadian government will have a positive obligation to provide such documentation to its citizens.⁴

Interprovincial Mobility

As explained, s.6(2) of the Charter protects the right of citizens and permanent residents to enter, take up residence and earn a living in any province. The elements of this right are separable, meaning that one has a right to move to a province without pursuing a livelihood, or pursue a livelihood in a province without establishing residence (*Law Society of Upper Canada v. Skapinker* 1984). It has been alleged that vaccine passports may erode these interprovincial

⁴ The European Commission’s recent proposal for a Digital Green Certificate cites, as a primary motivation, the importance of protecting mobility rights (*European Commission* 2021).

mobility rights, particularly if provinces/territories establish a “patchwork” of non-interoperable passports (Bryant 2020).

This is not a concern about vaccine passports *per se*, but a concern about their patchy and uncoordinated implementation under Canadian federalism. The concern is important and understandable: in related areas, such as public health data sharing (Canadian Press 2021) and electronic medical records (Chang and Gupta 2015), the provinces have a poor record of timely cooperation.

It is not clear, however, that such failings will plague interprovincial cooperation on vaccine passports. For one thing, there are no obvious incentives for provinces to exploit vaccine passports as a means of blocking out-of-province travellers. In many leading s.6(2) cases, the impugned regulations are designed to protect a specific industry or profession from extra-provincial competition (*Canadian Egg Marketing Agency v Richardson* 1998, *Black v Law Society of Alberta* 1989). A refusal to cooperate on vaccine passports, by contrast, seems a very blunt and self-defeating strategy of provincial protectionism. Likewise, it is not clear that the provinces’ guardedness around patient and public health data will extend to vaccination status. It seems more likely that provinces will come under public pressure to negotiate reciprocal vaccine passport agreements. Furthermore, the federal government is sure to come under public pressure to devise and coordinate a national vaccine passport that could simultaneously meet the needs of international and domestic travel during the pandemic.

2.2 Liberty Rights

Section 7 of the Charter provides that, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” This Charter guarantee includes an internal limitations clause, allowing governmental entities to limit these rights, provided that such limits are implemented in a manner consistent with principles of fundamental justice. Altogether, this sets up a three-stage analysis: Does the vaccine passport regime infringe one or more of the protected rights to life, liberty and/or security of the person? If so, are the infringements inconsistent with some principle of

fundamental justice, i.e., are they arbitrary, overbroad or grossly disproportionate (*Canada (AG) v Bedford* 2013)? If so, can the vaccine passport regime nonetheless be saved, under s.1 of the Charter, as proportionate and “demonstrably justified in a free and democratic society?” We consider these questions in turn.

Impact of Vaccine Passports on s.7 Interests

It is well established in s.7 jurisprudence that patients have a right to autonomy and informed consent over medical treatments and a right to refuse medical treatment (*Rodriguez v British Columbia (AG)* 1993). Of course, no serious proponent of vaccine passports is suggesting that patients should be forcibly vaccinated in violation of these longstanding and fundamental rights to patient autonomy and bodily integrity. But some may argue that a vaccine passport regime — if sufficiently ubiquitous in application — may have the effect of pressuring or even coercing individuals to be vaccinated in a manner that engages s.7.

A key question here is whether the deprivations that might be incurred by a refusal to acquire a vaccine passport — e.g., exclusion from travel, restaurant dining, indoor concerts, gyms and even one’s workplace — rise to the level of engaging s.7 interests. The Supreme Court has emphasized that s.7 is meant to protect only “basic choices going to the core of what it means to enjoy individual dignity and independence” (*Godbout v Longueuil (City)* 1997); it seems unlikely that pedestrian decisions over whether to dine in at a restaurant or exercise in a gym meet this test. The court’s reasons for limiting the scope of s.7 in this way are laid out in *R v. Malmo Levine* (2003), as the court rejects a challenge to prohibitions on recreational marijuana use:

“...the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle. One individual chooses to smoke marijuana; another has an obsessive interest in golf; a third is addicted to gambling. The appellant Caine invokes a taste for fatty foods. A society that extended constitutional protection to any and all such lifestyles would be ungovernable.”

It is difficult to predict with confidence whether a vaccine passport regime might impact decisions that rise beyond lifestyle choices to affect issues of basic dignity and independence. One can certainly imagine hypotheticals: consider, say, a scenario where lack of a vaccine

passport prevents a family member from visiting a dying loved one in a hospital or long-term care facility. Below, we propose that any gating by vaccine passports be limited to *non-essential* activities, to mitigate these concerns.

One might instead frame these questions within the law of informed consent, which governs health care professionals who provide vaccination. The Supreme Court of Canada has described, “the tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity” (*A.C. v. Manitoba (Director of Child and Family Services)* 2009). In administering vaccination, health care professionals must disclose to patients the attendant risks and available alternatives, ensure that these risks are comprehended, and ensure that the patient *voluntarily* authorizes the vaccination (Bélanger-Hardy 2017). Within this legal framework, it might be argued that vaccination passports create an imperative to vaccinate — or else be cut off from certain forms of work, travel, social life — which undermines the voluntariness of the decision to vaccinate, vitiating informed consent. A difficulty for this argument is that, as explained, there are longstanding precedents for proof of vaccination, which have never, to our knowledge, given rise to comparable concerns about informed consent. The mandatory vaccination of school children for MMR requires the informed consent of parents or guardians, and yet the coercive threat of suspension from classes has never been construed by courts as undermining the voluntariness of consent.

Perhaps the most problematic scenario will arise when vaccine passports are required by employers. There has been some discussion of whether workers in healthcare and long-term care settings should be mandated to vaccinate as a condition of work — a controversial proposal which no province has implemented to date (Flood, Thomas and Wilson 2021).⁵ Nevertheless, it is generally understood that *economic* rights are not protected under s.7 of the Charter — except perhaps in the limiting case where government interferences with market freedoms jeopardizes survival (*Chaoulli v Quebec (Attorney General)* 2005, *R v Weyer* 1988, *Irwin Toy Ltd v Quebec*

⁵ Ontario has implemented a half-measure, requiring that long-term care workers either be vaccinated, provide a documented medical reason for not being vaccinated, or else attend an educational program on the benefits of vaccination.

(*Attorney General*) 1989). Of course, many Canadians have felt severe economic distress from *existing* lockdown measures, and here, as well, it is quite unlikely that a s.7 challenge would pass the infringement stage. If lockdown measures that impact employment and economic interests are Charter compliant, it stands to reason that a vaccine passport regime that *lessens* those economic harms would also be compliant, unless and until the threat of COVID-19 recedes significantly

Vaccine Passports and Principles of Fundamental Justice

Assuming for the sake of argument that, in some instances, a vaccine passport regime interferes with basic dignity and independence, claimants then bear the onus of showing that the regime does not operate in accordance with principles of fundamental justice. As explained, the Supreme Court has indicated that these include principles against *arbitrariness* (i.e., a rights deprivation that “bears no connection” to the law’s purpose); *overbreadth* (i.e., a law that partially captures its intended purpose but captures some unrelated conduct) (*R v Clay* 2003); and *gross disproportionality* (i.e., a law that is rationally targeted but the seriousness of the rights deprivation is “totally out of sync with the objective...”) (*Canada (AG) v Bedford* 2013).

Again, without specific facts on the table regarding the design of the vaccine passport regime and the nature/severity of the rights deprivation, it is difficult to model and assess the relevant legal arguments. It is safe to say that relevant evidence and arguments would relate to the effectiveness of vaccine passport requirements in preventing transmission, the relative effectiveness of alternative mitigation strategies (e.g., masks and PPE) and so on.

Societal Trade-offs and Proportionality

Assuming that plaintiffs succeed in showing that a vaccine passport regime interferes with protected liberty interests in a manner that is either arbitrary, overbroad or grossly disproportionate, the onus would then shift to government, under s.1 of the Charter, to show that

its passport regime can be “demonstrably justified in a free and democratic society.”⁶

Specifically, government will be required to show that the goal of the vaccine passport regime is *pressing and substantial*, that its design and implementation is *rationally connected* to that goal, that the approach taken is *minimally impairing* of rights and that the overall impact on the claimants’ rights is *proportionate* to the importance of the stated goals (*R v Oakes* 1986).

The goal of vaccine passports — i.e., the safe reopening of society in the wake of a pandemic — is clearly pressing and substantial. The use of vaccine passports to prevent unvaccinated individuals from gathering in enclosed public spaces and transmitting the disease to each other is clearly rationally connected to that goal. Government lawyers may encounter evidentiary challenges at the *minimal impairment stage*: depending on the specifics (e.g., levels of herd immunity within a community or feasibility of using PPE instead), there may be settings where categorically requiring proof of vaccination is not strictly necessary.

At the final stage of analysis, the all-things-considered proportionality assessment, government lawyers will have powerful evidence at their disposal, given the incalculable harms caused by the spread of COVID-19 and the mounting evidence that vaccination prevents transmission (Thompson et al 2021). The overall burden of vaccine passports must be assessed against the realistic alternative: continuing lockdowns, border closures and quarantine orders, with all of the attendant harms to liberty interests, physical and mental health, the economy, education and so on. Courts purport to be especially deferential to government in Charter cases that involve complex, polycentric trade-offs between multiple individuals (Manfredi and Maioni 2010, Roach 2008) — particularly vulnerable individuals such as low-skilled workers (*R v Edwards Books and Art Ltd* 1986) and children (*Irwin Toy v Quebec (AG)* 1989). This reflects, first, a recognition that courts lack institutional competence over polycentric questions and, second, that laws protecting vulnerable people should be shown special deference lest the Charter “simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.” The Supreme Court of Canada has also indicated that governments should be granted wider latitude to justify measures enacted in response to emergencies (*R v Heywood* 1994, *Reference Re BC*

⁶ Given the overlap between the s.7 limitations clause and s.1 proportionality analysis, a claimant who succeeds at the s.7 stage will usually succeed as well at s.1.

Motor Vehicle Act 1985). Together, these considerations support the conclusion that a well-designed vaccine passport regime would withstand challenge under s.7.

2.3 Religious Freedom, Freedom of Conscience

Some Canadians will refuse COVID-19 vaccination as a matter of religious conviction or personal conscience. It may be argued, accordingly, that government policies requiring vaccine passports (e.g., for air or train travel, school attendance) are an indirect infringement of the Charter's section 2(a) protection of freedom of religion and conscience. The jurisprudence around freedom of religion is more developed than the jurisprudence on (non-religious) freedom of conscience, so we discuss them in turn.

Religious Freedom

The courts have given the Charter's s.2(a) protections for freedom of religion a very generous and expansive interpretation. In *Syndicat Northcrest v. Amselem* (2004), the Supreme Court outlined the basic test:

“Freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion. Once religious freedom is triggered, a court must then ascertain whether there has been non-trivial or non-insubstantial interference with the exercise of the implicated right....”

No doubt some Canadians will decline vaccination on sincere religious grounds — *sincerity* is a highly subjective test, after all⁷ — leading to the question of whether vaccine passport requirements are *non-trivial*. This question is difficult to answer without the specifics of where, if at all, governments will mandate vaccine passports and what accommodations will be made available. In explaining the non-trivial test, the court has written that s. 2(a) “does not require

⁷ There is no onus on believers to establish in any objective sense that the religious practice in question is mandated by their religious teachings; idiosyncratic beliefs are protected. There is perhaps a concern that the anti-vaccination movement might coach refusers to frame their vaccine resistance under the guise of a religious objection.

the legislatures to eliminate every minuscule state-imposed cost associated with the practice of religion” (*R v Edwards Books* 1986).

Whether vaccine passports impose a non-trivial burden on religious believers may depend on how they are employed at the government’s hand. One can imagine a scenario wherein governments (federal or provincial) merely issue official vaccine passports⁸ and take a hands-off approach to their use — allowing decentralized decision-making by specific airlines or venues; it appears this is Manitoba’s approach. Insofar as airlines or concert venues opt to require vaccine passports as a condition of entry, this would not constitute governmental action and would not engage the Charter. Under an alternative scenario, government might require vaccine passports for entry into government buildings and public institutions, and/or mandate vaccine passports for specific private contexts, e.g., restaurant dining, gyms, air travel and movie theatres. Such measures would implicate government in a non-trivial interference with religious freedom.

Having established a *prima facie* infringement, the onus would then shift to government to justify its vaccine passport requirement under s.1 of the Charter as demonstrably justified in a free and democratic society. Again, it is difficult to predict the specifics of a s.1 defence without knowing the specifics of the vaccine passport policy. Broadly speaking, the s.1 analysis would assess the rationality of vaccine passport policies (e.g., on the effectiveness of passports in preventing transmission; the availability of less intrusive policies) and the proportionality of government objectives relative to the harm done to the rights of non-vaccinating religious groups.

It is conceivable that the courts would order some accommodation for affected religious groups in some circumstances (e.g., the option of providing a recent test result before air travel). In the *Multani* decision, for example, the Supreme Court granted an exemption to a general prohibition on weapons in schools, allowing a 13-year-old Sikh student to don a kirpan

⁸ In some provinces (e.g., Ontario), a paper and digital receipt is provided after vaccination, although these do not have the security features, such as a QR code, that would prevent forgery.

(ceremonial dagger) in the classroom (*Multani v Commission scolaire Marguerite-Bourgeois* 2006). It is also conceivable that the courts would side with government on the importance and administrative efficiency of enforcing consistent rules around vaccine passports. In *Alberta v. Hutterian Brethren of Wilson Colony* (2009), the claimants challenged a provincial law requiring that all licensed drivers be photographed. Chief Justice McLachlin, writing for the majority, found the impugned law to be reasonably justified: the photo requirement is designed, in combination with a facial recognition data base, to prevent identity theft and allowing exemptions would undermine the integrity of this system. The question of whether accommodations are granted or denied may turn on the nature of the activities gated by vaccine passports. In *Multani*, access to basic education was at stake, whereas in *Hutterian Brethren*, at issue was the claimants' ability to drive automobiles on highways — the latter is “not a right, but a privilege,” the majority emphasized.

Freedom of Conscience

The more prevalent resistance to COVID-19 vaccines may come in the form of non-religious vaccine hesitancy — primarily rooted in philosophical skepticism, incorporating concerns about the safety of vaccines and the pharmaceutical industry's trustworthiness. There is scant Supreme Court jurisprudence on s.2(a)'s protections for freedom of conscience, but it seems doubtful that vaccine hesitancy will qualify. In an early Charter ruling, *Edwards Books*, then Chief Justice Dickson explained that, “The purpose of s. 2 (a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being.” The thinking here has echoes of the court's efforts, outlined above, to limit the scope of Charter protections to beliefs and practices of a more profound nature.

It seems unlikely that vaccine hesitancy — often rooted in misinformation about the science — would be construed by the courts as a “profoundly personal belief.” Consider, by analogy, the 2004 Alberta Provincial Court ruling, *R. v. Locke*, where the plaintiff, skeptical of the science behind seatbelts, claimed that mandatory seatbelt laws infringed his freedom of conscience. The court drew on *Edwards Books* to conclude that seatbelt hesitancy is not

protected under the Charter’s protection of conscience because it does not reflect a “comprehensive value system,” or “profoundly personal beliefs that govern one’s perception of oneself, humankind, [and] nature....” Similar reasoning might apply to reject s.2(a) protections for vaccine hesitancy. Perhaps in some isolated and extreme cases, resistance to vaccination might be linked to a comprehensive rejection of modern science, so as to engage freedom of conscience. This is however a very remote possibility, given the lack of relevant precedents.

2.4 Equality/Discrimination

One persistent worry is that any system of vaccine passports risks being inequitable in terms of accessibility and effects and will run afoul of legal protections against unjust discrimination. The Charter’s s.15 guarantee of Equality Rights prohibits “discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability,” and the Supreme Court has ruled in (*Andrews v Law Society of BC* 1989) that certain other “analogous grounds” are protected as well and include characteristics that are immutable or at least difficult for a person to change (e.g., sexual orientation, citizenship).⁹ At its core, s.15 aims at the “promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration (*Andrews*).” Section 15 protections are not satisfied by mere *formal* equality (e.g., offering a staircase to a public building that everyone is welcome to use) and courts will instead demand *substantive* equality (e.g., an elevator for those unable to use stairs due to disability). An important caveat is that s.15 applies only in areas where government has taken action (e.g., by enacting laws, regulations, public policies). The courts have *not* interpreted s.15 as creating a positive duty on government to proactively correct inequalities in broader society (*Eldridge v British Columbia (Attorney General)* 1997). Thus, a vaccine passport regime that sprung up from the private sector, without government involvement, would likely not be challengeable under s.15 — more on this public/private interaction below.

⁹ See also *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 60: “An analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging. The fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground.”

Enumerated or Analogous Grounds?

A preliminary question is precisely who might suffer disadvantage under a vaccine passport regime and whether this grouping falls under some enumerated or analogous ground, such as race, disability status, etc. Perhaps the broadest grouping facing disadvantages from vaccine passports are the vaccine hesitant. Yet, it seems quite unlikely that the courts would accept vaccine hesitancy as an analogous ground under s.15. Crucially, vaccine hesitancy does not have the quality of being “unchangeable or changeable only at unacceptable personal costs” (*Egan v Canada* 1995) required of analogous grounds. Indeed, governments have made a policy aim of educating the public, precisely to change minds on vaccine hesitancy. In *Malmo-Levine* (2003), the Supreme Court pointed to this issue of mutability to find that a person’s “substance orientation” toward marijuana is not an analogous ground.

A more plausible case concerns those unable to be vaccinated due to health issues, which might count as a disability for the sake of the law. A vaccine passport regime threatens exclusion from restaurants, gyms, airline travel and even employment, and such deprivations could be construed as discriminatory. On the other hand, such a scenario is plausible only under an unsophisticated vaccine passport regime that did not permit some accommodations for people who cannot be vaccinated. It would be relatively easy, for example, for such individuals to access air travel safely without threatening the integrity of a passport system: instead of proof of vaccination, they might provide proof of a negative COVID-19 test and possibly a period of quarantine.

In addition to worries about discriminatory treatment of people who cannot be vaccinated for health reasons, broader equity concerns about unfair and differential distribution of vaccines have been advanced to criticize the fairness of vaccine passports. For example, we know that people in marginalized groups are in some cases less likely to be vaccinated and that some people in some historically oppressed groups may be vaccine hesitant for reasons involving past abuse and suspicion of official requirements to carry identification (Barned 2021; Statistics Canada 2021). At least one application has already been brought in Ontario seeking a declaration (in part) that the province’s vaccination program violated Charter section 15 because of discrimination due to age, race, disability and Indigenous descent. With respect to vaccine passports, the worry is that inequitable distribution of vaccines will make any related vaccine

passport system inequitable as well, and so invites Charter scrutiny. The Canadian Civil Liberties Association (CCLA) writes that,

“An immunity certificate regime that predicates presence in the workplace or participation in a range of social activities on proof of vaccination will disproportionately impact those individuals who have little social or political power to resist. [The vulnerable will] probably be the last to get inoculated, and least likely to produce an Immunity Passport, because of their socioeconomic status, their social, economic and psychological incapacity, and pre-existing obstacles to both.”

Notice again that at least some of these worries can be attenuated by making all efforts to ensure those who can be vaccinated are vaccinated as soon as possible and, for example, making sure that access to vaccines is as easy as possible in neighbourhoods of people who have faced historic and ongoing discrimination. Education and outreach, focused on the leadership of affected communities, will also help address intelligible vaccine hesitancy.

Are Vaccine Passports Discriminatory?

Our discussion to this point has assumed that a *prima facie* case can be made that vaccine passports will discriminate against members of some enumerated or analogous groups, and we have suggested how those disadvantages might be mitigated through exemptions and/or through in-built privacy protections in the passports themselves. It is worth briefly interrogating the very idea that vaccine passports are discriminatory, in the wrongful sense of discrimination that s.15 aims to prevent; i.e., treating members of enumerated and analogous groups as less deserving of respect and consideration. The problem here is that — far from being motivated by a sense of anyone’s lesser value — vaccine passports have been proposed precisely as a means of *protecting* those who cannot or will not be vaccinated. Vaccine passports are not proposed as a means of protecting the vaccinated population, who after all face little risk of serious illness; they are proposed as a means of controlling the risk of unvaccinated people interacting indoors where they might contract the disease. Surely, what matters to an s.15 analysis is not the public optics of vaccine passports, but their true policy rationales. There is no plausible sense in which vaccine passports can be described as excluding people on the basis of stereotypes or discounting the interests of enumerated or analogous groups (*R v Kapp* 2008, *Withler v Canada (AG)* 2011).

On the contrary, this is a science-based policy, aimed ultimately at protecting unvaccinated populations.

Is Anyone Disadvantaged by Vaccine Passports?

There is arguably a second conceptual confusion at play in equity-based objections around the basic notion that members of some vulnerable or marginalized class will be disadvantaged by vaccine passports. The putative disadvantage, of course, is denial or limitations on entry to venues gated by vaccine passports. However, this is not a disadvantage conferred by vaccine passports per se; it is conferred by public health lockdowns, which will have to persist until at least an acceptable level of herd immunity is achieved across the entire population. Some seem to suggest that vaccine passports are unethical and should be eschewed in favour of continued lockdowns and other mitigation strategies. In our view, such an argument speaks to a perverse ‘levelling down’ conception of equality that has no basis in s.15 jurisprudence—and, again, the burdens associated with maintaining the lockdown in full force will be borne disproportionately by the vulnerable and marginalized, meaning that this approach is hard to justify even under an equity lens.

Public vs. Private Sector Discrimination

As explained, there is every indication that Canada will move forward with vaccine passports, if only because this will be required for foreign travel (and hence falls under s.6 mobility rights). Some provinces, such as Ontario, have announced plans to issue digital receipts for vaccination. From the government’s standpoint the most immediate question is whether and how vaccine passports will gate access to public services, including access to things like hospitals, universities, public schools, driver licensing tests, and so on. The Canadian Council of Parliamentary Ombudsman recently published a guidance document, setting out fairness principles for the use of vaccine passports in the public sector (CCPO 2021). The principles laid out are entirely sensible, and include (e.g.) calls for transparency around where vaccination passports are required, that accommodations be made where possible for those who remain

unvaccinated, and that the passport program be evidence-based and subject to review and appeal processes.

Even if Canadian governments do not provide a secure, digital passport, Canadians themselves will have some proof of vaccination (e.g., a paper-based record or as part of their normal electronic health record) that can be displayed and authenticated at the bearer's discretion. Consequently, there is a potential that private actors will begin checking vaccination status on their own initiative. One question — beyond the scope of this paper — is whether (say) a private movie theatre would violate anti-discrimination protections contained in provincial human rights legislation by turning away patrons who cannot or will not furnish proof of vaccination.¹⁰ A separate question, more germane to our discussion, is whether the government action of issuing vaccine passports in the first place might be challenged, under s.15, as laying the groundwork for potential private sector discrimination. At issue here is whether governments have some obligation, flowing from s.15, to contemplate how vaccine passports might be used (or misused) by private actors.

It is certainly the case that a provincial government could pro-actively regulate how vaccine passports are used in broader society. For example, Ontario's *Personal Health Information Protection Act* (2004) strictly regulates where and when an individual can be required to show their health card, and analogous provisions could regulate the use and collection of vaccine passports. By the same token, if a government opted *not* to regulate in this way, it is unlikely that misuse of vaccine passports by private actors could ground a viable s.15 challenge. Consider, by analogy, that governments issue driver's licences, which are then used for myriad purposes in the private sector, some of which engage s.15 interests (e.g., the requirement by most car rental companies that drivers must be over the age of 25).

To be clear, the intended takeaway here is not that governments should avoid issuing vaccine passports in the first place for fear of unleashing private sector abuses. That is a futile

¹⁰ Provincial human rights legislation is more limited than the Charter and generally protects only against discrimination; there is generally no right to "liberty and security of the person" under provincial human rights legislation, enforceable against private parties. A notable exception is Quebec's *Charter of Human Rights and Freedoms*.

message, given the near inevitability of vaccine passports for international travel and that the fact of vaccination is information belonging to an individual which he or she may disclose at will. The path forward for those concerned about potential discrimination is to engage with the more nuanced question of how passports should be designed (to ensure privacy and data security) and rolled out in the context of Canadian federalism. We turn to these questions now, starting with privacy issues.

3. Privacy and Vaccine Passports

The key question about vaccine passports from a privacy law perspective is whether it is reasonable to require individuals to reveal some of their health information to gain access to public venues and services that, in ordinary times, could be accessed without divulging such information. While Canadian privacy law has a constitutional dimension,¹¹ the privacy questions raised by vaccine passports relate primarily to the statutory protections of privacy, both federal and provincial.

Consent is the central principle around which Canadian privacy law is built (*Privacy Act 1985, Personal Information Protection and Electronic Documents Act 2000*). Federal and provincial privacy laws are premised on individuals expressly or implicitly consenting to the collection, use and disclosure of their “personal information” for some legitimate purpose (*PIPEDA*). This consent-based framework is subject to numerous exceptions — including for public health purposes (*Personal Health Information Protection Act 2004*). The framework also recognizes that not all personal information is alike. Correspondingly, the law imposes heightened obligations on organizations that deal with sensitive data—including health data (Office of the Privacy Commissioner 2014). These heightened obligations apply to vaccine passports, since they must necessarily incorporate information about an individual’s vaccination status to be useful.

Vaccine passports have been conceptualized as a form of location-based surveillance (Cofone 2021, Renieris 2021). Given that the premise underlying vaccine passports is that they must be presented to gain access to public spaces that were freely accessible prior to the

¹¹ Notably, s. 8 of the Charter guarantees all individuals the right to be secure against “unreasonable searches and seizures.”

pandemic, vaccine-passport systems raise the specter of population-level, location-based surveillance. As the analysis below will demonstrate, however, the deployment of vaccine passports need not exacerbate the epidemic of surveillance that we face in society today (Zuboff 2019). Choices can be made in the design and use of these systems that maximize their public health benefits while minimizing their privacy impacts.

3.1 Design Considerations

Privacy scholars and practitioners from fields ranging from law to engineering have come to recognize that the design of a system is a key factor in determining its privacy impacts (Hartzog 2018). Correspondingly, an entire field known as "privacy by design" has developed in the last decade to guide the design of data processing systems to maximize their benefits while minimizing their privacy-related risks (Cavoukian 2010).

There are at least **four** fundamental choices regarding the design of vaccine passport systems that bear upon their privacy impacts.

The **first** relates to what information is encoded into the passport. To be useful, vaccine passports obviously need to encode information regarding an individual's vaccination status. Such information might include the date on which individuals received their vaccinations, as well as details regarding the vaccines they received.

Most discussions of the privacy impacts of vaccine passports assume that they must contain at least some information regarding an individual's identity, such as their name, date of birth or perhaps a unique identification number (Gstrein 2021). Such identifying information does not necessarily need to be encoded into the passports for them to be useful, however. One could imagine a system of vaccine passports that record the fact that the bearer has received certain vaccinations without recording any information about the bearer's identity.

Not including any identifying information on a vaccine passport would reduce the privacy risk the system poses, as there would be no way for organizations that are verifying passports to inspect, collect or retain information about an individual's identity. The trade-off that policymakers must weigh, however, is that omitting identification information makes the system more subject to fraud and abuse. Correspondingly, policymakers must weigh the public health

benefits of incorporating more identity information into a vaccine passport versus the privacy drawbacks of doing so.

The **second** choice relates to what information is collected by the organization issuing the passport at the time of issuance. The default assumption is that issuing organizations will simply collect and retain whatever information is encoded into the passport, but they could choose to collect more or less personal information than appears on the face of the passport. For example, the issuer could collect information about an individual's risk factors for adverse reactions without encoding that information into the passport. Conversely, passport issuers might not collect everything that appears on the face of the passport. For example, a government that has issued a travel passport cannot collect information about the various foreign visas that a passport bearer has received without gaining physical access to the individual's passport.

Here too, there are public health benefits to collecting more information that need to be weighed against privacy risks. There are inherent privacy risks in creating any new large databases of private information, such as the risk of data breaches (Sokol 2017) or the possibility that the data will be reused for some other unforeseen purpose (Office of the Privacy Commissioner 2020).

The **third** choice relates to who should be permitted to issue vaccine passports. Under our consent-based privacy regime, there is nothing to stop any private-sector entity from developing its own vaccine passport system, so long as those entities operate within the generally applicable laws that govern the collection, retention, use and sharing of personal information. As explained below, however, the modalities of Canada's current vaccine rollout make it likely that only governments have the capacity to issue vaccine passports. It is noteworthy, therefore, that Canada's federal, provincial, and territorial privacy commissioners recently issued a unanimous joint statement expressing the view that “[f]or vaccine passports introduced by and for the use of public bodies, consent alone is not a sufficient basis upon which to proceed (Office of the Privacy Commissioner 2021).”

The **fourth** choice—which is really a set of choices—relates to the technological implementation of vaccine passports.

Most discussions of vaccine passport systems presume that they will be digital, on the basis that they are cheaper and faster to deploy than analog systems (Beduschi 2021, Renieris 2021). This is a debatable assumption, as most large bureaucracies have systems in place to produce vast quantities of personalized documents relatively quickly. It may well be simpler and easier for governments to issue vaccine passports on paper stock incorporating some physical security features (such as watermarks or embossing) than to create secure digital systems for the issuance and verification of vaccine passports.

Many different digital technologies have been discussed in relation to vaccine passports. For example, the European Union's "Digital Green Certificate" system is based on QR codes that can be printed on paper or stored on a smartphone (European Commission 2021), while South Korea has proposed a blockchain-based vaccine passport system to prevent counterfeiting (Cha 2021).

The devil of the privacy implications of these technological choices is in the details, but digital systems raise more serious privacy concerns than analog ones because digital technologies make it much easier to collect, store and analyze data. Consider how the use of a proximity-based ID card to enter a building creates a digital record of one's movements, whereas using a key or flashing one's ID badge to a security guard does not result in the creation of any such records.

3.2 Use Conditions

The design characteristics of a vaccine passport system have an obvious impact upon the uses that can be made of them. Even so, there is a separate set of considerations regarding how such passports can be used that is germane to understanding their privacy impacts.

The **first** relates to who can ask to see your vaccine passport. Under background privacy law principles, individuals can consent to showing their passports to any entity that has some legitimate reason to view the passport or to such entities collecting some information that is encoded into the passport (such as the bearer's name). Preventing the spread of COVID-19 through the verification of vaccine passports would seem to be a legitimate purpose under Canadian privacy law, although this question has yet to be decided.

There is an obvious intersection here with the Charter analyses above of when exactly an individual's vaccination status can be used to provide them with preferential access to public spaces and services. With respect to privacy, the question facing policymakers is whether the default rules of privacy law govern the use of vaccine passports or whether laws are needed that limit who can ask to see them, and for what purposes.

There is also a **second** set of considerations regarding how vaccine passports are verified and validated when they are presented to gain access to a place or a service. This question relates back to the design choices that were discussed above, such as whether passports are analog and digital, what information is encoded into them, and what information is stored by the organizations that issue them.

The storage of at least some information about the passports and their bearers by the organizations issuing them opens the possibility of real-time authentication at the moment of presentation. Regardless of whether the passports are analog or digital, electronic authentication systems could be established to check whether the details appearing on the face of a vaccine passport correspond to a record stored in a centralized database.

Other potential authentication avenues are opened by storing more personal information about the bearer on the passport. For example, if vaccine passports incorporate an individual's name, an entity examining the passport could ask for corroborating documents to prevent fraud and misuse.

There is also a **third** set of questions relating to what information can be collected and stored regarding the bearer of a vaccine passport when one is presented to gain access to a service or a place. Should the default rules of privacy law apply, whereby organizations can collect any information of interest to them so long as they have a legitimate purpose, as well as the consent of the passport holder? Or should we enact new laws to govern the collection of information about vaccine passport bearers by entities to whom the passport is presented?

Setting appropriate rules for what information can be collected about bearers at the time they present a vaccine passport is key to mitigating the privacy impacts of such a scheme. We could conceivably achieve most of the objectives of a vaccine passport system without the

collection of any personal information about the bearer of the passport at the moment of presentation. Age and identity verification by liquor stores provides a useful point of comparison. We are able to effectively prevent underage individuals from purchasing alcoholic beverages by asking them to present a photo ID for inspection by the store clerk (Labine 2020). Information about the identity of would-be purchasers of alcoholic beverages does not need to be recorded or retained for the age verification system to operate effectively. Similarly, governments could mandate that entities that are permitted to inspect the vaccine passport may simply verify the information encoded into the passport without retaining it for any purpose.

4. Implementation of a Vaccine Passport Regime in Canada

Even if vaccine passports are deemed inevitable for Canada, their potential implementation faces several obstacles. These include challenges related to our federal system of government, a desire among Canadian governments to avoid the political heat of what may be an unpopular policy move, as well as technological and scientific challenges — not least, the backlog of second doses necessary to achieving vaccination.

In an ideal scenario, implementation of vaccine passports would be led and coordinated by the federal government and/or by a joint effort by all provincial/territorial (P/Ts) governments. They would create a national standard that provinces/territories could adhere to, thus permitting not only international travel but also inter-provincial travel and clear standards as to where and when the private sector could require proof of vaccination. In the absence of a pan-Canadian approach, different P/T governments may set different standards resulting in, for example, an individual's vaccination status enabling her to enter one province but not another. As provinces are experimenting with different vaccine schedules (holding second doses for up to four months for example), this is more than a theoretical concern.

An even more problematic scenario could occur if both levels of government shirk responsibility for developing standards for vaccine passports. Almost certainly, the private sector will develop mechanisms to verify immunization status and enable a safe reopening that protects workers and patrons. This would further increase the heterogeneity in approaches across

the country, undermine public health and create potential equity, privacy and legal challenges. Nonetheless, the calls are strong from those opposed to vaccine passports on alleged human rights grounds and this resistance, combined with resistance from anti-vaxxers, civil libertarians and the vaccine hesitant, may prompt governments to choose the path of least resistance; i.e., permit a Wild West of vaccination requirements to emerge.

4.1. Respective Roles of the Federal and Provincial Governments

The Supreme Court of Canada has stated that “health” is not a matter that is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending on the circumstances of each case on the nature and scope of the health problem in question (*Schneider v The Queen* 1982). In Canada, the field of vaccination and immunization certificates is clearly a matter of shared jurisdiction between the federal and provincial governments.

In terms of vaccines themselves, the federal government is responsible for approving and regulating vaccines as safe for distribution to the general public (using its criminal law powers). In the case of COVID-19 vaccines, the federal government, using its spending powers, also procures vaccines on behalf of the provinces and territories for further distribution to all Canadians. Theoretically, the federal government could have a role to play in surveillance of vaccines, but they have not chosen to exercise any legislative power in this context. The federal government has used its spending power in the past to influence vaccine policy through the national immunization trust program to harmonize pediatric vaccine schedules across the country.

The most obvious use case for vaccine passports is to limit access across Canadian national borders. The federal *Quarantine Act* establishes authority to prevent the introduction and spread of communicable diseases in regard to movement across the national border. The statute permits the establishment of quarantine facilities anywhere in the country and limits entry into Canada of persons or goods where necessary to control the spread of disease. Under this

head of power, the federal government has, for example, closed Canada's border to entry for most non-Canadians and, most recently, has instituted a three-day mandatory isolation requirement (at the traveller's cost) prior to re-entry by air to Canada as well as requirements for a negative COVID-19 test within 72 hours of arrival (Government of Canada 2021) as well as another test during the remaining 11 days of the 14-day self isolation. The federal government has recently lifted the 14-day quarantine for those who provide proof of full vaccination, completed two weeks prior to entry.

Provinces and territories are responsible for the actual implementation of vaccine programs, including administration and tracking of vaccines (local powers). Provinces run immunization information systems that would be central to any vaccine passport system, particularly if there are concerns about fraud. It stands to reason, therefore, that federal/provincial cooperation will be required for the creation of a vaccine passport regime—even one used only at national borders (an area of federal jurisdiction).

The implementation of international standards for vaccine passports would likely occur through the IHR and its Annex 7 standards for International Certificates for Vaccination and Prophylaxis, which currently only apply to the yellow fever vaccine. An amendment to this Annex 7 could permit the inclusion of standards for COVID-19 vaccines. This could extend beyond paper records to digital standards that a WHO Smart Vaccination Certificate working group is currently working to establish.

The federal government is responsible for compliance with the IHR but implementation must occur at the provincial level (as discussed below). While the US issued a federal reservation to the IHR, Canada did not. It remains uncertain whether the federal government has the ability or political will to force the provinces to meet international standards as defined by the IHR.

Practically, implementation of vaccine passports in Canada would likely occur as follows (see Figure 1). The federal government would serve as a coordinator of pan-Canadian efforts. It would work with the WHO and other countries to be aware of the international standards

emerging and communicate these to the provinces. The National Advisory Committee on Immunization (NACI) would set standards for what constitutes adequate immunization.

Provinces will be responsible for tracking immunization data and linking that data to individuals. They would be responsible for making immunization records accessible to individuals through provincial portals. They would create the digital standards for these records and define their use in each case. The European Council has identified three pillars for interoperable vaccine records: “a minimum data set, a standard unique identifier for such proofs and a trust framework, which provides the basis for establishing the certificates’ authenticity, integrity and validity (European Council 2021).”

The federal government would have to lead similar initiatives to achieve interoperability of immunization records across Canada. A minimum data set and a common data standard would be achievable and should align with WHO guidance. Unique identifiers will be more challenging and will likely initially rely on a health card number, but several provinces are developing a digital identity. The trust framework will be perhaps the most challenging aspect of the solution. This framework is needed to ensure that vaccination certificates are authentic and that this authenticity can be verified.

In summary, for a vaccination certificate system to work effectively and equitably across Canada, provinces will need to issue standardized immunization records for COVID-19 vaccines that are securely linked to an individual’s identity. When the individual provides proof of vaccination, the verifier can be confident that the record accurately represents the vaccines that that specific individual has received, has not been altered and is from a trusted issuer. An additional consideration will be the logic that will need to be implemented to ensure that the vaccine series meets the criteria for immunity, as this will vary by vaccine and time after receiving vaccines as information on duration of immunity becomes available. This will be a critical component moving forward as there is a wide variability in effectiveness of vaccines and this effectiveness is also different depending on the variant. Eventually, data may emerge on the effectiveness of mixed dosing schedules, impact of time between vaccine doses on immunity, and waning immunity post series completion, which would also need to be incorporated into

assessments of whether individuals are sufficiently immune. Immunity thresholds may also change depending on the basic reproduction number (the number of subsequent individuals infected for each infected individual) of the variant, which changes the “herd immunity” threshold. As reproduction numbers of circulating variants increase the percentage of individuals needed to be vaccinated for a given level of vaccine effectiveness to achieve “herd immunity” increases [critical fraction to vaccine = $(1-1/\text{reproduction number})/\text{vaccine effectiveness}$]. These factors are particularly relevant at present as the Delta variants has an increased basic reproduction number compared to other variants.

While it would be difficult and likely not politically expedient for the federal government to force the provinces to adhere to national standards, there would be a strong incentive for pan-Canadian harmonization. Provinces that do not adhere to these standards would limit the inter-provincial travel of their residents and likely also impede international travel.

4.2 Regulating the Use of Vaccine Passports

To date, Canadian public discourse on this topic has largely stalled at the very preliminary question of whether to adopt vaccine passports at all. For some use cases, vaccine passports are on their way: the prime minister and minister of health have both signalled that Canada will coordinate with the international community on vaccine passports for international travel (Scherer 2021). What is needed at this point is a more nuanced and granular discussion of how vaccine passports will be implemented, where their use will be required or forbidden, and what accommodations will be made for those who cannot be vaccinated for medical, age or religious reasons.

Vaccine Passports and Access to Essential Services

Perhaps the most consequential question, legally and ethically, concerns which areas of life will be gated by vaccine passports. A recent poll finds that Canadians are comfortable with vaccine passport requirements for international travel and large events, but less comfortable with their use in everyday settings (e.g., restaurants, shopping) (Ipsos 2021). The primary concern, it seems, is not with perceived inequities, but instead reflects privacy concerns around routinely

disclosing vaccination status to employers and other private actors (tech companies, airlines, hotels).

It is unclear what lessons to draw from polling Canadians on their reactions to vaccine passports in the abstract. The more germane question, surely, is how Canadians view vaccine passports relative to the available alternatives — across-the-board restrictions on indoor restaurant dining, concerts and sports events, in-person shopping, and so on. Presented with these alternatives, would Canadians eschew vaccine passports?

Perhaps Canadians' misgivings could be answered by prohibiting vaccine passports for access to essential services — of the sort that have been exempted from lockdowns — such as grocery stores and pharmacies. One argument for this approach is that it answers Canadians' concerns about unwanted sharing of vaccination status: anyone with worries in this regard can simply opt not to engage in the non-essential activities that are gated by vaccine passports; they are made no worse off than under the alternative of ongoing lockdown. Moreover, as we have seen, the Charter's protections of liberty and security of the person are targeted at fundamental interests, meaning that interference with non-essentials is less likely to engage these rights and freedoms. There is also a pragmatic argument for targeting vaccine passports at non-essentials: after prolonged experience with this pandemic, our essential services are well equipped to continue with alternative protective measures (e.g., enforcing PPE and social distancing). It is the non-essential sectors of the economy that look to vaccine passports as a lifeline.

Accommodating the Unvaccinated

The use of vaccine passports should be regulated to achieve optimal accommodation of individuals who cannot be vaccinated for medical or religious reasons. The measure just mentioned — of ensuring that essential services are not gated by vaccination status — is one such measure. An additional policy option would be to allow individuals to furnish recent negative test results in lieu of vaccine certification. Indeed, it is conceivable that the passport itself might track multiple variables related to transmission risk: for example, the European Commission's recent proposal for a Digital Green Certificate, intended to facilitate travel within

the EU, specifies that, “A Digital Green Certificate will be a proof that a person has been vaccinated against COVID-19, has received a negative test result or has recovered from COVID-19 that can be used across all EU Member States (European Commission 2021).” Whether this approach to certification will have use in cases beyond border crossings is an open question; presumably, there may be some risk of individuals becoming infected between the moment of testing and their entry to a large gathering, and informed judgments will have to be made about the risks and benefits here.

In the workplace, a potential less-restrictive measure is for employers to request that employees provide proof of vaccination, but allow unvaccinated employees to attend work unless there is a reported case of COVID-19 on site. If a case is reported, employers would notify individuals who have not submitted proof of complete vaccination, and ask that they either stay at home or have rapid testing conducted on arrival at the workplace to protect themselves and their families as well as co-workers. Such an approach is already used in schools for routine pediatric vaccines and in hospitals for the influenza vaccine.

5. Conclusion

As we write, Canadians have been under varying forms of lockdown for well over a year. While many comparator countries have moved forward with vaccine passport regimes, Canada’s debate on this topic appears to have stalled in the face of *prima facie* concerns over equity, privacy and civil rights. Much of the time, ethicists and lawyers raising these concerns do so on a tentative basis – urging Canadian lawmakers to carefully reflect on the legal and moral implications of vaccine passports, but without offering detailed legal reasoning or staking out a clear position on what steps governments should take, at the end of the day. To be sure, vaccine passports present complex legal and ethical questions, and the analysis presented in this report is by no means the last word. But delay and inaction have costs too – in the form of prolonged lockdown measures, which disproportionately burden marginalized populations. If this report accomplishes nothing more, we hope it will prompt readers’ impatience with this state of affairs, and trigger a more probing and productive conversation on this topic.

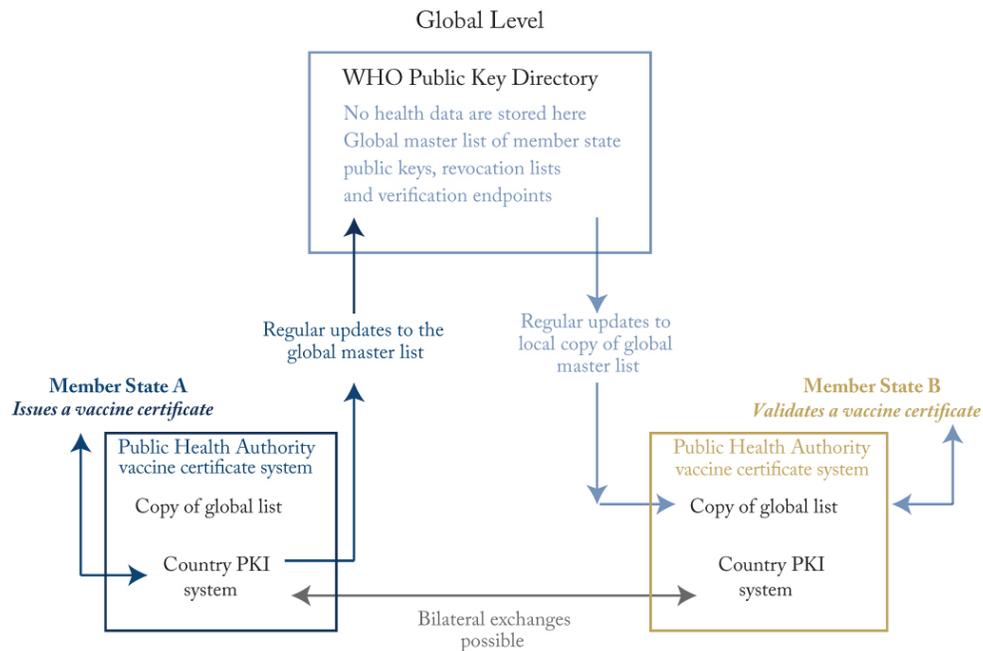
Figure 1: Potential Model for Establishment of Pan-Canadian Immunization Passports

Supranational (WHO) guidance/International harmonization (North America, G7, EU)



Key elements: Minimal data set/standards, trust framework, identity solution

WHO Model for Trust Framework



Establishment of pan-Canadian standards based on key elements (Fed/Prov/Territory deliberation)

- determination on rules for what constitutes immunity (NACI guidance)



Issuance of pan-Canadian standard by federal government that will govern use at international ports of entry



Voluntary adoption of standards by provinces/territories (P/Ts) to govern cross border travel
within Canada



P/Ts to develop internal rules for application to cases within their borders
-e.g., LTC homes, schools, universities, etc.

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