

# MANDATORY MASK POLICY DOES NOT BREACH HUMAN RIGHTS ACT

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In *Szeles v Costco Wholesale Canada Ltd.*,<sup>[1]</sup> the Chief of the Commission and Tribunals (the “Chief”) of the Alberta Human Rights Commission (the “Commission”) dismissed a complaint alleging that Costco had discriminated against a customer with a disability who refused to wear a mask or face shield.

## What happened?

In November 2020, the customer attended at a Costco store in Edmonton, Alberta and was told that he had to wear a mask under the company’s COVID-19 policy. The customer indicated that he was exempt from masking requirements because of a disability. The customer also refused Costco’s offer to wear a face shield as an alternative. An altercation ensued, the police were called and the customer was removed from the store.

The customer filed a complaint with the Commission alleging that Costco had discriminated against him in the area of goods, services and accommodation on the ground of physical disability, in contravention of the *Alberta Human Rights Act* (the “Act”).

A Human Rights Officer assigned under the Act conducted an investigation and recommended that the customer’s complaint be dismissed. The customer then requested that the Chief review the Human Rights Officer’s recommendation.

## Are mandatory mask policies discriminatory?

### 1. Adverse Impact

The initial question for the Chief was whether Costco’s policy had an adverse impact on persons protected under the Act. In this case, the Chief found that Costco’s policy did have an adverse impact on persons with certain disabilities who may be unable to wear masks. However, limitations on human rights can be justified in certain circumstances.

In particular, a limitation is justifiable where it is:

- instituted for valid reasons;

- instituted in the good faith belief that it is necessary; and
- reasonably necessary, meaning it is impossible to accommodate persons who may be adversely affected without incurring undue hardship.

To establish the third aspect of the test, Costco needed to show that it considered the least intrusive options, and made every effort to accommodate the customer's disability-related needs, short of undue hardship.

## *2. Valid Reasons*

The Chief found that Costco had a valid business purpose for instituting the policy in light of the mandatory public health regulations in place. Costco also provided substantial information, based on public health guidance and epidemiological research, that its policy was instituted for a valid business and safety purpose.

## *3. Good Faith*

The customer provided no basis for his allegation that Costco's policy had been established in bad faith, and with the purpose of singling out persons with disabilities for humiliation. The Chief also noted that there was nothing in the provincial and municipal public health regulations that prohibited businesses like Costco from instituting policies requiring the use of masks by employees or customers.

## *4. Reasonably Necessary Limitation*

The customer argued that the alternative offered by Costco; namely, wearing a face shield, was unreasonable because it did not offer protection against the transmission of COVID-19. In his view, the use of a face shield was also stigmatizing, was meant to single him out as a person with a disability, and would subject him to humiliation. He also argued that other available alternatives such as curbside pickup and on-line shopping did not provide equivalent service (among other things).

The Chief was not persuaded by the customer's arguments. Costco had provided substantial information from local and international health organizations that face shields may be an alternative to, albeit not as effective as, wearing masks. Moreover, according to the Chief, a less effective measure does not undermine the reasonableness of the restriction.

The Chief also noted that the customer's concerns regarding curbside pickup and on-line shopping were purely hypothetical. There was no evidence that any of the concerns raised actually impacted the customer. The Chief did not agree that these alternatives would impose any serious limitations on the customer.

Therefore, the Chief upheld the Human Rights Officer's recommendation and dismissed the customer's complaint. However, the Chief was cautious to note that he was making no decision on what outcome might be appropriate in other circumstances.

## Other Cases

Recently, the Chief also released his decision in *Beaudin v Zale Canada Co. o/a Peoples Jewellers*,<sup>[2]</sup> wherein he dismissed a similar human rights complaint from a customer against a business' mandatory mask policy even though there was no government mandate requiring mask wearing at the time. In that case, the business had offered online and telephone shopping as alternatives.

## Key Takeaways

These are promising decisions for businesses that have implemented robust measures to protect the health and safety of customers and employees during the COVID-19 pandemic. Businesses should continue to follow provincial and municipal regulations, and also institute their own written policies expressly offering accommodations for persons with disabilities (such as curbside pickup, on-line shopping and telephone shopping). Businesses should be prepared to apply their policies reasonably and flexibly based on the particular circumstances of each case.

[1][ps2id id='1' target=''] 2021 AHRC 154

[2][ps2id id='2' target=''] 2021 AHRC 155

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## A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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