

REDACTED

February 2, 2022

Via Email (ahrctribunal@gov.ab.ca)

Office of the Chief of the Commission and
Tribunals
7th Floor, Commerce Place
10155 -102 Street NW
Edmonton AB T5J 4L4

Dear Sir or Madam:

**Re: David Dickson (“Complainant”) v. Costco Wholesale Canada Ltd. (“Costco”)
Complaint No. S2020/12/0301 (“Complaint”)**

We write further to the Complainant’s December 21, 2021 Request for Review.

OVERVIEW

1. This Request for Review should be dismissed as there is no reasonable basis to proceed to a hearing. Dismissing this Request for Review would be consistent with recent decisions under section 26 of the *Alberta Human Rights Act* (“Act”).¹

REQUEST FOR REVIEW

2. The applicable test for carrying out the review function under section 26 of the Act is “whether there is a reasonable basis in the evidence for proceeding to a hearing before a Tribunal”.²

3. An instituted policy, which may have an adverse impact on persons with certain disabilities, is justified where:

A. the policy is instituted for valid reasons;

¹ *Szeles v Costco Wholesale Canada Ltd*, 2021 AHRC 154 [*Szeles*]; *Beaudin v Zale Canada Co o/a Peoples Jewelers*, 2021 AHRC 155 [*Beaudin*]; *Sox v Knott Insurance and Registries (Gibbons)*, 2021 AHRC 182 [*Sox*]; *Pelletier v 1226309 Alberta Ltd o/a Community Natural Foods*, 2021 AHRC 192 [*Pelletier*].

² *Szeles* at para 12; *Beaudin* at para 13; *Pelletier* at para 16.

- B. the policy is instituted in the good faith belief that it is necessary; and
 - C. it is impossible to accommodate persons who may be adversely affected, without incurring undue hardship.³
4. In applying the above noted test to face covering policies implemented in response to the global COVID-19 pandemic (“**Pandemic**”), the decision should be based on the policy in force at the time of the alleged discrimination and based on information related to the status of the Pandemic at that time.⁴
5. This Request for Review is based on whether there is a reasonable basis in the evidence for proceeding to a hearing to determine:
- A. whether Costco’s face covering policy in force in November 2020 was instituted for valid reasons and in the good faith belief that it was necessary; and
 - B. whether the Complainant was unable to comply with the policy due to a disability and whether Costco accommodated the Complainant to the point of undue hardship.
6. For the reasons outlined below, there is no reasonable basis to proceed to a hearing.

RESPONSE TO THE MERITS

- A. Costco’s face covering policy in force in November 2020 was instituted for valid reasons and in the good faith belief that it was necessary.***

7. The Complainant submits that Costco’s face covering policy was not instituted for valid reasons as it was contrary to municipal face covering bylaws and was not instituted in good faith, including as a result of recent changes to Costco’s face covering policy.

³ Szeles at para 13; Beaudin at para 14; Pelletier at para 21.

⁴ Szeles at para 21.

Costco's Face Covering Policy was Instituted for Valid Reasons and in Good Faith

8. As set out in greater detail in Costco's Initial Response, public health and epidemiological information support that Costco's face covering policy was instituted for valid reasons and in a good faith belief that it was necessary.

9. Since December 2019, COVID-19 has claimed over 5,600,000 lives.⁵ COVID-19 poses a serious, and potentially, fatal, threat to the health and safety of Costco's employees, members, guests, and the community at large.

10. The Government of Alberta requires businesses to provide a safe environment for their workers and customers. To comply with this obligation, public health guidance, and its general legal obligation under the *Occupational Health and Safety Act* (Alberta) to ensure the health, safety and welfare of people working at and attending its business locations, Costco implemented comprehensive safeguards, including the mandatory use of face coverings and the implementation of enhanced cleaning and disinfecting practices as further set out in Costco's Initial Response to the Complaint.

11. In November 2020, Costco revised its face covering policy to require anyone attending its warehouse locations to wear a face covering, either a face mask or face shield. This revision was a necessary and appropriate response to the rapidly increasing number of COVID-19 cases and the increased direction and emphasis on the efficacy of face coverings from medical and public health officials as further set out in Costco's Initial Response.

12. While the Complainant disputes the efficacy of face shields, it is trite that face coverings have been widely accepted and supported by governments and medical authorities, including in Alberta, as a fundamental and effective safeguard against COVID-19. While authorities and public health authorities generally do not recognize face shields as an equivalent safeguard to masks, they recognize the appropriateness and benefit of a face shield where a mask cannot be worn.⁶

⁵ COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU), Johns Hopkins University, online: <https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>

⁶ COVID-19: Mask requirements, Government of Alberta, online: <https://www.alberta.ca/masks.aspx>; Masks, BC Centre for Disease Control, online: <http://www.bccdc.ca/health-info/diseases-conditions/covid-19/prevention-risks/masks>; Guidance for Wearing Masks, Centres for Disease Control and Prevention, online: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>; Coronavirus

13. Costco's face covering policy was implemented in good faith and for valid reasons as it was consistent with public health recommendations aimed at preventing the spread of COVID-19 and was in place to protect the health and safety of Costco's employees, members, guests, and the community at large.

14. Indeed, the Chief of the Commission and Tribunals previously found that Costco's face covering policy was instituted for valid reasons and in a good faith belief that it was necessary.⁷

Municipal Face Covering Bylaws and the Act are Separate Legal Schemes

15. The Complainant submits that Costco's face covering policy was contrary to municipal face covering bylaws.

16. While Costco's face covering policy may have exceeded minimum standards, both the Government of Alberta and the City of Edmonton issued guidance expressly providing that private businesses may set their own policies as long as they also meet the minimum provincial requirements, as set out in Costco's Initial Response.

17. Additionally, as set out in previous decisions of the Chief of the Commission and Tribunals in *Szeles* and *Pelletier*, nothing in the provincial or municipal public health regulations neither allowed the Complainant to enter the store unmasked or prevented Costco from instituting its COVID-19 face covering policy.⁸

18. A bylaw does not create any right enforceable under the Act.⁹ Indeed, the Chief of the Commission and Tribunals previously noted the following in specific response to similar arguments advanced by complainants in the context of challenges to face covering policies:

[T]he complainant misunderstands the effect of the Calgary face mask bylaw, and its relevance to whether the respondent's policy violates his rights under the Act. While the bylaw provides for exemptions based on, amongst other reasons, disabilities, it does not prohibit businesses from establishing their own policies. It does not prohibit businesses from requiring all persons to wear face

disease (COVID-19): Children and masks, World Health Organization, online: <https://www.who.int/news-room/questions-and-answers/item/q-a-children-and-masks-related-to-covid-19>.

⁷ *Szeles* at para 15.

⁸ *Szeles* at para 17; *Pelletier* at para 20.

⁹ *Ibid.*

masks, including those who may have disability-related grounds for not doing so. It does not force, as the complainant argues, businesses to allow persons who may be medically unable to wear face masks to enter premises without wearing face masks. The exemption in the bylaw provides a defense to a charge that a person has violated the bylaw. It bestows no positive right to enter a business without a mask.¹⁰

I agree with the respondent that the provincial and municipal public health regulations neither allowed the complainant to enter the store unmasked, nor did they prevent the respondent from instituting its COVID-19 health and safety policy. There is nothing in those regulations that prohibits businesses from requiring the use of face masks by employees or customers, and indeed both specifically provide that businesses may institute their own policies. Subject to specific prohibitions, there is nothing in the public health regulations that “exempted” the complainant from complying with the respondent’s policy.¹¹

Costco is Allowed to Change its Face Covering Policy

19. The Complainant submits that the fact that Costco welcomed him without a face covering in recent months demonstrates that Costco’s face covering policy in force in November 2020 was not instituted in good faith.

20. As noted in *Szeles*, this Request for Review should be assessed based on Costco’s policy in force in November 2020, and the information related to the status of the Pandemic at that time.¹²

21. As such, Costco submits that changes in its face covering policy are irrelevant to this Request for Review and further submits that it is appropriate and consistent with applicable laws for an organization to change its face covering policy as various aspects of the Pandemic change over time.

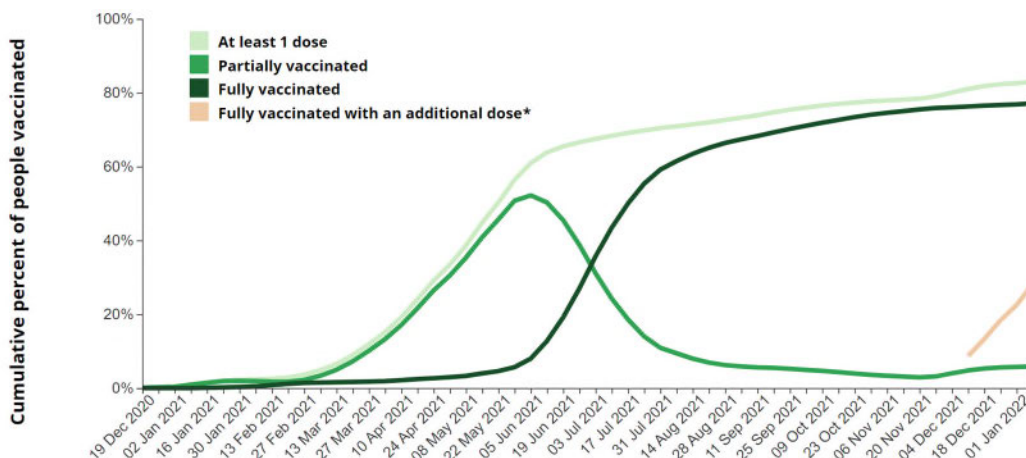
22. Due to the availability of COVID-19 vaccines and high vaccination rates, as set out in the below chart, which lessened the hazards presented by COVID-19, in October 2021, Costco

¹⁰ Ibid at para 19.

¹¹ *Szeles* at para 17.

¹² *Szeles* at para 21.

relaxed its face covering policy by allowing entry to individuals who could not wear a face covering due to a medical disability.¹³



B. Costco accommodated the Complainant to the point of undue hardship.

23. The Complainant argues that Costco’s accommodations were not genuine and Costco failed to accommodate him to the point of undue hardship.

Reasonable Accommodation was Offered by Costco

24. First, as set out in the Initial Response, Costco disputes that the Complainant suffers from a medical disability which prevented him from complying with Costco’s face covering policy. In particular, the Complainant provided no evidence that he was unable to wear a face shield. The Complainant provided a copy of a letter from a physician stating that he had “prior health conditions which symptoms are exacerbated by wearing a mask” and a copy of a medical note for a mask exception. While Costco disputes that these two records are enough to even support a claim that the Complainant has a disability that prevents him from wearing a mask¹⁴, the information the Complainant provided certainly does not support that he cannot wear a face shield and therefore comply with Costco’s face covering policy.

¹³ The majority of Canadians had been fully vaccinated by October 2021 and over 70% of individuals had received at least one dose in Canada and in Alberta. COVID-19 vaccination in Canada, Government of Canada, online: <https://health-infobase.canada.ca/covid-19/vaccination-coverage/>; COVID-19 Alberta statistics, Government of Alberta, online: <https://www.alberta.ca/stats/covid-19-alberta-statistics.htm#vaccinations>

¹⁴ *Pelletier* at paras 24-27.

25. Notwithstanding the foregoing, Costco met its obligations to the Complainant to provide reasonable accommodation. While the Complainant may have preferred to shop in-store without any face covering, the Act does not require perfect or preferred accommodation to be provided.

26. Indeed, with particular reference to a service provider's duty to accommodation during the Pandemic, the Chief of the Commission and Tribunals in *Pelletier* noted the following¹⁵:

The fact that an accommodation that limits an individual's ability to peruse grocery products, as a trade-off to limiting the spread of a disease that has reportedly caused the death of 5 million people worldwide, does not mean that it is unreasonable. Further, Courts and Tribunals have recognized that accommodations need not be perfect, or be the complainant's preferred accommodation.

27. As further set out in Costco's Initial Response, Costco offered numerous reasonable alternatives to in-store shopping including online shopping, grocery delivery and pick-up services, curbside pick-up for prescriptions, and having immediate family members shop on their behalf. The Complainant has not suggested what other accommodations would have been acceptable, apart from wearing no face covering, and positions that offering any other options to in-store shopping, short of unrestricted entry, is not reasonable accommodation.

28. However, given the serious, and potentially fatal, threat to health and safety that COVID-19 posed in November 2020, particularly in light of the fact that COVID-19 vaccines were not available, it would have constituted undue hardship to permit individuals to enter its premise without a face covering.

CONCLUSION

29. On the basis of foregoing, Costco submits that the Request for Review should be dismissed as there is no reasonable basis in the evidence to proceed to a hearing.

30. Costco's measures were reasonable, justifiable and lawful in the circumstances. Costco also offered reasonable accommodation to the Complainant, which was refused. Given the serious, and potentially fatal, threat to health and safety that COVID-19 posed in November 2020,

¹⁵ Ibid at para 41.

permitting any exceptions to Costco's face covering policy would have constituted undue hardship.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF FEBRUARY, 2022

Yours truly,

REDACTED

C: David Dickson <david.dickson@dksdata.com>

124353/540690
MT MTDOCS 43461709