



THE *CHARTER* CHALLENGE

Ontario Justice Education Network

CASE SCENARIO Fall 2017

JOHN WILSON AND MARY FERNANDES AND SUZAN SIMPSON AND
MARLYS JONES

v.

THE ATTORNEY GENERAL OF ONTARIO

L'éducation et le dialogue pour une société civile
A civil society through education and dialogue



Ontario Superior Court of Justice**Date: 20170303
Court File No: 19867-14****BETWEEN:****JOHN WILSON AND MARY FERNANDES AND SUZAN SIMPSON AND MARLYS JONES****Applicants****and****ATTORNEY GENERAL (ONTARIO)****Respondent****REASONS FOR DECISION****MEZODY J.****Introduction**

- [1] In this case, parents' rights to make fundamental decisions regarding the health and moral upbringing of their children collide with the state's duty to protect its citizens from the ravages of a deadly disease.
- [2] The *Protecting Ontarians Against Bigpox Act*, S.O. 2015 c. 13 (*POABA*), was enacted by the Ontario legislature in 2015, following an outbreak of a new and, in some cases, deadly disease, "bigpox", in the town of Petrolia, Ontario, in spring 2014. The *POABA* requires that any child who attends a school or a day-care centre in Ontario must have been vaccinated against bigpox. While the *POABA* provides an exemption for children who are unable to take the bigpox vaccine

because of a medical condition, there is no exemption for children (or their parents) who object to taking the vaccine for any other reason.

- [3] The applicants in this case have chosen not to vaccinate their children against bigpox, for different reasons. Mary Fernandes and John Wilson decided not to have their four-year-old daughter Rashida vaccinated because they are concerned that the aluminum adjunct in the vaccine may have a detrimental impact on Rashida's brain development. Suzan Simpson and Marlys Jones are practicing vegans who are raising their son, Harrison, as a vegan. Vegans do not consume any sort of animal product. They decided not have their two-year-old son, Harrison, receive the bigpox vaccine because it contains a compound isolated from sheep blood. Because Rashida and Harrison have not received the bigpox vaccine, and because they do not fall within the medical exemption found within the *POABA*, each of them has been barred from registering for, and attending day-care (Harrison) and school (Rashida).
- [4] The applicants have brought this application against the Attorney General of Ontario seeking declarations that:
- (i) the *POABA* infringes section 2(a) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") because it violates parents' (and their children's) rights to freedom of religion and freedom of conscience;
 - (i) the *POABA* infringes section 15(1) of the *Charter* because it discriminates against parents (and their children) based on their religious or conscientious beliefs;
 - (ii) the *POABA* infringes section 7 of the *Charter* because it deprives parents of liberty and security of the person in a manner not in accordance with the principles of fundamental justice; and

(iii) the violations of ss. 2(a), 15(1) and 7 of the *Charter* cannot be demonstrably justified under s. 1 of the *Charter* and the offending sections of the *POABA* are therefore of no force and effect.

[5] For the reasons that follow, I hold that the *POABA* does not infringe section 15(1) of the *Charter*. However, I hold that the *POABA* infringes sections 2(a) and 7 of the *Charter* and cannot be saved by section 1.

Facts

Bigpox and the 2014 Outbreak in Ontario

[6] In fall 2013, a new disease, *variola virus* (commonly called “bigpox”), was first identified in the United Kingdom. It is believed that the disease first appeared in sheep and then spread to humans through direct contact with infected animals.

[7] The bigpox virus attacks the respiratory and the central nervous systems. The initial symptoms of bigpox include a wet, hacking cough, a persistent headache and low-grade fever, accompanied by large sores most commonly located on the bottom of the feet, the inner ear and in the lower, inner throat.

[8] Treatment for bigpox includes a multi-week course of a combination of antibiotic and other medicines. Unfortunately, approximately 3% of the population does not respond to the course of treatment that has been developed.

[9] If left untreated (or if the patient is resistant to treatment), bigpox will eventually attack the lungs; in its most extreme cases, bigpox can lead to paralysis of the lungs, leading to death. During its initial outbreak in the United Kingdom, of

3,291 persons diagnosed with bigpox, 31 died and a further 479 people have ongoing respiratory problems due to lung damage suffered as a result of bigpox.

- [10] Unfortunately, as is often the case with diseases, bigpox poses particular dangers to certain vulnerable parts of our society: the very young, very old and other immunocompromised people are at the greatest risk for contracting the disease. Moreover, children under eight (8) years and adults over 55 years of age are more likely to prove resistant to the bigpox treatment. Of the 31 persons who died in the UK outbreak, 11 were younger than eight years old, and 17 were older than 55 years.
- [11] Before the end of 2014, more than 65 countries had experienced at least once diagnosed case of bigpox. In March 2014, a bigpox outbreak occurred in Petrolia, Ontario. It is believed that the outbreak can be traced back to a teenager who was exposed to bigpox when he travelled with his family to a football game in Ann Arbor, Michigan. Although the teenager experienced some bigpox symptoms (cough, headache, low-grade fever), because he did not notice any sores until several days later, he continued attending high school where, among other things, s/he was a member of the varsity swim team. Four other members of the swim team, and the team coach, became infected with bigpox. When they were diagnosed with bigpox a week later, the local health authority declared a state of emergency and implemented a bigpox outbreak protocol which included a shut-down of local schools, day-cares and community centres, monitoring and masking protocols for all local hospitals and doctor's offices, and other measures.

By the time the outbreak was declared contained three weeks later, 67 people had been diagnosed with bigpox. Sadly, four people died, including a seven-year old boy, a three-year old girl, her 81 year old grandmother, and a 34-year old nurse. A further 14 people continue to suffer health problems as a result of having contracted the disease.

- [12] There have been no confirmed cases of bigpox in Ontario since August 12, 2015. World-wide, the incidence of bigpox has plummeted since the vaccine was introduced in 2015.

The Bigpox Vaccine

- [13] As soon as bigpox was identified in the United Kingdom, researchers across the globe worked collaboratively to identify both an effective means of treating patients and a form of vaccine that could prevent people from spreading or contracting the disease. A bigpox vaccine was developed in November 2014. By February 2015, the vaccine was being used in areas that had been affected by bigpox outbreaks; by July 2015, the bigpox vaccine was in mass production and could be made available to all persons in Canada. The vaccine is approved by Health Canada, and that organization tests and approves every batch of the vaccine before it is distributed for use.
- [14] While the bigpox vaccine represented a critical step in the fight against bigpox, it is not perfect. The vaccine cannot be administered to certain segments of the population, including the following:

- babies under 18 months of age;
- persons undergoing certain types of cancer treatment (including chemotherapy and radiation therapy);
- persons who take immune-suppression drugs, for example, persons who have received kidney or liver transplants;
- persons who have been diagnosed with epilepsy or any other seizure disorder; and
- persons with an allergy or sensitivity to one or more of the vaccine's ingredients.

As I already noted, persons who fall within one or more of these categories will receive a medical exemption under the *POABA*. It is estimated that approximately 14% of the population falls within one or more of these categories; among children attending either day-care or school, approximately 17% fall within one or more of these categories, and therefore cannot be vaccinated against bigpox.

[15] In addition, like all other vaccines, the bigpox vaccine is not 100% effective.

While the overall effective rate of the bigpox vaccine is quite high (approximately 90%), the vaccine's effectiveness varies across different segments of the population. Once again, the very young (under eight (8)) and very old (over 75) are most vulnerable, with effectiveness rates of 80% and 65%, respectively.

[16] As a result, approximately 33.6% of children attending Ontario day-cares or schools are vulnerable to contracting bigpox if exposed, either because they cannot receive the bigpox vaccine or because the vaccine is not effective.

Keeping that one-third of children safe relies on the phenomenon commonly referred to as community immunity (or herd immunity). Community immunity is a

form of indirect protection from infectious disease that occurs when a significant portion of a population is immune to an infection. The larger the proportion of individuals in a community who are immune, the less likely those who are not immune will come into contact with an infectious individual and thus contract the disease. With respect to bigpox, scientists have indicated that a vaccination rate of at least 65% is necessary to render another bigpox outbreak significantly unlikely.

The Applicants' Objections to the Bigpox Vaccine

- [17] John Wilson and Mary Fernandes have chosen not give their daughter, Rashida, the bigpox vaccine because it contains aluminum potassium sulfate. Aluminum is often used an “adjuvant” in a vaccine, to improve the immune response. By improving immune response, adjuvants allow for lesser quantities of the vaccine and fewer doses.
- [18] Aluminum salts such as aluminum hydroxide, aluminum phosphate and aluminum potassium sulfate, have been used to improve the immune response to vaccines for more than 70 years. One dose of the bigpox vaccine contains 2 milligrams of aluminum. To put this into perspective, over the course of their first six months, babies receive approximately 10 mg of aluminum in breast milk, 40 mg of aluminum through infant formula or approximately 120 mg of aluminum in soy-based infant formula.
- [19] Nonetheless, because some neurological studies have found a link between high levels of aluminum in brain tissue and impaired brain development, some

parents, such as the parents of Rashida Wilson-Fernandes, have concerns about the presence of aluminum in vaccines.

[20] Rashida's mother, Mary Fernandes, is a biologist; in her affidavit she indicates that she has done extensive research into the effects of aluminum in early brain development. Based on that research, Ms. Fernandes and Rashida's father, John Wilson, have decided to delay having Rashida receive the bigpox vaccine until she is seven (7) years old. Ms. Fernandes indicates in her affidavit that, while she and Rashida's father understand the scientific research indicating the level of aluminum in the bigpox vaccine is small when compared to other sources of aluminum to which children are exposed, they believe that any risk to Rashida's brain development, and therefore any amount of aluminum, is unacceptable.

[21] Suzan Simpson and Marlys Jones are practicing vegans. They do not eat, wear or otherwise consume any animal products. According to the affidavit sworn by Ms. Simpson, this decision is an ethical and moral one, based on concerns about animal cruelty, as well as concerns about the impact that an animal-based diet has on the environment. Ms. Simpson and Ms. Jones are raising their two-year-old son, Harrison, as a vegan. From the time he was born, Harrison has not consumed any food or medicine that contains animal products, nor does he wear any clothing that contains an animal product (such as wool). In their affidavit, they indicate that they have determined not to have Harrison receive the bigpox vaccine because it contains a compound isolated from sheep blood, thus

having Harrison take the vaccine would violate their conscience as vegans.

The *POABA*

[22] The *POABA* was enacted in October 2015 and came into effect September 1, 2016. The full text of the *POABA* is set out in Schedule “A” to these reasons.

Section 3 of the *POABA* prohibits any child from registering for, or attending, an Ontario school (private school or public school) or day-care if the child has not received the bigpox vaccine.

[23] Section 2(a) of the *POABA* provides a medical exemption for any child in respect of whom “a physician licensed to practice medicine in Ontario certifies that it is a danger to the child’s health” for the child to receive the vaccine. Section 2(b) allows for further exemptions “in accordance with any regulations or orders passed by the Minister of Health”. No such orders or regulations have been made, leaving the medical exemption the sole exemption under the *POABA*.

[24] Pursuant to section 3 the *POABA*, Rashida Wilson-Fernandes and Harrison Simpson-Jones are prohibited from attending any day-care or school in Ontario. Rashida is being home-school by her father, who has taken an unpaid leave of absence from work. Harrison’s mother, Marlys Jones, has delayed her return to full-time studies in order to stay home and look after him.

Legal Issues

[25] The disposition of this case requires me to address four legal issues:

- (i) Does the *POABA* infringe section 2(a) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) because it violates parents’ (and their children’s) rights to freedom of religion and freedom of conscience?

- (ii) Does the *POABA* infringe section 15(1) of the *Charter* because it discriminates against parents (and their children) based on their religious or conscientious beliefs?
- (iii) Does the *POABA* infringe section 7 of the *Charter* because it deprives parents of liberty and security of the person in a manner not in accordance with the principles of fundamental justice?
- (iv) If the *POABA* infringes section 2(a), section 15(1) or section 7, is the infringement justified under section 1 of the *Charter*?

[26] The applicants bear the burden of establishing that their rights have been violated under one or more of sections 2(a), 15(1) and 7 of the *Charter*. If they succeed in establishing a violation of their *Charter* rights, the Attorney General bears the burden of establishing that the violation is justified under s. 1 of the *Charter*.

[27] I also believe that it is important, at the outset, to identify what this case is not about: First of all, it is not about forced vaccination. The *POABA* does not “force” parents to vaccinate their children against bigpox – at least, not in the sense of physical or legal compulsion to vaccinate one’s child. While the applicants have argued that denying access to critical services, such as day-care and schooling, amounts a practical compulsion to vaccinate, they acknowledge that the *POABA* affords them the right to decide not to vaccinate their child. The practical consequences that flow from that decision under the provisions of the *POABA*, form an important part of my analysis regarding the impact of the *POABA* on the applicants’ *Charter* rights, and will therefore be discussed in more detail below.

[28] Second, this case is not about the state interfering in a particular parent-child

relationship to compel the child to undergo some form of medical treatment *for the benefit of that child* (as in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 or *Children's Aid Society of Peel (Region) v. H. (T.M.C.)*, 2008 ONCJ 20) . No one is alleging that the risk to Harrison and Rashida's health presented by their parents' refusal to give them the bigpox vaccine is significant enough to justify the state taking custody of the children to have them vaccinated. What is at issue in this case is the state's authority to take measures to protect the general public – and, in particular, children attending schools and day-cares – from bigpox by requiring that all children who attend schools and day-cares who can be vaccinated receive the bigpox vaccine.

[29] Third, this case is not a trial about the science of vaccination. The applicants in this case are not arguing that the bigpox vaccine is unsafe or ineffective. Rather, they submit that the *POABA*'s refusal to allow them an exemption from the bigpox vaccination regime, based on their conscience-based objection to the bigpox vaccination violates their *Charter* rights. It is in that context that I turn to the four issues in this case.

Issue One: Does the *POABA* infringe the applicants' right to freedom of conscience under section 2(a) of the *Charter*?

[30] I have no hesitation in finding that the provisions of the *POABA* infringe upon the applicants' right to freedom of conscience under s. 2(a) of the *Charter*.

[31] Section 2(a) of the *Charter* provides as follows:

2. Everyone has the following fundamental freedoms:

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(a) freedom of conscience and religion...

- [32] S. 2(a) of the *Charter*, like the other provisions of the *Charter*, must be given a liberal interpretation with a view to satisfying its purpose. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Chief Justice Dickson, defined “freedom of conscience and religion” as follows:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. [Emphasis added.]

- [33] I appreciate that the *POABA* does not require that parents vaccinate their children under threat of a penalty such as a fine or imprisonment. Instead, the *POABA* requires vaccination as a pre-condition to children attending schools or day-cares. However, that condition must be considered in context and in terms of its practical consequences. Schools and day-cares play a fundamental role in a child’s social and cognitive development; being barred from these institutions will result in social isolation, stigma and educational deprivation for children, and added expense and strain on their parents. When considered in context, it is clear that denying parents who refuse to vaccinate their children access to

schools or day-cares amounts to a practical compulsion to vaccinate even though it is contrary to their conscience (*i.e.* their belief system).

- [34] The Supreme Court of Canada has held that the right of parents to raise their children according to their religious beliefs is a fundamental aspect of freedom of religion, guaranteed by s. 2(a) of the *Charter*. This would include the right to make decisions regarding their children's medical and other treatment: *B. (R.)*, *supra*, at para. 105, and also include the right of parents to educate their children according to their religious beliefs: *R. v. Jones*, [1986] 2 S.C.R. 284, at para. 76.
- [35] I see no reason why, in principle, these findings do not apply equally to a belief system or a system of morals or ethics founded on something other than a recognized, organized religion. Section 2(a)'s reference to "freedom of conscience" protects systems of belief which are not theocentric (centred on a deity), and which might not be characterized as religions for that reason. The line between religion and another system based on morals and ethics – such as veganism – is not always easy to draw. Indeed, as the applicants pointed out in their submissions, a number of religions, such as Jainism, Buddhism, Hinduism and Rastafarianism, are associated with the practice of vegetarianism or veganism. Drawing distinctions between practices or beliefs based on recognized, organized religions and other moral or ethical systems would, in my view, create artificial distinctions and would run contrary to the principle that *Charter* rights are to be given a liberal interpretation.

[36] For these reasons, I find that the *POABA* violates 2(a) of the *Charter*.

Issue Two: Does the *POABA* infringe the applicants' right to equality under section 15(1) of the *Charter*?

[37] Section 15(1) of the *Charter* protects against discrimination. It states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[38] In *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 17, the Supreme Court of Canada set out a two-part test for assessing a claim under s. 15(1) of the *Charter*:

- 1) does the law create a distinction based on an enumerated or analogous ground?
- 2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[39] The Supreme Court subsequently affirmed this test in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 30.

[40] Dealing with the first part of the test, the applicants submit that conscience is an analogous ground for the purposes of section 15(1) of the *Charter*. In my mind, however, it is not necessary for me to determine this issue. Even assuming that “conscience” is an analogous ground under s. 15(1) of the *Charter*, and that the *POABA* draws a distinction based on “conscience”, I find that the applicants have failed to satisfy the second part of the *Kapp-Withler* test.

[41] A distinction based on an enumerated or analogous ground does not, by itself,

amount to a s. 15(1) violation. The second part of *Kapp-Withler* test requires the applicants to show that the law has a discriminatory impact. This can be done in one of two ways. First, one can show that the impugned law, in purpose or effect, perpetuates prejudice or disadvantage to members of the claimant group based on personal characteristics within s. 15(1). Second, one can show that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group: *Withler*, at paras. 34-36.

- [42] In this case, the disadvantage suffered by the applicants is the denial of access to important institutions for their children: school and day-care. While I recognize that these institutions play a critical role in children's lives, I find that the denial of this access is not based on the circumstances or characteristics of the applicants', *i.e.* their belief system. The denial of access is based on the proposition, founded upon accepted science, that unvaccinated children pose a risk to people (particularly other children) who are unable to be vaccinated or who, despite being vaccinated, have not developed immunity to bigpox. Because schools and day-cares are place where children congregate and spend a great deal of time together in close proximity, denying access to these two locations is rationally connected to the state's purpose of limiting the spread of infectious disease such. As a result, I am unable to find that denying access to schools and day-cares to children whose parents choose not to vaccinate them for conscientious reasons is discriminatory in the sense that it is arbitrary or

based on stereotypes.

[43] I therefore conclude that the *POABA* does not offend s. 15(1) of the *Charter*.

Issue Three: Does the *POABA* deprive the applicants of any of the interests protected by section 7 of the *Charter*?

[44] Section 7 of the *Charter* provides:

7. 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.

[45] The section 7 inquiry involves two steps. I must first determine whether the impugned law engages the applicants' life, liberty, or security of the person interest. If so, I must then determine whether this infringement on life, liberty or security of the person is in accordance with the principles of fundamental justice.

[46] The s. 7 *Charter* right to life, liberty and the security of the person is not limited to criminal or penal matters. Instead, the protections of s.7 extend to civil or administrative deprivation of life, liberty and security of the person, so long as the deprivation is threatened by state action.

[47] "Liberty" means more than the absence of coercion; it includes the right to make decisions of fundamental personal importance in one's life. For parents, this extends to important decisions regarding their children. This "parental liberty" extends to matters such as decisions about medical care (*B.(R.)*, at para. 83) and the right of parents to educate their children as they see fit: *R. v. Jones*, [1986] 2 S.C.R. 284, at para. 76.

- [48] “Security of the person” encompasses a notion of “personal autonomy involving control over one’s bodily integrity free from state interference” and is engaged by state interference with an individual’s physical or psychological integrity, including any state action that causes physical or serious psychological suffering: *Carter v. Canada (Attorney General)*, 2015 SCC 5, at para. 64. Significant intrusion into the ability of a parent to make decisions regarding his or her child can interfere with the psychological integrity of the parent, involving stigmatization, loss of privacy, stress, anxiety and disruption of family life and therefore engages the parent’s security of the person: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Winnipeg Child and Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519.
- [49] Having found that *POABA* engages section 7, by impinging upon the applicants’ rights to liberty and security of the person, I turn to the second stage of the section 7 analysis. At this stage, I must identify and define the relevant principle or principles of fundamental justice and determine whether the deprivation respects the relevant principle or principles of fundamental justice: *Blencoe v. B.C. (Human Rights Commission)*, 2000 SCC 44.
- [50] As I will explain, I find that the *POABA* violates two settled principles of fundamental justice: overbreadth and gross disproportionality.
- [51] Applying each of these principles requires the court to identify the objective of the law in question. As I indicated earlier, I find that the purpose of s. 3 of the *POABA*

is to prevent the spread of bigpox and, in particular, to protect children who cannot be vaccinated or who, despite having been vaccinated, remain vulnerable to contracting bigpox, from exposure to bigpox.

- [52] The first principle, overbreadth, is violated when a law is so broad in scope that it includes *some* conduct that bears no relation to its purpose; the law is rationally connected in some of its applications, but goes too far, affecting s. 7 rights in other situations where there is no rational connection to the law's purpose: *Bedford v. Canada (Attorney General)*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (QL) at para. 112. The second issue, gross disproportionality, arises when a person is deprived of life, liberty or security of the person in a manner that is "grossly disproportionate" to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms. The law's effects on the s. 7 interests are "totally out of sync" with its objective: *Bedford*, at paras. 120-121.
- [53] I note that there is a third settled principle of fundamental justice: arbitrariness. In my view, s. 3 of the *POABA* is not arbitrary. As I indicated at paragraph 50 of these reasons, I find that the deprivation of the applicants' liberty and security of the person interests – namely, depriving their children access to schools and day-cares because they have chosen not to have them vaccinated – is rationally connected to the law's purpose.
- [54] In considering whether the *POABA* is overbroad or grossly disproportionate, I am

mindful that the Supreme Court of Canada said in *Bedford* that this analysis must be done at an individual, not a societal level. I am not to consider issues such as ancillary benefits to the general population, or the percentage of the population that is negatively affected by the law. That sort of cost-benefit analysis is appropriate under s. 1, but not under s. 7. “The question under s. 7 is whether *anyone’s* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7”: *Bedford*, at para. 123

[55] Applying these principles to this case, I find that the *POABA* violates the principle of overbreadth and it is grossly disproportionate. Banning all voluntarily unvaccinated children – whether or not they have exhibited any bigpox symptoms, in the absence of any reason to think that they have been exposed to bigpox and, indeed, in the absence of any reason to think that the bigpox virus is even present within the community – goes too far. It bars children from attending schools or day-cares who, despite not being vaccinated, pose virtually no bigpox threat to others. Prohibited from attending any school or day-care in the province, essentially, permanently, these children are being stigmatized, isolated and denied access to institutions that are critical to their social and cognitive development, and to their physical and psychological well-being. Such draconian measures are “totally out of sync” with the risk these children may pose to others.

Issue Four: If the *POABA* infringes section 2(a), section 15(1) or section 7, is the infringement justified under section 1 of the *Charter*?

[56] As I have found that *POABA* infringes the applicants’ section 2(a) and 7 rights, I

must now determine whether this infringement is justified under section 1 of the *Charter*.

[57] Before turning to the specific elements of s. 1, I make some general observations about the relationship between s. 7 and s. 1 of the *Charter*. The Supreme Court of Canada has previously noted that violations of s. 7 will be seldom saved by s. 1. In *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486, Lamer J. stated that "[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like" [emphasis added]. That is because of the inherent difficulty in demonstrating that a law that violates the principles of fundamental justice is nonetheless "justified in a free and democratic society".

[58] Section 1 provides:

1. The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[59] The provisions of the *POABA* are, undoubtedly, "prescribed by law" because they are duly enacted legislative provisions.

[60] The two-stage test for "reasonable limits" was established by the Supreme Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, and can be summarized as follows:

Stage 1: Does the *POABA* have a pressing and substantial objective?

Stage 2:

- a) Are the means chosen by the legislature in the *POABA* rationally connected to the objective of preventing the spread of bigpox?
- b) Does the *POABA* minimally impair the applicants' rights?
- c) Are the positive effects of the *POABA* proportional to its negative effects?

[61] Dealing with stage one, I find that the purpose of the *POABA*, that is protecting the health of people in Ontario and, more specifically, of children who attend Ontario schools and day-cares, by preventing the spread of bigpox, is a pressing and substantial objective. One need look no further than the impact of the 2014 outbreak in Petrolia, Ontario, to see the devastating toll that bigpox can have on a community once infection takes hold.

[62] Moving on to stage two, I find, for the reasons set out above, that this infringement is rationally connected to that objective.

[63] Nevertheless, I am unable to conclude, that the *POABA* meets the requirement of minimal impairment. The *Act* prohibits all children who have not received the bigpox vaccine from attending a school or day-care. This prohibition is wide-sweeping and permanent; it applies regardless of the actual risk that bigpox poses within the community. The legislation makes no attempt to tailor the circumstances of the prohibition against attending school to those children, or those circumstances, where the risk of contracting or spreading bigpox has increased beyond virtually non-existent.

[64] As Lamer J. noted in the *BC Motor Vehicle Reference*, exceptional circumstances, such as the outbreak of war or an epidemic, may justify a law that entrenches upon people's *Charter* rights, even s. 7 rights. Nonetheless, when those exceptional circumstances cease to exist, the law must be reconsidered (and rejustified) under the *Charter*. There has not been a confirmed case of bigpox in Ontario since August 2015 - more than two years ago. A permanent ban on children attending schools or day-cares because they have not received the bigpox vaccine, in the absence of any indication that bigpox remains a threat within their community, is unjustified.

[65] Further, based on the foregoing analysis, I also find that the Attorney General has failed to establish that the deleterious effects of the *POABA* are outweighed by its salutary effects. As such, the *POABA* cannot be saved by section 1 of the *Charter*.

Conclusion

[66] Section 3 of the *POABA* does not offend section 15(1) of the *Charter*, but it does offend sections 2(a) and 7 of the *Charter*. This violation cannot be justified under section 1. The provision is therefore of no force and effect and I order that Rashida Wilson-Fernandes and Harrison Simpson-Jones be permitted to register and attend day-care and/or school.

MEZODY, J.

Schedule "A"

Protecting Ontarians Against Bigpox Act, S.O. 2015, c. 13

Whereas the government of Ontario recognizes the significant danger that *variola* *humungous* (bigpox) poses to the health of Ontarians.

And whereas bigpox poses the most significant danger to vulnerable Ontarians, such as young children, older persons and persons fighting other diseases or medical conditions.

And whereas the bigpox vaccine is a safe and effective means of preventing the transmission of the smallpox.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Vaccination

1. Unless exempt under this Act, a parent or guardian shall
 - a) ensure that his or her child receives a bigpox vaccine approved by the Minister of Health, no later than the child's third birthday; and
 - b) obtain a Certificate of bigpox Immunization in the prescribed form signed by a physician licensed to practice medicine in Ontario.

Medical Exemption

2. A child can be exempt from this vaccination
 - a) if a physician licensed to practice medicine in Ontario certifies that it is a danger to the child's health; or
 - b) in accordance with any regulations or orders passed by the Minister of Health.

Failure to Obtain Bigpox Immunization

3. Any child who has not been vaccinated under s. 1(1) of this Act, or who is not exempt under s. 2(a) of this Act, shall not be allowed to register for, or attend:
 - c) any school (including a private school) established under the *Education Act*, R.S.O. 1990, c. E.2
 - d) any child care centre established under the *Child Care and Early Years Act*, 2014, S.O. 2014, c. 11, Sched. 1

GROUNDS OF APPEAL

For the purposes of the Fall 2017 Charter Challenge, The Attorney General of Ontario is appealing to the Court of Appeal for Ontario to reverse Justice Mezody's findings that a) the *POABA* infringes on Wilson et al's rights under sections 7 and 2(a) of the *Charter* and b) that this infringement is not justified under section 1 of the *Charter*. The families who were the applicants in Justice Mezody's decision are the respondents in this appeal, but may additionally argue on cross-appeal that the judge erred in finding no violation of rights provided under section 15 of the *Charter*.

The outcome of this appeal will determine whether the two children will be permitted to attend school and day-care, respectively. The issues on appeal are identical to those stated in Justice Mezody's Reasons for Decision:

1. Does the *POABA* infringe section 2(a) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") because it violates parents' (and their children's) rights to freedom of religion and freedom of conscience?
2. Does the *POABA* infringe section 15(1) of the *Charter* because it discriminates against parents (and their children) based on their religious or conscientious beliefs?
3. Does the *POABA* infringe section 7 of the *Charter* because it deprives parents of liberty and security of the person in a manner not in accordance with the principles of fundamental justice?
4. If the *POABA* infringes section 2(a), section 15(1) or section 7, is the infringement justified under section 1 of the *Charter*?