

#OJENTMVax

OJEN's March 2021 Twitter Moot About Mandatory Vaccinations

Does a law requiring mandatory vaccinations violate the *Canadian Charter of Rights and Freedoms?*

The COVID-19 pandemic

The COVID-19 pandemic has had a profound effect on Canada and the world. Governments have shut down schools, imposed travel restrictions and curtailed business operations. To reduce the transmission of the disease, we have made radical changes to our lives, including limiting social contact, working and learning remotely, wearing masks in public, and staying home as much as possible.

Complex social questions often lead to complex legal questions. Recently, Health Canada authorized the use of two COVID-19 vaccines.¹ More vaccines are still undergoing trials. Reducing the spread of the disease is a significant public health priority.

In a free and democratic society, the needs of a group and the rights of individuals can conflict with one another. It is often the job of the justice system to decide how these conflicts should be resolved. Vaccinations will only put a stop to the community transmission of COVID-19 in Canada if enough Canadians receive the vaccine. While we do not yet know the exact number of Canadians who would need to receive the vaccine to stop community transmission,² typically a community becomes protected when 70 to

¹ For the purposes of this Twitter moot, we will not distinguish between different vaccines. We will assume that all vaccines are the same and protect equally.

² World Health Organization. "Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19." 31 December 2020: <https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19>.

90 percent of the population is immune through natural infection or vaccination.³ Given the importance of vaccinating a substantial number of Canadians, should we make vaccinations mandatory?

Does a law requiring mandatory vaccinations violate the *Canadian Charter of Rights and Freedoms*?

OJEN invites Twitter Moot participants to prepare discussion points dealing with the **moral, social** and **legal** implications of mandatory vaccinations from a variety of perspectives.

Here are some additional questions to consider:

- Which of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* (*Charter*) are involved in this decision?
- Could a decision either for or against mandatory vaccination be the beginning of a “slippery slope”?
- Do governments compel people to have medical procedures in other circumstances? In what ways is this the same or different?
- If provincial governments decide against imposing mandatory vaccinations, could the federal government intervene using emergency powers under “Peace, Order and Good Government” (POGG)?

Relevant law

Section 2(a) of the *Charter*

What about religious or conscientious objections to vaccines?

Section 2(a) of the *Charter* grants to everyone the “freedom of conscience and religion.” Some Canadians refuse vaccinations for religious or conscientious reasons. Many aspects of our legal system reflect this. For example, some provinces make religious

³ Rubin R., “Difficult to Determine Herd Immunity Threshold for COVID-19.” *JAMA*. 2020;324(8):732: <https://jamanetwork.com/journals/jama/fullarticle/2769704>

exemptions available to the parents of public-school children who do not wish to vaccinate their children for religious or conscientious reasons.

According to the Supreme Court of Canada, section 2(a) includes “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.”⁴ According to the Court, a religious belief does not need

to be grounded in a religious book or endorsed by an organized religion.⁵ Similarly, the religious practice can be voluntary and still receive protection.⁶

As a result, a law violates the religious protections of section 2(a) if:

- (1) law affects someone who has a “belief or practice that has a nexus with religion,” and
- (2) the law interferes with this person’s ability to conduct themselves in accordance with their religious beliefs in a manner “that is more than trivial or insubstantial.”⁷

Section 7 of the *Charter*

Would mandatory vaccinations violate section 7 of the *Charter*?

Section 7 of the *Charter* outlines 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.” For the courts to find a violation of section 7, a person must show that a law violates their right to either life, liberty, or security of the person in a way that violates at least ONE of the principles of fundamental justice (or “PFJs”).

⁴ *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 19.

⁵ *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 46.

⁶ *Ibid* at para 47.

⁷ *Ibid* at para 59.

The Supreme Court of Canada has found that “security of the person” protects the right to make choices about one’s own body.⁸ In the past, the Supreme Court has used this provision to strike down laws that prohibited assisted suicide, regulated abortion, or mandated unwanted medical treatments.⁹

Principles of fundamental justice (PFJs) are important values that protect the basic fairness of our justice system. According to the Supreme Court, a law violates the principles of fundamental justice if it is arbitrary, grossly disproportionate, or overbroad. A law is **arbitrary** if its infringement of life, liberty, or security of the person “bears no connection” to the law’s purpose.¹⁰ Likewise, a law is **grossly disproportionate** if the punishment imposed by the law greatly outweighs the law’s purpose or benefit.¹¹ Finally, a law is **overbroad** when it captures behaviour that “bears no relation to its purpose in order to make enforcement more practical.”¹²

Section 1 of the *Charter*

If mandatory vaccinations violate the *Charter*, could they be “saved” by section 1?

Section 1 explains that *Charter* rights are subject to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Even if a law violates one of the rights listed in the *Charter*, this violation may still be found constitutional (or “saved”) if it is a reasonable limit on rights. The courts use this section to resolve disputes between the rights of individuals and the rights enjoyed by others or broader collective interests. When assessing whether a limit on *Charter* rights is valid under section 1, the courts use the *Oakes* test.

The ***Oakes* test**¹³ has two steps. The **first step** of the test asks whether there is a “pressing and substantial” objective for the law or government action. The **second step** asks whether the means chosen to achieve the objective are proportional to the burden on the rights of the claimant. This second step contains within it three sub-questions:

⁸ *R v Morgentaler*, [1988] 1 SCR 30 at 587-88.

⁹ See: *R v Morgentaler*, supra; *Carter v Canada (Attorney General)*, 2015 SCC 5; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44.

¹⁰ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 101.

¹¹ *Ibid* at para 120.

¹² *Ibid* at para 113.

¹³ *R v Oakes*, [1986] 1 SCR 103 at para 69-70.

- (a) Is the law's objective rationally connected to the limit on the Charter right?
- (b) Does the limit minimally impair the Charter right?
- (c) Is there an overall balance or proportionality between the benefits of the limit and its deleterious effects?

If the law fails to meet any one of these requirements, it is unconstitutional and is not "saved" under section 1.

Section 1 of the Charter has a special relationship with section 7. The design of section 7 captures and neutralizes "inherently bad laws" that run "afoul of our basic values."¹⁴ Because of this, the Supreme Court of Canada has cautioned that infringements of section 7 "are not easily saved by section 1."¹⁵ To date, the Supreme Court of Canada has not upheld a law that violates section 7 using the *Oakes* test. However, the Supreme Court of Canada has never said that Section 1 cannot save a law that violates section 7. In fact, the Supreme Court has singled out events such as "natural disasters, the outbreak of war, epidemics, and the like" as instances where such a violation may be acceptable.¹⁶ Importantly, while the Supreme Court of Canada has never used section 1 to save a law that violates section 7, lower appellate courts, like the Ontario Court of Appeal, have used section 1 to save laws that violate section 7.¹⁷

Additional Reading

OJEN resources:

[In Brief: Canadian Charter of Rights and Freedoms](#)

[In Brief: Canadian Constitution](#)

[In Brief: Section 1 of the Charter & the Oakes Test](#)

Canadian cases and government links:

[R. v. Big M Drug Mart, \[1985\] 1 SCR 295](#), for the section 2(a) analysis

[Syndicat Northcrest v. Amselem, 2004 SCC 47](#), for the section 2(a) analysis

¹⁴ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 96.

¹⁵ *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 99.

¹⁶ *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 85.

¹⁷ See: *R v Michaud*, 2015 ONCA 585.

[Canada \(Attorney General\) v. Bedford, 2013 SCC 72](#), for the section 7 analysis

[Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37](#), for the section 1 analysis

[Charterpedia](#) – the Department of Justice’s guide to current Charter jurisprudence organised by sections.

News articles and website posts:

[Pfizer’s Covid Vaccine: 11 Things You Need to Know](#)

[New Brunswick’s mandatory vaccination bill voted down](#)

[COVID-19: Limits on Governments’ Emergency Powers](#)