

## The Constitutionality of Mandatory COVID-19 Vaccine Passports

### Introduction

On August 15th, Prime Minister Justin Trudeau called for a snap election, leaving Canadians only five weeks to prepare for the polls. Many questioned this sudden decision, some even suggesting that it was made to gain political power<sup>1</sup>. Regardless, it came as no surprise that COVID-19 vaccination was in fact the main issue on the campaign trail. In no time, the question of whether or not citizens who refuse to get vaccinated should have the same rights and freedoms as those who do get vaccinated had erupted into a heated debate. It is even fair to say that this issue has divided Canadian citizens into two camps—one arguing for so-called “public needs,” the other “private rights.”

Those advocating for mandatory vaccination and vaccine passports believe it is necessary to take away the rights and freedoms of citizens who refuse to get vaccinated, as this would seemingly protect the health of Canadians by limiting the spread of the virus. They claim this is an urgent situation that requires a drastic, even draconian response. However, the scientific data on COVID-19 vaccines—and COVID-19 itself for that matter—is not yet sufficient to reach a definitive conclusion on this matter. Thus, because of the limited knowledge revolving around the virus and the vaccines, there is still a lot of uncertainty among the scientific community, who has not yet reached a consensus on the entirety of this situation.

From a legal standpoint though, one can determine whether or not it would be constitutional to take away the rights and freedoms of citizens who refuse the vaccine by addressing the following questions: 1) Does a COVID-19 vaccination mandate and vaccine passport infringe the right to liberty and security of the person guaranteed under section 7 of the *Canadian Charter of Rights and Freedoms* (hereinafter “*Charter*”)?; 2) If mandatory vaccination does infringe section 7 of the *Charter*, is that infringement justified under section 1 of the *Charter*?

### Section 7

To begin, it is obvious that mandating and requiring proof of vaccination infringes section 7 of the *Charter*, and there is no way to argue otherwise. By requiring proof of COVID-19 vaccination to access a certain service or to remain employed, citizens who refuse to get vaccinated will be severely discriminated against. If deprived of such rights and freedoms, they will “be coerced or pressured by the government into submitting to a medical intervention to which they do not consent<sup>2</sup>.” This is irrefutably a direct violation of section 7 of the *Charter*, which guarantees the right to liberty, including that of bodily autonomy and medical privacy—not to mention the potential infringement of section 2(a) of the *Charter*, which guarantees the freedom of conscience

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<sup>1</sup> Jessica MURPHY, *Canada election: Trudeau calls snap summer campaign*, [<https://www.bbc.com/news/world-us-canada-58209031>].

<sup>2</sup> JCCF, *Justice Centre gives Ontario final warning over vax passports*, 22 September 2021, [<https://www.jccf.ca/justice-centre-gives-ontario-final-warning-over-vax-passports/>], (retrieved 11 October 2021).

and religion, and section 15, under which every individual is equal before the law without discrimination.

### **Section 1 and the *Oakes* test**

Still, this would not be sufficient to prove that vaccine mandates are unconstitutional. Section 1 of the *Charter*, also known as the “reasonable limits clause,” could be used in an attempt to justify the limit on section 7. However, for a law that infringes a *Charter* right to be justified under the reasonable limits clause, it must pass the *Oakes* test. To do so, the law would have to be consistent with every criterion established by the test. In other words, if the law is not compatible with merely one criterion, it is deemed unconstitutional.

### **Pressing and Substantial Objective**

All that being said, according to the first part of the *Oakes* test, the objective of the law has to be pressing and substantial<sup>3</sup>. Given that there is currently a worldwide pandemic, which has infected and killed several Canadians, it is fair to say that the objective of saving human lives is pressing and substantial. Even though “the survival rate from the virus [is] over 99% for those under 65<sup>4</sup>,” the objective is still important for society.

### **Proportionality**

Yet, according to the second part of the *Oakes* test, the means chosen to achieve the objective (i.e. the law as such) must be proportional to the burden on the rights, in this case guaranteed under section 7. In other words, in the course of achieving its legislative objectives, the government must choose proportional and reasonable ways to achieve those objectives<sup>5</sup>.

### **Rational Connection**

Furthermore, the second part of the *Oakes* test is divided into three sub-steps; the first requiring that the objective be rationally connected to the limit on the *Charter* right<sup>6</sup>. In this case, if the objective of mandatory vaccines is saving human lives by preventing the spread of the virus, then they must precisely do that. However, in the event that the vaccines are not effective at preventing the spread of COVID-19, then they would not be rationally connected to their objective. In order to determine this, S. V. Subramanian and Akhil Kumar led a thorough investigation into the effectiveness of COVID-19 vaccines using data from 68 countries. After computing the COVID-19 cases per 1 million people and the percentage of the population that is fully vaccinated, it was found that there is “no discernable relationship between percentage of population fully vaccinated and new COVID-19 cases (...). In fact, the trend line suggests a marginally positive

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<sup>3</sup> OJEN, *Section 1 of the Charter & the Oakes Test*, 2013, [[https://ojen.ca/wp-content/uploads/In-Brief\\_STUDENT\\_Section-1-and-Oakes\\_0.pdf](https://ojen.ca/wp-content/uploads/In-Brief_STUDENT_Section-1-and-Oakes_0.pdf)], (retrieved 11 September 2021).

<sup>4</sup> JCCF, *The Issue of Mandatory Vaccines*, 13 August 2021, [<https://www.jccf.ca/the-issue-of-mandatory-vaccines/>], (retrieved 13 September 2021).

<sup>5</sup> OJEN, *op. cit.*

<sup>6</sup> *Ibid.*

association such that countries with higher percentage of population fully vaccinated have higher COVID-19 cases per 1 million people<sup>7</sup>.” It is also worthy to note that in a report released from the Ministry of Health in Israel, “the effectiveness of 2 doses of the BNT162b2 (Pfizer-BioNTech) vaccine against preventing COVID-19 infection was reported to be 39%<sup>8</sup>.” It was therefore concluded that the effectiveness of COVID-19 vaccines must be seriously reconsidered. Other studies have also proven that the COVID-19 vaccine “will [not] prevent someone from becoming infected and transmitting the virus to someone else, even after vaccination<sup>9</sup>.” Correspondingly, it cannot be said that COVID-19 vaccines are rationally connected to their objective.

### **Minimal Impairment**

According to the second sub-step of the proportionality stage, the limit must minimally impair the *Charter* right<sup>10</sup>. When considering several non-pharmacological ways to prevent the spread of the virus (e.g. social distancing, handwashing, more frequent and less expensive forms of testing, etc.), it is hard to argue that mandatory vaccination minimally impairs section 7 of the *Charter*. In fact, the *Oakes* test suggests that if the objective can be achieved in a way that involves less impairment of a right, the limit is not justified<sup>11</sup>.

Moreover, naturally acquired immunity for SARS-CoV-2—which is the virus that causes COVID-19—is not considered at all. Yet, it was found that natural immunity is much more effective than the protection offered by vaccines, and that those with natural immunity are, in fact, more likely to experience severe adverse reactions after vaccination (see *Proportionate Effect* for more details)<sup>12</sup>.

Besides, the very concept of mandatory vaccination is questionable. If an individual receives the vaccine of his own accord, there is no need to mandate others into receiving it. Whether or not the people around this individual are vaccinated does not change the effectiveness (or lack thereof) of his or her vaccine. For instance, if the vaccine were effective, it would not be necessary to mandate it for the “common good,” because the vaccinated population would be protected from the virus. It is known, however, that COVID-19 vaccines do not prevent people from contracting nor spreading the virus, so it would be useless to mandate them. Therefore, in both cases, mandatory vaccination is neither reasonable nor logical and cannot be considered minimal.

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<sup>7</sup> S. V. SUBRAMANIAN and Akhil KUMAR, *Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States*, *European Journal of Epidemiology*, 30 September 2021, [<https://doi.org/10.1007/s10654-021-00808-7>], (retrieved 8 October 2021).

<sup>8</sup> *Ibid.*

<sup>9</sup> JCCF, *The Issue of Mandatory Vaccines*, 13 August 2021, [<https://www.jccf.ca/the-issue-of-mandatory-vaccines/>], (retrieved 13 September 2021).

<sup>10</sup> OJEN, *Section 1 of the Charter & the Oakes Test*, 2013, [[https://ojen.ca/wp-content/uploads/In-Brief\\_STUDENT\\_Section-1-and-Oakes\\_0.pdf](https://ojen.ca/wp-content/uploads/In-Brief_STUDENT_Section-1-and-Oakes_0.pdf)], (retrieved 11 September 2021).

<sup>11</sup> *Ibid.*

<sup>12</sup> Michael PALMER *et al*, *Open letter to UW officials: Repeal the COVID vaccination and testing mandates*, [<https://cs.uwaterloo.ca/~mannr/Open-letter-UW-vaccine-mandates.html>], (retrieved 8 October 2021).

Simply put, every vaccine has three potential outcomes: 1) providing sterilizing immunity, which prevents the vaccinated individual from contracting or spreading the pathogen in question; 2) providing protection without sterilizing immunity, which would suppress or reduce the effects (such as symptoms) of a disease in the vaccinated individual, while still being able to contract and spread the pathogen; 3) providing neither sterilizing immunity nor protection. For a vaccine to be mandated, it must provide sterilizing immunity, otherwise the mandate would not be proportional. Yet, COVID-19 vaccines do not provide sterilizing immunity; at best, they provide limited protection<sup>13</sup>.

### **Proportionate Effect**

Finally, according to the third and final sub-step of the proportionality stage, which concludes the *Oakes* test, there should be an overall balance between the benefits of the limit and its harmful effects<sup>14</sup>. That being said, not only are COVID-19 vaccines ineffective, they “were rushed into production and are experimental<sup>15</sup>.” While vaccines have historically been developed over the course of five to ten years, current COVID-19 vaccines have only been in trial for around a year<sup>16</sup>. As explained above, their effectiveness is ill-portrayed, but in addition, they have been the cause of many adverse reactions. Not to mention the fact that the long-term side effects are still unknown, “there are growing reports of injury and deaths linked to the shots, including blood clots, neurological damage, stroke, heart attacks, and paralysis<sup>17</sup>.” Although the threat posed by COVID-19 is extremely low, Health Canada, the U.S. FDA and the European Medical Association have accepted the fact that myocarditis and pericarditis (serious heart inflammation disorders), Guillain-Barré syndrome, capillary leak syndrome and miscarriages are among the severe adverse events attributed to COVID-19 vaccination<sup>18</sup>.

To mandate such a vaccine does not establish a balance between the benefits of the limit and its harmful effects. In fact, it is quite the contrary, for in the case of COVID-19 vaccines, the harmful effects of the limit overpower its benefits, and in many ways. It is even fair to state that vaccine mandates offer little to no benefits. If COVID-19 vaccines do not prevent the spread of the virus, but rather result in numerous negative adverse reactions—some of which are quite severe—the risk-benefit ratio of mandatory vaccination is highly disproportionate. Vaccine mandates would, in fact, do more harm than good.

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<sup>13</sup> Michael PALMER *et al*, *Open letter to UW officials: Repeal the COVID vaccination and testing mandates*, [<https://cs.uwaterloo.ca/~mannr/Open-letter-UW-vaccine-mandates.html>], (retrieved 8 October 2021).

<sup>14</sup> OJEN, *Section 1 of the Charter & the Oakes Test*, 2013, [<https://ojen.ca/wp-content/uploads/In-Brief-STUDENT-Section-1-and-Oakes-0.pdf>], (retrieved 11 September 2021).

<sup>15</sup> JCCF, *The Issue of Mandatory Vaccines*, 13 August 2021, [<https://www.jccf.ca/the-issue-of-mandatory-vaccines/>], (retrieved 13 September 2021).

<sup>16</sup> Benjamin GABBAY, *Open letters to U of T re COVID-19 vaccine mandates*, Students for COVID Ethics, [<https://studentsforcovidethics.org/>], (retrieved 8 October 2021).

<sup>17</sup> JCCF, *The Issue of Mandatory Vaccines*, *op. cit.*

<sup>18</sup> Benjamin GABBAY, *op. cit.*

## Is mandatory vaccination justified under section 1?

Whereas the objective of vaccine mandates may be pressing and substantial, they are not proportional in any way. For that reason, mandatory vaccination does not pass the *Oakes* test; hence section 1 does not justify the limit on section 7. It would therefore be unconstitutional to deprive citizens who refuse to get vaccinated of their rights and freedoms.

## Conclusion

The science is clear: statistically, the risk posed by COVID-19 is minimal; the vaccines do not prevent transmission of the virus; its adverse effects are severe; and the long-term risks are unknown. Several doctors have even acknowledged that vaccine mandates are “misguided<sup>19</sup>,” “dangerous for public health<sup>20</sup>,” “unprecedented and unethical<sup>21</sup>” and “contrary to the bedrock medical principle of informed consent<sup>22</sup>.”

In short, the *Charter* guarantees an individual’s right to receive the COVID-19 vaccine or to refuse it; whether for medical, religious or simply conscientious reasons. Vaccination is a personal decision and never ought to be the basis for discriminatory treatment. But that is precisely what COVID-19 vaccines do, for their only actual impact is division. This separation between vaccinated and unvaccinated individuals is doing more harm than good, as the COVID-19 vaccine does not bring back any sense of normality to Canadian’s lives.

100 years after the 1918 Spanish flu, seasonal alterations of the 1918 Influenza virus are still actively circulating to this day<sup>23</sup>. Knowing this, it would be in the best interest of society to learn how to live with COVID-19, just as people have with Influenza.

In truth, the “new normal” is not going to be determined by the vaccines or COVID-19, but rather by what Canadians make of it.

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<sup>19</sup> Benjamin GABBAY, *Open letters to U of T re COVID-19 vaccine mandates*, Students for COVID Ethics, [<https://studentsforcovidethics.org/>], (retrieved 8 October 2021).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> S. V. SUBRAMANIAN and Akhil KUMAR, *Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States*, *European Journal of Epidemiology*, 30 September 2021, [<https://doi.org/10.1007/s10654-021-00808-7>], (retrieved 8 October 2021).

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