

IN THE SUPREME COURT OF FLAVELLE
(ON APPEAL FROM THE FALCONER COURT OF APPEAL)

BETWEEN:

LUCAS YUNO

Appellant

- and -

FLAVELLE (ATTORNEY GENERAL)

Respondent

FACTUM OF THE APPELLANT

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PART I - OVERVIEW AND FACTS

A. OVERVIEW

1. The impact of the Human Infectious Respiratory Syndrome (“HIRS”) pandemic in Flavelle has been devastating, and there is no question that a decisive government response is required. Times of emergency sometimes require sacrifices — but there must also be a limit on what a government can ask its people to give up. Few choices are more personal and significant in a free and democratic society than the right to make one’s own medical decisions. Forcing virtually the entire population of Flavelle to undergo a medical procedure is far too extreme to be justified even in such extraordinary circumstances.

2. Section 3 of the *Vaccination Act* (the “*Act*”) compels every individual residing in Flavelle above the age of 4 to receive the HIRS vaccine. Non-compliance is met with harsh sanctions, including escalating fines ranging from \$1,000 to \$20,000 that can be issued every 7 days if a person is repeatedly convicted — a strikingly punitive approach that will have a disproportionate impact on low-income communities. On a third offence, which may occur after remaining unvaccinated for just 21 days, a person can be sentenced to incarceration in a correctional facility, an environment particularly vulnerable to transmission and outbreaks. These extraordinarily coercive measures eliminate the ability of all people in Flavelle to make a free and informed decision about the vaccine, amounting to forced medical treatment on an unprecedented scale.

3. In November 2020, Lucas Yuno was apprehended at a grocery store and charged under the *Act* for refusing the HIRS vaccine. Having had a traumatic experience with another vaccine, Mr. Yuno has sworn off vaccinations in favour of natural remedies. Mr. Yuno’s right to choose his course of treatment is fundamental to his sense of liberty and personal security. Yet, because he

exercised that right, he now faces the prospect of a mandatory \$1,000 fine, additional fines that may increase weekly if he is subsequently charged, and potential imprisonment.

4. The *Act* deprives Mr. Yuno and others in his situation of their liberty and security of the person in a manner that is arbitrary, overbroad, and grossly disproportionate, contrary to s 7 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). This violation of s 7 cannot be justified under s 1 of the *Charter*. Although some deference is warranted to the government’s preferred approach, resorting to such a coercive and punitive scheme is not necessary to effectively manage the HIRS pandemic. The *Act* is unconstitutional and should be declared of no force or effect.

B. FACTS

1. The HIRS Pandemic and the *Vaccination Act*

5. Flavelle is currently grappling with the spread of HIRS, a contagious disease caused by a severe acute respiratory syndrome virus strain. HIRS is spread through airborne transmission or contact with contaminated surfaces, including by asymptomatic people. HIRS carries a risk of serious complications that may result in death, and no specific treatment is currently available, although supportive care may improve outcomes. Flavelle experienced HIRS outbreaks throughout 2019 and 2020. As of August 2020, Flavelle public health agencies reported 129,000 total cases and 9,000 deaths. New cases fluctuate between 200 and 2,000 per day.

6. A person may become immune to HIRS if they have already contracted the disease, given that most people do not get it more than once, or alternatively if they get vaccinated. A HIRS vaccine was developed in 2020 and has a median vaccine efficacy rate of 73%, whereby 73% of vaccinated people who are exposed to the disease will not get sick. The efficacy rate of the HIRS vaccine is notably lower than most other vaccines, which have efficacy rates between 90-99%.

7. In August 2020, to supplement other emergency measures geared towards combatting HIRS, the Government of Flavelle passed the *Vaccination Act*. Section 3 requires all persons in Flavelle over 4 years of age to get immunized with the HIRS vaccine within 6 weeks of the date the *Act* came into force. Section 4 provides for a narrow medical exemption to the vaccination mandate. In order to obtain a medical exemption, a medical professional must determine that immunization is unnecessary due to past infection or laboratory evidence of immunity, or alternatively, that the vaccine is detrimental to the person's health. An exemption based on harm to the person's mental health requires a DSM-5 diagnosis of mental disorder. Individuals with medical exemptions must get tested for HIRS every 14 days, and the *Act* mandates that they self-isolate if they lapse in their testing.

8. Compliance with the mandatory vaccination scheme is enforced in part through vaccination cards, which are issued to everyone who gets vaccinated. Medical exemption cards are issued to individuals who have obtained exemptions under s 4 of the *Act* and display the date of their last negative test result. Individuals must produce these cards when accessing both public spaces and private businesses and will be denied entry if they fail to produce them.

9. Failure to comply with the *Act* results in severe penalties. Pursuant to s 3 of the *Act*, a person who does not get vaccinated and lacks a medical exemption is liable, on first conviction, to a fine of between \$1,000 and \$10,000; on second conviction, to a fine of between \$1,000 and \$15,000; and on any subsequent conviction, to a fine of between \$1,000 and \$20,000 and/or to a term of imprisonment of up to 14 days. Subsequent convictions may be entered after at least 7 days have elapsed from the prior conviction. Both the fines and the imprisonment provisions apply to people 12 years of age or older, including children aged 12 to 17.

2. Mr. Yuno's Charter Claim

10. Lucas Yuno is an internationally renowned holistic care practitioner. He manufactures natural balms and oils and teaches classes on using his products in furtherance of a more natural lifestyle, although he also supports clients who choose to engage in non-natural medical treatment. Mr. Yuno is personally opposed to vaccination. He is a veteran member of the not-for-profit organization Flavellians for Vaccine Choice, whose mandate is to ensure that Flavellians are making fully informed and voluntary decisions about vaccination.

11. Mr. Yuno's opposition to vaccination is rooted in a traumatic experience he had while working as a nurse abroad. To limit the spread of a disease called Mumpella, Mr. Yuno and others in the region were told to get vaccinated. Despite receiving the Mumpella vaccine, Mr. Yuno suffered a full bout of the disease. Mr. Yuno was not fully informed as to the vaccine's efficacy rate, the necessity of widespread vaccination, or the potential side effects of the vaccine. Mr. Yuno has spoken publicly about the psychological trauma this experience caused him: because his decision to get vaccinated was neither informed nor truly voluntary, he suffered from anxiety, panic attacks, and sleeplessness.

12. Mr. Yuno has since refused to get vaccinated against any diseases. He believes the HIRS vaccine's low efficacy rate and the uncertainty of its long-term consequences do not justify surrendering his right to make a free and informed choice about his health.

13. In November of 2020, Mr. Yuno was charged under s 3(1) of the *Act* after failing to produce a vaccination card at a grocery store. At that point, Mr. Yuno brought an application for a declaration that s 3 of the *Act* is unconstitutional and therefore of no force or effect. Mr. Yuno does not qualify for a medical exemption because his psychological symptoms do not rise to the level

of a DSM-5 disorder. Accordingly, he is in indefinite non-compliance with the *Act* and faces the prospect of repeated penalties, up to and including imprisonment.

C. JUDICIAL HISTORY

1. The Superior Court of Falconer Decision

14. Two experts testified on the *Charter* application. Dr. Sugumar, the expert for the Appellant, concluded that the rigid mandatory vaccination scheme in the *Act* may not be as effective as anticipated in increasing vaccination rates. Dr. Sugumar attributed this to the HIRS vaccine's low efficacy rate of 73%, as well as to research showing no marked difference in vaccination rates in jurisdictions where it is mandatory as opposed to voluntary. Dr. Sugumar also noted that vaccination rates tend to be lowest in low-income communities and that many people remain unvaccinated for socioeconomic reasons, not ideological ones.

15. Dr. Adhihetty, the expert for the Government of Flavelle, noted that the unusually low efficacy rate of the HIRS vaccine required near-universal coverage, and that approximately 5% of the population would already be unable to get vaccinated for medical reasons. Dr. Adhihetty identified many potential sources of vaccine-resistant or vaccine-hesitant beliefs, including homeopathy, distrust of government and pharmaceutical companies, and the legacy of medical testing in residential schools. Both experts concluded that 2% or less of the Flavellian population is staunchly opposed to vaccination or would otherwise refuse to take the HIRS vaccine.

16. Ibrakovic J of the Superior Court of Falconer accepted the testimony of both experts and concluded that s 3 of the *Act* infringed s 7 of the *Charter* in a manner that was not justified under s 1. She concluded that the broader purpose of the *Act* was to protect the health and well-being of

Flavellians against HIRS and the specific objective of s 3 was to achieve herd immunity by ensuring sufficient vaccination coverage.

17. At the s 7 stage, Ibrakovic J held that liberty and security interests were clearly engaged because mandating vaccinations impinges both on an individual's freedom of choice as well as their bodily integrity. These deprivations were not in accordance with the principles of fundamental justice because they were overbroad. As a 100% coverage rate is not required to achieve herd immunity against HIRS, the mandatory vaccination scheme captured conduct that was not necessary to achieve the *Act's* objective.

18. At the s 1 stage, Ibrakovic J held that the government had failed to satisfy its burden. The objective of achieving herd immunity was pressing and substantial and mandatory vaccination was rationally connected to this objective. However, s 3 was not minimally impairing. Because herd immunity could be achieved without universal coverage, Ibrakovic J found that the government could have allowed for non-medical exemptions without threatening its public health objectives. Ibrakovic J also held that the salutary effects of s 3 did not outweigh its deleterious effects.

2. The Court of Appeal of Falconer Decision

19. A majority of the Falconer Court of Appeal allowed the appeal, holding that s 3 of the *Act* did not violate s 7 of the *Charter* and, in the alternative, any violation was justified under s 1 of the *Charter*. Writing for the majority, Cutinha JA disagreed with Ibrakovic J's formulation of the legislative objective. She instead concluded that the purpose of s 3 was to achieve herd immunity *as soon as possible*.

20. Cutinha JA held that s 3 deprived Flavellians of their liberty and security, but that these deprivations were in accordance with the principles of fundamental justice. She held that because

vaccine-hesitant individuals may not get vaccinated under a voluntary scheme, mandating vaccinations for all but those with medical exemptions was reasonably necessary to protect against HIRS outbreaks, and the provision was accordingly not overbroad. Cutinha JA also rejected the proposition that s 3 creates an absolute liability offence, holding instead that s 3 is a strict liability offence that does not offend the principles of fundamental justice.

21. In the alternative, the majority would have upheld any violation of s 7 under s 1. Cutinha JA held that the HIRS pandemic provided the “exceptional circumstances” required to allow a s 7 violation to be justified under s 1. She would have found the mandatory vaccination scheme to be minimally impairing, because an alternative of allowing choice-based exemptions would turn a mandatory scheme into a voluntary one and compromise the objective of achieving herd immunity as soon as possible. Cutinha JA would have also found that the salutary effects of the *Act* outweighed its deleterious effects. She accepted that the scheme had the effect of ensuring near-universal coverage, which outweighed the impact of taking away an individual’s right to choose their own course of medical treatment.

22. Boljevic JA, dissenting, agreed with Ibrakovic J’s reasoning in the court below. Additionally, Boljevic JA would have held that the provision contravenes the principles of fundamental justice because it creates an absolute liability offence with a possibility of imprisonment, while lacking a *mens rea* element.

PART II - ISSUES

23. The questions to be decided on this appeal are as follows:

1. Does the *Vaccination Act* violate s 7 of the *Charter*?
2. If so, can the violation be justified under s 1 of the *Charter*?

PART III - ARGUMENT

24. Medical self-determination remains a vital *Charter*-protected interest even during a public health emergency. By forcing the population of Flavelle to submit to a medical procedure, the *Vaccination Act* is so coercive and intrudes so significantly upon personal autonomy that it cannot stand in a free and democratic society. The *Act* violates s 7 of the *Charter* by depriving the people of Flavelle of their liberty and security of the person in a manner that is overbroad, grossly disproportionate, and arbitrary. This violation cannot be justified under s 1.

SECTION 3 OF THE *VACCINATION ACT* VIOLATES SECTION 7 OF THE *CHARTER*

A. THE *ACT* DEPRIVES FLAVELLE RESIDENTS OF LIBERTY AND SECURITY OF THE PERSON

25. Mandatory vaccination amounts to forced medical treatment and therefore engages liberty and security of the person. Section 3(1) of the *Act* makes it an offence to remain unvaccinated beyond a prescribed 6-week timeline, eliminating the ability to choose whether or not to take the HIRS vaccine. In order to avoid substantial fines and the possibility of jail time, people in Flavelle are forced to take a vaccine with an efficacy rate of only 73% and for which side effects or future complications remain unknown.

26. Liberty is engaged because mandatory vaccination interferes with a person's sense of medical self-determination — a sphere of autonomy involving inherently private choices that are intrinsic to individual dignity and independence.¹ Security of the person is engaged because the

¹ *R v Malmo-Levine*, 2003 SCC 74 at para 85 and references cited therein [*Malmo-Levine*], Joint Book of Authorities, Tab 1 [Joint BOA].

requirement to get an injection under threat of legal sanction prevents a person from controlling their own bodily integrity.²

27. The *Act* specifically interferes with independent medical decision-making as well as with the right to refuse medical treatment, which are both protected by the rights to liberty and security of the person under s 7 of the *Charter*. The Supreme Court of Canada has recognized that the protection s 7 provides extends to decisions such as having an abortion,³ taking one's own life assisted by a physician,⁴ and consuming medical marijuana in whatever form one prefers.⁵ In *AC v Manitoba*, the Court held that s 7 also protects the right to refuse treatment, even in "circumstances where we instinctively recoil from the choice made."⁶ Supporting this *Charter* jurisprudence is a robust common-law history affirming patients' free and informed consent.⁷

28. Furthermore, s 3(2)(c) of the *Act* provides that people may be imprisoned for up to 14 days if they remain unvaccinated for at least 3 weeks. Imprisonment is a severe deprivation of liberty and therefore clearly engages s 7.⁸ It does not matter that imprisonment is discretionary and has yet to be invoked under the *Act*. As Lamer J (as he then was) held in *Reference Re BC Motor Vehicle Act*, a law can constitute a deprivation of liberty "as of the moment it is open to the judge to impose imprisonment."⁹

² *R v Morgentaler*, [1988] 1 SCR 30 at paras 20-25, Joint BOA, Tab 2.

³ *Ibid* at paras 26-27.

⁴ *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 64-70 [*Carter*], Joint BOA, Tab 3.

⁵ *R v Smith*, 2015 SCC 34 at paras 17-18 [*Smith*], Joint BOA, Tab 4.

⁶ *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at paras 101-102, 219 [*AC v Manitoba*], Joint BOA, Tab 5.

⁷ See *Fleming v Reid*, 4 OR (3d) 74 (CA) at para 41, Joint BOA, Tab 6; *Ciarlariello v Schachter*, [1993] 2 SCR 119 at paras 40-41, Joint BOA, Tab 7; *Malette v Shulman*, 67 DLR (4th) 321 (CA) at paras 17-19, Joint BOA, Tab 8.

⁸ *Reference Re Section 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486 at para 84 [*Reference Re BC Motor Vehicle Act*], Joint BOA, Tab 9.

⁹ *Ibid*. See also *Malmo-Levine*, *supra* note 1 at para 220, Joint BOA, Tab 1.

B. THE DEPRIVATION VIOLATES THE PRINCIPLES OF FUNDAMENTAL JUSTICE

29. As the Supreme Court clarified in *Bedford* and *Carter*, ss 7 and 1 of the *Charter* serve different purposes. The focus of the s 7 analysis is on the impact of the law on the individual, not on its benefits for society at large.¹⁰ The pandemic context does not change this frame of analysis. Even when dealing with a communicable disease, a person’s right to medical self-determination is independently valuable and not diminished by the need to protect others. Considerations of how Mr. Yuno’s choice may affect others and the benefits to society of a mandatory vaccination scheme are best reserved for s 1 of the *Charter*, where the government is required to justify the established infringement in the name of the public good. Making s 7 dependent on the health or well-being of others risks rendering hollow the vital interests that the section protects.

1. The Act’s Mandatory Vaccination Mandate is Overbroad

30. The *Act* is drafted more broadly than necessary to attain its objective.¹¹ The offence of being unvaccinated in s 3(1) unfairly targets vaccine-resistant or vaccine-hesitant individuals like Mr. Yuno, who do not stand in the way of the government’s objective.

31. The *Act* has two objectives, one broad and one specific. The general objective of the *Act*, according to s 2, is “to protect the health and well-being of persons in Flavelle against HIRS.” Ibrakovic J of the Superior Court identified the specific objective of the *Act* as “ensuring sufficient vaccination coverage to achieve herd immunity.” The *Act* is thus centred on achieving satisfactory vaccination coverage to prevent significant spread or outbreak of the disease. Total or maximum

¹⁰ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 125-129 [*Bedford*] Joint BOA, Tab 10; *Carter*, *supra* note 1 at para 80, Joint BOA, Tab 3.

¹¹ *R v Heywood*, [1994] 3 SCR 761 at para 51 [*Heywood*], Joint BOA, Tab 11.

coverage is not necessary to achieve this goal. Deference is warranted to Ibrakovic J's findings, based in the expert evidence, that 100% vaccination coverage is unnecessary to achieve herd immunity and that people who are staunchly opposed to vaccination or to the HIRS vaccine represent 2% or less of Flavelle's population.

32. The *Act* is also overbroad because it fails to reflect the actual threat unvaccinated people may pose to public health. An overbroad law casts its regulatory net too wide and accordingly will be arbitrary in some of its applications.¹² The *Act* is arbitrary in its application to people like Mr. Yuno because it disregards the measures he can take to avoid contracting HIRS or spreading it to others. A law's failure to consider relevant personal characteristics that are related to the objective can also render it overbroad.¹³ The *Act* assumes unvaccinated people are an inherent risk, while ignoring the possibility that they may effectively minimize that risk by continuing to follow existing health protocols such as social distancing and wearing masks.

33. An unvaccinated person who knows they are a potential source of HIRS transmission and takes significant precautions may in fact pose less of a risk to public health than a vaccinated person for whom the vaccine is ineffective. The vaccine's efficacy rate is a mere 73%, whereby 27% of the people who receive the vaccine will not be properly immunized. Over a quarter of the vaccinated population in Flavelle can still spread the disease yet are required to take no precautions following the administration of the vaccine. Unlike Mr. Yuno, these people will not be held liable under the *Act* despite the risk they pose to public health.

34. The government has implicitly acknowledged that the risk of spread can be effectively managed in ways other than forced vaccination. Under s 4 of the *Act*, people can obtain medical

¹² *Bedford*, *supra* note 10 at paras 114-117, Joint BOA, Tab 10.

¹³ *See Heywood*, *supra* note 11 at para 63, Joint BOA, Tab 11; *Carter*, *supra* note 4 at para 86, Joint BOA, Tab 3.

exemptions from vaccination and need only abide by regular testing and self-isolation protocols in order to manage their risk. Similar measures could have been extended to people with sincere vaccination-related anxieties or personal beliefs without posing a threat to the *Act*'s objectives.

2. The Fines in Section 3(2) are Grossly Disproportionate

35. The way the Government of Flavelle has chosen to enforce the mandatory vaccination mandate poses serious concerns for the principles of fundamental justice. The primary enforcement mechanism in the *Act* is fines, ranging from a mandatory minimum of \$1,000 per instance of non-compliance and up to \$20,000 on a third or subsequent offence. The fines are grossly disproportionate because their impact on low-income people in Flavelle is so extreme as to be disproportionate to any legitimate government interest.¹⁴ The effect of the fines system is to punish low-income people severely for remaining unvaccinated due to logistical or financial circumstances, an outcome that is disproportionate even to the *Act*'s important public health goals.

36. Although Mr. Yuno remains unvaccinated due to his personal beliefs, Dr. Sugumar's expert report indicates that low vaccination rates are concentrated in low-income communities and that socioeconomic factors are an important reason why many people remain unvaccinated. Low-income people who experience issues securing transit, taking time off work, or finding childcare are less likely to get the vaccine than people who face no such barriers. In turn, low-income people are likely to be disproportionately convicted and impacted by the *Act*'s extraordinarily high fines. This is particularly the case for low-income families with children, given that every Flavelle resident over the age of 12 is subject to the *Act*'s penalties.¹⁵

¹⁴ *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 133 [*PHS*], Joint BOA, Tab 12.

¹⁵ *Vaccination Act*, s 3(2).

37. Few people in Flavelle have the resources to pay amounts ranging from \$1,000 to \$20,000 per conviction. Given that fines may be repeatedly issued and escalated the longer a person remains unvaccinated, it is likely that the amounts to be paid will rapidly accumulate if a person stays unvaccinated for weeks on end. Although people may only be convicted again after at least 7 days have elapsed since their prior conviction, the *Act* does not preclude multiple charges during that 7-day period, compounding the amount payable upon repeated conviction at the discretion of law enforcement.

38. The effect of this scheme is cyclical for low-income people. Someone who cannot get vaccinated due to a lack of resources faces the prospect of being repeatedly charged fines until they can secure those resources, which is made less likely if they must first settle thousands of dollars of government debt.

39. The situation the *Act* creates is very similar to that in *Boudreault*, wherein the Supreme Court struck down a mandatory surcharge system that placed continued financial burdens on marginalized people with no reasonable prospect of paying them.¹⁶ Such a system amounted to cruel and unusual punishment under s 12 of the *Charter*: it forced economically marginalized people into an indeterminate relationship with the justice system and subjected them to heightened scrutiny as compared to wealthier individuals.¹⁷ The *Act* is significantly more punitive than the surcharge system in *Boudreault*, given that in the latter case even \$100 or \$200 per offence was held to be grossly disproportionate in some circumstances.

40. Although *Boudreault* was argued under s 12 of the *Charter*, it is applicable by analogy. The values under s 12 can inform the scope of s 7, particularly when it comes to measures that

¹⁶ *R v Boudreault*, 2018 SCC 58 at para 61 [*Boudreault*], Joint BOA, Tab 13.

¹⁷ *Ibid* at paras 66-68, 76-79. *See also R v Nur*, 2015 SCC 15 at para 39, Joint BOA, Tab 14.

subject people to certain treatment or punishment.¹⁸ In *Malmo-Levine*, the Supreme Court acknowledged that the concept of gross disproportionality under s 12 is very similar to its counterpart under the principles of fundamental justice.¹⁹

41. Like in *Boudreault*, the fines in the *Act* fail to reflect the moral blameworthiness of people found to be non-compliant.²⁰ A minimum \$1,000 fine for people who remain unvaccinated for socioeconomic reasons is inconsistent with the fundamental principle of sentencing, which requires a penalty to be proportionate both to the gravity of the offence and the degree of responsibility of the offender.²¹ \$1,000 may be grossly disproportionate even for people who are vaccine-hesitant for reasons unrelated to socioeconomic status; this includes reasons such as Indigenous communities' long-standing distrust of the medical system as a result of residential schools. A person is unlikely to escape liability under s 3(1) for such reasons — the only defence available under a strict liability regime is the limited excuse of due diligence.²² The mandatory minimum fine is unforgiving in such cases, because judges have no discretion for leniency.²³

¹⁸ *United States v Burns*, 2001 SCC 7 at para 57 [*Burns*], Joint BOA, Tab 15.

¹⁹ *Malmo-Levine*, *supra* note 1 at para 160, Joint BOA, Tab 1.

²⁰ *Boudreault*, *supra* note 16 at para 68, Joint BOA, Tab 13.

²¹ *R v Proulx*, 2000 SCC 5 at para 83 [*Proulx*], Joint BOA, Tab 16; *R v Lacasse*, 2015 SCC 64 at para 12, Joint BOA, Tab 17.

²² *R v Sault Ste Marie (City)*, [1987] 2 SCR 1299 at para 60, Joint BOA, Tab 18.

²³ *Boudreault*, *supra* note 16 at para 66, Joint BOA, Tab 13.

3. **The Availability of Imprisonment in Section 3(2)(c) is Grossly Disproportionate and Arbitrary**

(a) *The Unique Risks Imprisonment Poses During a Pandemic*

42. Jailing people for being unvaccinated during a pandemic is an extreme approach. In turn, the severe consequences of the imprisonment provision in s 3(2)(c) render it incompatible with the principles of fundamental justice.

43. This Court may take judicial notice that infectious diseases like HIRS can spread readily within jails, given that detainees are housed in close quarters and correctional authorities often have limited ability to implement recommended public health protocols. Canadian courts have acknowledged this when grappling with pre-trial detention and sentencing during the COVID-19 pandemic. In *JS*, Copeland J took notice that “the risks to health from [the] virus in a confined space with many people, like a jail, are significantly greater than if a defendant is able to self-isolate at home.”²⁴ In some circumstances, the pandemic and its impact on the detainee can constitute a material change in circumstances sufficient to justify pre-trial release.²⁵ In *Morgan*, the Ontario Court of Appeal considered that the impact of COVID-19 may be a collateral factor in sentencing that could result in alternatives to jail.²⁶

44. Unvaccinated people are already vulnerable to contracting HIRS — and they are especially vulnerable to contracting it in jails. Evidence of conditions within specific prisons in Flavelle is not necessary for the Court to take notice of this concern. In *CJ*, Conlan J rejected the suggestion that an accused would need to present evidence that the risk of contracting COVID-19 in jail is higher than outside of jail, holding “it is incontrovertible that [jail] is not conducive to the types of

²⁴ *R v JS*, 2020 ONSC 1710 at para 19, Joint BOA, Tab 19.

²⁵ See *R v Kazman*, 2020 ONCA 251 at paras 17-20 [*Kazman*], Joint BOA, Tab 20; *R v JA*, 2020 ONCA 660 at para 55, Joint BOA, Tab 21.

²⁶ *R v Morgan*, 2020 ONCA 279 at paras 8-10 [*Morgan*], Joint BOA, Tab 22.

physical distancing and other safety measures being recommended by all of the health authorities to help protect oneself against the virus.”²⁷ In *Kazman*, the Ontario Court of Appeal considered that the applicant’s vulnerability to suffering complications from COVID-19 was sufficient to reconsider incarceration despite a lack of evidence of COVID-19 cases or crowded conditions at the given correctional institution.²⁸ The concerns s 3(2)(c) poses for the principles of fundamental justice should be considered with this context in mind.

(b) Imprisonment is Grossly Disproportionate

45. Imprisonment is a grossly disproportionate sentence for the offence in s 3(1) of the *Act*. Even absent the pandemic context, incarceration is the most extreme possible penalty in our justice system.²⁹ People who are jailed lose their liberty and relinquish nearly all personal agency and control over their lives to correctional authorities. The *Act* allows unvaccinated people to be jailed merely for exercising their own medical self-determination, a *Charter*-protected interest. It allows unvaccinated people to be jailed even in circumstances where their non-compliance is driven by socioeconomic factors. Nothing in the *Act* requires that jail be a last resort: the only legislative guidance provided, per s 3(2)(b), is that a person can be sent to jail on a third conviction, which can be entered if they remain unvaccinated for at least three weeks.

46. The potential consequences of imprisonment on the health of unvaccinated people are so extreme as to be disproportionate to any legitimate government interest.³⁰ By jailing unvaccinated people during a pandemic, the government is not only depriving them of their liberty — it is

²⁷ *R v CJ*, 2020 ONSC 1933 at para 9 [*CJ*], Joint BOA, Tab 23.

²⁸ *Kazman*, *supra* note 25 at paras 14, 17-19, Joint BOA, Tab 20.

²⁹ See *Criminal Code*, RSC, 1985, c C-46, ss 718.2(d) and (e). See also *R v Gladue*, [1999] 1 SCR 688 at para 36, Joint BOA, Tab 24.

³⁰ *PHS*, *supra* note 14 at para 133, Joint BOA, Tab 12.

actively exposing them to a heightened risk of a serious, potentially deadly disease. Government action that puts a person at risk of facing a penalty that may lead to their death contravenes the principles of fundamental justice: for example, the Supreme Court held in *Burns* and *Suresh* that removing a person from Canada to a jurisdiction where they could face death or torture violates s 7.³¹ Unlike people in the community who can freely make choices about sanitizing and distancing, incarcerated people are also disempowered from managing their own risk by being required to share living spaces and property with other inmates.

47. In the context of the HIRS pandemic, the combined loss of liberty and heightened risk of infection that unvaccinated people will experience if sentenced to prison under the *Act* is grossly disproportionate. Where people commit serious offences associated with significant moral responsibility, incarceration may remain a fit sentence during a pandemic despite the increased risk of transmission that exists in facilities.³² In this case, however, the offence punishable by jail under the *Act* is simply *being unvaccinated* — a regulatory contravention that amounts to refusing or neglecting to take a medical treatment. Imprisoning people who merely wish to exercise their medical autonomy, and thereby exposing them to a greater risk of illness, is grossly disproportionate even when measured against the *Act*'s important purposes.

(c) *Imprisonment is Arbitrary*

48. Section 3(2)(c) of the *Act* is arbitrary because the consequences of imprisoning unvaccinated people run contrary to the law's overarching goal of protecting health and well-

³¹ *Burns*, *supra* note 18 at paras 124-128, Joint BOA, Tab 15; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 52-54, Joint BOA, Tab 25.

³² *Proulx*, *supra* note 21 at para 83, Joint BOA, Tab 16; *Morgan*, *supra* note 26 at para 11, Joint BOA, Tab 22.

being.³³ Jail is a blunt enforcement tool unsuitable for managing a public health crisis, given that it creates a risk of additional transmission and outbreaks that undermines public health responses.

49. Housing unvaccinated people in jails, especially if kept in close quarters with other inmates, undermines the *Act*'s purpose by directly threatening their health. The government puts unvaccinated people at greater risk of contracting HIRS when it imprisons them. The goal of protecting “the health and well-being of persons in Flavelle against HIRS” extends equally to unvaccinated people, who are members of society deserving of protection regardless of their non-compliance.³⁴ At the very least, the government should not put unvaccinated people at greater risk of falling ill with the very disease the *Act* purports to protect them from. The Supreme Court reached a similar conclusion in *Smith*, wherein a law passed in the name of public health and safety, but which prevented people from managing their own treatment while also exposing them to further health risks, was arbitrary and violated s 7.³⁵

50. The potential for HIRS to spread in jails poses a risk not only to those who contravene the *Act*, but also to other inmates, visitors, and community members who come into contact with unvaccinated inmates once they are released. Given that unvaccinated people with medical exemptions represent an estimated 5% of the population and vaccinated people who are not effectively immunized represent another 27%, about a third of the Flavellian population remains at risk of falling ill from transmission caused or aggravated by a jail outbreak. There is no connection between imprisoning unvaccinated people and protecting public health: the law exacts a constitutional price without furthering the public good.³⁶

³³ *Vaccination Act*, s 2.

³⁴ *Ibid.*

³⁵ *Smith*, *supra* note 5 at para 25, Joint BOA, Tab 4.

³⁶ *Bedford*, *supra* note 10 at para 111, Joint BOA, Tab 10; *Carter*, *supra* note 4 at para 83, Joint BOA, Tab 3.

THE VIOLATION OF SECTION 7 IS NOT JUSTIFIED UNDER SECTION 1 OF THE *CHARTER*

51. Even during a public health emergency, there must be a limit on how significantly a government can impair individual rights in pursuit of collective goals. By forcing every individual in Flavelle above the age of 4 to receive the HIRS vaccine, the Government of Flavelle has crossed this line. Although achieving herd immunity is a pressing and substantial objective, s 3 of the *Vaccination Act* is not rationally connected to the broader objective of protecting public health, does not minimally impair the rights to liberty and security of the person, and is not proportionate in its effects. Even considering deference to Parliament in its response to a public health emergency, the Respondent has failed to provide a sound justification for forcing a medical treatment on Flavelle's population.

52. The Supreme Court has repeatedly held that a violation of s 7 rights is not easily justified.³⁷ The rights to life, liberty, and security of the person protected by s 7 are not easily overridden by competing considerations. A deprivation that fails to accord with the principles of fundamental justice signifies that the provision is fundamentally flawed and requires truly extraordinary circumstances to justify the violation.³⁸ In *Reference Re BC Motor Vehicle Act*, the Supreme Court held that exceptional circumstances, like natural disasters, war, or epidemics, are required before a s 7 violation will be justified.³⁹

53. The HIRS pandemic presents exceptional circumstances of the kind that may be sufficient to justify a s 7 violation. However, a state of emergency cannot be used to insulate legislation from

³⁷ *Reference Re BC Motor Vehicle Act*, supra note 8 at para 93, Joint BOA, Tab 9; *Heywood*, supra note 11 at para 71, Joint BOA, Tab 11; *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 99 [*New Brunswick v G(J)*], Joint BOA, Tab 26; *R v Ruzic*, 2001 SCC 24 at para 92, Joint BOA, Tab 27; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 66, Joint BOA, Tab 28.

³⁸ *New Brunswick v G(J)*, supra note 37 at para 99, Joint BOA, Tab 26.

³⁹ *Reference Re BC Motor Vehicle Act*, supra note 8 at para 93, Joint BOA, Tab 9.

proper *Charter* review. As the Court noted in *RJR-MacDonald*, judicial deference cannot be taken “to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution difficult[.]”⁴⁰

54. Deference must remain grounded in the factual context of the present public health emergency. The government is not expected to adduce long-term studies, conclusive evidence of the effectiveness of its chosen scheme, or other forms of evidence that could not reasonably be generated in light of the novel and rapidly evolving nature of the HIRS pandemic. The government is also entitled to act swiftly and decisively, rather than incrementally, considering the urgent nature of the present emergency. However, even taking a deferential posture towards the government’s mandatory vaccination scheme and the evidence on which it is based, the scheme is still not justified under s 1.

A. SECTION 3 HAS A PRESSING AND SUBSTANTIAL OBJECTIVE OF ACHIEVING HERD IMMUNITY

55. The legislative objective must be defined with precision, at an appropriate level of generality, and with a focus on the ends of the legislation rather than on its means.⁴¹ The specific objective of s 3, which is to ensure sufficient vaccination coverage to achieve herd immunity, is pressing and substantial. This specific objective is in service of the *Act*’s broader objective of protecting the health and well-being of persons in Flavelle against HIRS.⁴²

⁴⁰ *RJR-Macdonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 136 [*RJR-Macdonald*], Joint BOA, Tab 29.

⁴¹ *R v KRJ*, 2016 SCC 31 at para 63, Joint BOA, Tab 30; *R v Moriarity*, 2015 SCC 55 at para 26, Joint BOA, Tab 31.

⁴² *Vaccination Act*, s 2.

B. SECTION 3 IS NOT RATIONALLY CONNECTED TO THE OBJECTIVE OF PROTECTING PUBLIC HEALTH

56. The rational connection stage requires that there be a causal connection between the measure and the objective.⁴³ A measure that is arbitrary for the purposes of the s 7 analysis is unlikely to ever satisfy the rational connection test under s 1.⁴⁴ Section 3 of the *Vaccination Act* is arbitrary and therefore not rationally connected to the legislative objective in two respects. First, the penalty of imprisonment created by s 3(2)(c) runs contrary to the objective of protecting individuals against HIRS because incarceration puts them at greater risk of contracting the disease. Second, s 3's harsh penalties create a powerful disincentive against seeking vaccination for those who miss the *Act*'s initial 6-week cut-off, undermining the goal of achieving herd immunity.

57. First, as noted above,⁴⁵ incarcerating unvaccinated people puts them at greater risk of HIRS infections. While imprisonment might remove an unvaccinated person from the broader community, it merely transfers whatever risk they pose to another community: inmates. In the context of the COVID-19 pandemic, the courts have taken judicial notice of the fact that jail settings make it significantly more difficult to contain the spread of infectious diseases.⁴⁶

58. In *Bedford*, the application judge found the prohibition against keeping a bawdy-house to be arbitrary because its effect was to put sex workers at increased risk of violence, and this was inconsistent with the goal of protecting public health and safety.⁴⁷ As in *Bedford*, the penalty of imprisonment puts individuals at a significantly higher risk of contracting the very virus the *Act* is intended to protect them against and is accordingly not rationally connected to the objective. The

⁴³ *RJR-Macdonald*, *supra* note 40 at para 153, Joint BOA, Tab 29.

⁴⁴ *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 155, Joint BOA, Tab 32.

⁴⁵ Appellant's Factum, paras 48-50.

⁴⁶ *CJ*, *supra* note 27 at para 9, Joint BOA, Tab 23.

⁴⁷ *Bedford v Canada (Attorney General)*, 2010 ONSC 4264 at para 385, Joint BOA, Tab 33.

irrationality of this impact does not impugn other offences carrying imprisonment as a sanction because unlike s 3 of the *Vaccination Act*, these offences do not have as their specific purpose protecting people against HIRS.

59. Second, by making it an offence to be unvaccinated, s 3 makes it more likely that people who initially fail to comply will refrain from seeking vaccination in the future for fear of attracting legal consequences. An initial fine of up to \$10,000, and even the minimum fine of \$1,000, has strong potential to deter an individual from drawing attention to their unvaccinated status by seeking health services. Rather than attempting to change the minds of people who are vaccine-hesitant, s 3 erects barriers to those who seek to get vaccinated once the initial transition period has passed, compromising the goal of achieving herd immunity.

C. SECTION 3 DOES NOT MINIMALLY IMPAIR THE RIGHTS TO LIBERTY AND SECURITY OF THE PERSON

60. Section 3 of the *Vaccination Act* is not minimally impairing of s 7 rights because there are less impairing alternatives that would help achieve herd immunity in a timely manner. At the minimal impairment stage, the burden is on the Respondent to show the absence of less drastic means of achieving the government's goal in a real and substantial manner.⁴⁸ The Supreme Court of Canada has held that alternatives need not satisfy the government's objective to exactly the same degree as the impugned measure. A provision will not be minimally impairing if there are less impairing alternatives that "give sufficient protection, in all the circumstances, to the government's goal."⁴⁹

⁴⁸ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 55 [*Hutterian Brethren*], Joint BOA, Tab 34; *KRJ*, *supra* note 41 at para 70, Joint BOA, Tab 30; *Carter*, *supra* note 4 at para 102, Joint BOA, Tab 3.

⁴⁹ *Hutterian Brethren*, *supra* note 48 at para 55, Joint BOA, Tab 34.

61. There are at least two alternatives to the present scheme that would provide sufficient protection to the goal of achieving herd immunity in a timely manner while impacting s 7 rights to a significantly less drastic degree: relying on the system of vaccination cards the government has already established, and allowing for limited non-medical exemptions within a broader mandatory scheme. The Respondent has not demonstrated that these alternatives would be inadequate in combatting the HIRS pandemic.

1. Vaccination Cards

62. The system of vaccination cards established by the Government of Flavelle provides a powerful incentive for vaccination that gives sufficient protection to the government's goal while being substantially less impairing of s 7 rights. Vaccination cards allow businesses and other entities to deny entry to public spaces without proof of either vaccination or a medical exemption. Under this scheme, it will be virtually impossible to remain unvaccinated out of carelessness or laziness. The system effectively requires individuals to get vaccinated in order to resume normal life. However, a vaccination card system preserves an element of choice for those with strong personal convictions against vaccination, who are permitted to remain unvaccinated provided they do not put others at risk by interacting with them in certain settings.

63. The vaccination card system is still highly coercive and does impact s 7 rights. Denying access to fundamental social institutions like schools and workplaces as well as essential retail services like grocery stores is an unprecedented incursion into people's daily lives. For many Flavellians, including many vaccine-hesitant individuals, this may not be a meaningful choice. However, for the less than 2% of Flavellians who are unlikely to change their minds, the vaccination card system stops short of fully removing their right to medical self-determination and

allows them to remain unvaccinated. At the same time, the risk to the public is significantly mitigated and the benefits of herd immunity are preserved by preventing unvaccinated individuals from mingling with others out in the community and potentially spreading the virus.

64. A vaccination card system could also be supplemented by public outreach and education programs that provide opportunities for targeted interventions towards communities with historically lower vaccination rates, such as migrants, low-income individuals, and individuals facing housing insecurity. As Dr. Sugumar's report notes, the burdens of a mandatory vaccination scheme fall most heavily on disadvantaged groups "who are more likely to lose contact with the health system and experience disrupted access to medical services." An outreach-based approach that includes initiatives such as mobile vaccination clinics and clinics at workplaces employing large numbers of low-income individuals has significant potential to remove barriers to vaccination and increase overall vaccination coverage while mitigating the potential adverse impacts of the vaccination card system on those who face socioeconomic barriers to vaccination.

65. Having already established a system that drastically restricts access to public spaces for unvaccinated individuals, it was unnecessary and unreasonable for the Government of Flavelle to take the extraordinary additional step of forcing every person in Flavelle to submit to vaccination under penalty of fines and imprisonment. Requiring vaccination cards for access to public spaces preserves the strong deterrent element that animates the scheme of the *Act* as well as the imperative of getting vaccinated within a short period of time. The Respondent has not shown that an already-coercive vaccination card system is somehow not coercive enough to give sufficient protection to the goal of achieving herd immunity.

2. Non-Medical Exemptions

66. Allowing for non-medical exemptions within a mandatory vaccination scheme is another alternative that would significantly reduce the impact on s 7 rights without compromising herd immunity. Cutinha JA erred in equating the incorporation of non-medical exemptions to a fully voluntary system. This ignores the reality that mandatory vaccination would remain the default and that it would be open to the government to impose restrictions on when and with what conditions non-medical exemptions are issued.

67. For example, those seeking a non-medical exemption could be required to first undergo an education session, as is required to obtain a non-medical exemption under the *Immunization of School Pupils Act*.⁵⁰ Restrictions could be imposed on who is eligible for these exemptions, such as by limiting eligibility to religious and conscience-based beliefs that are protected under s 2(a) of the *Charter*. These exemptions could be subject to the same testing and self-isolation requirements that apply to individuals with medical exemptions under s 4 of the *Act*, significantly reducing the likelihood of outbreaks.

68. The Respondent has not demonstrated that allowing non-medical exemptions would compromise its goal of achieving herd immunity in a timely manner. Universal coverage is not required to provide effective protection against HIRS. The Respondent has not led evidence of how the coverage rate would be impacted by a non-medical exemption, particularly one tailored in its scope. The Respondent's only evidence on this issue is Dr. Adhichetty's observation that vaccination coverage increased in some jurisdictions after the elimination of non-medical exemptions. However, this both ignores the consequent rise in rates of medical exemptions in these

⁵⁰ RSO 1990 c I.1, ss 3(1) and (3).

jurisdictions and provides no evidence as to whether this purported increase would be significant enough to compromise herd immunity.

69. As the Supreme Court affirmed in *Carter*, it is not for the claimant whose rights are infringed to prove that alternative approaches achieve the objective and dispel any risks associated with these alternatives. The burden of establishing minimal impairment is on the government.⁵¹ In this case, the Respondent has not shown that it was reasonably necessary to force a medical treatment on the people of Flavelle when herd immunity can be achieved through less intrusive alternatives.

D. SECTION 3'S DELETERIOUS EFFECTS OUTWEIGH ITS SALUTARY EFFECTS

70. At the final proportionality stage, the Court must weigh the impact of the law on protected rights against the law's beneficial effects towards the public good.⁵² While the salutary effects of increasing vaccination coverage are significant, the cost to individual rights is just too great. Compelling everyone in Flavelle without a medical exemption to undergo a state-mandated medical treatment under threat of imprisonment is a severe incursion into fundamental rights that is not justified in a free and democratic society.

71. The salutary effects of s 3 should not be overstated. While the *Act* is likely to yield a higher rate of vaccination coverage in a short period of time, the Respondent has not shown that the mandatory vaccination scheme is likely to yield near-universal coverage. The available evidence on whether mandatory vaccination regimes increase vaccination coverage is conflicting at best, and the magnitude of a hypothetical increase remains unknown. While Dr. Adhichetty's study found

⁵¹ *Carter*, *supra* note 4 at para 118, Joint BOA, Tab 3.

⁵² *Ibid* at para 122.

an increase in coverage after the introduction of mandatory vaccination schemes, Dr. Sugumar's study found no marked difference in coverage between jurisdictions with mandatory schemes and those without them.

72. Even absent non-compliance, s 3 on its face is unlikely to achieve near-universal coverage. Beyond the estimated 5% of the population that may require a medical exemption, s 3 entirely exempts two additional populations by omitting them from the definition of a "designated person": non-residents present in Flavelle and children under the age of 4, the latter of which represent roughly 5% of the Flavellian population. There is no explanation for the exclusion of these populations from the ambit of s 3, despite both being capable of spreading HIRS.

73. As Dr. Sugumar's research indicates, the current heavy-handed approach established under s 3 may drive vaccine-resistant or vaccine-hesitant individuals to seek medical exemptions, potentially increasing the proportion of individuals who will remain permanently unvaccinated. Cutinha JA's conclusion that s 3 will yield near-universal coverage also ignores the reality that some individuals will still fail to get vaccinated, whether by choice or due to accessibility concerns.

74. In contrast, the *Act's* deleterious effects on s 7 rights are severe. The Supreme Court has recognized that the right to medical self-determination is deserving of the utmost protection.⁵³ Section 3 eliminates the ability of all people in Flavelle to make a meaningful choice about their own health and instead forces them to receive a medical treatment that violates their bodily integrity. The long-term effects of the HIRS vaccine are still unknown, raising the spectre of possible deleterious health effects. Compelling individuals to receive the vaccine against their will may also cause significant psychological distress. Because medical exemptions on the basis of mental disorder require a DSM-5 diagnosis, individuals like Mr. Yuno, who do not meet the

⁵³ *Ibid* at para 67.

requisite diagnostic criteria but still have significant vaccine-related anxiety, will suffer potentially severe adverse psychological effects from being forced to get vaccinated.

75. An individual's choice not to be vaccinated can be of great personal significance. For Mr. Yuno, the choice not to receive the HIRS vaccine is informed by his past traumatic experience with a vaccine. Other Flavellians, such as many of Mr. Yuno's clients, may share similar convictions. Other Flavellians still may be motivated in their choice by sincerely held religious beliefs that prevent them from receiving the HIRS vaccine. While we may "instinctively recoil" from the choice made, as Binnie J observed in *AC v Manitoba*, these profoundly personal choices made on the basis of conscience or religion are no less deserving of protection under the *Charter*.⁵⁴

76. The penalties for contravening s 3 are severe. For Flavellians like Mr. Yuno, who are ineligible for medical exemptions but for whom the prospect of getting vaccinated is too distressing to be contemplated, s 3 would impose exorbitant fines and possible imprisonment. Subsequent convictions may be entered after 7 days if a person remains unvaccinated, subjecting unvaccinated people to ever-mounting fines and prison sentences even where the individual risk they pose to others may well be minimal. These financial penalties, which are at minimum \$1,000 per conviction, are potentially devastating for low-income people in particular, who are already less likely to get vaccinated for socioeconomic reasons.

77. These deleterious impacts on s 7 rights far outweigh the provision's speculative and undefined salutary effects on vaccination coverage. The HIRS pandemic is undoubtedly serious and likely justifies some limitations on s 7 rights. However, s 3 of the *Vaccination Act* goes too far by forcing a medical treatment on effectively the entire population of Flavelle. Particularly in the face of significantly less drastic alternatives that would enable Flavelle to quickly reach herd

⁵⁴ *AC v Manitoba*, *supra* note 6 at para 219, Joint BOA, Tab 5.

immunity, the mandatory vaccination scheme Flavelle has adopted is not demonstrably justified in a free and democratic society.

PART IV - ORDER SOUGHT

78. For the foregoing reasons, s 3 of the *Act* violates s 7 of the *Charter* and cannot be justified under s 1. As the entire scheme of the *Act* is inextricably linked to s 3, the Appellant seeks a declaration that the *Act* as a whole is unconstitutional and of no force or effect pursuant to s 52 of the *Constitution Act, 1982*.⁵⁵ Should the Court accept only the submissions pertaining to the unconstitutionality of the *Act*'s penalties, the Appellant asks the Court to strike the penalty of imprisonment as well as the minimum fine of \$1,000 from the legislation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of January, 2021.

The image shows two handwritten signatures in black ink. The signature on the left is more stylized and appears to be 'TP'. The signature on the right is written in a cursive script and reads 'Olivia Eng'. Both signatures are positioned above a horizontal line.

Teodora Pasca and Olivia Eng
Counsel for the Appellant

⁵⁵ *Constitution Act, 1982*, s 52(1), being Schedule B to the Flavelle Act 1982 (UK), 1982, c 11.

PART V - TABLE OF AUTHORITIES

JURISPRUDENCE

	Case Authority	Paragraph
1	<i>AC v Manitoba (Director of Child and Family Services)</i> , 2009 SCC 30	28, 76
2	<i>Alberta v Hutterian Brethren of Wilson Colony</i> , 2009 SCC 37	61
3	<i>Bedford v Canada (Attorney General)</i> , 2010 ONSC 4264	59
4	<i>Canada (Attorney General) v Bedford</i> , 2013 SCC 72	30, 33, 51
5	<i>Carter v Canada (Attorney General)</i> , 2015 SCC 5	28, 30, 33, 51, 61, 70, 71, 75
6	<i>Chaoulli v Quebec (Attorney General)</i> , 2005 SCC 35	57
7	<i>Charkaoui v Canada (Citizenship and Immigration)</i> , 2007 SCC 9	53
8	<i>Ciarlariello v Schachter</i> , [1993] 2 SCR 119	28
9	<i>Fleming v Reid</i> , 4 OR (3d) 74 (CA)	28
10	<i>Malette v Shulman</i> , 67 DLR (4th) 321 (CA)	28
11	<i>New Brunswick (Minister of Health and Community Services) v G(J)</i> , [1999] 3 SCR 46	53
12	<i>PHS Community Services Society v Canada (Attorney General)</i> , 2011 SCC 44	36, 47
13	<i>R v Boudreault</i> , 2018 SCC 58	40, 42
14	<i>R v CJ</i> , 2020 ONSC 1933	45, 58
15	<i>R v Gladue</i> , [1999] 1 SCR 688	46
16	<i>R v Heywood</i> , [1994] 3 SCR 761	31, 33, 53
17	<i>R v JA</i> , 2020 ONCA 660	44
18	<i>R v JS</i> , 2020 ONSC 1710	44
19	<i>R v Kazman</i> , 2020 ONCA 251	44, 45
20	<i>R v KRJ</i> , 2016 SCC 31	56, 61

21	<i>R v Lacasse</i> , 2015 SCC 64	42
22	<i>R v Malmo-Levine</i> , 2003 SCC 74	27, 29, 41
23	<i>R v Morgan</i> , 2020 ONCA 279	44, 48
24	<i>R v Morgentaler</i> , [1988] 1 SCR 30	27, 28
25	<i>R v Moriarity</i> , 2015 SCC 55	56
26	<i>R v Nur</i> , 2015 SCC 15	40
27	<i>R v Proulx</i> , 2000 SCC 5	42, 48
28	<i>R v Ruzic</i> , 2001 SCC 24	53
29	<i>R v Sault Ste Marie (City)</i> , [1987] 2 SCR 1299	42
30	<i>R v Smith</i> , 2015 SCC 34	28, 50
31	<i>Reference Re Section 94(2) of the Motor Vehicle Act (British Columbia)</i> , [1985] 2 SCR 486	29, 53
32	<i>RJR-MacDonald Inc v Canada (Attorney General)</i> , [1995] 3 SCR 199	54, 57
33	<i>Suresh v Canada (Minister of Citizenship and Immigration)</i> , 2002 SCC 1	47
34	<i>United States v Burns</i> , 2001 SCC 7	41, 47

LEGISLATION

Flavellian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Flavelle Act 1982 (UK), 1982, c 11

<p>1. The <i>Flavellian Charter of Rights and Freedoms</i> 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.</p>	<p>1. La <i>Charte flavellienne des droits et libertés</i> garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restraints que par une règle de droit, dans des limites qui soient raisonnables et don't la justification puisse se démontrer dans le cadre d'une société libre et démocratique.</p>
<p>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.</p>	<p>7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.</p>

Constitution Act, 1982, being Schedule B to the Flavelle Act 1982 (UK), 1982, c 11

<p>52. (1) The Constitution of Flavelle is the supreme law of Flavelle, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.</p>	<p>52. (1) La Constitution de Flavelle est la loi supreme de Flavelle; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.</p>
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Flavelle Vaccination Act

<p>Definitions</p> <p>1. In this Act...</p> <p>“designated person” means a person residing in Flavelle over the age of 4. [...]</p> <p>“recognized mental disorder” means a mental disorder recognized and described in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), published by the American Psychiatric Association.</p> <p>“statement of medical exemption” means a statement in the prescribed form signed by a physician or nurse practitioner stating that the prescribed program of immunization in relation to HIRS</p> <p style="padding-left: 40px;">(a) is detrimental to the health of the person named in the statement, meaning: [...]</p> <p style="padding-left: 80px;">(iii) The designated person is suffering from a recognized mental disorder,</p>

or

(b) is unnecessary in respect of the person named in the statement by reason of past infection or laboratory evidence of immunity.

Purpose of this Act

2. The purpose of this Act is to protect the health and well-being of persons in Flavelle against HIRS.

Duty of Designated Persons

3. (1) Designated persons shall complete the prescribed program of immunization in relation to HIRS within six weeks of this Act coming into force.
- (2) A designated person over the age of 12 who contravenes section (1) is guilty of an offence and on conviction is liable:
- (a) on a first conviction to a fine of not less than \$1,000 and not more than \$10,000;
 - (b) on a second conviction, not less than 7 days after a first conviction, to a fine of not less than \$1,000 and not more than \$15,000; and
 - (c) on any subsequent conviction, not less than 7 days after the last conviction, to a fine of not less than \$1,000 and not more than \$20,000 or to imprisonment for a term of not more than 14 days, or both.

Duties of Designated Persons with Statements of Medical Exemptions

4. (1) Section 3 does not apply to designated persons in respect of immunization in relation to HIRS if specified by a physician or a registered nurse in a statement of medical exemption and, where the physician or registered nurse has specified an effective time period, only during the effective time period.
- (2) A designated person over the age of 12 with a statement of medical exemption must:
- (a) undergo the prescribed testing for HIRS at least once every 14 days for the effective time period of medical exemption; and
 - (b) remain in self-isolation for any time period spanning from 14 days after the last negative test result until the next negative test result, for the effective time period of medical exemption.
- (3) A designated person with a statement of medical exemption who contravenes subsection (2) is guilty of an offence and on conviction is liable:
- (a) on a first conviction to a fine of not less than \$1,000 and not more than \$10,000;
 - (b) on a second conviction, not less than 7 days after a first contravention, to a fine of not less than \$1,000 and not more than \$15,000; and
 - (c) on any subsequent conviction, not less than 7 days after the last contravention, to a fine of not less than \$1,000 and not more than \$20,000 or to imprisonment for a term of not more than 14 days, or both.

Criminal Code, RSC 1985, c C-46

<p>718.2 A court that imposes a sentence shall also take into consideration the following principles:</p> <p>[...]</p> <p>(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and</p> <p>(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.</p>	<p>718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants:</p> <p>[...]</p> <p>(d) l'obligation, avant d'envisager, la privation de liberté, d'examiner la possibilité de sanctions moins contraignantes lorsque les circonstances le justifient;</p> <p>(e) l'examen, plus particulièrement en ce qui concerne les délinquants autochtones, de toutes les sanctions substitutives qui sont raisonnables dans les circonstances et qui tiennent compte du tort cause aux victimes ou à la collectivité.</p>
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Immunization of School Pupils Act, RSO 1990, c I.1

<p>Duty of Parent</p> <p>3. (1) The parent of a pupil shall cause the pupil to complete the prescribed program of immunization in relation to each of the designated diseases.</p> <p>[...]</p> <p>(3) Subsection (1) does not apply to a parent who has completed an immunization education session with a medical officer of health or with a medical officer of health's delegate that complies with the prescribed requirements, if any, and who has filed a statement of conscience or religious belief with the proper medical officer of health.</p>	<p>Obligation du père ou de la mère</p> <p>3. (1) Le père ou la mère d'un élève fait en sorte que l'élève suive en entiere la programme d'immunisation prescrit contre chacune des maladies désignées.</p> <p>[...]</p> <p>(3) Le paragraphe (1) ne s'applique pas au père ou à la mère qui, d'une part, a suivi en entiere une séance d'éducation en matière d'immunisation offerte par un médecin-hygiéniste ou un de ses délégués et conforme aux exigences prescrites, s'il y a, et, d'autre part, a déposé une déclaration de conscience ou de croyance religieuse auprès du médecin-hygiéniste compétent.</p>
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