

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 RESPONDENT

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The devastation of the HIRS pandemic will not necessarily end with the discovery of an effective vaccine. The HIRS vaccine simply represents a crossroad: either Flavelle acts quickly to ensure maximum vaccination coverage and herd immunity, or the HIRS pandemic indefinitely continues to harm Flavellians' safety, economic security, and social well-being. This appeal asks the Court to permit individuals to shirk their personal responsibility to protect public health at society's expense. It should be dismissed.

2. In a free and democratic society, legislatures must ensure the common welfare by enacting reasonable safety regulations. This governmental function is never more important than in times of war, natural disasters, and public health emergencies. Even without such exigencies, a government in a free and democratic society may impose speed limits on highways, ban smoking in certain places, and enforce quarantines to prevent the spread of communicable diseases. These measures reasonably restrict the liberty and personal security of some individuals in accordance with the principles of fundamental justice. The *Vaccination Act* ("the *Act*") is such a measure.

3. The *Act* does not violate the Appellant's right to life, liberty, and security of the person under section 7 of *Flavellian Charter of Rights and Freedoms* ("the *Charter*") in a manner that is inconsistent with the principles of fundamental justice. Any deprivation caused by the *Act*, including the possibility of imprisonment, is neither arbitrary, overbroad, nor grossly disproportionate.

4. Alternatively, if the *Act* does infringe the Appellant's section 7 rights, it does so reasonably and in a manner demonstrably justified in a free and democratic society. The vaccination requirement is rationally connected to a pressing and substantial purpose, namely the achievement

of herd immunity against HIRS as soon as possible. The *Act* impairs the Appellant's section 7 rights as little as possible and the alternatives proposed by the Appellant fail to give sufficient coverage to the government's objective. Finally, the substantial salutary effects of the vaccination requirement for Flavellian society outweigh its deleterious effects on the Appellant.

B. FACTUAL BACKGROUND

1) The Devastating Impact of the HIRS Pandemic

5. The highly contagious infectious disease, Human Infectious Respiratory Syndrome ("HIRS"), was first identified in 2019. By early 2020, the World Health Organization declared the HIRS outbreak to be a global pandemic. The pandemic has since caused over 20 million cases and 800,000 deaths worldwide and counting.

6. HIRS is readily communicable from person to person through airborne transmission or direct contact. Individuals may unknowingly transmit the virus through asymptomatic contagion. 90% of those exposed to that virus who are not immune will contract the disease. Once infected, HIRS can cause serious complications, including death, and there is no specific treatment available.

7. Flavelle experienced serious, recurring HIRS outbreaks throughout 2019 and 2020. The daily increase in HIRS cases fluctuates between 200 and 2,000 in Flavelle. 129,000 Flavellians have contracted the disease and 9,000 Flavellians have died of HIRS as of August 2020.

8. The HIRS pandemic also has broader detrimental consequences for Flavellian society. After the initial uptick in cases, the Government of Flavelle passed emergency legislation requiring residents to stay home, disrupting education and causing many businesses to shut down indefinitely. The Government of Flavelle continues to prohibit all but essential travel into the country.

2) **The Vaccination Act Will Help End the HIRS Pandemic**

9. After the release of the HIRS vaccine in August 2020, the Government of Flavelle passed the *Vaccination Act* which came into force on September 1, 2020. In a public statement introducing the *Act*, the Minister of Health, Dr. Tessier, stated:

Timing is of utmost importance in controlling the future spread of HIRS. If we do not take action now, countless more Flavellians will lose their businesses, their homes, their employment, their educational opportunities, and their lives.¹

10. To achieve herd immunity against this deadly virus and help end the pandemic, section 3 of the *Act* requires everyone over the age of 4 to be vaccinated, barring medical exemptions (the “vaccination requirement”). The *Act* allows Flavellians a 6-week period, until October 13, 2020, to comply with the vaccination requirement. Individuals who get the vaccine or a medical exemption will receive a card to that effect.

11. Non-compliance with the vaccination requirement results in escalating fines, which are allocated to a public health fund dedicated to HIRS vaccination efforts. While imprisonment is an available penalty for recurring and reckless non-compliance, the Government of Flavelle has not resorted to imprisonment to date.

12. The HIRS vaccine has a 73% efficacy rate, meaning that it will result in immunity for 73% of those vaccinated. Vaccinated individuals who contract the virus will experience milder symptoms and are significantly less likely to be highly contagious.

13. Given the vaccine’s 73% efficacy rate and the highly contagious nature of HIRS, Dr. Adhihetty found that herd immunity would require near-universal vaccination coverage. Approximately 5% of the population would be exempt from the vaccination requirement for valid medical reasons.

¹ 2021 Grand Moot Problem, at para 13.

14. Dr. Adhihetty finds that a potentially significant segment of the population would avoid the vaccine if it were not legislatively mandated. Dr. Adhihetty's survey research shows that only 68% of Flavellians are willing to get the HIRS vaccine voluntarily and 2% of the population are adamantly opposed to vaccination. The remaining 30% of survey participants declined to answer the question.

15. Anti-vaccine and vaccine-hesitant individuals raised a diverse range of reasons for opposing the vaccine. Anti-vaccine individuals are unlikely to change their minds through public outreach and education, according to Dr. Sugumar's findings.

16. Dr. Sugumar's research found no marked difference in vaccination rates for other diseases between provinces that mandate vaccination compared to those that do not. However, Dr. Adhihetty lauded the success of mandatory vaccination schemes in other jurisdictions which saw an increase in immunization coverage after the introduction of mandatory vaccination schemes and the elimination of non-medical exemptions.

3) The Appellant's Personal Aversion to Vaccination

17. The Appellant was charged and fined \$1,000 under section 3(1) of the *Act* in November 2020 for failing to produce a vaccination card at a grocery store in Falconer. The Appellant's opposition to vaccination stems from his rejection of modern medicine following a negative experience with the Mumpella vaccine abroad. Before beginning his all-natural journey as a holistic care practitioner, the Appellant worked abroad as a travelling nurse. During one such trip, the host nation experienced a Mumpella outbreak. All healthcare workers, including Mr. Yuno, were required to get the Mumpella vaccine. Despite receiving the vaccine, the Appellant suffered through a full bout of Mumpella. While the Appellant encourages those who choose to take non-

natural medical treatments, he personally does not believe that vaccines are effective given his past experience.

18. The Appellant has not sought a medical exemption under the *Act* because his vaccine-related anxieties are undiagnosed. The Appellant seeks a declaration that the vaccination requirement in the *Act* infringes his section 7 rights and cannot be saved under section 1 of the *Charter*.

C. PROCEDURAL HISTORY

1) The Superior Court of Falconer Ruled in Favour of the Appellant

19. Ibrakovic J held that section 3 of the *Act* violated the Appellant's right to liberty and security of the person under section 7 of the *Charter* in a manner that was overbroad. According to Ibrakovic J, the objective of the impugned provision was to achieve herd immunity by ensuring sufficient vaccination coverage. Ibrakovic J accepted the uncontradicted evidence at trial that 100% vaccine coverage is not strictly necessary to achieve herd immunity. As such, she found that the vaccination scheme overreached its objective in capturing conduct that was not necessary to protect Flavellians against HIRS.

20. Under section 1, Ibrakovic J found that the goal of widespread vaccine coverage was not sufficient to justify the infringement of section 7. Ibrakovic J held that the *Act* was not minimally impairing as the Government of Flavelle could have expanded the medical exemption to include those who do not want to be vaccinated. Ibrakovic J further held that the salutary effects did not outweigh the deleterious effects of taking away an individual's choice to receive medical treatment.

2) **The Falconer Court of Appeal Ruled in Favour of the Government of Flavelle**

21. Cutinha JA, writing for the majority, held that the deprivations of liberty and security of the person under section 7 of the *Charter* were in accordance with the principles of fundamental justice. Given the time sensitive circumstances, Cutinha JA found that the proper formulation of the impugned provision's objective was to achieve herd immunity *as soon as possible* by ensuring maximum vaccination coverage. Cutinha JA held that the *Act* was not overbroad because mandating vaccination for everyone without a medical exemption was reasonably necessary to control contagious, deadly outbreaks in a timely manner.

22. Cutinha JA further found that the possibility of imprisonment in the impugned provisions was not contrary to the principles of fundamental justice. There was no clear legislative intent to create an absolute liability offence as the *Act* did not expressly or impliedly preclude a due diligence defence.

23. Even if the impugned provisions violated the Appellant's section 7 rights, Cutinha JA found that this case fell into the exact "exceptional circumstances" contemplated in *R v Ruzic* that could justify a section 7 breach under section 1 of the *Charter*.

24. In dissent, Boljevic JA largely echoed the lower court's reasons.

PART II – QUESTIONS IN ISSUE

25. This appeal raises the following questions in issue:

- A. Does the *Vaccination Act* infringe the right under section 7 of the *Charter* to not be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice?
- B. If the *Vaccination Act* is found to infringe section 7 of the *Charter*, is the infringement a reasonable limit that has been demonstrably justified in a free and democratic society under section 1 of the *Charter*?

PART III – ARGUMENT

A. THE *ACT* ACCORDS WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE UNDER SECTION 7

26. Section 7 of the *Charter* involves a two-step analysis.² At the first stage, the Government of Flavelle concedes that the vaccination requirement and the possibility of imprisonment under the *Act* engage the Appellant’s right to liberty and security of person. However, the substantive rights guaranteed under section 7 are not absolute,³ and may be subject to limitations in accordance with the principles of fundamental justice.⁴

27. At the second stage, the Appellant has not met his burden of showing that the deprivation of his section 7 rights is contrary to the principles of fundamental justice. The principles of fundamental justice do not hold the government to a standard of perfection. They “are not designed to ensure that the optimal legislation is enacted.”⁵ The question is not whether the legislative scheme is imperfect or unwise, but whether it offends the basic tenets of our legal system.⁶

28. While the *Act* engages the Appellant’s right to liberty and security of the person, it does so in a manner that is consistent with principles of fundamental justice. First, the vaccination requirement under section 3(1) of the *Act* is not overbroad. The vaccination requirement is a necessary means to achieve the objective of the impugned provision, namely to achieve herd immunity *as soon as possible*. Second, the applicable fines under section 3(2) are not grossly disproportionate to the provision’s objective of ensuring compliance with the *Act*. Third, the availability of imprisonment under section 3(2)(c) of the *Act* as a deterrent for persistent non-compliance that threatens public health is not arbitrary or grossly disproportionate.

² *Canada (AG) v Bedford*, 2013 SCC 72 [at para 58](#) [*Bedford*], Joint Book of Authorities, Tab 10 [Joint BOA].

³ *Operation Dismantle v The Queen*, [1985] 1 SCR 441 [at para 98](#), Joint BOA, Tab 35.

⁴ *B(R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 [at 339](#), Joint BOA, Tab 36.

⁵ *Reference re ss. 193 and 195.1(1) of the Criminal Code*, [1990] 1 SCR 1123, [at 1142](#), Joint BOA, Tab 37.

⁶ *Ibid.*

1) The Vaccination Requirement is not Overbroad

29. The Supreme Court of Canada has defined overbreadth as “the situation where there is no rational connection between the purpose of the law and *some*, but not all, of its impacts.”⁷ The vaccination requirement is not overbroad because its impacts are rationally connected and “reasonably necessary” to achieve its legislative purpose,⁸ namely to achieve herd immunity as soon as possible by ensuring maximum vaccination coverage.

30. The overbreadth analysis begins with identifying the specific purpose of the provision at issue. In *R v Safarzadeh-Markhali*, the Supreme Court of Canada set out the three sources to consider when determining the objective of the impugned provision: (1) statements of purpose in the legislation; (2) the text, context, and scheme of the legislation; and (3) other relevant extrinsic evidence, such as the Minister of Health Dr. Tessier’s public statement in this case.⁹

31. First, the express legislative purpose under section 2 of the *Act* is “to protect the health and well-being of persons in Flavelle.” Second, the context surrounding this legislation is a global pandemic where it is especially imperative to take immediate ameliorative action. Third, Dr. Tessier stated that “timing is of utmost importance in controlling the future spread of HIRS” and preventing needless deaths. Given the time sensitive nature of the circumstances informing this legislation, Cutinha JA properly articulated the purpose of the vaccination requirement as achieving herd immunity *as soon as possible* by ensuring maximum vaccination coverage.

32. The Appellant contends that the vaccination requirement is overbroad because the *Act* does not include an individualized risk assessment of transmitting HIRS.¹⁰ This contention cannot stand for three reasons.

⁷ *Bedford*, *supra* note 2 [at para 112](#), Joint BOA, Tab 10.

⁸ *R v Safarzadeh-Markhali*, 2016 SCC 14 [at para 50](#) [*Safarzadeh-Markhali*], Joint BOA, Tab 38.

⁹ *Ibid*, [at para 31](#), Joint BOA, Tab 38.

¹⁰ Factum of the Appellant, at para 33.

33. First, there is no evidence to suggest that the Appellant, and other individuals opposed to vaccination, are more likely to comply with social distancing measures than the general public. Second, the law regularly and validly imposes categorical restrictions on liberty without individualized risk assessments in order to reduce the likelihood of harm. For instance, legislation that mandates fingerprinting and DNA registration for certain offenders without individualized assessments of the risk of re-offending is constitutionally valid.¹¹ The vaccination requirement for all those without a medical exemption is similarly grounded in a reasoned apprehension of the risk of harm caused by the continued spread of HIRS.

34. Third, and most importantly, the relevant objective under sections 7 and 1 is the objective of the specific impugned provision, not the broader objective of the legislation as a whole.¹² The specific purpose of the vaccination requirement is to ensure maximum vaccination coverage, not only to protect public health more broadly. Strict adherence to social distancing measures may temporarily protect public health but will not ensure sufficient vaccination coverage to achieve herd immunity or provide long-term reprieve from the HIRS pandemic.

35. The specific legislative objective of the impugned provision, to achieve herd immunity by ensuring maximum vaccination coverage, would not be possible without requiring all designated persons to be vaccinated. According to Dr. Adihetty, the HIRS vaccine requires *near-universal* coverage to be effective because the vaccine has a relatively low efficacy rate of 73% and HIRS is highly contagious. Approximately 5% of the population already requires a medical exemption from the vaccination requirement. Even with an 89% vaccination coverage rate, Flavelle experienced four measles outbreaks in the past decade. This suggests that the vaccination coverage

¹¹ *R v Dyck*, 2008 ONCA 309 [at paras 112-117](#) and [123](#), Joint BOA, Tab 39, citing *R v Beare*, [1988] 2 SCR 387, *R v Rodgers*, 2006 SCC 15, and *R v Briggs* (2001), 55 OR (3d) 417 (CA).

¹² *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 [at para 144](#) [*RJR-MacDonald*], Joint BOA, Tab 29; *R v KRJ*, 2016 SCC 31 [at para 62](#), Joint BOA, Tab 30.

rate for the HIRS vaccine must be much higher than 89% to achieve herd immunity against HIRS.

36. Near-universal coverage would not be possible without a mandatory vaccination scheme. Dr. Adihetty's research shows that up to 32% of Flavellians would avoid the vaccine if it were not legislatively mandated. As such, including a non-medical exemption would substantially undermine the Government of Flavelle's ability to protect Flavellians against the continued spread of HIRS.

37. While voluntary vaccination coupled with a mass public education campaign could over time achieve a higher rate of vaccination, time is of the essence. The current vaccination requirement is imperative to prevent further needless deaths.

2) The Fines under the Act are not Grossly Disproportionate

38. The Appellant has not established that the effects of the vaccination requirement on his section 7 rights are so extreme as to be disproportionate to any legitimate government interest.¹³ The government interest at stake here is to quickly eliminate the spread of HIRS by achieving herd immunity. The effects of fines on non-compliant individuals are not totally out of sync with the objective of protecting public health.¹⁴

39. The issue of disproportionate punishment, such as the impact of fines on low-income communities, is more appropriately addressed under section 12 of the *Charter* which protects against cruel and unusual punishment, and not under section 7.¹⁵ For a fine to be unconstitutional under section 12, it must be so excessive as to outrage standards of decency in a manner that is abhorrent or intolerable to society.¹⁶

¹³ *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [at para 133](#) [*PHS Community Services*] Joint BOA, Tab 40 citing *R v Malmo-Levine*, 2003 SCC 74 [at para 143](#) [*Malmo-Levine*], Joint BOA, Tab 1.

¹⁴ *Bedford*, *supra* note 2, [at para 120](#), Joint BOA, Tab 10.

¹⁵ *Malmo-Levine*, *supra* note 13 [at para 160](#), Joint BOA, Tab 1.

¹⁶ *R v Boudreault*, 2018 SCC 58 [at para 45](#) [*Boudreault*], Joint BOA, Tab 13.

40. The Supreme Court of Canada in *R v Boudreault* found that a mandatory victim surcharge constituted cruel and unusual punishment under section 12 of the *Charter*.¹⁷ Judges had to impose the surcharge in every case without any discretion “regardless of the severity of the crime, the characteristics of the offender, or the effects of the crime on the victim.”¹⁸ The mandatory victim surcharge applied automatically and universally.

41. Unlike the surcharge in *Boudreault*, fines under the *Act* are not imposed automatically. Section 3(2) of the *Act* is a strict liability offence which provides for a due diligence defence. An unvaccinated individual who made reasonable efforts to get vaccinated can raise a due diligence defence and would not be convicted or subject to penalties under the *Act*.

42. Dr. Sugumar’s evidence shows that individuals from low-income communities represent the largest unvaccinated group for financial and logistical reasons. The Government of Flavelle is dedicated to eliminating the socioeconomic barriers to vaccination. Flavelle has secured 117 million vaccines that it will make widely available at local clinics, schools, hospitals, and community centers free of charge. The government will also redirect fines to a public fund dedicated to vaccination efforts, including public outreach and education.

43. Even if an individual is convicted under the *Act*, the amount of the fine is not predetermined. Judges have discretion to order an appropriate amount within the range of applicable fines, depending on the recurrence of non-compliance and the individual’s financial circumstances.

44. While a mandatory minimum fine of \$1,000 may seem high, public welfare offences must have sufficiently severe penalties to serve a deterrent function.¹⁹ For example, driving with a

¹⁷ *Ibid* at para 36, Joint BOA, Tab 13.

¹⁸ *Ibid* at paras 1-2, Joint BOA, Tab 13.

¹⁹ *Ontario (Environment, Conservation and Parks) v Henry of Pelham*, 2018 ONCA 999 at para 53, Joint BOA, Tab 40.

suspended license carries a mandatory minimum fine of \$1,000 under the *Highway Traffic Act* for a first offence.²⁰

45. The economic consequences of the continued spread of HIRS could be more devastating for low-income communities than the fines under the *Act*. 90% of unvaccinated people who are exposed to HIRS will contract the disease. Individuals from low-income communities who remain unvaccinated and contract HIRS risk losing their jobs, ability to provide for their families, and even their lives. Although the efficacy rate of the HIRS vaccine is lower than other vaccines in Flavelle, the vaccine considerably reduces the risk of contracting HIRS from 90% to 27%. Those vaccinated individuals who do end up contracting the disease will experience much milder symptoms and are far less likely to be highly contagious. Given the benefits of achieving herd immunity for all Flavellians, the fines under the *Act* aimed at encouraging compliance with the vaccination requirement are not so excessive as to be abhorrent or intolerable to society.

3) The Possibility of Imprisonment Accords with the Principles of Fundamental Justice

46. The Government of Flavelle concedes that the potential for imprisonment under sections 3(2) and 4(3) of the *Act* is sufficient to trigger the Appellant's liberty interests. However, the Appellant has failed to demonstrate that this deprivation is arbitrary or grossly disproportionate.

(a) *The Possibility of Imprisonment is not Arbitrary*

47. The possibility of imprisonment as a means of enforcement is not arbitrary because it is rationally connected to its dual legislative purpose of deterrence and incapacitation. The test for arbitrariness is not whether the law achieves its purpose perfectly in every case, but whether the chosen means bear *no connection* to the objective.²¹ As long as there is some connection between the means and the legislative purpose, the impugned provisions are not arbitrary.

²⁰ *Highway Traffic Act*, RSO 1990, c H 8, [s 53\(1\)\(a\)](#).

²¹ *Bedford*, *supra* note 2 [at paras 101, 111](#), Joint BOA, Tab 10.

48. The mere fact that state action is in some way unsound or does not further the legislative objective as effectively as possible is insufficient to establish a lack of rational connection.²² While imprisonment is not the preferred enforcement mechanism, it is but one necessary tool to further the public good that is the object of the impugned provisions.²³

49. The specific objectives of imprisonment as a potential penalty are to deter repeated, flagrant non-compliance with the *Act* and to incapacitate individuals that pose a serious threat to public health. The risk of imprisonment, and the use of imprisonment as a last resort, are capable of fulfilling these objectives.

(b) *The Possibility of Imprisonment is not Grossly Disproportionate*

50. The possibility of imprisonment is not grossly disproportionate to the measure’s objective. State action is “grossly disproportionate” only in extreme cases where “the seriousness of the deprivation is totally out of sync with the objective of the measure.”²⁴ The standard is high. The law’s objective, taken at face value, and its impact may be incommensurate without reaching the threshold for *gross* disproportionality.²⁵

51. Imprisonment is only available as a last resort to respond to repeated and flagrant non-compliance with the *Act* which poses a significant threat to public health. The possibility of imprisonment only becomes available after two previous contraventions and even then, it is discretionary. The Government of Flavelle has yet to resort to imprisonment as a penalty for violations of the *Act*. In the vast majority of cases, repeat contraventions will result in fines, which the Government of Flavelle redirects to a public health fund dedicated to HIRS vaccination efforts.

52. Even in the extreme hypothetical case where an individual must be incapacitated to protect

²² *Ewert v Canada*, 2018 SCC 30 [at para 73](#), Joint BOA, Tab 41.

²³ *Carter v Canada (Attorney General)*, 2015 SCC 5 [at para 83](#) [*Carter*], Joint BOA, Tab 3.

²⁴ *Bedford*, *supra* note 2, [at para 120](#), Joint BOA, Tab 10.

²⁵ *Carter*, *supra* note 23 [at para 89](#), Joint BOA, Tab 3.

public health, the deprivation to the individual is not totally out of sync with the impugned measure's objective. The individual would be imprisoned for no longer than the 14-day incubation period for HIRS. While the effects of imprisonment are more severe than an equivalent period of self-isolation, the government must have recourse to enforcement that separates potential carriers of the disease from society and minimizes the risk to public health in some extreme circumstances.

53. The Appellant has failed to adduce case-specific evidence required to establish that there is an increased risk of transmitting HIRS in custodial settings. The vaccination requirement under the *Act* applies to all residents in Flavelle, including inmates in correctional facilities. There is no evidence that the risk of contracting HIRS is higher among one predominantly vaccinated population than another. In fact, the risk may be lower within certain institutions. For instance, the Court of Appeal for Ontario in *R v JA* recently stated that “the present risk [of contracting COVID-19] is low in the Stratford institution compared to the risk in the general community.”²⁶

54. The safety of federal inmates is the responsibility of correctional services.²⁷ If there is a future outbreak of HIRS in correctional facilities, “it will be up to the prison authorities to take appropriate measures to ensure the health and safety of those who are incarcerated or work in the institution, as well as of the general public.”²⁸ The hypothetical failure of prison authorities to adequately do so is independently subject to *Charter* scrutiny. Any potential risk of exposure to HIRS in correctional facilities is “not sourced in a legislative regime that is incapable of constitutional administration, but in the maladministration of the legislative regime by [correctional] staff.”²⁹ As such, the potential recourse to imprisonment under the *Act* for extreme cases of non-compliance is not, in and of itself, grossly disproportionate.

²⁶ *R v JA*, 2020 ONCA 660 [at para 77](#), Joint BOA, Tab 21.

²⁷ *R v Stone*, 2020 ONCA 448 [at para 15](#), Joint BOA, Tab 42.

²⁸ *Ibid* [at para 19](#), Joint BOA, Tab 42.

²⁹ *BCCLA v Canada (Attorney General)*, 2019 BCCA 228 [at para 216](#), Joint BOA, Tab 43.

B. ANY INFRINGEMENT OF SECTION 7 IS JUSTIFIED UNDER SECTION 1 OF THE CHARTER

1) A Section 7 Infringement can be Justified under Section 1

55. The tendency of Canadian courts to dismiss section 1 justifications for limits on section 7 has led some commentators to erroneously assume that such a justification is incompatible with the *Charter*. That is not the case. Although rare, a section 7 violation can and should be justified under section 1 in some cases because the two sections serve different purposes. Section 7 deals only with the impact of a law on the claimant, whereas section 1 considers the law's impact on society as a whole.³⁰

56. The Supreme Court of Canada's decision in *Bedford* necessarily implies that section 7 violations can be justified under section 1. *Bedford*'s highly individualized approach displaces broader societal considerations from the section 7 analysis.³¹ The approach set out in *Bedford* necessitates a careful balancing of the infringement and the competing societal interests under the *Oakes* test.³²

57. In this case, Parliament passed the *Act* in response to the very circumstances contemplated by Dickson CJ in *Re BC Motor Vehicles*. Dickson CJ stated that a section 7 infringement can be justified in a free and democratic society in "exceptional conditions such as natural disasters, the outbreak of war, epidemics, or the like."³³ Such situations are not just collectively characterized by urgency. More importantly, they impose circumstances where the public interest at stake is so great as to sometimes outweigh the individual rights protected by section 7.

³⁰ *Carter*, *supra* note 23 [at paras 85, 95](#), Joint BOA, Tab 3; *Bedford*, *supra* note 2 [at paras 125-126](#), Joint BOA, Tab 10.

³¹ *R v Michaud*, 2015 ONCA 585 [at paras 146-148](#) [*Michaud*], Joint BOA, Tab 44.

³² *R v Oakes*, [1986] 1 SCR 103, Joint BOA, Tab 45.

³³ *Reference Re s 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486 [at para 85](#), Joint BOA, Tab 9.

58. The Supreme Court of Canada repeated this refrain in *Carter*, holding:

In some situations the state may be able to show that the public good — a matter not considered under s. 7, which looks only at the impact on the rights claimants — justifies depriving an individual of life, liberty or security of the person under s. 1 of the *Charter*. More particularly, in cases such as this where the competing societal interests are themselves protected under the *Charter*, a restriction on s. 7 rights may in the end be found to be proportionate to its objective.³⁴

The HIRS pandemic brings these words into sharp relief.

59. The Appellant’s interests on this appeal are in direct conflict with the interests of vulnerable Flavellians. In particular, they conflict with the interests of all those who cannot obtain the vaccine themselves and therefore must rely on society for their personal security, including the elderly, young children, and those with underlying medical conditions. The Appellant’s interests also conflict with the interests of children whose education has been interrupted by the pandemic, families unable to reunite with their loved ones due to recurring lockdowns, and business owners and workers whose livelihoods have been jeopardized by this pandemic.

60. The Appellant’s interest in avoiding vaccination does not outweigh the significant costs Flavelle will continue to incur if it does not achieve herd immunity. Any limit on section 7 rights imposed by the *Act* is justified under section 1.

2) The Limit is Reasonable in a Free and Democratic Society

(a) *The Act has a Pressing and Substantial Objective*

61. The Appellant concedes that the infringing measure’s objective is pressing and substantial. The objective of the vaccination requirement is to achieve herd immunity as soon as possible, as identified by a majority of the Falconer Court of Appeal. As argued above,³⁵ the temporal element reflects the urgency necessitated by the HIRS pandemic.

³⁴ *Carter*, *supra* note 23 [at para 95](#), Joint BOA, Tab 3.

³⁵ Factum of the Respondent, at paras 30-31.

62. Canadian courts have repeatedly affirmed that the protection of public health and safety are pressing and substantial objectives.³⁶ The objective in this case is likewise pressing and substantial.

(b) The Limit on Section 7 Rights is Rationally Connected to the Objective

63. There is a logical, common sense connection between section 3 of the *Act* and the objective of achieving herd immunity as soon as possible. The government need not present evidence establishing a direct causal connection between means and ends to satisfy the rational connection requirement.³⁷ Rather, a “common-sense connection” will suffice, even where there is “admittedly inconclusive scientific evidence.”³⁸

64. The vaccination requirement in section 3(1) is rationally connected to the objective of achieving herd immunity as soon as possible because a sufficiently high vaccination rate is required to reduce the spread of HIRS in the community. The penalties, both financial and carceral, in sections 3(2) and 4(3) are rationally connected to the objective because they deter designated persons from avoiding vaccination out of carelessness.

65. These common-sense connections suffice to satisfy this stage of the *Oakes* test. The rational connection stage is “not particularly onerous.”³⁹ This Court only needs to find that it is reasonable to suppose that the law is capable of fulfilling its purpose, and not necessarily that it will do so.⁴⁰

³⁶ *R v Badesha*, 2011 ONCJ 284 [at para 38](#), Joint BOA, Tab 46; *Toronto (City, Medical Officer of Health) v Deakin*, [2002] OJ No 2777, [2002 CarswellOnt 2401](#) at para 31, Joint BOA, Tab 47.

³⁷ *R v Butler*, [1992] 1 SCR 452 [at 503](#), Joint BOA, Tab 48; *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825 [at para 101](#), Joint BOA, Tab 49.

³⁸ *RJR-MacDonald*, *supra* note 12 [at paras 86, 156-158](#), Joint BOA, Tab 29.

³⁹ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 [at para 228](#), Joint BOA, Tab 50.

⁴⁰ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [at para 48](#) [*Hutterian Brethren*], Joint BOA, Tab 34.

66. The Appellant contends that the financial penalty would deter unvaccinated individuals from seeking vaccination and the penalty of imprisonment would increase infections among incarcerated persons.⁴¹

67. There is no evidence supporting either contention and neither can be established through common-sense inferences. The vaccination requirement applies to incarcerated persons in Flavelle which makes prisons an unlikely site for an outbreak, especially given their highly regulated nature.⁴² Likewise, it is not uncommon for individuals in Flavelle to seek medical care to remedy unlawful conduct, whether it is illegal drug use or failure to comply with the vaccination requirement in the *Act*.

(c) *The Act Minimally Impairs Section 7 Rights*

68. For the *Act* to be minimally impairing, this Court must be satisfied that it falls within a range of reasonable policy alternatives. As the Supreme Court of Canada held, “section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be ‘reasonable’ and ‘demonstrably justified.’”⁴³

69. The minimal impairment requirement must therefore be applied flexibly.⁴⁴ The government’s chosen means of achieving its pressing and substantial objective should be afforded a measure of appreciation.⁴⁵ Deference is particularly necessary where, as here, the impugned law responds to a pressing social problem,⁴⁶ protects a vulnerable population,⁴⁷ reconciles competing

⁴¹ Factum of the Appellant, at para 56.

⁴² Factum of the Respondent, at paras 53-54.

⁴³ *Hutterian Brethren*, *supra* note 40, at para 37, Joint BOA, Tab 34.

⁴⁴ *United States of America v Cotroni*, [1989] 1 SCR 1469 at 1489, Joint BOA, Tab 51.

⁴⁵ *Irwin Toy v Quebec*, [1989] 1 SCR 927 at 999 [*Irwin Toy*], Joint BOA, Tab 52; See also *Hutterian Brethren*, *supra* at para 37, Joint BOA, Tab 34.

⁴⁶ *R v Whyte*, [1988] 2 SCR 3 at 26-27, Joint BOA, Tab 53; *Canada (Attorney General) v JTI-Macdonald Corp.*, 2007 SCC 30 at para 43, Joint BOA, Tab 54.

⁴⁷ *Irwin Toy*, *supra* note 45 at 993-994, Joint BOA, Tab 52.

interests,⁴⁸ and is premised on complicated scientific and social-science evidence.⁴⁹

70. The alternatives proposed by the Appellant do not give “sufficient protection, in all the circumstances” to the provision’s objective.⁵⁰ The Appellant’s first proposed alternative relies on a vaccination card system to deny unvaccinated individuals access to public spaces. This fails to realize the goal of achieving herd immunity because unvaccinated individuals can put others at risk by interacting with them in private spaces. The Appellant’s proposal would permit large private gatherings that jeopardize the safety of those who choose not to be vaccinated and those who cannot be vaccinated for medical reasons. Such private interactions are nearly impossible to regulate without limiting the freedoms of everyone in Flavelle through large-scale lockdowns and restrictions on movement. Given the highly contagious nature of HIRS, such private gatherings would lead to outbreaks and significant strains on Flavelle’s healthcare system.

71. In addition, the low efficacy rate of the HIRS vaccine means that Flavelle needs near-universal coverage to achieve herd immunity. By permitting individuals to remain unvaccinated, the vaccination card proposal would lower vaccination rates in Flavelle below the level required to achieve herd immunity. This would frustrate the vaccination requirement’s objective.

72. The vaccination card system effectively shifts the burden of individual responsibility onto the collective. Instead of limiting the Appellant’s section 7 right, the proposal would significantly limit the right to assemble, to pray in a house of worship, and to enjoy freedom of movement.

73. The Appellant suggests supplementing the vaccination card system with education and outreach. Without a vaccination requirement, such efforts would fail to realize the infringing measure’s objective of achieving herd immunity as soon as possible. Dr. Adhihetty’s expert

⁴⁸ *McKinney v University of Guelph*, [1990] 3 SCR 229, Joint BOA, Tab 55.

⁴⁹ *RJR-MacDonald*, *supra* note 12 at para 70, Joint BOA, Tab 29.

⁵⁰ *Hutterian Brethren*, *supra* note 40 at para 55, Joint BOA, Tab 34.

evidence shows that a “potentially significant and diverse subset of the population” would avoid the HIRS vaccine if it were not mandated. Dr. Sugumar’s research shows that those who oppose vaccines are unlikely to change their minds. This suggests that public education and outreach alone would simply fail to achieve herd immunity in Flavelle within a reasonable timeframe.

74. The Appellant’s second proposed alternative is the inclusion of a non-medical exemption in the *Act*. Like the vaccination card system, the addition of a non-medical exemption is unfeasible because it is likely to lower the vaccination rate in Flavelle below the level required to achieve herd immunity. Dr. Adhihetty’s evidence shows that Flavelle would need near-universal vaccine coverage to achieve herd immunity against HIRS. He estimates that 5% of the Flavellian population would be unable to be vaccinated for medical reasons. Flavelle cannot afford to expand the proportion of unvaccinated individuals beyond the percentage required for medical exemptions.

75. In addressing pressing threats to society, a government will necessarily need to draw lines. Parliament, not the courts, is entrusted with this responsibility, especially where the line-drawing exercise is inevitably discretionary.⁵¹ In *Michaud*, the Court of Appeal for Ontario held that the 105km/hr speed limit, which violates the claimant’s section 7 rights, was minimally impairing even though it could have been slightly higher or slightly lower. The limit minimally impaired the claimant’s section 7 rights because it was not “arbitrary in the constitutional sense.”⁵² These line-drawing exercises are complex and illustrate the “inadvisability of the courts undertaking too searching an analysis of the legislative response to public safety concerns.”⁵³

⁵¹ *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 [at para 47](#), Joint BOA, Tab 56.

⁵² *Michaud*, *supra* note 31 [at para 134](#), Joint BOA, Tab 44.

⁵³ *Ibid.*

(d) *The Act's Salutory Effects Outweigh its Deleterious Effects*

76. At the final proportionality stage, the Court should weigh the deleterious against the salutary effects of the impugned provision.⁵⁴ In doing so, it must consider conflicting societal interests and colliding values.⁵⁵ In this case, the vaccination requirement's salutary effects are substantial and outweigh the limit on the Appellant's section 7 rights.

77. The *Act's* salutary effects must be appreciated in light of the irreversible harm the HIRS pandemic has already caused, and the harm it would continue to cause without the vaccination requirement. As Cutinha JA noted, the pandemic has already resulted in thousands of deaths as well as the permanent closure of businesses, evictions and foreclosures that displaced Flavellian families from their homes, and educational interruptions for students in Flavelle. These costs will continue to accumulate if Flavelle does not achieve herd immunity as soon as possible.

78. The Appellant contends that Flavelle has not sufficiently proven that the vaccination requirement would achieve herd immunity.⁵⁶ Section 1 does not require such proof. As the Supreme Court of Canada held in *Hutterian Brethren*:

Legislatures can only be asked to impose measures that reason and the evidence suggest will be beneficial. If legislation designed to further the public good were required to await proof positive that the benefits would in fact be realized, few laws would be passed and the public interest would suffer.⁵⁷

79. The Government of Flavelle has satisfactorily shown that the vaccination requirement, if permitted to stand, is likely to result in herd immunity. Although the evidence available to the parties is limited due to the unprecedented circumstances, the novelty of this pandemic should not impose a higher justificatory burden on Flavelle.

⁵⁴ *Dagenais v CBC*, [1994] 3 SCR 835 [at 889](#), Joint BOA, Tab 57.

⁵⁵ *Hutterian Brethren*, *supra* note 40 [at paras 75-76](#), Joint BOA, Tab 34.

⁵⁶ Factum of the Appellant, at para 71.

⁵⁷ *Hutterian Brethren*, *supra* note 40, [at para 85](#), Joint BOA, Tab 34.

80. In *Michaud*, Lauwers J emphasized that safety regulations will always involve uncertain risk assessment that will implicate the safety of others. They involve drawing certain and knowable bright lines.

When a regulator uses a precautionary or hybrid regulation...the regulator chooses a pro-active bright-line rule in preference to a general behavioural standard, even though such a rule is usually over-inclusive and errs on the side of safety. These are legitimate and reasonable uses of governmental authority.⁵⁸

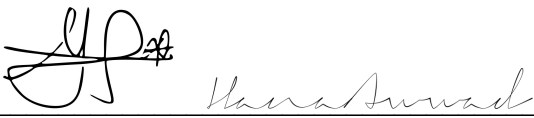
By enacting the *Act*, Parliament has legitimately and reasonably exercised its governmental authority to regulate for the safety and well-being of Flavellians.

81. In contrast to these substantial salutary effects, the deleterious effects on the Appellant's section 7 rights are on the lower end of the spectrum. The Appellant's personal aversion to vaccination alone does not outweigh the significant public health, economic, educational, and social harms that the HIRS pandemic would continue to cause without the *Act*.

PART IV – ORDER SOUGHT

82. The Government of Flavelle respectfully requests that this Court dismiss the appeal.

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



Gerri Angelova and Hana Awwad
Counsel for the Respondent

⁵⁸ *Michaud*, *supra* note 31, [at para 148](#), Joint BOA, Tab 44.

PART V – TABLE OF AUTHORITIES

JURISPRUDENCE

Case Authority	Paragraphs
<i>Alberta v Hutterian Brethren of Wilson Colony</i> , 2009 SCC 37	65, 68-70, 76, 78
<i>British Columbia Civil Liberties Association v Canada (Attorney General)</i> , 2019 BCCA 228	54
<i>B(R) v Children's Aid Society of Metropolitan Toronto</i> , [1995] 1 SCR 315	26
<i>Canada (Attorney General) v Bedford</i> , 2013 SCC 72	26, 29, 38, 47, 50, 55
<i>Canada (Attorney General) v JTI-Macdonald Corp.</i> , 2007 SCC 30	69
<i>Canada (Attorney General) v PHS Community Services Society</i> , 2011 SCC 44	38
<i>Carter v Canada (Attorney General)</i> , 2015 SCC 5	48, 55, 58
<i>Dagenais v CBC</i> , [1994] 3 SCR 835	76
<i>Ewert v Canada</i> , 2018 SCC 30	48
<i>Harvey v New Brunswick (Attorney General)</i> , [1996] 2 SCR 876	75
<i>Irwin Toy v Quebec</i> , [1989] 1 SCR 927	69
<i>Little Sisters Book and Art Emporium v. Canada (Minister of Justice)</i> , 2000 SCC 69	65
<i>McKinney v University of Guelph</i> , [1990] 3 SCR 229	69
<i>Ontario (Environment, Conservation and Parks) v Henry of Pelham</i> , 2018 ONCA 999	44
<i>Operation Dismantle v The Queen</i> , [1985] 1 SCR 441	26
<i>R v Badesha</i> , 2011 ONCJ 284	62
<i>R v Boudreault</i> , 2018 SCC 58	39-40
<i>R v Butler</i> , [1992] 1 SCR 452	63

<i>R v Dyck</i> , 2008 ONCA 309	33
<i>R v JA</i> , 2020 ONCA 660	53
<i>R v KRJ</i> , 2016 SCC 31	34
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<i>R v Michaud</i> , 2015 ONCA 585	56, 75, 80
<i>R v Oakes</i> , [1986] 1 SCR 103	56
<i>R v Safarzadeh-Markhali</i> , 2016 SCC 14	29-30
<i>R v Stone</i> , 2020 ONCA 448	54
<i>R v Whyte</i> , [1988] 2 SCR 3	69
<i>Reference re ss. 193 and 195.1(1) of the Criminal Code</i> , [1990] 1 SCR 1123	27
<i>Reference Re s 94(2) of Motor Vehicle Act (British Columbia)</i> , [1985] 2 SCR 486	57
<i>RJR-MacDonald Inc v Canada (Attorney General)</i> , [1995] 3 SCR 199	34, 63, 69
<i>Ross v New Brunswick School District No. 15</i> , [1996] 1 SCR 825	63
<i>Toronto (City, Medical Officer of Health) v Deakin</i> , [2002] OJ No 2777, 2002 CarswellOnt 2401	62
<i>United States of America v Cotroni</i> , [1989] 1 SCR 1469	69

LEGISLATION

Flavellian Charter of Rights and Freedoms

1. The *Flavellian 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.

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.

Flavelle Vaccination Act

Definitions

S. 1 In this Act...

“designated person” means a person over the age of 4 residing in Flavelle.

[...]

“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.

“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

(a) is detrimental to the health of the person named in the statement, meaning: [...]

(iii) The designated person is suffering from a recognized mental disorder,

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

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

Duty of Designated Persons

S. 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 subsection (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

S. 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 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 over the age of 12 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 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.

Highway Traffic Act, RSO 1990, c H 8

Driving while driver's licence suspended

53 (1) Every person who drives a motor vehicle or street car on a highway while his or her driver's licence is suspended under an Act of the Legislature or a regulation made thereunder is guilty of an offence and on conviction is liable,

- (a) for a first offence, to a fine of not less than \$1,000 and not more than \$5,000; and
- (b) for each subsequent offence, to a fine of not less than \$2,000 and not more than \$5,000, or to imprisonment for a term of not more than six months, or to both.