

Grand Moot 2020

Mandatory Vaccination Schemes and the *Charter*

Yuno v Flavelle (Attorney General)

Official Problem by Saambavi Mano and Alina Yu

Yuno v Flavelle (Attorney General)

Introduction

[1] This appeal addresses whether a mandatory vaccination program infringes individuals' *Charter* rights to life, liberty, and security of the person. It explores the tension between individual rights and public health and tests the extent to which a state can legitimately restrict the liberties of its citizens to control a contagious disease.

[2] Falconer is a common law province in the country of Flavelle. The Constitution, judicial system, statutory law, common law, and social and political history of Flavelle and Falconer are identical to that of Canada and Ontario, respectively.

[3] Flavelle's highest court is the Supreme Court of Flavelle. All Canadian legislation is binding on the Supreme Court of Flavelle, but the Court is not bound by Canadian jurisprudence. However, decisions of Canadian courts, particularly the Supreme Court of Canada, are considered highly persuasive.

[4] The Superior Court of Falconer and the Falconer Court of Appeal have jurisdiction over all issues raised in their respective jurisdictions below.

HIRS

[5] Human Infectious Respiratory Syndrome, or HIRS, is a highly contagious infectious disease caused by a severe acute respiratory syndrome virus strain. HIRS was first identified in 2019 in several highly populated countries around the world, including Flavelle. In early 2020, the World Health Organization declared that the HIRS outbreak was a global pandemic. The pandemic has resulted in over 20 million known HIRS cases and 800,000 deaths.

[6] HIRS is readily communicable from person to person and carries a risk of serious complications that may result in death. HIRS is spread through airborne transmission or direct contact with contaminated surfaces. People who contract HIRS are infectious to others within a few days of infection. Since the early contagious period is often asymptomatic, people may transmit the virus without showing any signs of illness. Children can carry high viral loads despite showing mild or no symptoms.

[7] 90% of people who are exposed to HIRS and who are not immune will contract the disease. Once a person has become infected, no specific treatment is available, although supportive care may improve outcomes. Most people do not get HIRS more than once.

[8] Herd immunity is a form of indirect protection from infectious disease that occurs when a sufficient percentage of the population has become immune to an infection, whether through vaccination or previous infections. Herd immunity reduces the likelihood of infection for individuals who lack immunity. To achieve herd immunity against HIRS, a high percentage of a community must be immune due to the ease with which HIRS is transmitted from person to person.

[9] The HIRS vaccine has a median vaccine efficacy rate of 73%, whereby 73% of vaccinated people exposed to HIRS will not contract HIRS. Individuals who are vaccinated also tend to have milder HIRS symptoms and are much less likely to be highly contagious if they contract HIRS. Given that HIRS was first detected in 2019, and considering the relatively short testing period for the HIRS vaccine, the long-term consequences of the virus and the vaccine are unknown.

Legislative History of the *Vaccination Act*

[10] Flavelle experienced repeated HIRS outbreaks throughout 2019 and 2020. As of August 2020, Flavelle public health agencies reported approximately 129,000 cases and 9,000 deaths. Beginning in late 2019, new reported daily cases have fluctuated between 200 to 2,000.

[11] The Government of Flavelle implemented a number of emergency measures in response to the pandemic. In conjunction with provincial governments, the Government of Flavelle opened testing centres throughout Flavelle. These centres administer free HIRS tests, which normally produce results within 24 to 48 hours. After the first uptick in HIRS cases, the Government of Flavelle passed a temporary emergency Act mandating that residents shelter in place. This emergency measure was gradually eased throughout 2020 and lifted altogether in October 2020. The Government of Flavelle also passed a federal Act to prevent all but essential travel into the country for a prescribed time period. The prescribed time period has been extended repeatedly and the Act remains in effect today.

[12] In August 2020, following the release of a HIRS vaccine, the Government of Flavelle passed the *Vaccination Act* (the “*VA*”). The *VA* is aimed at preventing the spread of HIRS and protecting the health and well-being of persons in Flavelle. It requires persons who are over 4 years of age and who do not have a valid medical exemption to receive the HIRS vaccine. Contravention of the *VA* results in escalating fines, which the Government of Flavelle redirects to a public health fund dedicated to HIRS vaccination efforts.

[13] The *VA* came into force on September 1, 2020. As per s. 3 of the *VA*, designated persons must be vaccinated by October 13, 2020. The provisions of the *VA* relevant to this appeal are reproduced below:

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) may be 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.

[14] The Flavellian Minister of Health, Dr. Tessier, issued the following statement to the press following the passage of the *VA*:

“The longer the HIRS pandemic continues, the longer Flavelle suffers. HIRS has already resulted in untold human cost. It has strained our medical system and pushed our healthcare

workers to their absolute maximum capacity. 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.

To curb the spread of HIRS and achieve herd immunity against this deadly virus, Flavelle is mandating vaccination for all persons over 4 years of age, barring medical exemptions. Everyone who can get vaccinated, must get vaccinated. We have secured 117 million vaccines to ensure widespread coverage. We are offering free HIRS vaccinations across Flavelle at pharmacies, clinics, schools, and community centres. Those who receive the HIRS vaccine will obtain a vaccination card. Those with valid medical exemptions will receive a medical exemption card that displays the date of their last negative test result. If you cannot produce either card upon request, you may be denied access to public spaces and private businesses and you will be subject to penalties.

The message is clear: do not put yourself or others at risk. It is critical that we take every action required to restrict the spread of HIRS, and vaccination works.”

[15] At the time of this appeal, the Government of Flavelle has not pursued imprisonment as a penalty for violations of the *VA*.

The Facts of *Yuno v Flavelle (Attorney General)*

[16] Lucas Yuno is a lifelong Falconer resident. He is a member of Flavellians for Vaccine Choice (FFVC), a not-for-profit advocacy group registered in Falconer. FFVC describes itself as a watchdog organization with the mandate of “ensuring that Flavellian families are making fully informed and voluntary decisions about vaccination.” Mr. Yuno has been involved in the organization since 1998. He has published letters on his opposition to vaccines for FFVC’s website.

[17] Mr. Yuno’s opposition to vaccination is rooted in his rejection of modern medicine. He has worked as a holistic care practitioner for nearly 40 years and he is internationally renowned for his natural balms and oils. He teaches group and individual classes on using his products in furtherance of a more natural lifestyle.

[18] While Mr. Yuno supports his clients who choose to engage in non-natural medical treatment, he eschews it himself. Before beginning his all-natural journey, Mr. Yuno worked as a travelling nurse in several foreign nations. During one of his work trips abroad, the host nation experienced an outbreak of a rare local disease called Mumpella. To limit the spread of the disease, all locals and healthcare workers, including Mr. Yuno, were asked to receive the Mumpella vaccine. The vaccine did not have a 100% efficacy rate, and despite getting vaccinated, Mr. Yuno suffered through a full bout of Mumpella. One of his symptoms was temporary paralysis, which Mr. Yuno claims to have cured with his natural treatments.

[19] Mr. Yuno has spoken at several FFVC conferences about the psychological effects of his experience with the Mumpella vaccine. He suffered from anxiety, panic attacks, and sleeplessness after he was diagnosed with Mumpella. Mr. Yuno believes that these symptoms were rooted not in his diagnosis, but rather in his decision to receive the Mumpella vaccine. He maintains that his decision was neither informed nor voluntary because he lacked information about the vaccine

efficacy rate, the necessity of widespread vaccinations, and potential symptoms of the vaccination. Although Mr. Yuno's psychiatrist prescribed medication to help manage his psychological symptoms, Mr. Yuno was never officially diagnosed with a condition or disorder.

[20] Mr. Yuno has not received any vaccinations, including the HIRS vaccine, since his experience with the Mumpella vaccine. He has not sought a medical exemption under s. 4 of the *VA* because his vaccine-related anxiety and sleeplessness do not rise to the level of a DSM-5 mental disorder. He also believes that the exemption does not accurately reflect his motivations for rejecting vaccination. Mr. Yuno understands why the HIRS vaccination is recommended and he appreciates the consequences of failing to receive the vaccination. He does not trust vaccinations and he believes that a 73% vaccination efficacy rate is not high enough to justify infringing his health and bodily sanctity.

Judicial History

[21] In November 2020, Mr. Yuno was charged and fined \$1,000 under s. 3(a) of the *VA* after failing to produce a vaccination card at a grocery store in Falconer. In the same month, counsel for Mr. Yuno brought an application for a declaration that s. 3 of the *VA* is of no force and effect. They alleged that the impugned provision infringes s. 7 of the *Flavellian Charter of Rights and Freedoms*, and that it cannot be saved under s. 1.

The Expert Report of Dr. Sugumar

[22] Mr. Yuno advanced epidemiological evidence about vaccination programs through his expert, Dr. Sugumar. Dr. Sugumar is a professor of epidemiology at the University of Falconer. She holds the Flavelle Research Chair in Public Health. She received her PhD in epidemiology from the University of Falconer in 1998, and has been tenured since 2004. Her research focuses on vaccine preventable infectious disease.

[23] Dr. Sugumar presented her report, "Effective Vaccination for HIRS Control", at trial. The report outlines the feasibility of sustained population immunity to HIRS through voluntary vaccination. The report is based in part on Dr. Sugumar's epidemiological simulation experiments. All studies included in the report, including Dr. Sugumar's own research, were published in peer-reviewed journals.

[24] Dr. Sugumar concluded that rigid mandatory vaccinations do not present a simple solution to improving vaccination rates. She warned that although mandatory immunization programs appear to be the simplest solution to outbreaks of vaccine preventable disease, they are not always as effective as anticipated.

[25] Dr. Sugumar began by noting that the goal of vaccination programs is to reduce or eliminate transmission in the larger community. To reach this goal, not every person needs to be vaccinated. If a sufficient percentage of the population receives vaccinations, the likelihood of transmissions and outbreaks are greatly reduced for persons who are unable to or choose not to receive vaccinations.

[26] Dr. Sugumar noted that the effectiveness of a vaccination program depends on two factors: vaccine efficacy and vaccine coverage. Vaccine efficacy refers to the level of protection granted to a vaccinated individual compared to an unvaccinated individual. As the vaccine efficacy rate goes down, the number of vaccinated persons who are unresponsive to a vaccine will increase. For a vaccine with an efficacy rate of 99%, 1 vaccinated person out of 100 will not respond to the vaccine and contract the disease. Research on the HIRS vaccine shows a 73% efficacy rate.

[27] Vaccine coverage refers to the proportion of the total population that has received the vaccine. Although Dr. Sugumar maintained that the goal of any vaccination program is to cover as much of the population as possible, she noted that 99% of possible infections can be prevented without 100% vaccination coverage. Flavelle has no other federal compulsory vaccination programs, but vaccine coverage is high. Flavelle has vaccination coverage goals of 95% for all infectious diseases with available vaccines, but actual vaccine coverage among Flavellians for these diseases ranges between 75% to 90%.

[28] Dr. Sugumar also highlighted the misconception that mandatory vaccination would result in higher coverage. Prior to the HIRS pandemic, only two provinces in Flavelle mandated vaccines to access certain public services. Dr. Sugumar found that vaccination coverage in provinces that mandate vaccination is on par with the national average. Her survey found no marked difference in vaccination rates between jurisdictions that recommend vaccinations as compared with jurisdictions that mandate vaccination.

[29] Furthermore, Dr. Sugumar identified a number of unintended consequences associated with mandatory vaccination programs. Instead of increasing immunization, the traditional top-down model of delivery and enforcement often fails to address the underlying problem of vaccine rejection. Dr. Sugumar pointed to two phenomena that suggest vaccine-rejecting individuals will seek medical exemptions rather than accept immunization. First, there are higher rates of medical exemptions in jurisdictions with mandatory vaccinations programs without personal belief exemptions. Second, jurisdictions see an immediate rise in rates of medical exemptions once personal belief exemption provisions are eliminated.

[30] Dr. Sugumar expressed her concerns that passing stricter laws does not address the right problem. According to Dr. Sugumar's surveys, less than 2% of the Flavellian population staunchly opposes vaccines. She observed that this small minority of people who refuse vaccines will likely not change their minds. In Dr. Sugumar's view, the bigger problem is the much larger group of people with some concerns about vaccination that make them vaccine-hesitant.

[31] Dr. Sugumar concluded that the resources currently levied towards mandating vaccination and penalizing non-compliance would be better used toward education and equitable access to immunization. She noted that mandatory vaccination campaigns tend to focus on the middle-class "anti-vaxxer" cohort despite the fact that the largest unvaccinated group in Flavelle is comprised of people who cannot or hesitate to access health services due to socioeconomic factors.

[32] Dr. Sugumar found that vaccination rates in Flavelle are lowest among persons in the lowest socioeconomic quintile, and particularly among migrants and individuals in communities with high housing insecurity. She noted that these individuals may miss vaccinations due to difficulty securing

transport or inability to take time off work. Low-income persons may also avoid the healthcare system altogether for fear of out-of-pocket fees. Dr. Sugumar found that migrants are very likely to miss vaccinations despite having low rates of ideological vaccine rejection. She cited logistical and financial concerns to explain low vaccination rates among this population.

[33] At the conclusion of her testimony, Dr. Sugumar suggested that implementing mass public education programs and opening mobile vaccination clinics or vaccination clinics at workplaces that employ large numbers of low-income individuals would be a much better use of Flavelle's resources. She maintained that the brunt of the financial and social penalties of mandatory vaccination would be borne by disadvantaged groups, who are more likely to lose contact with the health system and experience disrupted access to medical services.

The Testimony of Mr. Yuno

[34] Mr. Yuno testified about his motivations for rejecting vaccination and the impact of the *VA* on his livelihood:

“My reasons for rejecting vaccination are not based in fear or misinformation. I understand that the government believes that it might be able to curb the spread of HIRS if everyone gets vaccinated, but I do not believe that vaccines are effective. I know that there are significant economic consequences associated with repeated lockdown orders, but I do not see mandatory vaccinations as the only solution to the HIRS pandemic. I acknowledge that Flavelle's healthcare system is struggling, but I think this is symptomatic of larger problems with modern medicine.

There is no place for vaccination in the medical treatment that I choose for myself. Vaccinations are not 100% risk-free, nor are they 100% effective. My past experience with the Mumpella vaccine has made this very clear to me. After what I went through, the thought of being forced to get vaccinated against my will makes me sick to my stomach.

For years after the Mumpella incident, I had nightmares about the vaccine. Even worse than the nightmares I had after the incident were the dreams I had while I was sick with Mumpella. I would dream of being told that it was all a mistake, that I had not received the Mumpella vaccine, and that I was Mumpella-free. I would wake up after those dreams and I would be plagued by the thought of what could be if I had exercised my choice to not receive the vaccine. I spent almost every waking minute wondering if I would not have gotten Mumpella if I had not received the vaccine.

The Mumpella incident severely disrupted my life. I had to delay the launch of my holistic care practice due to the lasting physical and mental effects of my experience with Mumpella and the Mumpella vaccine. After I began my practice, I had to put the business on hold for a year because I started experiencing anxiety and sleeplessness after hearing my clients' stories about their experiences with vaccinations. I was able to return to my business and to my clients by reminding myself that I was giving people what I did not have when I received the Mumpella vaccine: an educated choice.

My client base has grown exponentially since the Government of Flavelle passed the *Vaccination Act*. Like my clients, I have serious concerns about the government's course of action in response to the pandemic. I treasure my individual autonomy, and one way in

which I exercise this autonomy is by turning to my natural remedies when I fall ill. The *VA* requires me to prioritize the government's fantasy of achieving immunity by vaccination over my liberty and personal security. I have refused, and will continue to refuse, any vaccination program mandated by the Government of Flavelle."

The Expert Report of Dr. Adhietty

[35] Flavelle proffered the report of Dr. Adhietty. Dr. Adhietty is a tenured professor of public health at Flavelle University. Prior to joining Flavelle University, Dr. Adhietty served as the Medical Officer of Health for Lenora, a city in Falconer, and as a co-chair of the Flavelle Association for Immunization Research, Evaluation, and Education. He holds a PhD in public health and his research focuses on infectious disease prevention.

[36] Dr. Adhietty's report began by noting the unusually low efficacy rate of the HIRS vaccine. For infectious diseases that require 95% of the population to be vaccinated, the vaccine must have an efficacy rate of at least 78% in order for the population to achieve herd immunity. Most vaccines have efficacy rates between 90-99%. In Dr. Adhietty's simulation experiments, given a vaccine efficacy rate of 60%, coverage would need to be 100% to achieve herd immunity. When the efficacy rate rises to 70%, coverage would still need to be near-universal. Since the HIRS vaccine has an efficacy rate of 73%, and since HIRS is highly infectious, Dr. Adhietty found that effective elimination of the spread of the disease through vaccination would require near-universal coverage. Dr. Adhietty noted that universal immunity would be impossible given that around 5% of the Flavellian population would be unable to get vaccinated for medical reasons. Dr. Adhietty compared the daunting task of eliminating HIRS to that of eliminating measles. Even with an 89% vaccination coverage rate, Flavelle reported four measles outbreaks in the past ten years.

[37] Dr. Adhietty warned that the government's expectation of widespread coverage of the HIRS vaccine rests on the assumption that demand for the free vaccine would be high. He noted that the HIRS pandemic has coincided with a recent worldwide trend of increasing vaccine rejection and vaccine hesitancy. Before the HIRS vaccine was discovered, Dr. Adhietty conducted a survey on attitudes toward vaccination in Flavelle. His results showed that only 68% of Flavellians would be willing to get vaccinated against HIRS. 2% indicated that they would refuse to be vaccinated and the remainder declined to answer the question.

[38] Dr. Adhietty's survey identified diverse underpinnings to the beliefs of vaccine-rejecting and vaccine-hesitant individuals: adherence to homeopathy, distrust of provincial health agencies, distrust of large pharmaceutical companies, distrust of the federal or provincial government, and the legacy of medical testing in residential schools. He noted that without a mandatory vaccination scheme, a potentially significant and diverse subset of the population would avoid the vaccine.

[39] Dr. Adhietty concluded by lauding the successes of mandatory vaccination schemes in other jurisdictions. He pointed to the increase in immunization coverage in jurisdictions after the introduction of mandatory vaccination schemes. Similarly, he noted that vaccination coverage increased in jurisdictions after the elimination of non-medical exemptions.

The Decision of the Superior Court of Falconer (Ibrakovic J)

[40] The application judge, Ibrakovic J, found that s. 3 of the *VA* infringes s. 7 of the *Charter* in a manner that cannot be justified under s. 1.

[41] Ibrakovic J considered the legislative history of the *VA* and found that the intention of Parliament was to protect the health and well-being of Flavellians against HIRS. With respect to s. 3 of the *VA*, Ibrakovic J held that the objective of the impugned provision is to achieve herd immunity by ensuring sufficient vaccination coverage in Flavelle.

[42] Ibrakovic J admitted Dr. Sugumar's report and Dr. Adhihetty's report as expert evidence and accepted their conclusions. She also stated in her reasons that Mr. Yuno's testimony was uncontested.

[43] With respect to s. 7, Ibrakovic J found that s. 3 of the *VA* infringes the right to liberty and security of the person. She stated:

Individuals are entitled to select their own form of medical treatment, regardless of the opinions of the Government of Flavelle, the medical profession, or the community. To mandate vaccinations is to plainly violate an individual's right to control his own body. Such a scheme impinges upon the sphere of inherently private choices that go to the core of what it means to enjoy liberty. It also profoundly impacts security of the person by precluding individuals from legally controlling their bodily integrity.

[44] Ibrakovic J also found that the deprivations of liberty and security of the person are overbroad, and therefore not in accordance with the principles of fundamental justice. She noted that both Dr. Sugumar and Dr. Adhihetty found that a 100% vaccine coverage rate is not strictly necessary to achieve herd immunity to HIRS. As a result, she found that the mandatory vaccination scheme, while rational in part, overreaches its objective and captures conduct that need not be penalized in order to protect persons in Flavelle against HIRS.

[45] At the s. 1 stage, Ibrakovic J found that the objective of ensuring sufficient vaccination coverage to achieve herd immunity is pressing and substantial. She also found that the mandatory vaccination scheme is rationally connected to the objective.

[46] However, Ibrakovic J concluded that s. 3 of the *VA* is not minimally impairing. Since the expert reports indicated that a 100% vaccine coverage rate may not be necessary to achieve herd immunity, Ibrakovic J found that the Government of Flavelle could have expanded the medical exemption to accommodate those who did not wish to receive the vaccination. Citing Dr. Sugumar's findings about targeted and actual coverage rates, she found that expanding the exemption would not threaten the objective of protecting the health of persons in Flavelle against HIRS. Ibrakovic J also pointed to Falconer's *Immunization of School Pupils Act* and *Day Nurseries Act* as examples of effective mandatory vaccination legislation tailored to include exemptions for religious or conscience-based beliefs, in addition to a narrow medical exemption.

[47] Ibrakovic J further found that the salutary effects of the legislation did not outweigh the significant deleterious effects of taking away an individual's choice in medical treatment. She cited Dr. Sugumar's findings that vaccine education and mobile vaccination clinics might help increase coverage, whereas the current scheme may encourage vaccine-resistant or vaccine-hesitant individuals to apply for medical exemptions. Ibrakovic J also noted Dr. Sugumar's finding that those staunchly resistant to vaccines will avoid vaccination by any means necessary, and she added that this may result in individuals choosing to accept significant fines over vaccinations. Ultimately, Ibrakovic J refused to accept that the goal of widespread vaccine coverage alone was sufficient to justify infringing individuals' s. 7 rights.

[48] By way of conclusion, Ibrakovic J noted that her findings were consistent with past Supreme Court of Canada jurisprudence, which overwhelmingly indicates that s. 7 breaches can rarely, if ever, be justified in a free and democratic society.

[49] The Attorney General of Flavelle appealed the decision to the Falconer Court of Appeal.

The Decision of the Falconer Court of Appeal (Cutinha JA for the majority, Boljevic JA dissenting)

[50] The majority of the Falconer Court of Appeal, Boljevic JA dissenting, allowed the appeal. Cutinha JA found that the impugned provisions do not breach s. 7 of the *Charter*, and in the alternative, that any breach would be justified under s. 1. Boljevic JA largely agreed with Ibrakovic J's reasons but added that the *VA* also contravenes the principles of fundamental justice by creating an absolute liability offence that carries with it the possibility of imprisonment.

[51] Cutinha JA, writing for the majority, disagreed with Ibrakovic J regarding her formulation of the objective of s. 3 of the *VA*:

The objective of the impugned provision of the *VA* is to achieve herd immunity *as soon as possible* by ensuring maximum vaccination coverage. In crafting this legislation, the Government of Flavelle took account of the significant economic, social, and health tolls associated with an enduring pandemic. HIRS has already produced irreversible harm in the form of failed businesses, foreclosures on rental accommodations and mortgages, terminations of educational programs, and thousands of deaths. The longer the pandemic continues, the longer Flavelle suffers.

[52] Turning first to the s. 7 arguments, Cutinha JA agreed with Ibrakovic J that s. 3 of the *VA* infringes the s. 7 protected interests of liberty and security of the person. However, she found that the deprivation is in accordance with the principles of fundamental justice.

[53] Looking to the principle of overbreadth, Cutinha JA expressed concerns about the Respondent's argument that the legislative scheme of the *VA* captures conduct that bears no relation to the legislative objective:

The expert report proffered by Mr. Yuno fails to specify the proportion of Flavellians who are "hesitant" about vaccinations, or who may not get vaccinated if vaccinations are not mandatory. Dr. Adhihetty's research indicates that up to 30% of

the Flavellian population may be vaccine-hesitant. Under a voluntary vaccination scheme, these individuals may not get vaccinated, which threatens the legislative objective of protecting Flavellians against HIRS. Absent evidence that the number of Flavellians who will not get vaccinated is low enough to allow for herd immunity, it is difficult to accept that the mandatory vaccination scheme is overbroad.

[54] Ultimately, Cutinha JA found that it is reasonably necessary for the provision to mandate vaccination for all but those with valid medical exemptions for the law to achieve its objective of controlling contagious outbreaks and minimizing HIRS infections and deaths.

[55] Cutinha JA briefly addressed Boljevic JA's assertion that the *VA* creates an absolute liability offence that requires negligence as a minimum level of *mens rea* in order to impose imprisonment as a penalty. Cutinha JA rejected this interpretation and maintained that the Government of Flavelle created a strict liability offence in accordance with the principles of fundamental justice. Following *R v Sault Ste Marie*, a Supreme Court of Canada case, Cutinha JA stated that courts will only find an absolute liability offence when confronted with clear legislative intent to create an offence in respect of which guilt would follow on mere proof of a proscribed act. Cutinha JA found that the *VA* does not expressly or impliedly preclude accused persons from arguing that they made a reasonable effort to get vaccinated. Since she found that the *VA* created a strict liability offence, Cutinha JA concluded that the possibility of imprisonment contained in the impugned provisions was not contrary to the principles of fundamental justice.

[56] In the alternative, even if the legislation infringed the Respondents' s. 7 rights, Cutinha JA found that the facts of this case fell into the "exceptional circumstances" that would allow for a s. 7 breach to be justified under s. 1, as identified in cases like *R v Ruzic*.

The dire need to protect Flavellians, particularly those who are medically unable to be vaccinated, from the spread of a possibly deadly contagious virus creates *exactly* the exceptional circumstances contemplated in *obiter dicta* by the Supreme Court of Canada in *R v Ruzic*.

[57] Cutinha JA noted that her formulation of the legislative objective of s. 3 differed from Ibrakovic J's formulation. However, Cutinha JA agreed that the objective is pressing and substantial, and stated that the inclusion of the timeliness factor in her formulation of the legislative objective only heightened its pressing and substantial nature. Cutinha JA also agreed that the impugned provision is rationally connected to the objective.

[58] However, Cutinha JA found that the mandatory vaccination scheme, with its exception for those with a statement of medical exemption, is minimally impairing:

Ibrakovic J proposed that a tailored scheme of choice-based exemptions would impair individual's s. 7 rights less than the current scheme. With respect, this suggestion turns a mandatory vaccination scheme into a voluntary vaccination scheme. It threatens the pressing and substantial objective of achieving herd immunity as soon as possible because it compromises near-universal vaccine coverage. The Supreme Court of Canada has long held that the government need not

accept options that are less effective than the one chosen. I see no reason to deviate from that guidance today.

[59] At the final balancing stage of the *Oakes* test, Cutinha JA found that the deleterious effects of mandating vaccinations are far outweighed by the benefits of ensuring near-universal coverage. She noted that her conclusion was not a finding that the mere goal of widespread vaccine coverage outweighed the impacts of the legislation on individuals' s. 7 rights, as Ibrakovic J warned against. Cutinha JA pointed to Dr. Sugumar's and Dr. Adihetty's reports, both of which agreed on the benefits of vaccine coverage while disagreeing about how best to achieve this goal. Since the current vaccination scheme ensured vaccine coverage in all except those with legitimate medical exemptions, Cutinha JA accepted that the scheme had the effect of ensuring near-universal coverage.

[60] Cutinha JA concluded that the impact of taking away an individual's right to choose his or her course of medical treatment is outweighed by the benefits of ensuring near-universal vaccine coverage during a public health emergency that threatens the lives of thousands of people.

[61] Boljevic JA, dissenting, largely agreed with Ibrakovic J's reasoning. However, she added that the impugned provisions also contravene the principles of fundamental justice because they create an absolute liability offence with a possibility of imprisonment while lacking a *mens rea* element.

Where the state seeks to pursue imprisonment as a criminal sanction for an offence, the accused must be able to rely, at the very least, on a due diligence defence. On its face, the *VA* creates an absolute liability offence. Individuals who do not have medical exemptions *must* undergo vaccination. There is no room for a due diligence defence in the omission that is being penalized. An individual either has or has not been vaccinated.

Following the Supreme Court of Canada's decision in *Re BC Motor Vehicle Act*, absolute liability offences that are punishable by a period of imprisonment violate s. 7 of the *Charter*. Although the Supreme Court included epidemics in its list of possible exceptions to this principle, the existence of emergency circumstances alone cannot justify dispensing with the requirements of fundamental justice. The Government of Flavelle must show *why* an absolute liability offence with a carceral penalty was necessary to respond to HIRS.

[62] Boljevic JA adopted much of Ibrakovic J's reasoning with respect to the s. 1 analysis. However, she made the following comments on the majority's reasoning at the final stage of the *Oakes* test:

For the effects of a legislation to be "salutary", they must further the legislative purpose and yield actual benefits. My colleagues reason that, since a mandatory vaccination scheme enforces vaccinations for all but a small proportion of the Flavellian population, it must ensure widespread vaccine coverage. But the impugned provisions contemplate the imprisonment of unvaccinated people - many of whom may be marginalized, low-income individuals, as per Dr. Sugumar's report - in the middle of a global pandemic. I find it difficult to comprehend how imprisoning unvaccinated people helps the Government of Flavelle reach its goal of achieving herd immunity.

Ultimately, I am not convinced that this somewhat counterintuitive vaccination scheme outweighs the significant deleterious effects at play. Not only does this legislation take away individuals' rights to choose their course of medical treatment, but it also contemplates imprisoning individuals for their failure to partake in a government health program.

Issues on Appeal

[63] Mr. Yuno has been granted leave to appeal the Falconer Court of Appeal's decision to the Supreme Court of Flavelle.

The Court is being asked to decide the following issues:

1. Does s. 3 of the *VA* infringe s. 7 of the *Charter*?
2. If s. 3 of the *VA* infringes s. 7, is it justified under s. 1 of the *Charter*?

APPENDIX I: RELEVANT PROVISIONS OF THE *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.

APPENDIX II: RELEVANT PROVISIONS OF THE *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 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 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.