

## MANDATORY CHILDHOOD IMMUNIZATION PROGRAMS: IS THERE STILL A ROLE FOR RELIGIOUS AND CONSCIENCE BELIEF EXEMPTIONS?

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*Childhood immunizations are a vital component in controlling and stopping the spread of diseases. In recent years, we have seen an increase in anti-vaccine sentiment and, as a result, the rise of vaccine-preventable disease. We are also now living through a global pandemic in which COVID-19 vaccines are required for society to return to pre-pandemic normalcy. Childhood immunization programs are vital for public health. This article examines childhood vaccination programs and the use of exemptions in such programs. The article analyzes the constitutionality of religious and conscience belief exemptions in vaccination programs and highlights their applicability in terms of both routine childhood immunizations and in the case of COVID-19 vaccines. The article ultimately proposes ways to restructure religious and conscience belief exemptions and provides guidance on how to move childhood immunization programs forward in the COVID-19 era.*

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## I. INTRODUCTION

Once hailed as the medical breakthrough of the twentieth century, vaccinations have come under attack.<sup>1</sup> Skepticism over the safety and necessity of vaccinations has caused some parents to shy away from this common rite of childhood.<sup>2</sup> As a result, diseases that were once considered nearly eradicated from Canada have been making a comeback. In recent years, measles and pertussis outbreaks have been reported across the country.<sup>3</sup> Statistics show that immunization rates in Canada have fallen below target levels and the United Nations Children’s Fund (UNICEF) has stated that Canada’s low immunization rates pose a risk to the health of all Canadian children.<sup>4</sup>

Despite these outbreaks, Canadian childhood immunization laws have remained relatively unchanged.<sup>5</sup> The stagnancy of these laws is somewhat surprising considering the amount of

<sup>1</sup> Centers for Disease Control and Prevention, “Achievements in Public Health, 1900–1999 Impact of Vaccines Universally Recommended for Children — United States, 1990–1998” (1999) 48:12 *Morbidity & Mortality Weekly Report* 243, online: <[www.cdc.gov/mmwr/preview/mmwrhtml/00056803.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/00056803.htm)>. See also Linda E LeFever, “Religious Exemptions from School Immunization: A Sincere Belief or a Legal Loophole?” (2006) 110:4 *Penn St L Rev* 1047; Michael Specter, “Jenny McCarthy’s Dangerous Views,” *The New Yorker* (16 July 2013), online: <[www.newyorker.com/tech/annals-of-technology/jenny-mccarthys-dangerous-views](http://www.newyorker.com/tech/annals-of-technology/jenny-mccarthys-dangerous-views)>.

<sup>2</sup> Catherine Constable, Nina R Blank & Arthur L Caplan, “Rising Rates of Vaccine Exemptions: Problems with Current Policy and More Promising Remedies” (2014) 32:16 *Vaccine* 1793.

<sup>3</sup> Bobbi-Jean MacKinnon, “Measles Outbreak Grows to 12 Confirmed Cases, Spreads to Hampton High,” *CBC News* (1 June 2019), online: <[www.cbc.ca/news/canada/new-brunswick/measles-outbreak-saint-john-hampton-high-school-1.5158687](http://www.cbc.ca/news/canada/new-brunswick/measles-outbreak-saint-john-hampton-high-school-1.5158687)>; Bethany Lindsay, “B.C. is in the Middle of a Measles Outbreak. Here’s How to Figure Out if You Need to Get the Vaccine,” *CBC News* (27 February 2019), online: <[www.cbc.ca/news/canada/columbia-mechina-outbreak-who-needs-vaccine-1.5034726](http://www.cbc.ca/news/canada/columbia-mechina-outbreak-who-needs-vaccine-1.5034726)>. In 2012, a pertussis outbreak infected more than 2000 people in Alberta: Caroline Alphonso, “Whooping Cough Makes Deadly Return Across Canada,” *The Globe and Mail* (23 July 2012), online: <[www.theGlobeandMail.com/life/health-and-fitness/health/whooping-cough-makes-deadly-return-across-canada/article4436946/](http://www.theGlobeandMail.com/life/health-and-fitness/health/whooping-cough-makes-deadly-return-across-canada/article4436946/)>. In 2019, Iqaluit reported that a resident had died as a result of pertussis: “A Person in Nunavut Has Died of Whooping Cough, Health Department Says,” *CBC News* (9 December 2019), online: <[www.cbc.ca/news/canada/north/nunavut-whooping-cough-death-1.5389998](http://www.cbc.ca/news/canada/north/nunavut-whooping-cough-death-1.5389998)>.

<sup>4</sup> Chris Iorfida, “Measles Vaccinations of Toddlers at 89%, Below ‘Herd Immunity’ Level,” *CBC News* (21 July 2015), online: <[www.cbc.ca/news/health/measles-vaccinations-of-toddlers-at-89-below-herd-immunity-level-1.3161617](http://www.cbc.ca/news/health/measles-vaccinations-of-toddlers-at-89-below-herd-immunity-level-1.3161617)>. UNICEF, Office of Research “Child Well-Being in Rich Countries: A Comparative Overview” (2013), *Innocenti Report Card 11*, online: <[www.unicef-irc.org/publications/pdf/rc11\\_eng.pdf](http://www.unicef-irc.org/publications/pdf/rc11_eng.pdf)>.

<sup>5</sup> See generally, *Immunization of School Pupils Act*, RSO 1990, c I.1.

media coverage vaccinations receive.<sup>6</sup> Since the global COVID-19 pandemic, issues surrounding vaccination policies have only increased.<sup>7</sup>

The rapid development of multiple COVID-19 vaccines, with higher levels of uncertainty about safety and effectiveness compared to standard vaccines, are creating challenging ethical, legal, and policy questions with respect to mandatory vaccination. School-aged children will be a focus of vaccination strategies in an effort to safely reopen schools, protecting them and school workers as well as a mechanism to prevent spread of the disease from children to more vulnerable populations. However, this approach will be fraught with challenges.

This article will examine Canada's childhood immunization laws and will focus on the role of religious and conscience belief exemptions in mandatory childhood vaccination schemes. The article will explore the science and epidemiology that underpins vaccination policy and will look at current pediatric vaccinations, as well as the special case COVID-19 vaccines. Following this, the article will turn to focus on Canadian jurisprudence and legislation related to childhood immunization laws. The article will proceed with an examination of section 2(a) of the *Canadian Charter of Rights and Freedoms*<sup>8</sup> and its application in the context of religious and conscience belief exemptions in mandatory childhood vaccination programs. The article will then briefly consider section 7 arguments before examining different approaches, including mandatory education seminars and time limits on exemptions, that can be used to restrict the religious and conscience belief exemption. The article will also consider how the development of COVID-19 vaccines impacts this analysis.

## II. THE SCIENTIFIC AND EPIDEMIOLOGICAL PROPERTIES OF VACCINATION POLICY

After clean water, immunization programs are likely the most effective public health intervention for improving morbidity and mortality rates.<sup>9</sup> Mass immunization programs have eradicated smallpox and markedly reduced illness from pathogens such as polio and diphtheria. While some of this reduction in disease has been due to general improvements in population health, epidemiologic evidence demonstrates the marked reduction of these

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<sup>6</sup> André Picard, "Global Childhood Vaccination Programs are Still Needed in a Nationalistic World," *The Globe and Mail* (25 January 2020), online: <[www.theglobeandmail.com/opinion/article-global-childhood-vaccination-programs-are-still-needed-in-a/](http://www.theglobeandmail.com/opinion/article-global-childhood-vaccination-programs-are-still-needed-in-a/)>; Carly Weeks, "Judicial Appeals on Vaccination Can Create False Idea That Science Itself is Up for Debate," *The Globe and Mail* (21 January 2020), online: <[www.theglobeandmail.com/life/health-and-fitness/article-judicial-appeals-on-vaccination-can-create-false-idea-that-science/](http://www.theglobeandmail.com/life/health-and-fitness/article-judicial-appeals-on-vaccination-can-create-false-idea-that-science/)>; André Picard, "Canadian Medical Association Wants Schools to Seek Proof of Vaccination," *The Globe and Mail* (26 August 2015), online: <[www.theglobeandmail.com/news/national/schools-should-to-be-able-to-request-students-vaccination-records-cma/article26111472/](http://www.theglobeandmail.com/news/national/schools-should-to-be-able-to-request-students-vaccination-records-cma/article26111472/)>.

<sup>7</sup> Katherine J Igoe, "Establishing the Truth: Vaccines, Social Media, and the Spread of Misinformation," online: *TH Chan School of Public Health* <[www.hsph.harvard.edu/ecpe/vaccines-social-media-spread-misinformation/](http://www.hsph.harvard.edu/ecpe/vaccines-social-media-spread-misinformation/)>; Jillian Kramer, "COVID-19 Vaccines Could Become Mandatory. Here's How it Might Work," *National Geographic* (19 August 2020), online: <[www.nationalgeographic.com/science/2020/08/how-coronavirus-covid-vaccine-mandate-would-actually-work-cvd/](http://www.nationalgeographic.com/science/2020/08/how-coronavirus-covid-vaccine-mandate-would-actually-work-cvd/)>.

<sup>8</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

<sup>9</sup> Susan L Plotkin & Stanley A Plotkin, "A Short History of Vaccination" in Stanley A Plotkin & Walter A Orenstein, eds, *Vaccines*, 4th ed (Philadelphia: WB Saunders Co, 2004) 1 at 1.

diseases after the introduction of vaccine programs.<sup>10</sup> Similarly, reductions in vaccine coverage have been clearly linked to the re-emergence of these diseases. A study published in *The Lancet* illustrates the negative effects of reduced vaccination coverage, promulgated by anti-vaccine sentiment, on the incidence of pertussis.<sup>11</sup> A similar phenomenon is happening currently with vaccine hesitancy fueling outbreaks of measles.<sup>12</sup>

The primary beneficiaries of immunization programs are the vaccine recipients. At the same time, vaccinating individuals also protects others — in particular, those who may not have acquired immunity from a vaccine or those who cannot be vaccinated due to medical conditions or age — a concept referred to as “herd immunity.” The benefits of vaccination and the threshold for herd immunity vary by vaccine. Measles has one of the highest levels of immunization coverage (95 percent) needed to ensure herd immunity despite the fact that two doses of the vaccine provide a high level of protection. This is because of the highly infectious nature of the virus, which has one of the highest reproductive numbers of any infectious agent (the number of individuals subsequently infected for each infected individual).

The degree of infectivity of a pathogen is described by its reproductive number ( $R_0$  — pronounced R naught). This number represents the number of subsequent individuals infected for each infected individual. The  $R_0$  for measles is 12-18, for influenza about 1.2-1.4, and for SARS-CoV-2 estimated at 2.2 in non-variant viruses. In other words, SARS-CoV-2, the virus responsible for COVID-19, is more infectious than influenza but less so than measles. The herd immunity coverage threshold is provided by the formula  $1-1/R_0$ . Thus, the higher the  $R_0$  the higher herd immunity needs to be to provide protection to the population. For measles with a  $R_0$  of 18 the herd immunity threshold is thus 95 percent and for SARS-CoV-2 it is about 55 percent, using the aforementioned formula.

To determine the vaccine coverage rate that is needed to create herd immunity, the effectiveness of the vaccine needs to be taken into consideration. For vaccines that do not provide 100 percent protection, the percentage that needs to be vaccinated to achieve herd immunity increases and is captured by the formula:  $V_c=(1- 1/R_0)/E$ , where  $V_c$  is vaccine coverage needed and  $E$  is the effectiveness of the vaccine. Thus, for a hypothetical 60 percent effective COVID-19 vaccine, the vaccine coverage needed to achieve herd immunity, according to this formula, would mean 91 percent of the population would need to be immunized. The lack of effectiveness of a vaccine actually argues in favour of mandatory vaccination policies, as high percentages of the population need to be vaccinated to break person-to-person transmission. Fortunately, the mRNA COVID-19 vaccines confer immunity in the 95 percent range, though duration of this immunity has not been established and it has

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<sup>10</sup> Public Health Agency of Canada, “Vaccine Preventable Disease: Surveillance Report to December 31, 2015,” online: <[www.canada.ca/content/dam/phac-aspc/documents/services/publications/healthy-living/vaccine-preventable-disease-surveillance-report-december-31-2015/vaccine-preventable-disease-eng.pdf](http://www.canada.ca/content/dam/phac-aspc/documents/services/publications/healthy-living/vaccine-preventable-disease-surveillance-report-december-31-2015/vaccine-preventable-disease-eng.pdf)>.

<sup>11</sup> EJ Gangarosa et al, “Impact of Anti-Vaccine Movements on Pertussis Control: the Untold Story” (1998) 351:9099 *The Lancet* 356.

<sup>12</sup> Peter Hotez, “America and Europe’s New Normal: the Return of Vaccine-Preventable Diseases” (2019) 85 *Pediatric Research* 912.

not yet been determined whether the vaccines reduce infectivity or transmissibility.<sup>13</sup> If this were the case, a voluntary strategy could potentially work, since you would only need to vaccinate 60 percent of the population to achieve herd immunity based on the assumption that the vaccine prevents asymptomatic infection and infectivity.<sup>14</sup>

What are the implications of a loss of herd immunity? An illustration of this occurred during a measles outbreak in 1989 in Quebec City:

In 1989, Quebec City experienced an outbreak of measles. At first glance, the outbreak appeared unusual because the majority of cases occurred in vaccinated individuals. However, a closer examination of the data reveals that it was not a failure of the vaccine which led to the outbreak of measles in a highly vaccinated population. Rather, an epidemiological study following school children who developed measles and their siblings reinforces the strong protective effects of vaccination and the real risks associated with non-vaccination. Fifty-eight of the 462 (13%) monitored siblings contracted the highly infectious disease. Of the monitored siblings, 17 were unvaccinated, and all of them (100%) contracted measles. In contrast, only 41 of the 445 (8%) vaccinated siblings also developed the disease — a small percentage always subsists given that vaccination is not 100 percent effective.<sup>15</sup>

Another compelling example of herd immunity comes from Japan, where vaccinating school children with influenza vaccine reduced pneumonia and influenza deaths across the population. When this policy was removed, death rates climbed again.<sup>16</sup>

The importance of vaccination is not only dependent on the infectivity of the pathogen it is protecting against, but also the morbidity and mortality resulting from the pathogen. The consequences of contracting a vaccine-preventable disease vary by pathogen. However, even in the case of measles, a comparatively less harmful condition in high-income countries, United States data indicate that 1–3 of every 1,000 children who get measles will die from respiratory or neurological complications and 1 in 5 unvaccinated children who develop measles will be hospitalized.<sup>17</sup> According to the World Health Organization (WHO), there were more than 140,000 deaths globally from measles in 2018.<sup>18</sup> The population level impact of a pathogen is a consequence of its infectivity multiplied by infection or case morbidity and mortality rates. Thus, even less harmful pathogens can have significant population level

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<sup>13</sup> Lindsey R Baden et al, “Efficacy and Safety of the mRNA-1273 SARS-CoV-2 Vaccine,” (2021) 384:5 *New Eng J Med* 403; Fernando P Polack et al, “Safety and Efficacy of the BNT162b2 mRNA Covid-19 Vaccine” (2020) 383: 27 *New Eng J Med* 2603. At this point in time, evidence is emerging that COVID-19 vaccines may also prevent transmission of the virus: see Lauren Pelley, “Study Offers ‘Promising’ Evidence that at Least 1 COVID-19 Vaccine May Curb Transmission” *CBC News* (10 February 2021), online: <[www.cbc.ca/news/health/covid-vaccine-transmission-pfizer-1.5907459](http://www.cbc.ca/news/health/covid-vaccine-transmission-pfizer-1.5907459)>.

<sup>14</sup> This is a simplistic description of herd immunity provided as an illustration. These calculations assume an even distribution of vaccinated individuals. In reality, there are often pockets of under-immunized individuals that are at risk of outbreaks. This could be due to logistical challenges to being vaccinated or vaccine hesitancy.

<sup>15</sup> Rebecca Rodal & Kumanan Wilson, “Could Parents be Held Liable for Not Immunizing their Children?” (2010) 4:1 *McGill JL & Health* 39 at 41 [footnotes omitted]. See also G de Serres et al, “Measles Vaccine Efficacy During an Outbreak in a Highly Vaccinated Population: Incremental Increase in Protection with Age at Vaccination up to 18 Months” (1995) 115:2 *Epidemiology & Infection* 315.

<sup>16</sup> Thomas A Reichert et al, “The Japanese Experience with Vaccinating Schoolchildren against Influenza” (2001) 344:12 *New Eng J Med* 889.

<sup>17</sup> Centers for Disease Control and Prevention, “Complications of Measles,” online: <[www.cdc.gov/measles/symptoms/complications.html](http://www.cdc.gov/measles/symptoms/complications.html)>.

<sup>18</sup> World Health Organization, Joint News Release, “More Than 140,000 Die from Measles as Cases Surge Worldwide” (5 December 2019), online: <[www.who.int/news-room/detail/05-12-2019-more-than-140-000-die-from-measles-as-cases-surge-worldwide](http://www.who.int/news-room/detail/05-12-2019-more-than-140-000-die-from-measles-as-cases-surge-worldwide)>.

consequences as a result of their high infectivity. COVID-19 is an important example of this. While it remains challenging to determine the case and infection fatality rates related to this condition, given the high number of asymptomatic cases and limitations to surveillance for the disease, current estimates suggest an infection mortality rate of 0.5–1 percent.<sup>19</sup> While this is not an insignificant number, the high mortality figures we are seeing are a consequence of this mortality rate multiplied by a high proportion of the population being infected.

#### A. THE SCIENTIFIC AND EPIDEMIOLOGICAL ISSUES OF A COVID-19 VACCINE

The development of multiple COVID-19 vaccines provide additional scientific concerns that need to be considered when developing vaccination policies. As the normal development period for vaccines has been shortened from 15 years to just over a year, there will be higher levels of uncertainty concerning the safety and efficacy of the vaccine, particularly the longer-term aspects of these. In particular, studies are designed to determine if the vaccines reduce symptomatic infection. Longer-term follow-up and post-market surveillance will need to establish if individuals can be asymptomatic, be colonized by the virus, and still transmit the virus to others. As mandatory policies are intended to ensure individuals take action to protect others any such policies may have to wait until post-market surveillance after the initial release of the vaccine is available.

Phase 3 clinical trials should identify common adverse events (incidence of greater than 1:10,000).<sup>20</sup> However, with the H1N1 vaccine in Europe there was evidence of the association of vaccination with an increased incidence of narcolepsy in children and adolescents. This same observation was not noted in North America.<sup>21</sup> Nevertheless, there is a precedent for an adverse event affecting children from a novel vaccine that was not detected in Phase 3 trials. The adverse event risks are further complicated by the possibility of an unusual phenomenon known as disease enhancement. This has been identified in efforts to develop analogous vaccines where being vaccinated increased the severity of illness upon exposure to the virus.<sup>22</sup> The vaccine will also likely be made available before complete information on duration of immunity is available, which will likely be examined as part of standard post-market surveillance and inform the need for boosters or seasonal vaccination.

Efficacy is also another concern. The science on immunology of COVID-19 is rapidly evolving. Natural infection results in the creation of an antibody response which then rapidly decreases, and a similar response would be expected with a vaccine. Nevertheless, there has not been a great deal of evidence of reinfection of previously infected individuals.<sup>23</sup>

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<sup>19</sup> Smriti Mallapaty, “How Deadly is the Coronavirus? Scientists Are Close to an Answer” (2020) 582 *Nature* 467 at 468.

<sup>20</sup> World Health Organization, “Vaccine Safety Basics: Learning Manual” at 22–23, online: <[www.who.int/vaccine\\_safety/initiative/tech\\_support/Part-1.pdf?ua=1](http://www.who.int/vaccine_safety/initiative/tech_support/Part-1.pdf?ua=1)>.

<sup>21</sup> Centers for Disease Control and Prevention, “Narcolepsy Following 2009 Pandemrix Influenza Vaccination in Europe,” online: <[www.cdc.gov/vaccinesafety/concerns/history/narcolepsy-flu.html](http://www.cdc.gov/vaccinesafety/concerns/history/narcolepsy-flu.html)>.

<sup>22</sup> Lynne Peoples, “Avoiding Pitfalls in the Pursuit of a COVID-19 Vaccine” (2020) 117:15 *PNAS* 8218.

<sup>23</sup> Kelvin Kai-Wang To et al., “Coronavirus Disease 2019 (COVID-19) Re-infection by a Phylogenetically Distinct Severe Acute Respiratory Syndrome Coronavirus 2 Strain Confirmed by Whole Genome Sequencing” (2020) *Clinical Infectious Diseases*, online: <[academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1275/5897019?searchresult=1](http://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1275/5897019?searchresult=1)>.

suggesting either that lower levels of antibodies are effective or that cell-mediated immunity, which is much harder to measure, plays an important role. There is still substantial scientific uncertainty concerning this question. The initial vaccines also have not been fully tested on a student age population. However, it is quite possible that, like the influenza vaccine, the vaccine's effectiveness is limited in older populations — those most vulnerable to the virus — due to gradual deterioration of immune response, a phenomenon known as immunosenescence. Thus, vaccinating younger populations may be critical to protect older populations, depending on which vaccines are available. Childhood vaccination against COVID-19 could thus be crucial, despite the fact that most school aged children develop little in the way of morbidity from COVID-19 illness with the rare exception of cases of multisystem inflammatory syndrome.

There are increasing concerns about vaccine-preventable diseases, vaccine coverage, and the newly developed COVID-19 vaccines. Currently, these vaccines offer hope for society to fully reopen. Additionally, we are seeing an upsurge in other vaccine-preventable diseases.<sup>24</sup> The resurgence of vaccine-preventable diseases and the reliance on a vaccine to resolve the global pandemic is particularly problematic given the increase in vaccine hesitancy.

### III. VACCINE HESITANCY

Vaccine hesitancy, which was identified by WHO as a top global health threat for 2019, can be attributed to a variety of different factors.<sup>25</sup> It has been argued that vaccinations are victims of their own success. Since few people remember the actual impact of the diseases, the diseases are no longer feared.<sup>26</sup> For parents, some cite health concerns as the most determinative factor in their decision to not vaccinate.<sup>27</sup> Other parents believe that vaccinations are dangerous. This belief gained credibility when a reputable British medical journal, *The Lancet*, published a now debunked study by Andrew Wakefield linking the mumps, measles, and rubella (MMR) vaccine to autism.<sup>28</sup>

<sup>24</sup> See e.g. Hotez, *supra* note 12.

<sup>25</sup> World Health Organization, "Ten Threats to Global Health 2019," online: <[www.who.int/vietnam/news/feature-stories/detail/ten-threats-to-global-health-in-2019](http://www.who.int/vietnam/news/feature-stories/detail/ten-threats-to-global-health-in-2019)> [WHO, "Ten Threats"].

<sup>26</sup> Jay M Lieberman, "Myths Regarding Immunization" (2003) *Infectious Diseases in Children*, cited in LeFever, *supra* note 1 at n 65.

<sup>27</sup> The number of childhood vaccinations has dramatically increased since vaccinations were introduced, causing some parents to fear that the amounts of vaccinations may overwhelm their infant's immune system: Michael Poreda, "Reforming New Jersey's Vaccination Policy: The Case for the Conscientious Exemption Bill" (2011) 41:2 *Seton Hall L Rev* 765 at 773. See "Excellent Care for All: Immunization: Health Care Challenge," online: *Ontario Ministry of Health and Long-Term Care* <[web.archive.org/web/20181204073257/https://health.gov.on.ca/en/pro/programs/ecfa/action/primary/prev\\_immunize.aspx](http://web.archive.org/web/20181204073257/https://health.gov.on.ca/en/pro/programs/ecfa/action/primary/prev_immunize.aspx)> which cites an Ontario study claiming that 34 percent of the respondents believe that there are too many required vaccinations for a child. For a history of vaccinations, see "History of Public Health: Immunization Timeline," online: *Canadian Public Health Association* <[www.cpha.ca/immunization-timeline](http://www.cpha.ca/immunization-timeline)>.

<sup>28</sup> AJ Wakefield et al, "Ileal-lymphoid-nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children" (1998) 351:9103 *The Lancet* 637. The study has been discredited. Gardiner Harris, "Journal Retracts 1998 Paper Linking Autism to Vaccines" *The New York Times* (2 February 2010), online: <[www.nytimes.com/2010/02/03/health/research/03lancet.html](http://www.nytimes.com/2010/02/03/health/research/03lancet.html)>. For a comprehensive list of studies on vaccination safety, see "Vaccine Safety: Examine the Evidence," online: <[www.healthychildren.org/English/safety-prevention/immunizations/Pages/Vaccine-Studies-Examine-the-Evidence.aspx](http://www.healthychildren.org/English/safety-prevention/immunizations/Pages/Vaccine-Studies-Examine-the-Evidence.aspx)> ["Vaccine Safety"].

After Wakefield's study, the anti-vaccination movement gained momentum.<sup>29</sup> The movement secured a foothold in Hollywood, with celebrities warning about the dangers of childhood vaccinations.<sup>30</sup> In more recent years, the rise of social media has provided the anti-vaccination movement a platform on which to organize.<sup>31</sup> Moreover, concerns about COVID-19 vaccines and safety issues caused by its rapid development have increased vaccine hesitancy for some individuals.<sup>32</sup>

While anti-vaccine sentiment is often highlighted as a primary reason for failing to vaccinate, it is critical to recognize the importance of logistical considerations. In many instances, individuals simply forget to have their children vaccinated or do not have access to immunization. The latter has become more salient with the COVID-19 pandemic where routine care has been disrupted resulting in a reduction in pediatric vaccine coverage and the concomitant increase in risk of vaccine-preventable disease outbreaks.<sup>33</sup> Logistical challenges will also be substantial for the COVID-19 vaccines as several COVID vaccines are available at the same time, many need two doses, and the duration between the doses vary between the vaccines. All of these factors could provide confusion for providers and vaccine recipients resulting in suboptimal vaccination rates and series completion.

#### IV. MANDATORY IMMUNIZATION POLICIES

As described, individuals do not vaccinate for a variety of reasons, including logistical reasons and fear of harms or lack of benefit.<sup>34</sup> A small percentage have strong anti-vaccine views which can be very resistant to change. New Brunswick, Ontario, and British Columbia are the only provinces that require proof of immunization status for school entry (Manitoba has a more limited policy). These policies have the potential to serve as a check and reminder for those who may have forgotten — or to persuade the mildly vaccine hesitant. These programs have been demonstrated to be effective.<sup>35</sup>

<sup>29</sup> Anti-vaccination campaigns are not new; campaigns have existed since the introduction of public vaccination programs. For an overview of the anti-vaccination movement, see Katherine Arnup, "Victims of Vaccination?": Opposition to Compulsory Immunisation in Ontario, 1900-90" (1992) 9:2 *Can Bull Medical History* 159.

<sup>30</sup> EJ Dickson, "A Guide to 17 Anti-Vaccination Celebrities," *Rolling Stone* (14 June 2019), online: <[www.rollingstone.com/culture/culture-features/celebrities-anti-vaxxers-jessica-biel-847779/](http://www.rollingstone.com/culture/culture-features/celebrities-anti-vaxxers-jessica-biel-847779/)>.

<sup>31</sup> Kumanan Wilson & Jennifer Keelan, "Social Media and the Empowering of Opponents of Medical Technologies: The Case of Anti-Vaccinationism" (2013) 15:5 *J Medical Internet Research* 1. Recently, there has been some attempt to change the narrative on social media. See Barbara Ortutay, "How Social Media is Trying to Contain Misinformation Over Vaccines" *PBS News Hour* (5 April 2019), online: <[www.pbs.org/newshour/health/how-social-media-is-trying-to-contain-the-spread-of-misinformation-over-vaccines](http://www.pbs.org/newshour/health/how-social-media-is-trying-to-contain-the-spread-of-misinformation-over-vaccines)>.

<sup>32</sup> The COCONEL Group, "A Future Vaccination Campaign Against COVID-19 at Risk of Vaccine Hesitancy and Politicisation" (2020) 20:7 *The Lancet* 769.

<sup>33</sup> World Health Organization, News Release, "At Least 80 Million Children Under One at Risk of Diseases Such as Diphtheria, Measles and Polio as COVID-19 Disrupts Routine Vaccination Efforts, Warn Gavi, WHO and UNICEF" (22 May 2020), online: <[www.who.int/news-room/detail/22-05-2020-at-least-80-million-children-under-one-at-risk-of-diseases-such-as-diphtheria-measles-and-polio-as-covid-19-disrupts-routine-vaccination-efforts-warn-gavi-who-and-unicef](http://www.who.int/news-room/detail/22-05-2020-at-least-80-million-children-under-one-at-risk-of-diseases-such-as-diphtheria-measles-and-polio-as-covid-19-disrupts-routine-vaccination-efforts-warn-gavi-who-and-unicef)>. See also Jeanne M Santoli et al, "Effects of the COVID-19 Pandemic on Routine Pediatric Vaccine Ordering and Administration—United States, 2020" (2020) 69:19 *Morbidity & Mortality Weekly Report* at 591.

<sup>34</sup> Edward Mills et al, "Systematic Review of Qualitative Studies Exploring Parental Beliefs and Attitudes Toward Childhood Vaccination Identifies Common Barriers to Vaccination" (2005) 58:11 *J Clinical Epidemiology* 1081.

<sup>35</sup> While the majority of the studies occurred in the US, two were from Canada: Cecilia Lee & Joan L Robinson "Systematic Review of the Effect of Immunization Mandates on Uptake of Routine Childhood Immunizations" (2016) 72:6 *J Infection* 659.



The question is what the benefits of these programs are for the more staunchly anti-vaccine who have the option to declare a philosophical or religious exemption. Other jurisdictions have begun to remove these exemptions in an effort to improve immunization coverage.<sup>36</sup> An analysis by the Centers for Disease Control and Prevention (CDC) has demonstrated the benefits of removing these exemptions on vaccine coverage:

According to the researchers, both the rate of vaccination and the rate of nonmedical vaccine exemptions were strongly associated with the three major childhood immunizations that are mandated by schools: MMR, Tdap and varicella. Their analysis showed that the most effective way to increase immunization rates was by removing a certain type of nonmedical vaccine exemption, such as the removal of philosophical exemptions in Vermont, or all nonmedical exemptions, as California did.<sup>37</sup>

Another study demonstrated that the permission of exemptions was associated with a reduction in coverage rates:

We found that state policies that refer to Advisory Committee on Immunization Practices recommendations were associated with 3.5% and 2.8% increases in MMR and DTaP vaccination rates. Health Department–led parental education was associated with 5.1% and 4.5% increases in vaccination rates. Permission of religious and philosophical exemptions was associated with 2.3% and 1.9% decreases in MMR and DTaP coverage, respectively, and a 1.5% increase in both total exemptions and nonmedical exemptions, respectively.<sup>38</sup>

This article will now parse Canadian vaccination programs and examine how programs are being altered to maximize vaccination rates and to reap the aforementioned benefits.

## V. IMMUNIZATIONS IN THE CANADIAN CONTEXT

### A. CHILDHOOD IMMUNIZATION PROGRAMS

In Canada, provinces have jurisdiction to create their own vaccination programs.<sup>39</sup> These programs span from early childhood to old age. While there are significant legal issues that

<sup>36</sup> In 2015, the Australian government passed a law that removed the conscience and religious objector exemption and imposed a financial penalty for non-compliance: *Social Services Legislation Amendment (No Jab, No Pay) Act 2015*, (Austl) 2015/158. Within a year, the program was deemed a success because of the dramatic rise of vaccination rates. “No Jab, No Pay: Thousands Immunise Children to Avoid Family Payment Cuts,” *The Guardian* (31 July 2016), online: <[www.theguardian.com/australia-news/2016/jul/31/no-jab-no-pay-thousands-immunise-children-to-avoid-family-payment-cuts](http://www.theguardian.com/australia-news/2016/jul/31/no-jab-no-pay-thousands-immunise-children-to-avoid-family-payment-cuts)>. In the US, multiple states, including California, have removed the conscience belief exemption. See “States with Religious and Philosophical Exemptions from School Immunization Requirements,” online: *National Conference of State Legislatures* <[www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx](http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx)>.

<sup>37</sup> “Removing Nonmedical Vaccine Exemptions Improves Herd Immunity,” online: <[www.healio.com/news/pediatrics/20190405/removing-nonmedical-vaccine-exemptions-improves-herd-immunity](http://www.healio.com/news/pediatrics/20190405/removing-nonmedical-vaccine-exemptions-improves-herd-immunity)>.

<sup>38</sup> Jana Shaw et al, “Immunization Mandates, Vaccination Coverage, and Exemption Rates in the United States” (2018) 5:6 *Open Forum Infectious Diseases* 1 at 1.

<sup>39</sup> Vaccination programs generally fall into provincial jurisdiction under the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92, reprinted in RSC 1985, Appendix II, No 5. Though health was not assigned to either level of government, constitutional interpretation has determined that health is primarily a provincial power. See Martha Jackman, “Constitutional Jurisdiction Over Health in Canada” (2000) 8 *Health LJ* 95.

arise in all vaccination programs and policies,<sup>40</sup> we will be focusing on childhood vaccination programs. In the majority of provinces (Alberta, Saskatchewan, Manitoba,<sup>41</sup> Quebec, Nova Scotia, Prince Edward Island, and Newfoundland), childhood immunization programs are voluntary.<sup>42</sup> In these provinces, even though participation in the immunization program is voluntary, the province has established a comprehensive immunization schedule and scheduled vaccines are publicly funded.<sup>43</sup> Additionally, provincial governments encourage public participation.<sup>44</sup>

British Columbia, New Brunswick, and Ontario have a mandatory immunization or mandatory reporting of immunization program for school children.<sup>45</sup> British Columbia's mandatory reporting program is legislated by the *Vaccination Status Reporting Regulation*;<sup>46</sup> Ontario's vaccination program for school children is dictated by the terms of the *Immunization of School Pupils Act*;<sup>47</sup> New Brunswick's vaccination program for school children is dictated by the terms of the *Public Health Act*<sup>48</sup> and its *Reporting and Disease Regulation – Public Health Act*.<sup>49</sup> Each will be examined in turn.

British Columbia's childhood immunization law does not require parents to immunize their children; rather, the focus is on reporting and tracking immunizations for school-aged

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<sup>40</sup> Recently, there has been controversy surrounding the workplace adoption of vaccine or mask policies for healthcare workers. These policies stipulate that during the cold and flu season, healthcare workers who fail to obtain the influenza vaccine must wear a face mask during their work shift. Vaccine or mask policies are not provincial law and are implemented by various hospital and health care employers. Recently, two Ontario labour arbitration decisions struck down these policies. William Kaplan, the arbitrator in the most recent decision, concluded that such a policy was unreasonable. His ruling relied on several factors: "There is insufficient evidence of a problem to be addressed — nosocomial influenza transmitted by unvaccinated HCWs. There is insufficient evidence that asymptomatic or presymptomatic transmission is a significant source of infection. And there is insufficient evidence that masking prevents the spread of influenza" (*St Michael's Hospital v Ontario Nurses' Association*, 2018 CanLII 82519 (Ont LA) (Arbitrator: William Kaplan) at 34). See also *Sault Area Hospital and Ontario Nurses' Association*, 2015 CanLII 55643 (Ont LA) (Arbitrator: James Hayes). *Health Employers Assn of British Columbia v HSA BC (Influenza Control Program Policy)*, Re, [2013] BCCAAA No 138 (Arbitrator: Robert Diebolt), a British Columbia decision in which Arbitrator Diebolt ruled that given the seriousness of the influenza virus, a policy that would encourage and increase immunization rates among healthcare workers can be considered reasonable. See generally, Vanessa Gruben, Reed A Siemieniuk & Allison McGeer, "Health Care Workers, Mandatory Influenza Vaccination Policies and the Law" (2014) 186:14 CMAJ 1076. These vaccine or mask policies relate to the influenza vaccine and would need to be re-examined in light of the development of a COVID-19 vaccine.

<sup>41</sup> Manitoba maintains an immunization registry as part of its Public Health Information Management System (PHIMS). Each resident who is registered with Manitoba Health has an electronic health record in PHIMS. Among the data collected is a record of immunizations. See "The Public Health Information Management System (PHIMS)," online: <[www.gov.mb.ca/health/publichealth/surveillance/phims.html](http://www.gov.mb.ca/health/publichealth/surveillance/phims.html)>.

<sup>42</sup> As discussed later, when parents have separated and have been unable to agree on the issue of childhood immunizations, courts have become involved.

<sup>43</sup> Government of Canada, "Provincial and Territorial Routine and Catch-up Vaccination Schedule for Infants and Children in Canada," online: <[healthycanadians.gc.ca/healthy-living-vie-saine/immunization-immunisation/children-enfants/schedule-calendrier-table-1-eng.php](http://healthycanadians.gc.ca/healthy-living-vie-saine/immunization-immunisation/children-enfants/schedule-calendrier-table-1-eng.php)>.

<sup>44</sup> See e.g. "Alberta Immunization Strategy: 2007-2017," online: <[open.alberta.ca/dataset/e771c4d4-c677-45a2-9bff-7424f71d0a35/resource/e761dd24-275a-44ec-a51d-75b8190305c8/download/immunization-strategy-07.pdf](http://open.alberta.ca/dataset/e771c4d4-c677-45a2-9bff-7424f71d0a35/resource/e761dd24-275a-44ec-a51d-75b8190305c8/download/immunization-strategy-07.pdf)>.

<sup>45</sup> Manitoba repealed its mandatory vaccination program over a decade ago. See *The Public Schools Act*, RSM 1987, c P250, s 261(1) as amended by *The Public Schools Amendment Act*, SM 1999, c 14, s 5. See Rodal & Wilson, *supra* note 15 at 56.

<sup>46</sup> BC Reg 146/2019. The Regulations were enacted pursuant to the *Public Health Act*, SBC 2008, c 28.

<sup>47</sup> *Supra* note 5.

<sup>48</sup> SNB 1998, c P-22.4.

<sup>49</sup> NB Reg 2009-136.

children through the creation of a provincial immunization registry.<sup>50</sup> Starting in the 2019-2020 academic year, parents are obliged to provide their child's immunization record to the provincial health unit upon registering their child to school. Should a parent choose not to provide the information, the child will be listed as unimmunized and may be prohibited from attending school in the event of a vaccine-preventable disease outbreak.<sup>51</sup>

Ontario's *Immunization of School Pupils Act*, which has a purpose of protecting the health of children against certain diseases, requires that parents of school age children have their child complete the vaccination program.<sup>52</sup> The *Act* requires children to receive vaccines for diphtheria, tetanus, polio, measles, mumps, rubella, pertussis, meningococcal disease, and varicella.<sup>53</sup> To ensure compliance with the immunization program, the medical officer of health in a health unit must maintain a record of immunization for each school age child in the jurisdiction.<sup>54</sup> If a parent fails to have their child complete the immunization program, the parent is liable for a fine of not more than \$1000 and the child may be precluded from attending school.<sup>55</sup>

The *Immunization of School Pupils Act* grants two exemptions to the required immunization schedule. The first, found in section 3(2), is a medical exemption.<sup>56</sup> To obtain a medical exemption, the parent must complete a medical exemption statement and submit it to the medical officer at the health unit in lieu of a completed immunization record.<sup>57</sup>

The second exemption is a conscience or religious belief exemption.<sup>58</sup> To fulfill the exemption's requirements, a parent must file the "Statement of Conscience or Religious Belief Affidavit" which requires that the parent swear to the accuracy of the statement before

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<sup>50</sup> "Vaccination Status Reporting Regulation," online: <immunizebc.ca/vaccination-status-reporting-regulation>. See also Richard Zussman, "B.C. Government Set to Launch Mandatory Immunization Registration in September," *Global News* (28 June 2019), online: <globalnews.ca/news/5443023/b-c-student-immunization-registration/>. These new regulations apply to children registered in school (public, independent, or home-schooled) between kindergarten and grade 12.

<sup>51</sup> "Vaccination Status Reporting Regulations," *ibid*.

<sup>52</sup> *Supra* note 5, ss 2-3.

<sup>53</sup> *Ibid*, s 1. See *Designated Diseases*, O Reg 261/13 made under the *Immunization of School Pupils Act* (21 August 2013).

<sup>54</sup> *Immunization of School Pupils Act*, *ibid*, s 11; *Designated Diseases*, *ibid* at s 1. Ontario public health units use a provincial database, "Immunization Records System" to maintain a record of student immunizations. See Ministry of Health and Long-Term Care, "Immunization Management Guidance Document," online: <collections.ola.org/mon/24008/303001.pdf>. It is the parent's responsibility to provide proof of their child's vaccination to their local health unit. See Ministry of Health and Ministry of Long-Term Care, "Immunizations," online: <www.health.gov.on.ca/en/pro/programs/immunization/ispa.aspx>.

<sup>55</sup> *Immunization of School Pupils Act*, *ibid*, s 4. It is only parents who have not submitted an exemption or a vaccination record that can be fined; in reality, few parents are fined for failure to comply with the requirements.

<sup>56</sup> *Ibid*, s 3(2). Medical exemptions are granted in situations where receiving the vaccine would cause greater harm to the child than not receiving the vaccine. Such exemptions may be necessary for individuals with certain allergies or medical conditions. See Centers for Disease Control and Prevention, "Who Should NOT Get Vaccinated with these Vaccines?" online: <www.cdc.gov/vaccines/vpd-vac/should-not-vacc.htm>.

<sup>57</sup> Medical exemptions must be supported by evidence and either a physician or nurse practitioner must sign the form. See *Immunization of School Pupils Act*, *ibid*.

<sup>58</sup> The student's mandatory completion of the vaccination schedule "does not apply to a parent who has completed an immunization education session with a medical officer of health or with a medical officer of health's delegate that complies with the prescribed requirements, if any, and who has filed a statement of conscience or religious belief with the proper medical officer of health" (*ibid*, s 3(3)).

a commissioner.<sup>59</sup> The affidavit must then be submitted to the local health unit to be included in the child's school records.<sup>60</sup>

In 2017, the Ontario government introduced an amendment to the *Immunization of School Pupils Act* that requires parents to attend an education session at their health unit to obtain a vaccine education certificate before they can file a religious or conscience belief exemption.<sup>61</sup> The purpose of the session is to provide information that counters any anti-vaccination propaganda that a parent may have read. Once the parent has completed the education session, received the vaccine education certificate and submitted the affidavit, the child has a permanent exemption.

New Brunswick also has a mandatory vaccination program for school age children. Pursuant to the *Reporting and Disease Regulations – Public Health Act*, a school principal must receive proof of a child's immunization for the following diseases: diphtheria, tetanus, polio, pertussis, measles, mumps, rubella, varicella, and meningococcal disease.<sup>62</sup> The *Public Health Act and Regulation* are further supported by the *Education Act*.<sup>63</sup> Section 10 of the *Education Act* states that a superintendent "shall refuse admission to a pupil entering school for the first time who does not provide satisfactory proof of the immunizations required under the *Public Health Act* or the regulations under that Act."<sup>64</sup> Despite this strong language, exemptions are easier to obtain in New Brunswick than in Ontario.

New Brunswick's mandatory immunization program allows for exemptions.<sup>65</sup> The first is a medical exemption. To receive a medical exemption, the parent must have a doctor or nurse practitioner sign, date, and list the vaccinations that the child will be exempted from on the Immunization Exemption Form for School Entry.<sup>66</sup>

The second exemption is a parental objection exemption. For this exemption, the parent or legal guardian must complete part two of the Immunization Exemption Form for School Entry.<sup>67</sup> The parent or legal guardian is required to list the vaccinations that they are requesting their child be exempted from and sign and date the form. This form does not have to be certified by a lawyer. The ease with which vaccination exemptions can be obtained

<sup>59</sup> Ministry of Health and Long-Term Care, "Statement of Conscience or Religious Belief Affidavit," online: <[www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/014-4897-64E~1/\\$File/4897-64E.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/014-4897-64E~1/$File/4897-64E.pdf)> [Affidavit]. See also Public Health Division, "Changes to Immunization Requirements for School Attendance: Q&A for Health Care Providers," online: <[web.archive.org/web/20170623030936/http://www.health.gov.on.ca:80/en/pro/programs/immunization/docs/ispa\\_hcp\\_qa\\_en.pdf](http://web.archive.org/web/20170623030936/http://www.health.gov.on.ca:80/en/pro/programs/immunization/docs/ispa_hcp_qa_en.pdf)>.

<sup>60</sup> Affidavit, *ibid*.

<sup>61</sup> See Ontario Government, "Vaccines for Children at School," online: <[www.ontario.ca/page/vaccines-children-school#section-4](http://www.ontario.ca/page/vaccines-children-school#section-4)> [Ontario Government, "Vaccines"]. The education session is held at the local health unit, either in group sessions or individually, with a nurse present to answer any questions that the parents might have after viewing a 25 minute video. See Sharon Kirkey, "Ontario's Mandatory Class for Parents Seeking Vaccine Exemptions Has 'Zero Conversions,'" *National Post* (15 March 2019), online: <[nationalpost.com/news/ontarios-mandatory-class-for-parents-seeking-vaccine-exemptions-has-zero-conversions](http://nationalpost.com/news/ontarios-mandatory-class-for-parents-seeking-vaccine-exemptions-has-zero-conversions)>.

<sup>62</sup> *Supra* note 49, s 12(1).

<sup>63</sup> SNB 1997, c E-1.12.

<sup>64</sup> *Ibid*, s 10(1).

<sup>65</sup> *Public Health Act*, *supra* note 48, s 42.1(3).

<sup>66</sup> New Brunswick, "Immunization Exemption Form for School Entry," online: <[www2.gnb.ca/content/dam/gnb/Departments/h-s/pdf/en/CDC/HealthProfessionals/412-School ExceptionForm.pdf](http://www2.gnb.ca/content/dam/gnb/Departments/h-s/pdf/en/CDC/HealthProfessionals/412-School%20ExceptionForm.pdf)>.

<sup>67</sup> *Ibid*.

means that significant discretion is given to the parents to decide whether to vaccinate their child.

In the fall of 2019, following a measles outbreak, New Brunswick tabled legislation seeking to amend its school children immunization laws.<sup>68</sup> The amendments sought to remove the parental objection clause and it invoked the notwithstanding clause to safeguard the amendment from constitutional scrutiny.<sup>69</sup> In June 2020, the Bill was defeated by a vote of 22–20.<sup>70</sup>

## B. CANADIAN JURISPRUDENCE ON CHILDHOOD VACCINATIONS

In addition to statutory law, a court order can force parents to vaccinate their children. In Canada, vaccination-related litigation is increasing. Unsurprisingly, when the courts have been asked to intervene in a vaccination dispute, the courts are guided by the principle of the best interests of the child.<sup>71</sup> It is presumed that parents will make decisions in the best interests of their children. Where there is disagreement about whether a parent's decision meets this standard, a court may be asked to determine what is in a child's best interest. In determining what is in the best interests of the child, courts will consider a range of factors, including the "child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs."<sup>72</sup> Some have speculated that determining what is in a child's best interest is more straightforward in cases where there is an imminent threat to the child's health as opposed to cases involving preventive treatments, such as vaccination, where "many other medical and non-medical considerations may...be relevant in determining what maximizes the good for the specific child."<sup>73</sup>

In most instances, the decision of whether to vaccinate a child falls to the parent and the desires of the child are not taken into account because of their age. As children age, and

<sup>68</sup> Bill 11, *An Act Respecting Proof of Immunization*, 3rd Sess, 59th Leg, New Brunswick, 2020 (defeated 18 June 2020).

<sup>69</sup> *Ibid*, s 4. The notwithstanding clause, found in section 33(1) of the *Charter*, *supra* note 8, states: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." This section allows either the federal, provincial, or territorial government to pass a law that infringes on *Charter* rights contained in sections 2, 7-15. See *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712. See generally Peter W Hogg, *Constitutional Law of Canada: 2019 Student Edition* (Toronto: Thomson Reuters, 2019) at 36-14.

<sup>70</sup> Carly Weeks, "Bill to Eliminate N.B.'s Non-Medical Exemptions from School-Based Vaccination Program Is Voted Down," *The Globe and Mail* (18 June 2020), online: <[www.theglobeandmail.com/canada/article-bill-to-eliminate-nbs-non-medical-exemptions-from-school-based/](http://www.theglobeandmail.com/canada/article-bill-to-eliminate-nbs-non-medical-exemptions-from-school-based/)>. See also Bill 11, *supra* note 68.

<sup>71</sup> The standard of the best interests of the child is used whenever the courts are being asked to decide on forced medical treatment of the child. In *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 281 [citations omitted] [*B (R)*], the Supreme Court stated, "in recent years, this Court has emphasized that parental duties are to be discharged according to the 'best interests' of the child.... The nature of the parent-child relationship is thus not to be determined by the personal desires of the parent, yet rather by the 'best interests' of the child." See Joan Gilmour et al, "Childhood Immunizations: When Physicians and Parents Disagree" (2011) 128:4 *Pediatrics* s167.

<sup>72</sup> A number of these factors are set out in legislation and depend on the context. See e.g. *Child and Family Services Act*, RSO 1990, c 11, s 37(3). The *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) also requires courts to give "primary consideration" to the best interests of the child: article 3.

<sup>73</sup> Roland Pierik, "Vaccination Policies: Between Best and Basic Interests of the Child, Between Precaution and Proportionality" (2020) 13:2 *Public Health Ethics* 201 at 204.

commensurate with their maturity, their opinion on whether to receive an immunization can play a role or be the deciding factor.<sup>74</sup>

In the vaccination disputes that have been decided by the courts, historically, the decisions have been divided over whether to immunize on the child. In determining whether or not the child should be vaccinated, the analysis has focused primarily on the risks and benefits to the individual child(ren). For example, in *C.R.B. and S.G.B. v. Director of Child Welfare (Nfld.)*, the trial judge concluded that, barring some life-threatening emergency, state forced medical intervention is not warranted and this case did not meet that standard.<sup>75</sup> This approach was followed by the Provincial Court of Alberta in its decision in *J.P. (Re)*.<sup>76</sup> In *J.P. (Re)*, the judge concluded that, despite believing that vaccinations are the “preferred way to proceed,” there was no immediate health threat to the children if they remained unvaccinated and therefore it was not in their best interest to force a medical procedure contrary to parental consent.<sup>77</sup> This case can be contrasted with that of *Children’s Aid Society of Peel Region v. H. (T.M.C.)* decision, where the Ontario Court of Justice ordered that the child be given the hepatitis B vaccination despite parental objections.<sup>78</sup> In this case, the mother was infected with hepatitis B and the vaccination was necessary to stop transmission of the disease from mother to the child.

More recently, there has been a trend towards ordering vaccinations.<sup>79</sup> Although courts have continued to focus on the risks and benefits to the child(ren), a few have recognized and

<sup>74</sup> Once the child meets the statutory age to make their own medical decisions (for example, 14 in Quebec and 16 in New Brunswick) or is considered a mature minor, it will be the child’s decision on whether to vaccinate. For children who have not yet reached those milestones, the judge may still consider their opinion on the subject. See Patricia Peppin, “Vaccines and Emerging Challenges for Public Health Law” in Nola M Ries, Tracey M Bailey & Timothy Caulfield, eds, *Public Health Law and Policy in Canada*, 3rd ed (Markham: LexisNexis Canada, 2013) at 207–208. In *Chmiliar v Chmiliar*, 2001 ABQB 525, the Court had to determine whether children, whose divorced parents were unable to agree on immunizations, should be vaccinated. The Court ordered that the young son be vaccinated, but not the daughter. As a 13-year-old, it was argued that she had the ability to give informed consent and clearly did not want to be vaccinated. The judge found that had the daughter been able to make an independent choice, free from her mother’s coercion, that the daughter would have been able to make the decision (*ibid* at para 55). See generally *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, which discusses the best interest of the child standard and when a child can refuse to consent to medical procedures.

<sup>75</sup> 137 Nfld & PEIR 1 (NL SC (TD)). In this case, the children were apprehended and placed in foster care. One of the issues that was raised about the children’s care were concerns that they were unvaccinated. The trial judge concluded that it was fundamentally important for the children to be vaccinated. On appeal, the Court concluded,

[n]o authority has been offered to suggest that refusal of immunization constitutes grounds for interference in the upbringing of children by the state. Members of certain religious groups believe that mankind should not directly intervene in the natural evolution of bodily processes even if the end result will be the death of the individual or child. The courts have only intervened where failure to do so might be life threatening. Short of this courts have generally preserved the parental right to raise children in the manner that they deem appropriate and consistent with their religious belief (*ibid* at para 9).

<sup>76</sup> 2010 ABPC 379.

<sup>77</sup> *Ibid* at paras 46, 48.

<sup>78</sup> 2008 ONCJ 20.

<sup>79</sup> See e.g. *PW v CM*, 2017 NSSC 91, where the judge chose not to order that the child be vaccinated; however, the judge did grant medical decision-making to the parent who was not anti-vaccination (see paras 111, 189). See also *BLO v LJB*, 2019 ONCJ 534, where the judge ordered that the child be vaccinated in accordance with Ontario’s laws. See *contra AP v LK*, 2019 ONSC 7256.

affirmed the benefits of individual vaccination to the broader public. As Justice Harper noted in his 2015 decision in *C.M.G v. D.W.S.*:

I find [that] there is sufficient evidence on the balance of probabilities that the child in this case should be vaccinated in her best interests. Public policy as expressed by the Ontario and Canadian governments supports vaccinations as essential to the health of children and the public in general. The World Health Organization promotes vaccinations for the same purposes as a matter of public health and safety.<sup>80</sup>

Similar statements were echoed by Justice Frame in her 2019 decision:

The current best evidence is that vaccination is preferable to non-vaccination, *that it is required in order to protect those who cannot be vaccinated as well as to protect ourselves*, and that any adverse reaction the person may have from the vaccine is largely outweighed by the risk of contracting the targeted disease.<sup>81</sup>

Notably, an Ontario court recently granted the Minister of Health (MOH) leave to intervene in an appeal from a decision of an arbitrator where the arbitrator declined to order the vaccination of the parties' two children.<sup>82</sup> Interventions by public bodies in private arbitrations are relatively infrequent and subject to heightened scrutiny. Nevertheless, the Court concluded that the intervention should be permitted in this case as the MOH would make an important contribution by examining the appeal from a public health perspective.<sup>83</sup> In the context of a COVID-19 vaccine, the extent to which a court will consider the broader public interest in determining whether the child should be vaccinated will be critical as vaccination of children will likely be more important to protect older populations, rather than the child herself. Once again, this is predicated on evidence emerging that the vaccine not only protects the child but prevents the child from being asymptomatic and infectious.

### C. IMMUNIZATION RATES IN CANADA

In Canada, parents are encouraged or mandated to vaccinate their children through a series of publicly funded programs, legislation and, in some instances, court orders. Unfortunately, the anti-vaccination movement has strengthened, and it is impacting public health. Data has revealed that there are pockets of communities, including in major cities, where vaccination rates hover around 60 percent.<sup>84</sup> The issue is so problematic that the WHO has identified vaccine hesitancy as one of the greatest threats to public health that the world is facing.<sup>85</sup>

<sup>80</sup> 2015 ONSC 2201 at para 105.

<sup>81</sup> *DRB v DAT*, 2019 BCPC 334 at para 41 [emphasis added]. There have been some significant exceptions to this trend, see e.g. *AP v LK*, 2020 ONSC 2520 [*AP v LK* 2020].

<sup>82</sup> *AP v LK* 2020, *ibid*.

<sup>83</sup> The MOH identified the following arguments and submissions that she proposed to make (*AP v LK* 2020, *ibid* at para 56):

(i) vaccine hesitancy stemming from misinformation about vaccines is a threat to individual and public health; (ii) in cases touching on public health issues, the failure of an adjudicator to act as gatekeeper creates the added risk of threatening the health of the community by giving credence and authority to misinformation; (iii) courts and other adjudicators can and should admit and rely upon public health records.

<sup>84</sup> Marco Chown Oved, "Which Toronto Schools Have the Lowest Vaccination Rates and Why?" *Toronto Star* (3 September 2015), online: <[www.thestar.com/news/gta/2015/09/03/which-toronto-schools-have-the-lowest-vaccination-rates-and-why.html](http://www.thestar.com/news/gta/2015/09/03/which-toronto-schools-have-the-lowest-vaccination-rates-and-why.html)>.

<sup>85</sup> WHO, "Ten Threats," *supra* note 25.

The question thus begs, how can provinces increase their vaccination rates and, now more significantly, how can provinces encourage vaccination with COVID-19 vaccines? For provinces that do not have a mandatory vaccination scheme, there have been calls to implement one; for Ontario and New Brunswick, it would involve strengthening their current mandatory vaccination programs by limiting access to exemptions. One of the key areas of focus in the development or restructuring of a vaccination program would be to examine the role of the religious and conscience belief exemption. As discussed, the trend has been to eliminate this type of exemption in vaccination programs; the next part of the article will examine the constitutionality of eliminating such an exemption in Canadian vaccination schemes and will then focus on ways to control the use of such an exemption.

## VI. THE *CHARTER* AND RELIGIOUS OR CONSCIENCE BELIEF EXEMPTIONS

Given the recurrence of outbreaks and the risk that low immunizations rates are posing to the population, some may question why the religious or conscience belief exemption is used and why it should be adopted if other provinces implement a mandatory childhood vaccination scheme. The simple explanation is that provinces are subject to the *Charter*.<sup>86</sup> Section 2(a) protects individuals from laws that violate their freedom of conscience and religion, while section 7 protects individuals from laws that interfere with their rights to life, liberty, and security of the person in a manner that is inconsistent with the principles of fundamental justice.<sup>87</sup> This part of the article will discuss why a mandatory vaccination scheme should maintain a religious or conscience belief exemption in its vaccination legislation; the bulk of the analysis will focus on section 2 (a) but pertinent issues related to section 7 will be highlighted. To add context to the argument, the article will base the constitutional analysis on Ontario's *Immunization of School Pupils Act*.<sup>88</sup>

### A. SECTION 2(A): FREEDOM OF CONSCIENCE AND RELIGION

Section 2 of the *Charter* states: “[e]veryone has the following fundamental freedoms: (a) freedom of conscience and religion.”<sup>89</sup> This right, which is based on the concepts of personal choice and individual autonomy, has been given a broad interpretation.<sup>90</sup> The Supreme Court has recognized that the freedom of conscience and religion protects a myriad of rights; this

<sup>86</sup> *Supra* note 8.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Supra* note 5. This is the only mandatory vaccination program in Canada with a specifically worded exemption for religious or conscience belief.

<sup>89</sup> *Charter, supra* note 8, s 2(a). In *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 345–46 [*Big M Drug Mart*], the Supreme Court discusses the historical origins of the phrase freedom of conscience and religion. See generally, Richard Moon, “Freedom of Conscience and Religion” (2013) 61 SCLR (2d) 339.

<sup>90</sup> See *Big M Drug Mart, ibid* at 336–37:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.... Freedom means that ... no one is to be forced to act in a way contrary to his beliefs or his conscience.

See also at 351: “With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be.”

See also Howard Kislwicz, Richard Haigh & Adrienne Ng, “Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom” (2011) 48:3 *Alta L Rev* 679 at 703.



“pluralistic context also includes ‘atheists, agnostics, skeptics and the unconcerned,’” and it prohibits the government from interfering with “profoundly personal beliefs.”<sup>91</sup> Moreover, the freedom of religion contains not only individual aspects but also a collective element.<sup>92</sup>

The rights protected under section 2(a) prohibit laws that interfere or prevent the participation in both recognized religious practice,<sup>93</sup> as well as those that are personal and not widely followed by all members of the religion.<sup>94</sup> In short, the rights protected in section 2(a) are subjective and cannot be determined against any objective religiously-based practices.<sup>95</sup> The Supreme Court has thus concluded that the first stage of the test for determining whether there has been a violation of section 2(a) is whether the claimant has a sincere belief and that the practice or belief is linked to his or her religion.<sup>96</sup>

The second part of the test dictates that the law or restriction must interfere with the claimant’s ability to follow his or her religious beliefs in a manner that is “more than trivial or insubstantial.”<sup>97</sup> A trivial or insubstantial interference is one that does not threaten the individual’s belief or prevent the individual from practicing his or her religious faith.<sup>98</sup>

Jurisprudence on the freedom of religion has developed a clearly defined test for determining the infringement of a religious right; however, the same cannot be said for freedom of conscience. For much of its *Charter* jurisprudence, the Supreme Court has largely ignored the freedom of conscience.<sup>99</sup> Academics have argued, and the Supreme Court has

<sup>91</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 32, 90 [Hutterian]. See also Kislowicz, Haigh & Ng, *ibid.*

<sup>92</sup> *Hutterian*, *ibid* at para 31.

<sup>93</sup> In *Multani v Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6 [Multani], the Supreme Court ruled that a decision preventing a student from carrying a kirpan violated section 2(a); *Grant v Canada (Attorney General)*, [1995] 1 FC 158 (FCTD) recognized that laws prohibiting the wearing of a turban violated section 2(a).

<sup>94</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 43 [Amselem]. In *Multani*, *ibid* at para 35, the Supreme Court stated:

The fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed.

What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion. The religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice.

<sup>95</sup> Robert E Charney “How Can There Be Any Sin in Sincere?: State Inquiries into Sincerity of Religious Belief” (2010) 51 SCLR 2(d) 47. See also *Amselem*, *ibid* at paras 43–49.

<sup>96</sup> *Hutterian*, *supra* note 91 at para 32. The Supreme Court has cautioned that the government inquiry into the sincerity of the claimant’s religious belief “must be as limited as possible.” The subjective nature of this part of the test has been criticized because it may lead to fictitious religious claims. See Charney, *ibid.* See also *Amselem*, *supra* note 94 at paras 82, 142.

<sup>97</sup> *Hutterian*, *ibid.*

<sup>98</sup> *Ibid* at para 90. In *Multani*, *supra* note 93, the Supreme Court ruled that forcing Gurbaj Singh to choose between his religious beliefs or enjoying the benefit of attending a public school was more than trivial or insubstantial.

<sup>99</sup> There has been passing discussion on the subject, but the Supreme Court has not determined a test for when the freedom of conscience is engaged. The Federal Court has considered a case based on the freedom of conscience, see *Maurice v Canada (Attorney General)*, 2002 FCT 69. See Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto: University of Toronto Press, 2013) at 195. See generally Mike Madden, “Second Among Equals? Understanding the Short Shrift that Freedom of Religion is Receiving in Canadian Jurisprudence” (2010) 7:1 JL & Equality 57.

briefly discussed, that the right to freedom of conscience is a distinct right from the freedom of religion.<sup>100</sup>

What exactly is freedom of conscience and what does it entail? At its most basic level, it is “an individual, internal normative force that guides one’s behaviors according to fundamental beliefs”<sup>101</sup> and it is not constrained by religious dogma.<sup>102</sup> How such a right can fit into the current section 2(a) test has been the subject of academic debate; this is a highly underdeveloped area of law that will need to be further elucidated.<sup>103</sup>

Despite the uncertainty surrounding the freedom of conscience, the Supreme Court has recognized that section 2(a) rights can be curtailed in the event that the practice for which protection is sought harms or interferes with the rights of others; however, the Supreme Court has, in the majority of instances, concluded that the balancing of competing rights should occur during the section 1 analysis.<sup>104</sup> As such, when determining whether a law is constitutional, judicial review of the impugned law will involve two separate analyses: first, the court will consider whether the law infringes on one of the protected rights (in this case, section 2(a)); secondly, if the law does violate section 2(a), the court must then consider whether the law is one that “can be demonstrably justified in a free and democratic society.”<sup>105</sup> It is only after a thorough consideration of these two steps that a court will determine whether a law, including a mandatory vaccination program, is constitutionally valid.

## B. MANDATORY IMMUNIZATION PROGRAMS AND SECTION 2(A)

Due to *Charter* requirements, Ontario should not remove the religious or conscience belief exemption from its mandatory school vaccination program and provinces seeking to enact a mandatory scheme should consider adopting a similar exemption.<sup>106</sup> This article will now turn to examine how removing the religious or conscience belief exemption from mandatory immunization programs may be seen as a violation of section 2(a). The analysis of whether a mandatory vaccination program violates section 2(a) would be relatively similar regardless

<sup>100</sup> *Ibid.* In *R v Morgentaler*, [1988] 1 SCR 30 at 179 [*Morgentaler*], Wilson J (in concurring reasons) stated:

It seems to me, therefore, that in a free and democratic society “freedom of conscience and religion” should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, “conscience” and “religion” should not be treated as tautologous if capable of independent, although related, meaning.

See also Kislowicz, Haigh & Ng, *supra* note 90 at 705–13, where they argued that the Supreme Court in *Hutterian* “insinuated” that freedom of conscience is an independent right.

<sup>101</sup> Madden, *supra* note 99 at 60.

<sup>102</sup> *Morgentaler*, *supra* note 100 at 179; Waldron, *supra* note 99 at 196. See also Bryce Edwards, “Let Your Yea be Yea: The Citizenship Oath, the Charter, and the Conscientious Objector” (2002) 60:2 UT Fac L Rev 39 at paras 81–88.

<sup>103</sup> See Moon, *supra* note 89 at para 104.

<sup>104</sup> *Multani*, *supra* note 93 at para 26. See *B (R)*, *supra* note 71 at para 109: “[t]his Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter*.”

<sup>105</sup> Peter W Hogg, *Constitutional Law of Canada: 2006 Student Edition* (Scarborough: Thomson Carswell, 2006) at 826.

<sup>106</sup> This statement presupposes that the province would not use the notwithstanding clause when enacting amendments to its mandatory childhood immunizations laws or when it is implementing such a program.

of whether the program included a mandatory COVID-19 vaccine; the inclusion of such a vaccine becomes salient in the section 1 analysis.

The claimant must demonstrate that removing the religious and conscience belief exemption violates their section 2(a) rights by: (1) showing that the choice to forego vaccinating their child was tied with their religious belief and (2) that the interference was more than trivial or insubstantial. For individuals objecting on the basis of religion, it would seem likely that a court could find a violation of section 2(a). The Supreme Court has recognized that, subject to the best interests of the child, a parent's right to freedom of religion encompasses the right to raise their child in their choice of religion.<sup>107</sup> Vaccine hesitancy and non-vaccination have been tied to various religious groups.<sup>108</sup> Some individuals have stated that certain types of medical interventions are a violation of the tenets of their faith.<sup>109</sup> Parents who believe their faith forbids vaccination would meet the first part of the section 2(a) test.

The larger question that remains is whether parents who object to childhood vaccination for non-religious reasons would be able to avail themselves of section 2(a) protection. Academics have argued that conscience is an incredibly broad concept that can involve taking a moral or political stand;<sup>110</sup> anti-vaccination advocates may argue that the decision is politically based and that parents, and not the government, should be the ones dictating health care decisions for their child.<sup>111</sup> Ultimately, the answer to whether it does fall into section 2(a) protection would depend on what definition the court used to define conscience for the purposes of section 2(a). However, as Kerri Froc argued, "it would seem anomalous to have a less subjective test for conscience simply because those with fundamental moral commitments akin to religion do not associate them with belief in a higher being."<sup>112</sup> As such, the choice not to vaccinate a child based on conscience belief would likely be protected by section 2(a).

Once the claimant was able to demonstrate that their decision to not vaccinate was related to a religious or conscience belief, the claimant would then have to demonstrate that the government interference is more than trivial or insubstantial. While the Supreme Court has ruled that mere impositions of fines or small inconveniences is not enough to trigger *Charter* protection,<sup>113</sup> vaccinations go beyond a fine or minor inconvenience. Medical intervention in the form of a prolonged series of shots is not a minor inconvenience; rather, it threatens

<sup>107</sup> See *P(D) v S(C)*, [1993] 4 SCR 141.

<sup>108</sup> Both the Christian Scientist and the Dutch Reform Church oppose vaccinations, whereas, other religious groups (Orthodox Jewish, Amish, Jehovah Witness) do not have specific dogma opposing vaccinations; however, many members of the religions forgo vaccinations as part of their personal religious views. See Paul G Van Buynder, "Large Measles Outbreak in a Religious Community in British Columbia" (2014) 5:5 *J Vaccines & Vaccination* 246; Eli Rosenberg, "New York, Epicenter of Measles Outbreak, Bans Religious Exemptions for Vaccines," *The Washington Post* (13 June 2019), online: <[www.washingtonpost.com/health/2019/06/14/new-york-epicenter-measles-outbreak-bans-religious-exemptions-vaccines/](http://www.washingtonpost.com/health/2019/06/14/new-york-epicenter-measles-outbreak-bans-religious-exemptions-vaccines/)> (New York banned the exemptions following a large outbreak among its Orthodox Jewish population). See generally, John D Grabenstein, "What the World's Religions Teach, Applied to Vaccines and Immune Globulins" (2013) 31:16 *Vaccine* 2011.

<sup>109</sup> Grabenstein, *ibid*.

<sup>110</sup> See also *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 [*Edwards Books*].

<sup>111</sup> See Moon, *supra* note 89 at paras 108–11.

<sup>112</sup> Kerri Froc, "What Gets Lost in Using the Notwithstanding Clause" *CBA National* (16 December 2019), online: <[www.nationalmagazine.ca/en-ca/articles/law/opinion/2019/what-gets-lost-in-using-the-over-ride-clause/](http://www.nationalmagazine.ca/en-ca/articles/law/opinion/2019/what-gets-lost-in-using-the-over-ride-clause/)>.

<sup>113</sup> *Edwards Books*, *supra* note 110 at 759.

and interferes with the parent's sincerely held beliefs. Additionally, according to Ontario immunization laws, the parent would be forced to choose between their beliefs and their child's right to attend public school; this type of interference would be considered substantial.<sup>114</sup> While the best interests of the child is a valid reason for overruling the parents decision on religion, the best interests of the child test typically focuses on individual cases and examines a child's unique situation to limit the exercise of a parent's constitutional rights. A blanket requirement forcing every child to immunize contrary to parental wishes does not necessarily comply with the best interests of the child. As such, forced vaccinations in the face of a valid religious or conscience belief objection would likely be a violation of section 2(a) and the outcome of such a case would hinge on whether such a violation can be justified under section 1.

### C. MANDATORY IMMUNIZATION PROGRAMS AND SECTION 1

Not only would a law removing a religious or conscience belief exemption be considered a violation of section 2(a), an argument can be made that the violation cannot be saved under section 1. In *R. v. Oakes*, the Supreme Court laid out how a government may justifiably deprive an individual or group of individuals of their *Charter* rights.<sup>115</sup> The *Oakes* test would apply in a similar manner for both violations of religious belief and violations of conscience belief. After determining whether the deprivation is prescribed by law, the rest of the test requires:

First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right.<sup>116</sup>

The test is not to be applied in a rigid and formalistic manner; rather, it must examine the context surrounding the laws.<sup>117</sup>

The first part of the *Oakes* test requires that the limit on the *Charter* right be "prescribed by law." While the Supreme Court has extrapolated on the issue,<sup>118</sup> statutes, regulations, and by-laws meet the prescribed by law requirement.<sup>119</sup> Mandatory vaccination programs and subsequent amendments would meet the prescribed by law requirement.

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<sup>114</sup> This is similar to the case of *Multani*, *supra* note 93 at para 40, where the Supreme Court ultimately concluded "the interference with Gurbaj Singh's freedom of religion is neither trivial nor insignificant.... The prohibition against wearing his kirpan to school has therefore deprived him of his right to attend a public school."

<sup>115</sup> [1986] 1 SCR 103 at 135–36 [*Oakes*].

<sup>116</sup> *Egan v Canada*, [1995] 2 SCR 513 at para 182.

<sup>117</sup> *R v Sharpe*, 2001 SCC 2 at para 153; see also *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1355–56. See Christopher D Bredt, "The Right to Equality and *Oakes*: Time for Change" (2009) 27 NJCL 59 at 60.

<sup>118</sup> *Greater Vancouver Transportation Authority v Canadian Federation of Students-British Columbia Component*, 2009 SCC 31 at para 50.

<sup>119</sup> *Ibid* at paras 50–54.

The next step in the *Oakes* test requires a court determination on whether the statute has a pressing and substantial objective. Only state actions that have a pressing and substantial objective are important enough to justify limiting *Charter* rights.<sup>120</sup> This stage focuses on the legislation's purpose.<sup>121</sup> The purpose of *Immunization of School Pupils Act* is the "protection of the health of children against the diseases that are designated diseases under this Act."<sup>122</sup>

A purpose will be considered pressing if it aims to realize public objectives of fundamental importance.<sup>123</sup> In *JTI*, the Supreme Court acknowledged that legislation that seeks to protect the health of Canadians and respond to a public health problem meets the threshold of pressing and substantial.<sup>124</sup> Furthermore, the Supreme Court has also concluded that legislation that specifically targeted the protection of children from a particular evil was a pressing and substantial concern.<sup>125</sup> Given the purpose of the *Immunization of School Pupils Act* and the evidence of the harms caused by the listed childhood diseases, it is a pressing and substantial concern.

The addition of COVID-19 to the list of designated diseases is also consistent with the purpose of protecting the health of children and the public. Although the health outcomes for many children appear to be mild,<sup>126</sup> a number of children have suffered serious health effects, including death.<sup>127</sup> While the vaccines have not yet been tested or approved for use in children, we are assuming that once COVID-19 vaccines are approved for children that they will be safe and effective in children and will therefore protect the health of most children. The COVID-19 vaccine will, however, have another important advantage that makes it different from other routine childhood vaccinations. Unlike other childhood vaccinations, one of the primary benefits of vaccinating children against COVID-19 is the potential protection of older populations. As discussed above, the health outcomes of children who contract COVID-19 appear to be less serious than for older populations, where morbidity and mortality rates are significantly higher.<sup>128</sup> It is also possible that the vaccine will be more effective in younger populations.<sup>129</sup> As a result, vaccinating younger populations could be

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<sup>120</sup> *R v Keegstra*, [1990] 3 SCR 697 at 744.

<sup>121</sup> *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 [*RJR-MacDonald*]; see also Michael D Parrish, "On Smokes and *Oakes*: A Comment on *RJR-MacDonald Inc. v. Canada (A.G.)*" (1997) 24:3 Man LJ 667 at 677. A court "may deal both with the primary goal of an enabling law and with collateral concerns resulting from measures adopted to achieve this goal": *Hutterian*, *supra* note 91 at para 44.

<sup>122</sup> *Supra* note 5, s 2.

<sup>123</sup> *Oakes*, *supra* note 115 at 136; see also *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 37 [*JTI*].

<sup>124</sup> The Supreme Court concluded that public health was a pressing and substantial objective. In *JTI*, *ibid* at para 38 the Supreme Court stated "Parliament has stated its overall objective broadly: protecting the health of Canadians and responding to a national public health problem. No one disputes the importance of this objective."

<sup>125</sup> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 990.

<sup>126</sup> Xiaoxia Lu et al, "SARS-CoV-2 Infection in Children" (2020) 382:17 New Eng J Med 1663; CDC COVID-19 Response Team, "Coronavirus Disease 2019 in Children — United States, February 12–April 2, 2020" (2020) 69:14 Morbidity & Mortality Weekly Report 422 [CDC Response Team].

<sup>127</sup> Lu et al, *ibid*; Timothy Robertson et al, "Early Estimates of the Indirect Effects of the COVID-19 Pandemic on Maternal and Child Mortality in Low-Income and Middle-Income Countries: A Modelling Study" (2020) 8:7 The Lancet Global Health E901.

<sup>128</sup> Lu et al, *ibid*; CDC Response Team, *supra* note 126.

<sup>129</sup> Byram W Bridle & Shayan Sharif, "Why Vaccines are Less Effective in the Elderly, and What it Means for COVID-19," online: <[www.theconversation.com/why-vaccines-are-less-effective-in-the-elderly-and-what-it-means-for-covid-19-141971](http://www.theconversation.com/why-vaccines-are-less-effective-in-the-elderly-and-what-it-means-for-covid-19-141971)>.

critical to protecting the elderly if reduced infectivity is established.<sup>130</sup> Given the evidence of the health benefits of COVID-19 vaccination for children and the broader public, it is likely to meet the pressing and substantial test.

Lawmakers may also argue that there are other purposes that support mandatory COVID-19 vaccination for children. The court may be asked to consider the broader impacts of the COVID-19 pandemic in determining whether mandatory vaccination is a public objective of fundamental importance. As described above, this pandemic has had significant consequences in Canada and abroad: it has shuttered schools and businesses, closed borders, and devastated economies across the globe.<sup>131</sup> A mandatory vaccination program may well be justified on other grounds, such as protecting the overall well-being of society and safeguarding the economy.

In the final part of the *Oakes* test, the court considers the proportionality test: is the legislation rationally connected to the objective, does it impair the right in a minimal fashion, and is it proportionate in effect?<sup>132</sup>

At this stage of the analysis, the government will have to establish that the means the government adopted in the *Immunization of School Pupils Act* is rationally connected to the legislation's objective.<sup>133</sup> The threshold for this requirement is low; at minimum "it must be possible to argue that the means may help to bring about the objective."<sup>134</sup> This stage does not require proof that the means will bring about the objective. Furthermore, the Supreme Court has recognized that in situations involving complex social problems, deference may be appropriately granted to the government.<sup>135</sup>

It is highly unlikely that the *Act* would fail at this stage. Public health is a complex social issue that requires significant government resources and a multitude of government initiatives. The eradication and treatment of the diseases designated in the *Act* can be dealt with in numerous ways, including vaccination programs, education programs, and treatment programs (should an outbreak occur). As a result of the potential inability to form a consensus on the best means to increase vaccination rates, the legislature should be accorded "considerable deference."<sup>136</sup> Thus, the question remains whether the removal of the religious or conscience belief exemption from the *Immunization of School Pupils Act* is rationally connected to the public health purpose of protecting school children from the dangers associated with the designated disease.

There is a clear link between vaccination and the control of outbreaks of the designated diseases; countless scientific studies have demonstrated the effectiveness of vaccinations in

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<sup>130</sup> Alberto Giubilini, Julian Savulescu & Dominic Wilkinson, "COVID-19 Vaccine: Vaccinate the Young to Protect the Old?" (2020) 7:1 JL & Biosciences 1.

<sup>131</sup> "Coronavirus: Here's What's Happening in Canada and Around the World on March 13," *CBC* (13 March 2020), online: <[www.cbc.ca/news/canada/coronavirus-updates-1.5496334](http://www.cbc.ca/news/canada/coronavirus-updates-1.5496334)>.

<sup>132</sup> *Lavoie v Canada*, 2002 SCC 23 at para 53.

<sup>133</sup> The Supreme Court has noted that few cases fail this stage. *JTI*, *supra* note 123 at para 40.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid* at para 43.

<sup>136</sup> *Ibid* at para 41.

preventing the spread of diseases.<sup>137</sup> Additionally, the designated diseases are ones that spread easily among children or have particularly bad health outcomes for children.<sup>138</sup> As such, vaccinating school-aged children against such diseases is sound medical practice. Furthermore, to ensure the greatest protection for the general population, a vaccination rate of close to 100 percent of the population is a scientifically sound goal. Ontario has communities that have vaccination rates that fall below the critical levels needed to sustain herd immunity.<sup>139</sup> Moreover, recent studies in the US have shown that states that do not allow religious or conscience belief exemptions have higher vaccinations rates than states that allow them.<sup>140</sup> Finally, the Supreme Court has already acknowledged that the government should be granted “considerable deference” in the legislation it chooses to adopt to combat the difficult social problem and the government does not have to prove that its chosen method will produce a higher vaccination rate.<sup>141</sup> Based on all of the above, it would seem highly likely that a court would be able to find a rational connection between the elimination of religious and conscience belief exemptions and the stated objective of protecting children from the designated diseases.

Will a court reach the same conclusion for COVID-19 vaccines? In determining whether there is a rational connection for adding COVID-19 to the list of designated diseases and removing the religious or conscience belief exemption, the court will consider a range of factors, most notably the efficacy and safety of the vaccine. Unfortunately, much remains unknown about the immunology of COVID-19 and the emerging COVID-19 vaccines. There appears to be ample evidence that COVID-19 spreads easily among children and from children to adults.<sup>142</sup> A vaccine that effectively reduces the spread of COVID-19 will certainly result in reduced illness. However, there is variability in how effective the vaccines are. How will efficacy differ between younger populations and older populations? Will boosters be required to ensure immunity? Further, unlike other childhood vaccinations, the court will be called on to consider not only the effectiveness of the vaccine in protecting the health of children, but also the health of the broader community, especially older populations. Of course, the more effective the vaccine in protecting the health of children and the public, the more likely it will be for the court to find a rational connection.

There will also be greater uncertainty about the safety of the COVID-19 vaccine in children. The development of the COVID-19 vaccine is exceptionally short. Most childhood

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<sup>137</sup> See Part II, above. See also, Centers for Disease Control and Prevention, “Impact of Vaccines Universally Recommended for Children-United States, 1900-1998” (1999) 48:12 *Morbidity & Mortality Weekly Report* 243; Huong Q Nguyen, Aisha O Jumaan & Jane F Seward, “Decline in Mortality Due to Varicella after Implementation of Varicella Vaccination in the United States” (2005) 352:5 *New Eng J Med* 450.

<sup>138</sup> Allan J Jacobs, “Needles and Notebooks: The Limits of Requiring Immunization for School Attendance” (2010) 33:2 *Hamline L Rev* 171 at 175.

<sup>139</sup> These communities are now susceptible to vaccine-preventable diseases. See Iorfida, *supra* note 4. See also GH Lim, MA McIntyre & S Wilson, “Immunization Coverage and Exemptions Among Ontario’s School Pupils for 2011-12: Findings and Implications for Future Information Systems,” online: <[www.web.archive.org/web/20181225031127/publichealthontario.ca/en/LearningAndDevelopment/Events/Documents/Immunization\\_Coverage\\_exemptions\\_2013.pdf](http://www.web.archive.org/web/20181225031127/publichealthontario.ca/en/LearningAndDevelopment/Events/Documents/Immunization_Coverage_exemptions_2013.pdf)> at 18–19 for a history of the use of religious and conscience belief objections in Ontario.

<sup>140</sup> Linnea Nasman, “Philosophical Vaccine Exemptions and Their Risk to Public Health” (2013) 21 *LBJ J Public Affairs* 69 at 80.

<sup>141</sup> *JTI*, *supra* note 123 at para 41.

<sup>142</sup> Taylor Heald-Sargent et al, “Age-Related Differences in Nasopharyngeal Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Levels in Patients With Mild to Moderate Coronavirus Disease 2019 (COVID-19)” (2020) 174:9 *JAMA Pediatrics* 902.

vaccinations are developed and tested over a 15 year period.<sup>143</sup> By contrast, the COVID-19 vaccine was developed in roughly one year.<sup>144</sup> This means that the initial vaccines have not have been fully tested on children and vaccine safety will be determined, in large part, through post market surveillance. The absence of long-term safety data may mean that parents will be more reluctant to vaccinate their children.

Unlike with other routine immunizations, a court will not have evidence before it to show whether prohibiting a religious or conscience belief exemption will result in higher vaccination rates. Experience from other jurisdictions with standard vaccinations appears to indicate that a mandatory COVID-19 vaccine will result in higher vaccination rates.<sup>145</sup> However, it could be argued that mandating a COVID-19 vaccine where there is a higher level of uncertainty regarding the safety and efficacy of the vaccine may not result in higher vaccination rates for COVID-19 and in fact may have the unintended effect of lowering vaccination rates not only for COVID-19 but for other diseases as well. This would be particularly true if safety issues arise with the vaccine.

Once the court has determined that the issue is pressing and substantial and that there is a rational connection, it will then have to determine whether the legislation is minimally impairing.<sup>146</sup> This requires that the legislature demonstrates that it has crafted the legislation to ensure that the rights impacted by the impugned law are infringed upon no more than absolutely necessary.<sup>147</sup>

The Supreme Court has acknowledged that it may be difficult for the government to perfectly tailor the legislation.<sup>148</sup> As such, the government will only have to demonstrate that the limits on the *Charter* rights were reasonably tailored to the situation.<sup>149</sup> As the Supreme Court stated, “Parliament is not required to choose the absolutely least intrusive alternative in order to satisfy this branch of the analysis. Rather the issue is ‘whether Parliament could reasonably have chosen an alternative means which would have achieved the identified objective as effectively.’”<sup>150</sup>

Similar to the pressing and substantial branch of the test, deference will be granted to the legislature to tailor legislation in the method that it deems to be the least intrusive. The level of deference depends on the context; difficult social issues are granted more deference because precision in the legislation is often elusive.<sup>151</sup> Despite the requirement for deference, it may prove difficult to demonstrate that the *Immunization of School Pupils Act* is minimally impairing if the religious and conscience belief exemption is removed.

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<sup>143</sup> “Vaccine Development, Testing, and Regulation,” online: <[www.historyofvaccines.org/content/articles/vaccine-development-testing-and-regulation](http://www.historyofvaccines.org/content/articles/vaccine-development-testing-and-regulation)>.

<sup>144</sup> Amina Zafar, “‘We Have a Whole Globe to Protect’: Pandemic Vaccine Research Speeds Up,” *CBC News* (16 April 2020), online: <[www.cbc.ca/news/health/covid-vaccine-trials-accelerate-1.5533797](http://www.cbc.ca/news/health/covid-vaccine-trials-accelerate-1.5533797)>.

<sup>145</sup> See Liam Drew, “Forcing the Issue” (2019) 575 *Nature* S58.

<sup>146</sup> For a discussion on why the minimal impairment standard may be met, see Froc, *supra* note 112.

<sup>147</sup> *RJR-MacDonald*, *supra* note 121 at para 160.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62 [*Montréal (City)*].

<sup>150</sup> *R v Downey*, [1992] 2 SCR 10 at 37 [citations omitted].

<sup>151</sup> *Ontario v Canadian Pacific Ltd.*, [1995] 2 SCR 1031; *Montréal (City)*, *supra* note 149 at para 94.



By completely removing the religious or conscience belief exemption, it would be difficult to argue that section 2(a) rights are minimally impaired. Although jurisprudence has shown that Ontario does not have to wait until something becomes harmful to public health and safety before the legislature can act, the safety concerns must “be unequivocally established for the infringement of a constitutional right to be justified.”<sup>152</sup> This high threshold has not yet been met.

At present, while outbreaks do occur, childhood diseases, in most instances, are controlled. Outbreaks are typically localized.<sup>153</sup> Moreover, in the majority of communities, although the vaccination rate is dropping, vaccination rates have not yet fallen to critical levels that threaten the general public.<sup>154</sup> Additionally, courts have viewed vaccinations as preventative measures, and not life-saving.<sup>155</sup> This designation may mean that courts will be wary of forced intervention that does not give any leeway to protect religious rights. At this time, Ontario has flexibility to develop its vaccinations programs in a manner that encourages vaccinations, including through adopting community based champions, limiting time on exemptions, and so on, but does not coerce parents through the removal of the religious and conscience belief exemption.

The minimal impairment analysis for a mandatory COVID-19 vaccine without exemptions will require the court to examine a number of different considerations. On the one hand, the current public health crisis poses a much greater threat to the general public. Unlike other childhood diseases such as measles which are well-controlled, COVID-19 poses a significant threat to the public health, especially elderly populations.<sup>156</sup> In addition, the courts will likely consider the significant impact of this pandemic on the economy. Given the gravity and complexity of this public health crisis, courts may well give more deference to the government in tailoring an appropriate legislative response.

Nevertheless, there are a number of important reasons why completely removing the religious or conscience belief exemption may make it difficult for the government to argue that constitutional rights are being minimally impaired. Unlike other childhood vaccinations which have an excellent long-term safety record, there will be less evidence about the long-term safety of the COVID-19 vaccine in children.<sup>157</sup> As a result, many parents may be concerned about the safety of the vaccine and more reluctant to vaccinate their children. These safety concerns will likely be more acute because of the lack of any government compensation scheme for children who experience an adverse reaction. Canada was the only G7 country that did not provide compensation to individuals who suffer vaccine-related

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<sup>152</sup> *Multani*, *supra* note 93 at para 67.

<sup>153</sup> Alison Buttenheim, Malia Jones & Yelena Baras, “Exposure of California Kindergartners to Students With Personal Belief Exemptions From Mandated School Entry Vaccinations” (2012) 102:8 *American J Public Health* e59 at e60. The precautionary principle states that complete evidence of benefit or harm does not have to exist before measures are introduced to protect against a harm. Thus, while arguments will be made about how definitive this evidence is, the threshold for action in public health is less than the threshold to introduce a medical therapy in the healthcare system. Again, this may become a key consideration given the uncertainty around the COVID-19 vaccine and the significant impact of COVID-19 on society.

<sup>154</sup> See Iorfida, *supra* note 4.

<sup>155</sup> See *JP (Re)*, *supra* note 76, where it was concluded that vaccinations are not life-saving interventions.

<sup>156</sup> Smirti Mallapaty, “The Coronavirus is Most Deadly if You Are Old and Male” (2020) 585 *Nature* 16, online: <[www.nature.com/articles/d41586-020-02483-2](http://www.nature.com/articles/d41586-020-02483-2)>.

<sup>157</sup> “Vaccine Safety,” *supra* note 28.

injuries (though the province of Quebec does have a no-fault compensation program); however, the federal government has recently announced its intention to launch such a program.<sup>158</sup> The decision of the many governments to indemnify manufacturers from harm resulting from a COVID-19 vaccine potentially exacerbates these concerns.<sup>159</sup>

The court will likely also consider the efficacy of other less minimally impairing approaches to reducing the spread of COVID-19 such as mandatory vaccinate-or-mask policies for children at school, a more rigorous or onerous religious or conscience exemption process where the exemption needs to be renewed every year,<sup>160</sup> and so on.

Given the high threshold for removing a religious or conscience exemption, it will likely be difficult for the government to satisfy the minimal impairment threshold.

The final step in the *Oakes* test is determining the proportionate effect. In *Hutterian*, the Supreme Court clarified the purpose of this step:

It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis — pressing goal, rational connection, and minimum impairment — could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law’s purpose. Only the fourth branch takes full account of the “severity of the deleterious effects of a measure on individuals or groups.”<sup>161</sup>

The focus, at this stage, is on *Charter* values, including: “liberty, human dignity, equality, autonomy, and the enhancement of democracy.”<sup>162</sup> More specifically, in the section 2(a) analysis, the focus is on the liberty element and whether the law forces a religious or conscience belief value on an individual.<sup>163</sup> It is likely that any such analysis would conclude that the legislation, if it did not include a religious or conscience belief exemption, is disproportionate.

The salutary effects of a mandatory immunization program are notable: the elimination or potential eradication of harmful childhood diseases is a laudable cause. Moreover, there are even benefits associated with removing religious or conscience belief objections, namely, potential higher rates of vaccination. Higher rates of vaccination are important to ensure herd immunity and therefore the protection of public health.<sup>164</sup>

<sup>158</sup> Randy G Mungwira et al, “Global Landscape Analysis of No-Fault Compensation Programmes for Vaccine Injuries: A Review and Survey of Implementing Countries” (2020) 15:5 PLOS ONE 1; Public Health Agency of Canada, News Release, “Government of Canada Announces Pan-Canadian Vaccine Injury Support Program” (10 December 2020), online: <[www.canada.ca/en/public-health/news/2020/12/government-of-canada-announces-pan-canadian-vaccine-injury-support-program.html](http://www.canada.ca/en/public-health/news/2020/12/government-of-canada-announces-pan-canadian-vaccine-injury-support-program.html)>.

<sup>159</sup> Ludwig Burger & Pushkala Aripaka, “AstraZeneca to Be Exempt from Coronavirus Vaccine Liability Claims in Most Countries,” *Reuters* (30 July 2020), online: <[www.reuters.com/article/us-astrazeneca-results-vaccine-liability/astrazeneca-to-be-exempt-from-coronavirus-vaccine-liability-claims-in-most-countries-idUSKCN24V2EN](http://www.reuters.com/article/us-astrazeneca-results-vaccine-liability/astrazeneca-to-be-exempt-from-coronavirus-vaccine-liability-claims-in-most-countries-idUSKCN24V2EN)>.

<sup>160</sup> This is consistent with clinical guidelines. See also Douglas S Dickema, “Personal Belief Exemptions from School Vaccination Requirements” (2014) 35 Annual Rev Public Health 275 at 287.

<sup>161</sup> *Supra* note 91 at para 76. See generally Sara Weinrib, “The Emergence of the Third Step of the *Oakes* Test in *Alberta v Hutterian Brethren of the Wilson Colony*” (2010) 68:2 UT Fac L Rev 77.

<sup>162</sup> *Hutterian*, *ibid* at para 88.

<sup>163</sup> *Ibid*.

<sup>164</sup> Paul Fine, Ken Eames & David L Heymann, “‘Herd Immunity’: A Rough Guide” (2011) 52:7 Clinical Infectious Diseases 911 at 911.

In this analysis, problems arise when examining the deleterious effects of legislation that has no religious or conscience belief exemption. Courts have already ruled that vaccinations are preventative measures rather than ones that are medically necessary.<sup>165</sup> Forcing an invasive medical procedure onto an unwilling patient, or contrary to parental wishes, is a significant infringement on that individual's rights and personal autonomy.<sup>166</sup> More importantly, forced vaccinations remove a person's ability to practice his or her religion or conscience belief and forces the person to decide between vaccination and his or her right to educate their child in the public system.<sup>167</sup> It is state compulsion and the Supreme Court has stated that such compulsion is always a serious *Charter* breach.<sup>168</sup> Given the significant violation on the protected *Charter* rights, we argue the individual detrimental effects of the forced immunizations outweigh the potential benefits associated with removing the religious and conscience belief exemption.

The salutary effects of a mandatory childhood COVID-19 vaccine are significant. Mandatory vaccination will protect the health of children and potentially offers critical protection to vulnerable and elderly populations since the vaccine will likely have variable efficacy in these populations.<sup>169</sup> It is critical to underscore this point — unlike other childhood vaccinations, the greatest salutary effects of the COVID-19 vaccine are not for the children who are being immunized but rather for vulnerable and elderly populations. Another important salutary effect of a mandatory vaccination and the resulting widespread immunity against COVID-19 is the reopening of society and the economy.<sup>170</sup>

As with other mandatory childhood vaccinations, it is likely that the deleterious effects outweigh the salutary effects. Mandatory vaccination not only forces someone to undergo an invasive medical procedure, it also forces them to decide between vaccination and educating their children in the public school system.

#### **D. SECTION 7: LIFE, LIBERTY, AND SECURITY OF THE PERSON**

In addition to section 2(a), compelling arguments challenging mandatory vaccination laws can also be made under section 7.<sup>171</sup> Section 7 of the *Charter* states: “[e]veryone 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.”<sup>172</sup> The Supreme Court has adopted a two stage analysis to determine whether there has been an infringement: (1) the claimant

<sup>165</sup> *JP (Re)*, *supra* note 76 at paras 31, 39–40.

<sup>166</sup> *Hutterian*, *supra* note 91 at para 88. See also *JP (Re)*, *ibid*.

<sup>167</sup> *Hutterian*, *ibid*.

<sup>168</sup> *Ibid* at para 91.

<sup>169</sup> Bridle & Sharif, *supra* note 129.

<sup>170</sup> Matt Brand, “Canadian Economy Can’t Fully ‘Relaunch’ Until There’s a Vaccine: Economic Development Minister” *Halifax Today* (27 May 2020), online: <[www.halifaxtoday.ca/local-news/canadian-economy-cant-fully-relaunch-until-theres-a-vaccine-economic-development-minister-2389323](http://www.halifaxtoday.ca/local-news/canadian-economy-cant-fully-relaunch-until-theres-a-vaccine-economic-development-minister-2389323)>.

<sup>171</sup> Vaccine Choice Canada has filed a claim challenging the constitutionality of Ontario’s *Immunization of School Pupils Act*. The statement alleged that the laws violated sections 2(a), (b) and 7 of the *Charter*. See *Vaccine Choice Canada v Ontario (AG)* (24 October 2019), Toronto CV-19-006298100000 (Ont Sup Ct.J) (Statement of Claim), online: <<https://vaccinechoiccanada.com/wp-content/uploads/vcc-soc-ontario-redacted-october-24-2019.pdf>>.

<sup>172</sup> *Supra* note 8.

must prove that the state has deprived them of either their right to life,<sup>173</sup> liberty,<sup>174</sup> or security of the person;<sup>175</sup> and (2) the claimant must demonstrate that the deprivation is contrary to the principles of fundamental justice.<sup>176</sup>

After the claimant has established a violation of section 7, the government is given the opportunity to justify the law under section 1. Historically, there has been uncertainty surrounding the application of a section 1 justification for a violation of the section 7 rights; however, the Supreme Court has recently clarified the relationship between the two sections. The Supreme Court found that despite “parallels between the rules against arbitrariness, overbreadth, and gross disproportionality under s. 7 and elements of the s. 1 analysis for justification of laws that violate *Charter* rights[, t]hese parallels should not be allowed to obscure the crucial differences between the two sections.”<sup>177</sup> In a section 7 analysis the Supreme Court is concerned with “the narrower question of whether the impugned law infringes individual rights,” whereas, “justification on the basis of an overarching public goal is at the heart of s. 1.”<sup>178</sup> Despite these differences, the Supreme Court has maintained that the government will only be able to justify such an infringement in rare circumstances.<sup>179</sup>

#### E. MANDATORY IMMUNIZATION PROGRAMS AND SECTION 7

Based on the section 7 jurisprudence, mandatory childhood vaccinations programs would likely engage liberty or security of the person interests. Liberty interests may be engaged when the state interferes with parental decision-making. Specifically, section 7 liberty rights can be engaged when parents make fundamental decisions regarding their child’s medical

<sup>173</sup> In *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 62, the Supreme Court found that “the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly.” Issues surrounding autonomy and quality of life fall under the umbrella of the right to liberty or security of the person.

<sup>174</sup> The right to liberty encompasses more than the right to physical liberty. See *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44. Section 7 protects a myriad of liberty interests including those tied to the right to make fundamental life choices. In *B (R)*, *supra* note 71, the Supreme Court found that parental decision-making, particularly as it related to the child’s health and education, was protected by the right to liberty found in section 7.

<sup>175</sup> Security of the person has both physical and psychological aspects: *Morgentaler*, *supra* note 100 at 162–63. Not all state interference that causes stress or anxiety is a violation of security of the person, rather “the impugned state action must have a serious and profound effect on a person’s psychological integrity”: *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 60 [*G(J)*]. In terms of state interference in parental decision-making, the Supreme Court has recognized that such interference can potentially rise to the level of a section 7 violation. This determination is based on a contextual analysis and is more likely to occur when the state interferes with “psychological integrity of the parent *qua* parent”: *ibid* at para 64.

<sup>176</sup> In *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 503 [*BC Motor Vehicle*], the Supreme Court concluded that “[t]he principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.” The Supreme Court has since identified specific principles of fundamental justice that have emerged as dominant considerations: arbitrariness, overbreadth, and gross disproportionality: *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 45 [*Bedford*]. The Supreme Court has also concluded that the “best interests of the child” is not a principle of fundamental justice: *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 7.

<sup>177</sup> *Bedford*, *ibid* at para 124.

<sup>178</sup> *Ibid* at para 125.

<sup>179</sup> *Ibid* at para 129. In earlier jurisprudence, the Supreme Court has stated that such an infringement may only be justified “in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like”: *BC Motor Vehicle*, *supra* note 176 at 518; *G(J)*, *supra* note 175 at para 99.

treatment.<sup>180</sup> Forced vaccinations of children, contrary to a parent's beliefs, engage the liberty interest protected by section 7. The Supreme Court has also stated that a person's status as a parent is a fundamental aspect of that individual's identity. State interference with parental decision-making, particularly decision-making that interferes with "the psychological integrity of the parent *qua* parent"<sup>181</sup> can amount to a violation of the security of person. The court will need to assess whether the state "is making ... pronouncement[s] as to the parent's fitness or parental status ... usurping the parental role or prying into the intimacies of the relationship."<sup>182</sup> It could be argued that removing parental decision-making on vaccinations is usurping the traditional parental role.

The analysis would then turn to focus on whether the laws were in accordance with the principles of fundamental justice. In the context of childhood vaccinations, the analysis would likely turn on whether these laws were arbitrary or overbroad. A law will be considered arbitrary if there is no connection between the law's objective (in the case of the mandatory childhood vaccinations the objective would be the increasing public health and controlling the outbreak of communicable disease) and the effect of the law (forced vaccinations contrary to parental wishes). Overbreadth occurs when "the law goes too far and interferes with some conduct that bears no connection to its objective."<sup>183</sup> Forcing medical intervention on a child, contrary to parental wishes, as a preventative measure is a significant intrusion and the benefits that may arise are minimal. A law that fails to consider a parent's religious and conscience beliefs may be contrary to the principles of fundamental justice.

Finally, while much of the section 1 analysis described above would be applicable in evaluating whether a section 7 breach can be justified under section 1, the Supreme Court has stated that such a justification will be more difficult to establish following a section 7 breach.<sup>184</sup> A global pandemic, like the current one, may make such justifications easier.<sup>185</sup>

## VII. NEGATIVE IMPACT OF MANDATORY POLICIES

There are valid arguments that can be made that a decision to remove the religion and conscience belief exemption is unconstitutional. The ability of the state to impose a medical procedure on a child against the wishes of the parent is a serious consideration with important legal and ethical implications.

Additionally, since childhood immunization programs in Canada are tied with school entry requirements, such a decision may also have potentially negative public health consequences if these individuals withdraw their children from the public school system and enroll in alternative school systems. In this scenario, herd immunity is more likely to drop due to low vaccine coverage — a scenario noted in certain religious communities. Nevertheless, given the evidence for these policies and the current re-emergence of vaccine-preventable disease, the benefits to the public may outweigh the infringements on a parent's right to choose.

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<sup>180</sup> *B(R)*, *supra* note 71.

<sup>181</sup> *G(J)*, *supra* note 175 at para 64.

<sup>182</sup> *Ibid* at para 64.

<sup>183</sup> *Bedford*, *supra* note 176 at para 101.

<sup>184</sup> *Ibid* at para 129.

<sup>185</sup> *Ibid*. See also *BC Motor Vehicle*, *supra* note 176 at 518.

In order to proceed with removing non-medical exemptions, some basic tests need to be applied. This includes considering whether all other less restrictive measures have been attempted. For hard-to-reach religious communities, finding champions to act as vaccine advocates has been documented to be effective at increasing vaccine uptake.<sup>186</sup> However, in these cases vaccine hesitancy is a secondary consequence of religious identity. In the case of many who staunchly oppose vaccination for philosophical reasons, their position on vaccines is more entrenched in their personal identity, and these approaches are less likely to work. Another solution would be to restructure, rather than eliminate, the religious and conscience belief exemption.

### VIII. RESTRUCTURING THE RELIGIOUS OR CONSCIENCE BELIEF EXEMPTIONS

Although this article does argue that removing religious and conscience belief exemptions from mandatory vaccination programs would be unconstitutional, it also recognizes that the growing public health concern arising from dropping vaccine rates needs to be addressed. All this begs the question, if mandatory vaccination programs need to maintain or implement a religious or conscience belief exemption, what avenues are left to the government to compel parents to vaccinate their children?

The answer lies in limiting and altering access to the religious and conscience belief exemption. Many jurisdictions have experimented with how to structure religious and conscience belief exemption beyond a simple inclusion or exclusion of the exemption.<sup>187</sup> These alternatives encourage vaccinations but do not force them. These approaches also closely align with the best interests of the child. Vaccinations are the preferred choice, however doing so against parental wishes is not always in the best interest of the child. This article will examine two proposals: mandatory education seminars and a time limit for the religious or conscience belief exemptions. These proposals could work in Canada; in fact, Ontario, has recently adopted educational seminars.<sup>188</sup>

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<sup>186</sup> World Health Organization, “Overcoming Challenges in the Immunization Programme with Vaccine Heroes,” online: <[www.who.int/philippines/news/feature-stories/detail/overcoming-challenges-in-the-immunization-programme-with-vaccine-heroes](http://www.who.int/philippines/news/feature-stories/detail/overcoming-challenges-in-the-immunization-programme-with-vaccine-heroes)> [WHO, “Overcoming Challenges”].

<sup>187</sup> See WAC § 246–105–050 (2020). This legislation requires parents to attend a meeting with a health care professional prior to being granted a philosophical exemption. Arkansas also considered new legislation for philosophical objections. During the preliminary drafting stages for the philosophical objection, the State requested input from the Arkansas Chapter of the American Academy of Pediatrics, the Johns Hopkins Institute for Vaccine Safety, the Johns Hopkins Center for Law and the Public’s Health, and the Arkansas Medical Society. The group proposed legislation that included independent counselling for parents seeking an exemption for the child, swearing a statement regarding the sincerity of the parent’s belief and that the parent understands the potential harms of failing to vaccinate, and annually renewing the exemption. The draft legislation also allows the health department to deny the request for an exemption if there are community health risks. See Daniel A Salmon et al, “Draft Exemption,” online: <[web.archive.org/web/20190509204755/https://www.vaccinesafety.edu/DraftExemption.htm](http://web.archive.org/web/20190509204755/https://www.vaccinesafety.edu/DraftExemption.htm)>. See Poreda, *supra* note 27 at 798–801. See generally Ross D Silverman, “No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection” (2003) 12:2 *Annals Health L* 277.

<sup>188</sup> Ministry of Health and Long-Term Care, “Immunization 2020: Modernizing Ontario’s Publicly Funded Immunization Program,” online: <[www.health.gov.on.ca/en/common/ministry/publications/reports/immunization\\_2020/immunization\\_2020\\_report.pdf](http://www.health.gov.on.ca/en/common/ministry/publications/reports/immunization_2020/immunization_2020_report.pdf)>.

## A. MANDATORY EDUCATION SEMINARS

In 2017, Ontario introduced mandatory education sessions for parents wishing to obtain a religious or conscience belief exemption for their child.<sup>189</sup> These sessions provide the government with an opportunity to counter any misinformation that a parent has encountered about vaccinations, reassure vaccine-hesitant parents, and ultimately persuade some parents to vaccinate their child.<sup>190</sup> If, after attending the seminar, the parent still objects to immunizing his or her child, the parent may then request a religious or conscience belief exemption.

While there is a debate about the effectiveness of such a program, the question also remains whether such a proposal is constitutionally viable. We believe that the mandatory education sessions do comply with *Charter* provisions. As discussed above, the freedom of conscience and religion requires that an individual prove two requirements: first, that the belief has a nexus with religion and second, that the law interferes with the right in a manner that is more than trivial or insubstantial. While the choice to forego vaccinating your child may be properly characterized as a valid religious or conscience belief and would likely meet the first stage of the section 2(a) test, it could be argued that such an imposition is merely trivial and insubstantial.

The mandatory education seminars do not compel a person to vaccinate or choose between a religious or conscience belief and the right to attend a public school; rather, a mandatory education seminar requires a parent to listen to scientifically based evidence on vaccinations. In *Hutterian*, the Supreme Court stated that minor inconveniences or small fees are not enough to trigger a section 2(a) violation.<sup>191</sup> The time involvement would be minimal and there is no charge for attending the session. Attending a class is nothing more than a minor

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<sup>189</sup> Ontario Government, "Vaccines," *supra* note 61. Ontario has chosen the Public Health Unit to deliver its vaccination message; this is an alternative that other provinces should also consider. First, by having the information disseminated through provincial health units, the government ensures that the message being given is the same to each individual seeking an exemption. This also reduces resource demands on family doctors to hold lengthy discussions with vaccine hesitant patients. This service also fits into the Ontario Public Health Units public education mandate. See Ontario Government, "Health Care Options," online: <[www.health.gov.on.ca/en/public/programs/hco/options/phu.aspx](http://www.health.gov.on.ca/en/public/programs/hco/options/phu.aspx)>.

<sup>190</sup> Ontario Government, "Vaccines," *ibid*. While misinformation about vaccinations is an often-cited reason for the failure to vaccinate, mandatory education on vaccinations may not correct these misconceptions. A study on the effectiveness of vaccine education (in relation to the MMR vaccine) has found that the more information given to a parent, the more resistant a parent becomes: Brendan Nyhan et al, "Effective Messages in Vaccine Promotion: A Randomized Trial" (2014) 133:4 *Pediatrics* e835. This study applied to a situation that is different from the one proposed. This was an analysis of a general public health campaign (pictures and narratives on the MMR were given to the general public) and was not specifically done in a classroom environment to a group of vaccine-hesitant parents who would be receiving a tailored message. There has been some evidence to show that Ontario's new mandatory education session has had only limited success. See Kirkey, *supra* note 61. There could be many reasons for the lack of success, including the use of a government video (as opposed to a one-on-one discussion). Moreover, the content of the video is also critical. Some studies have shown the anti-vaxxers can change their opinions depending on how the pro-vaccination message is delivered. See Deborah K Johnson et al, "Combating Vaccine Hesitancy with Vaccine-Preventable Disease Familiarization: An Interview and Curriculum Intervention for College Students" (2019) 7:2 *Vaccines* 39. See also Jeffrey Kluger, "How to Change an Anti-Vaxxer's Mind," *Time Magazine* (3 August 2015), online: <[www.time.com/3982723/changing-minds-vaccines/](http://www.time.com/3982723/changing-minds-vaccines/)>. Even if the mandatory seminars do not cause parents to change their mind, it still has the effect of restricting the exemption. This may cause individuals to no longer view non-immunization as a time saver. Such a measure will discourage free loaders (see Fine, Eames & Heymann, *supra* note 164) and reserve the exemption for those who have a legitimate religious or conscience belief objection.

<sup>191</sup> *Hutterian*, *supra* note 91 at para 32.

inconvenience. It is therefore unlikely that a court would conclude that this is a violation of the freedom of religion or conscience.

This approach would also not likely contravene section 7. The stress caused by having to attend a mandatory education seminar would not reach the threshold to engage security of the person. As the Supreme Court stated, “[f]or a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person’s psychological integrity.... [It] need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.”<sup>192</sup> Nor would liberty rights be engaged because a parent is still free to make the ultimate decision over their child’s health.

In the alternative, even if the court found that *Charter* rights were violated, it is likely that these seminars would be saved under section 1. Once again, the legislation would easily pass the first steps: prescribed by law and a pressing and substantial objective. The amendment is found in the *Immunization of School Pupils Act* and is therefore prescribed by law. The purpose of the *Immunization of School Pupils Act* remains the same: children’s health and safety, which is a pressing and substantial issue. There is also a rational connection between mandatory classes prior to granting an exemption and the goal of protecting and eradicating the listed childhood diseases. A mandatory class will allow parents who were unsure of all the medical effects of vaccinations to make an educated choice, and may result in a higher vaccination rate. At this stage, the efficacy of the mandatory education seminars is not at debate. The contentious issues would be whether the law was minimally impairing and proportionate in effect.

Such a proposal should pass the minimally impairing portion of the *Oakes* test. While parents are obliged to attend a seminar, the time commitment is minimal, and the government message is based on scientifically proven information on vaccines. Furthermore, if the parent still chooses not to vaccinate, they are eligible to file the exemption. In short, barring a court order, no parent would have to vaccinate his or her child against his or her will. The law still allows significant exemptions for religious practices but seeks to reach out to parents who are using the exemption because they are unsure of the scientific evidence supporting vaccinations. Such a law imposes a very minor impairment on a religious or conscience belief right.

Under the proportionality test in *Oakes*, one has to balance the benefits of passing such requirements versus the negative impacts that it will have on the individual. In terms of salutary effects, this law allows the health unit to reach out to individuals who are unsure of the medical benefits and risks of vaccinations and educate them. Further, it may encourage individuals to vaccinate their children. Any child who is vaccinated increases herd immunity and the protection of public health.<sup>193</sup>

While there are benefits to passing laws of this nature, one must also look at the deleterious effects of the proposed legislation and the impact of these laws. In this situation,

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<sup>192</sup> *G(J)*, *supra* note 175 at para 60.

<sup>193</sup> Fine, Eames & Heymann, *supra* note 164.



as discussed, the deleterious impacts are minimal. The individuals are not being forced to alter their religious or conscience beliefs nor are they being forced to choose between obeying a law and their religious or conscience belief. Rather, the law imposes a small inconvenient time burden on the individual, nothing more. A short time commitment is not a significant deleterious effect.<sup>194</sup> The societal benefits of potentially having some parents choose to vaccinate their children outweigh the time burden to the individuals seeking to obtain the exemption.

Although we believe that mandatory seminars are constitutionally valid, we are hesitant to encourage their widespread adoption in mandatory vaccination programs. While the efficacy of these programs is not a constitutional law concern, it is a serious public health consideration. As Ontario's program currently works, parents are grouped in with other vaccine-hesitant individuals, where this exposure may further solidify vaccine hesitancy rather than reduce it. Several studies have also concluded that these types of programs do not necessarily lead to higher vaccination rates.<sup>195</sup> There have been some studies that have shown that these programs can be effective, but the effectiveness can depend on the message and imagery used during these education seminars.<sup>196</sup> In short, before a province considers such a program, it will need to consider issues apart from constitutional law and will need to thoroughly consider the content and messages of these seminars and their overall effectiveness. A similar approach, that has proven effective, is to seek partnerships with community-based champions.<sup>197</sup> This is most effective when dealing with pockets of communities with low immunization rates that are tied to religious objections. This approach could work in conjunction with other proposals to increase overall vaccination rates.

## B. TIME LIMITS ON THE EXEMPTION

A second proposal to restructure religious and conscience belief exemptions is the imposition of a time limit on the exemption.<sup>198</sup> As the law in Ontario currently stands, once a parent files an exemption, the exemption goes on the child's record and remains in effect for the duration of the child's public education.<sup>199</sup> Instead of allowing a life-time exemption, the legislation could be amended to make religious and conscience belief exemptions expire every year. Once the exemption has expired, the parent would have to resubmit the form.

Placing a time limit on religious or conscience belief exemptions serves two important purposes. First, it forces parents to constantly review and re-evaluate their stance on vaccination. This is important for individuals who are using the exemption because they are unsure of the medical evidence surrounding vaccinations because, over time, their opinion may change.<sup>200</sup> Indeed, an annual renewal of the exemption is consistent with clinical practice guidelines which recommend that physicians check in annually with vaccine-hesitant

<sup>194</sup> *Hutterian*, *supra* note 91 at para 95.

<sup>195</sup> Kirkey, *supra* note 61.

<sup>196</sup> Nyhan et al, *supra* note 190.

<sup>197</sup> WHO, "Overcoming Challenges," *supra* note 186.

<sup>198</sup> See generally, Poreda, *supra* note 27.

<sup>199</sup> *Immunization of School Pupils Act*, *supra* note 5.

<sup>200</sup> Doctors who spend more time discussing with vaccine-hesitant parents have more success in changing the parent's opinion: Anna Almendral, "Measles Outbreak: How Doctors Can Change Anti-Vaccine Minds" *NBC News* (7 April 2019), online: <[www.nbcnews.com/health/kids-health/measles-outbreak-how-doctors-can-change-anti-vaccine-minds-n991491](http://www.nbcnews.com/health/kids-health/measles-outbreak-how-doctors-can-change-anti-vaccine-minds-n991491)>.

parents. Second, the law will add a slight deterrent to parents who are freeloaders. Making the exemption so easily accessible and without a time limit can be an incentive since the time commitment to get an exemption, compared to the vaccination process, is minimal. If parents were forced to renew their exemption every year, there is not as great of an incentive to forgo vaccinations and only people who have a genuine religious or conscience belief will continue to use the exemption.

A time limit for the exemption would likely pass constitutional scrutiny. It could be argued that such an amendment would not infringe section 2(a) rights. While it may pass the first step in a section 2(a) analysis, the additional burden of having to file an exemption every year should not be construed as something that is more than trivial or insubstantial. The time and cost associated with imposing a time limit is minimal: individuals will not be stopped from practicing their religion or conscience belief and will not have to choose between compliance with the law and their religion or sincerely held beliefs.<sup>201</sup> This approach would also not likely contravene section 7. The stress caused by having to renew the exemption would not reach the threshold to engage security of the person nor would liberty rights be engaged because a parent is still free to make the ultimate decision over their child's health.

Similar to legislation invoking mandatory classes for the religious and conscience belief exemption, should time limits be found to be in violation of the *Charter*, it would likely be saved by section 1. Once again, the primary points of contention would be the minimal impairment and proportionate effect components of the *Oakes* test. In the minimal impairment analysis, the alternative proposal must still meet the objectives of the legislature. In this scenario, the legislature would be imposing time limits because more individuals are using this exemption and this increase in use may be attributed to a large anti-vaccination movement. A parent's opinion on vaccination may shift over time and the vaccine hesitancy may wane as his or her child grows up.<sup>202</sup> By placing time restrictions on religious and conscience belief exemptions, parents will be forced to, at minimum, re-examine their stance on vaccinations. Parents who maintain a seriously held belief against vaccinations can renew their exemptions. The legislature has tailored the law to allow for religious and conscience belief objections while still attempting to fulfill the objective of protecting children from the designated diseases.

Additionally, laws imposing a time limit on the religious exemption could be viewed as proportionate. There are significant benefits to public health if there is a high vaccination rate; this law may lead to more parents vaccinating their children. The potential health benefits are a significant advantage. The deleterious effects associated with imposing a time limit to the religious or conscience belief exemption are minimal. Again, there is no attempt to stop or alter an individual from practicing his or her religion or forcing him or her to choose between his or her religion and compliance with a law. Rather, the individual will be forced to fill out paperwork. When weighing the benefits (public health benefits) and the deleterious effects (a minimal time commitment to renew the exemption), the potential to protect the general public is greater than the individual inconvenience associated with expiration dates.

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<sup>201</sup> *Hutterian*, *supra* note 91 at para 88.

<sup>202</sup> *Ibid.* See also Poreda, *supra* note 27.

## IX. THE WAY FORWARD: CONCLUSIONS, CONSIDERATIONS, AND RECOMMENDATIONS

In the last decade, there has been a dramatic increase in the anti-vaccination movement. The increased numbers of required vaccinations and an organized anti-vaccination campaign have led to more parents refusing to vaccinate their children. Parents, especially with the increased reliance on the internet for information, may not always find expert medical and scientific opinion on vaccinations, and they form important decisions about their child's health based on misinformation. Parents, using this misinformation, have begun to forego immunizing their child and, in places with mandatory vaccination schemes, have been using the religious and conscience belief exemption to circumvent mandatory vaccination schemes.

To combat increased disease outbreaks and declining vaccination rates, governments have started to re-examine vaccination programs. In jurisdictions with mandatory vaccination schemes, there has been a trend towards limiting religious and conscience belief exemptions. In other jurisdictions, the public has debated as to whether to adopt a mandatory system. Throughout the legal analysis, we highlighted several key issues that should be seriously considered by provinces when they are structuring their childhood immunization laws.

Prior to adopting mandatory vaccination programs or altering the religious and conscience belief exemption, provincial governments should consider a number of different factors. Firstly, provinces need to confirm that other measures have been introduced to ensure that the mandatory policies, if introduced, will be effective. In this case, this means ensuring that there is an effective method to record immunization rates. New Brunswick is in the process of introducing a new information system for tracking vaccination. Ontario and British Columbia permit public reporting of vaccination status to ensure that schools and public health officials have the data they need. Other provinces should adopt similar measures.

A second consideration is whether there are reciprocal measures in place (principle of reciprocity). If a child should, in a very rare instance, be harmed by immunization, will compensation be provided? Canada (with the exception of Quebec, which has a program), until recently, was the only G7 country that did not have a no-fault vaccine injury compensation program and the details of the new program remain unknown at the time of this article.<sup>203</sup> An argument not to have a program is that vaccination is provided for the benefit of the child. However, the introduction of a mandatory no-exemption policy changes this calculus, with the state implicitly stating that the individuals are not only being vaccinated for their benefit but for the benefit of others and must do so. In these cases, if a rare event does occur where a child is injured by vaccination, they and their family should have access to compensation that does not require the tort system. This issue becomes particularly salient if a COVID-19 vaccine is introduced into the childhood immunization programs.

While provinces need to carefully consider whether they have a system in place for childhood vaccination programs to succeed (immunization tracking, vaccine injury

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<sup>203</sup> Jennifer Keelan & Kumanan Wilson, "Designing a No-Fault Vaccine-Injury Compensation Programme for Canada: Lessons Learned From an International Analysis of Programmes," online: <[www.munkschool.utoronto.ca/wp-content/uploads/2012/07/Keelan-Wilson\\_NoFaultVaccine\\_CPHS\\_2011.pdf](http://www.munkschool.utoronto.ca/wp-content/uploads/2012/07/Keelan-Wilson_NoFaultVaccine_CPHS_2011.pdf)>.

compensation schemes, and so on), this article focused heavily on what role the religious and conscience belief exemption should play in these schemes. It argued that because of the *Charter* mandatory vaccination schemes should maintain a religious and conscience belief exemption; however, it was argued that this exemption could be more narrowly structured so that it would encourage vaccination while still protecting fundamental rights.

This article advanced two proposals to strengthen the religious and conscience belief exemption: first, a mandatory education seminar, and second, a time limit on the exemption. Both of these proposals require small time commitments from the parents who are seeking to use the exemption, and the ultimate decision on whether to vaccinate remains with the parent and would comply with *Charter* obligations. By imposing such requirements, parents who were undecided about immunizations, may, once confronted with medical evidence about the benefits of vaccination, choose to vaccinate their child. Additionally, by having to regularly review their choice about vaccinations, some parents may change their mind and start their child on the vaccination schedule. Any additional child that is vaccinated increases the overall immunization rate and helps protect public health.

The burden associated with such proposals is minimal and individuals who have a sincere religious or conscience belief will not be forced to vaccinate their child and will still have the exemption available to them. Although Ontario has recently amended its childhood immunization laws to include mandatory education seminars and we believe that such an amendment is constitutional, we would be hesitant to recommend widespread adoption of such an initiative. Rather, we would encourage education initiatives through partnerships with community champions. Furthermore, we would argue that restructuring the religious and conscience belief exemptions to include a time limit of one year would be a beneficial amendment and falls in line with clinical guidelines.

Childhood immunizations remain a vital component in controlling and stopping the spread of diseases. Society has witnessed the successes of widespread use of vaccinations and it appears that we are now currently waiting for another vaccine to help return the country to “pre-pandemic” normalcy. This article has raised some of the key issues that need to be considered should the government choose to add COVID-19 vaccines to the mandatory list of childhood vaccines. We considered issues surrounding the safety and efficacy of the new vaccine and the lack of widespread COVID-19 morbidity in school age children. With these multitude of considerations, a nuanced, agile policy will be likely required. Forcing mandatory childhood vaccinations, without any exemptions would be problematic. At the initial stages, if emergency orders are still in place, some form of vaccine mandate could be introduced whereby the option of vaccinate or mask or virtual learning are offered. These regulations, and inclusion in routine childhood immunizations programs, can be refined as the science evolves. As with standard pediatric vaccinations, these policies would be best complemented by vaccine injury compensation programs, rigorous vaccine safety monitoring system, and approaches to effectively communicate the need for vaccination in a manner that is not considered to be coercive.

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As we continue to live through this current pandemic, childhood immunization programs will play a vital role, not only for the health of the individual child, but to general society. Governments need to adopt programs that recognize and respect the role of parental decision-making, encourage immunizations, and protect the best interest of the child. Current Canadian immunization policies are lacking fundamental measures, but, as we have highlighted, there is a way forward.

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