

Surfing the Fourth Wave: Riding out a Charter Challenge to University and College Vaccination Mandates

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1 Introduction

The debate over whether Canadian colleges and universities should adopt policies mandating COVID-19 vaccinations is heating up. Several Canadian colleges and universities have taken this step to various degrees.¹ While the list is growing,² and

¹ Seneca College, a public college with multiple campuses in Ontario, was the first to take this step. Their policy requires students and employees coming to campus for in-person learning, teaching and working to be vaccinated. Students living in residence and the employees who work there must also be vaccinated. See: <https://inside.senecacollege.ca/health/index.html> For an example of a college that has more recently adopted a vaccination mandate, see Mohawk College: <https://www.mohawkcollege.ca/covid-19-coronavirus/updates-on-covid-19-coronavirus>

² The University of Ottawa was the first university to take this step [<https://www.uottawa.ca/coronavirus/en/mandatory-covid-19-vaccination>, Aug. 11, 2021]. They have been followed by Algoma University [see <https://livetvble.com/blog/space/2021/algoma-university-to-implement-vaccination-requirements-this-fall/1157/>, August 16, 2021], Brock University [<https://brocku.ca/brock-news/2021/08/brock-will-require-covid-19-vaccination-for-students-staff-faculty-to-access-campus/>, Aug. 12, 2021], Carleton University [<https://newsroom.carleton.ca/2021/vaccination-requirements-campus-access>, Aug 12, 2021], Lakehead University [<https://www.orilliamatters.com/local-news/lakehead-university-students-staff-will-require-vaccinations-4227311>, August 16, 2021], Laurier University [<https://www.wlu.ca/news/news-releases/2021/aug/wilfrid-laurier-university-to-require-covid-19-vaccinations.html>, Aug 13, 2021], Laurentian University [see <https://northernontario.ctvnews.ca/laurentian-university-will-now-require-everyone-on-campus-to-have-covid-19-vaccine-1.5549302>, Aug. 16, 2021], McMaster University [<https://covid19.mcmaster.ca/mcmaster-requires-proof-of-vaccination-and-mandatory-vaccines-a-letter-from-the-president-and-provost/>, Aug. 21, 2021], Nipissing University [<https://www.nipissingu.ca/coronavirus>, Aug 16, 2021], Ontario Technical University [see

others are taking partial steps such as mandating the vaccine for on-campus residences or for participation in certain athletic activities, a general hesitancy to take stronger actions to ensure that Canadian campus-communities are fully vaccinated persists. This reluctance is not limited by size of the institution, or by the governance structure; it is evident across the board. And it is in stark contrast to the literally hundreds of institutions in the United States that have adopted full COVID-19 vaccination mandates in a timely manner.³

While it is difficult to pinpoint the exact causes of this hesitancy, a recurring concern is that a vaccination mandate would violate the Canadian Charter of Rights and Freedoms.⁴ This paper will address the Charter issue, specifically focusing on section 7, and is divided into four main sections.

First, we will address the threshold issue of whether the Charter is applicable to Canadian Universities.⁵ While the established doctrine has been that Canadian

<https://news.ontariotechu.ca/archives/2021/08/ontario-tech-university-mandating-covid-19vaccinations-for-individuals-coming-to-campus.php>, Aug. 12, 2021], Queens University [<https://www.queensu.ca/gazette/stories/queen-s-require-covid-19-vaccinations>, Aug. 12, 2021], Ryerson University [<https://www.ryerson.ca/news-events/news/2021/08/ryerson-to-require-vaccination-status-attestation-for-those-coming-to-campus-this-fall/>, Aug. 13, 2021], University of Guelph [<https://news.uoguelph.ca/2021/08/u-of-g-looks-to-the-fall-and-announces-vaccination-mandate/>, Aug. 12, 2021], University of Regina [<https://www.uregina.ca/term-updates/vaccination.html#mandatory-faculty>], University of Saskatchewan [<https://news.usask.ca/articles/general/2021/usask-announces-new-covid-19-vaccination-measures-for-fall-term.php>, Aug 13, 2021], University of Toronto [<https://www.utoronto.ca/utogether/vaccines>, n.d.], University of Western Ontario [<https://news.westernu.ca/2021/08/covid-vaccine-policy>, Aug 11, 2021], University of Waterloo [<https://uwaterloo.ca/coronavirus/news/mandatory-vaccination-and-attestation>, Aug. 16, 2021], and University of Windsor [<https://www.uwindsor.ca/publicaffairs/2021-08-13/uwindsor-announces-mandatory-vaccinations-staff-faculty-and-students>, Aug. 13, 2021].

This information is current through August 16, 2021. There are significant variations among this patchwork of policies, and further operational details still need to be developed. The biggest issue is becoming the level of proof that will be required for attestations of vaccination status.

³ See <https://www.bestcolleges.com/blog/list-of-colleges-that-require-covid-19-vaccine/> for a listing of institutional vaccine mandates in the United States,

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter].

⁵ Section 32(1) of the Charter limits its application to public entities, providing that: This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

universities are not entities to which the Charter applies,⁶ there is an emerging body of caselaw and commentary that questions this exclusion in the absolute sense. The argument that universities can no longer be thought of as Charter-free zones is persuasive and the paper will proceed under the assumption that the Charter is applicable.

Turning to the substance of section 7 of the Charter,⁷ we conclude that a court would likely find that a vaccination-mandate does not engage section 7. Further, even if a claimant can show an infringement of one of their section 7 protected interests, it is unlikely that a court would find that principles of fundamental justice have been violated. We then discuss section 1 of the Charter and conclude that in the unlikely event that this analysis is necessary, a court would uphold the mandate as a reasonable measure that can be demonstrably justified in a free and democratic society.

The final section suggests some brief recommendations for policies that could increase the chance of a measure being upheld which would enhance health and safety on campus. We conclude that a carefully drafted university or college policy requiring COVID-19 vaccinations for students and staff to learn/work and attend on campus would be upheld by a Canadian court.

2 Would the Charter Apply to a University-Imposed Vaccination Mandate?

Before turning directly to the substance of a Charter challenge to a university-imposed vaccine mandate, it is necessary to address the threshold question of whether Canadian universities are entities to which the Charter is applicable.⁸ The applicability

⁶ See *McKinney v University of Guelph*, [1990] 3 SCR 229 [*McKinney*].

⁷ Section 7 of the Charter provides that: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

⁸ Section 32 of the Charter limits its applicability to governmental entities. It provides:

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

of the Charter to colleges is not in issue since they are considered governmental agencies for the purposes of section 32(b) of the Charter.

In *McKinney v University of Guelph*, the court addressed whether the Charter would apply to the University of Guelph in the context of its employment contracts.⁹ While the judgment held that the facts of the case did not support the application of the Charter, the court left open the possibility that some actions taken by a university could be subject to the Charter. In her dissenting opinion, Wilson J. set out a framework consisting of three tests for conducting an analysis as to when a non-governmental entity like a university would be subject to the Charter. The three tests are: (i) the government control test; (2) the government function test; and (iii) the government entity test.¹⁰ Since 1990, the Supreme Court has adopted this framework with slightly modified language,¹¹ and lower courts have applied the three tests, though not in a consistent manner.

The application of the tests has been inconsistent across jurisdictions. While Alberta courts have applied the tests in a flexible and purposive manner, Ontario courts have been more rigid and have cited *McKinney* for the strict proposition that the Charter does not apply to universities.¹² Accepting the proposition that universities are essentially “Charter-free zones” without qualification is problematic for several reasons.

First, a close reading of the several reasons in *McKinney*, including La Forest’s leading opinion, indicate it was not the court’s intention to make universities a Charter-free zone in the absolute sense. In *Eldridge*, La Forest himself seems to support this flexibility by

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

⁹ *McKinney*, *supra* note 6.

¹⁰ *Ibid* at para 248.

¹¹ *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para 44 [*Eldridge*]; *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 at para 16.

¹² *Arriola v Ryerson Students’ Union*, 2018 ONSC 1246 at para 52; *Zettel v University of Toronto Mississauga Students’ Union*, 2018 ONSC 1240 at para 52; *Naggar v The Student Association at Durham College and UOIT*, 2018 ONSC 1247 at para 50; *Telfer v University of Western Ontario*, 2012 ONSC 1287 at para 55 [*Telfer*]; *Alghaithy v University of Ottawa* 2012 ONSC 142 at para 73.

citing his own judgment in *McKinney*, noting that while universities may not be a government entity, where a university is implementing a specific government policy or program it will be subject to the Charter.¹³

Second, the nature of the relationship between universities and governments has changed dramatically in the 30 years since *McKinney* was decided. There is much more oversight today, and the level of provincial involvement in university governance matters is increasing.¹⁴ Courts should consider the changing relationship between universities and government, and the difficulty in determining what is a government function, as was warned by Wilson J. in *McKinney*.¹⁵

Courts have distinguished the difference between universities in Ontario from those in Alberta, on grounds of their enabling legislation,¹⁶ but a growing body of commentary argues this is an arbitrary distinction, as all provincial governments have the same interest in the provision of post secondary education.¹⁷ Treating universities as “Charter-free zones” creates an inconsistent legal regime for Charter protections in different post-secondary education institutions.¹⁸

¹³ *Eldridge*, *supra* note 11 at para 43; *McKinney*, *supra* note 6 at para 268.

¹⁴ Similar considerations apply to hospitals. The SCC assessed the impugned actions of hospitals in the context of a changing relationship with the government when reaching different conclusions as to whether the *Charter* applied to hospitals in *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 and *Eldridge*. While a full discussion of the development of the Canadian post-secondary education and health care sectors is beyond the scope of this paper both can be characterized as having increased government oversight and increased government mandates

¹⁵ *McKinney*, *supra* note 6, at paras 237-8.

¹⁶ Ontario universities each have their own private enabling legislation, whereas all universities in Alberta are enabled under the *Post Secondary Learning Act*. See: *Telfer*, *supra* note 12 at paras 58-59; *Lobo v. Carleton University*, 2012 ONSC 254 at para 15.

¹⁷ Michael Marin, “Should the Charter Apply to Universities?” (2015) 35 National J Constitutional L 29; and Krupa M. Kotecha, “Charter Application in the University Context: An Inquiry of Necessity” (2016) 26 Educ & LJ 21.

¹⁸ This can be highlighted by considering students in bridge programs between colleges and universities who would have Charter protection for only part of their education. See *Pridgen v University of Calgary*, 2012 ABCA 139 para 83 (noting that “collaborative programs between universities and colleges can lead to the anomalous result that a student’s freedom of expression will be protected, or not, depending on whether he is involved in the university or college portion of his education”).

While the application of the Charter to universities remains a matter of significant debate, the remainder of this paper will focus on Section 7.¹⁹

3 Would the Vaccination Mandate Engage Section 7 of the Charter?

A Charter challenge to a university or college vaccination mandate would likely centre on the claim that the mandate violates the section 7 guarantee of life, liberty, and security of the person by imposing a medical treatment or procedure on students and staff.²⁰ The text of section 7 provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 7 requires a two-part analysis.²¹ In the context of a vaccination mandate, a claimant would need to demonstrate that:

1. The mandate violates their right to life, liberty, or security of the person; and
2. The denial of this right is inconsistent with the principles of fundamental justice.

Satisfying both elements is necessary to establish a *prima facie* violation of section 7. An unconstitutional effect on a single person is sufficient to establish a breach of section

¹⁹ And in any event, the Charter clearly applies to colleges such as Seneca College, which has already been threatened with a Charter challenge. See: <https://childrenshealthdefense.ca/wp-content/uploads/CHDC-Ltr-Seneca-College.pdf>.

²⁰ The anti-vaccination group Children's Health Defense Canada has threatened legal action against the University of Western Ontario's vaccination policy for students living in residence during the 2021-2022 academic year based on an alleged violation of section 7. See: <https://www.constitutionalrightscentre.ca/20CRC16/wp-content/uploads/2021/07/CHDC-Ltr-Western-University.pdf>. The same group has also threatened similar action against Seneca College due to its vaccination requirement for on campus teaching and learning (see note 19 above). While challenges under other sections of the Charter are also possible, we are focussing on section 7 because a vaccine mandate that grants exemptions to individuals with religious beliefs that prevent them from receiving the vaccine would be less susceptible to a challenge under section 2(a). Further, policies that apply to all groups will be less susceptible to a challenge under section 15.

²¹ See Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017) at 246 (des Libris – Irwin Law). Although it is sometimes necessary to consider whether the claimant comes within the meaning of “everyone” in section 7 before engaging in the two-part analysis, as it is expected that the claimant in a vaccine mandate challenge will be a natural person, this preliminary issue would not arise.

7. As mentioned by the Supreme Court in *Canada (Attorney General) v Bedford*, “the analysis is qualitative, not quantitative. The question under s. 7 is whether anyone’s life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.”²²

3.1 Does a vaccination mandate violate the right to life, liberty and security of the person?

A claimant could allege violations of life, liberty and security of the person on several grounds. The primary contention would likely focus on the mandate’s interference with personal autonomy in decision-making regarding medical treatment. Further, the claimant may allege that significant side effects from the vaccine and stress attributable to receiving the vaccine or suffering repercussions from refusal also violate their section 7 rights. As there is no comprehensive definition of life, liberty or security of the person, the case law is key when analyzing these rights.²³

In *AC v Manitoba (Director of Child and Family Services)* and *B(R) v Children’s Aid Society of Metropolitan Toronto*, the Supreme Court held that non-consensual medical treatment violates a person’s section 7 rights.²⁴ Both cases concerned orders for medically necessary blood transfusions for minors made following the plaintiffs’ refusal on religious grounds. In *AC*, the Court held that liberty includes the right to refuse medical treatment and that the imposition of unwanted medical treatment constitutes a violation of security of the person.²⁵ In *B(R)*, where the plaintiffs were the parents of a sick infant rather than the minor herself, four justices of a deeply divided Court held that the liberty right of a parent includes the right to make decisions for his/her child in

²² *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at para 123 [*Bedford*]. Also see: *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125 at para 182 [*Taylor*].

²³ Sharpe & Roach, *supra* note 21 at 249.

²⁴ *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181 [*AC*]; *B(R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 [*B(R)*].

²⁵ *AC*, *supra* note 24 at paras 100-102, 136.

fundamental matters like medical care.²⁶ *A fortiori*, liberty includes an individual's right to make decisions concerning his own medical care, as confirmed in *AC*.

In light of these cases, an actual forced vaccination would constitute a violation of the rights to liberty and security of the person. However, there is a significant difference between a physically forced vaccination and a college or university-imposed mandate. Vaccination mandates provide students and staff with the choice to receive the vaccine or decline the vaccine and remain off campus while the mandate is in place. While those who decline will need to take a semester off or limit themselves to virtual teaching and learning, these individuals are not forced to undergo a medical procedure against their wishes. The options available to those who decline the vaccine may be unappealing to some members of the campus community. However, as stated in a recent U.S. decision which declined a preliminary injunction against the University of Indiana's vaccine mandate, "this hard choice doesn't amount to coercion."²⁷

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."²⁸ Despite the safety record of vaccines currently being administered in Canada, it is not wholly unforeseeable that an individual claimant could suffer a significant side effect. However, the consensual nature of the vaccination rather than its imposition on individuals remains a hurdle to establishing a claim. Further, given the efficacy of COVID-19 vaccines and their ability to prevent serious illness, a university vaccination mandate that encourages vaccine uptake stands in stark contrast to the situation in

²⁶ *B(R)*, *supra* note 24 at 370-372. As for the remaining justices, three held that parental liberty which seriously endangers the survival of a child is outside the scope of section 7, one held that section 7 does not include the right of parents to choose or refuse medical treatment for children or to bring them up without state interference, and one found it unnecessary to rule on section 7.

²⁷ *Klaassen v The Trustees of Indiana University*, 1:21-CV-238 DRL at 53 [*Klaassen*]. This decision was upheld on appeal: *Klaassen v The Trustees of Indiana University*, No. 21-2326 (Court of Appeals for the Seventh Circuit). An emergency application to block the University's measure was denied by Justice Amy Coney Barrett on August 12, 2021, allowing the 7th Circuit decision to stand. A Canadian labour arbitrator similarly held that a flu influenza vaccination or mask policy did not violate section 7 because it offered a choice: *Health Employers Assn. of B.C. v Health Sciences Assn.*, [2013] BCCA 138 [*Health Employers Assn. of B.C.*].

²⁸ *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at para 62 [*Carter*].

Chaoulli v Quebec (Attorney General) where the Supreme Court held that the lack of potentially life-saving medical treatment impacted the right to life.²⁹

While state interference that causes severe psychological harm violates the right to security of the person, ordinary stresses and anxiety caused by state action do not violate section 7.³⁰ Assessment of the effects of state interference requires an objective standard that looks at their impact on the physiological integrity of a person of reasonable sensibility.³¹ In light of these requirements, a claim that university or college vaccine mandates violate the right to security of the person by creating stress, whether related to a fear of injections or the perceived undesirability of options available to those who decline the vaccine, is unlikely to succeed.

3.2 Is the denial of the right to life, liberty, or security of the person inconsistent with the principles of fundamental justice?

Even if a claimant can establish a violation of their rights to life, liberty and security of the person, they must also demonstrate that the violation is inconsistent with the principles of fundamental justice. In other words, the claimant needs to establish that the mandate violates the prohibition on arbitrariness, overbreadth or gross disproportionality.³²

The purpose of the vaccine mandate is a key element when analyzing whether there is a violation of the principles of fundamental justice. The objectives of a vaccine mandate include protecting the health and safety of the campus community from a highly contagious, and sometimes deadly, virus and ensuring that the campus can remain

²⁹ *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791. Evidence regarding dangers associated with the pandemic and the safety and efficacy of vaccines has already been recognized by courts: *Klaassen*, *supra* note 27; *Taylor*, *supra* note 22. As new studies are regularly being published, it would be important to refer to the latest scientific evidence in an eventual court challenge to university vaccination mandates.

³⁰ *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at paras 58, 60-61.

³¹ *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 60.

³² While the principles of fundamental justice also include a prohibition on vagueness, it is unlikely that a challenge to a clearly stated and explicit college or university vaccination mandate would turn on this issue.

open for in-person classes, laboratories and other activities.³³ The focus of the analysis at this stage remains on the effect on the individual rather than the societal interest in the vaccine mandate.

A college or university vaccine mandate is not arbitrary if it is capable of fulfilling its objectives,³⁴ and this test for arbitrariness is difficult for claimants to satisfy.³⁵ A vaccine mandate that requires students and staff attending campus during the pandemic to receive a vaccine that is effective at preventing transmission and serious infection is capable of fulfilling its objectives of protecting the health and safety of those on campus and maintaining the viability of onsite educational programming. In other words, there is a rational connection between the mandate's purpose and the section 7 limitation.³⁶

The prohibition against overbreadth asks if the vaccine mandate is rational in some cases but overreaches in others, i.e. whether the measure "goes too far by sweeping conduct into its ambit that bears no relation to its objective".³⁷ Requiring individuals who study or work on campus to receive the vaccine is not a form of overreach. This situation is far removed from a case like *R v Demers* where a law requiring all unfit accused to attend repeated review board hearings, regardless of whether the person was temporarily or permanently unfit, was found to be overbroad in relation to permanently unfit individuals.³⁸ Similarly, a mandate would be overbroad if it unnecessarily swept a wide range of people into its ambit, such as students enrolled in

³³ In *Taylor*, the judge similarly characterized the objective of the Newfoundland and Labrador pandemic travel restrictions as protecting people in the province from illness and death from the importation and spread of COVID-19 in the context of a section 1 analysis: see *Taylor*, *supra* note 22 at para 436.

³⁴ *Carter*, *supra* note 28 at para 83.

³⁵ Sharpe & Roach, *supra* note 21 at 264.

³⁶ There must be a rational connection between the object of the measure that causes the section 7 deprivation and the limits it imposes on life, liberty and security of the person: *Bedford*, *supra* note 22 at para 111.

³⁷ *Ibid* at para 117.

³⁸ *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489.

online-only programs and alumni. However, the vaccination mandates now under consideration are limited to those who attend campus onsite.

Gross disproportionality examines whether the vaccine mandate is disproportionate to the university's legitimate interest in addressing the issue of campus health and safety and maintaining in-person educational activities.³⁹ While a claimant might argue that requiring individuals to abide by other precautions, such as masking, surveillance testing and social distancing is sufficient, this reasoning is unlikely to succeed. Vaccination efforts have achieved what lockdowns, masking, social distancing and testing could not. Further, unvaccinated individuals are currently at elevated risk of becoming infected with highly contagious variants and transmitting the virus to others. In *AC*, the Supreme Court upheld the constitutionality of legislation allowing medical treatment to be ordered for children under 16 when it was in their best interests, finding that this law was a proportionate response to the goal of protecting vulnerable young people from harm while respecting the autonomy of those mature enough to make a particular treatment decision.⁴⁰ In the case of a vaccine mandate, a minimally invasive measure given only on consent likewise achieves the goal of protecting the health and safety of the individual recipient while on campus, as well as those around her.

3.3 Section 7 Conclusion

A section 7 challenge against a college or university vaccination mandate is unlikely to succeed. A claimant would have difficulty establishing that the mandate violates their right to life, liberty, or security of the person. Further, even if a violation is established, such a denial would likely be consistent with the principles of fundamental justice.⁴¹

4 *Would a Violation be Upheld Under Section 1?*

Assuming that an aggrieved Charter claimant can establish that one of the protected interests is engaged and that the deprivation is not in accordance with principles of

³⁹ See Sharpe & Roach, *supra* note 21 at 267.

⁴⁰ *AC*, *supra* note 24 at para 115.

⁴¹ This latter point is within the control of the entity drafting the mandate. See Section 5 for drafting considerations that would enhance the likelihood of a measure being upheld.

fundamental justice, the next question becomes whether the violations can be upheld under section 1 of the Charter:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

As a measure mandating vaccination would likely be considered a “limit prescribed by law”, the issue would become whether it is a reasonable limit and whether it “can be demonstrably justified in a free and democratic society”. This inquiry would be conducted under the *Oakes* test⁴² which has established the elements for a claim of justification under section 1.

Before examining the prongs of the *Oakes* test, it is necessary to consider the general relationship between section 7 and section 1. As indicated in the previous discussion concerning the principles of fundamental justice, section 7 itself contains an internal check which limits its scope. The requirement that any such deprivation be in accordance with the principles of fundamental justice necessarily raises similar issues that would be addressed in a typical section 1 analysis. Courts have recognized this parallel set of requirements, and as a practical matter if the measure satisfies the tests of arbitrariness and reasonableness under the fundamental justice prong it would not be necessary to turn to section 1.

This relationship between the parallel requirements contained in both sections 1 and 7 was noted by the Supreme Court in *Canada (Attorney General) v Bedford*:⁴³

Section 7 and s. 1 ask different questions. The question under s. 7 is whether the law’s negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law’s purpose, taken at face value, is connected to its effects and whether the negative effect is grossly

⁴² *R v Oakes*, [1986] 1 SCR. 103 [*Oakes*] (limit on a Charter right must be based on a pressing and substantial legislative objective, must be a rational connection between the impugned measure and the objective, right must not be limited more than necessary to accomplish objective, and must be proportional).

⁴³ *Bedford*, *supra* note 22 at paras 124-129.

disproportionate to the law's purpose. Under s. 1, the question is different — whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of an overarching public goal is at the heart of s. 1, but it plays no part in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights.⁴⁴

In the context of section 7, Peter Hogg notes that the “s. 1 justification has been upheld in minority opinions, but never by a majority of the [Supreme] Court.”⁴⁵ However, despite the fact that a majority of the Court has never upheld a section 7 violation, it has indicated that exceptional conditions like natural disasters, outbreak of war and epidemics may justify upholding a section 7 violation under section 1.⁴⁶

Further, the emerging COVID jurisprudence and the limited vaccine-related cases from non-COVID contexts indicate that courts will likely err on the side of deference to rational policies aimed at combatting the pandemic. For example, a judge upheld the Newfoundland travel ban under section 1 in a case about section 6(1) mobility rights.⁴⁷ And there are labour arbitration cases that have upheld mandatory COVID testing, masking policies or full PPE policy for staff in a nursing homes or medical facilities.⁴⁸ In B.C., public health orders impacting religious services were upheld under section 1,⁴⁹ and in the family law context, sole decision-making power over vaccination was granted to the parent who supported vaccination on the basis of scientific evidence in favour of vaccines.⁵⁰

⁴⁴ *Ibid* at para 125.

⁴⁵ Peter W Hogg, *Constitutional Law of Canada*, (2019 Student Edition, Thomson Reuters) at 38-49 [Hogg]. See also *R v Michaud*, 2015 ONCA 585, 2015 127 OR (3d) 81 (Ontario Court of Appeal upheld a provincial regulation regarding requiring speed limiters in trucks under s. 7, but found it was justified under s. 1).

⁴⁶ Sharpe & Roach, *supra* note 21 at 246-47.

⁴⁷ *Taylor*, *supra* note 22.

⁴⁸ See *Caressant Care Nursing & Retirement Homes v. Christian Labour Assn. of Canada*, [2020] OLAA No 342 [*Caressant Care*].

⁴⁹ *Beaudoin v British Columbia*, 2021 BCSC 512 [*Beaudoin*].

⁵⁰ *AP v LK*, 2021 ONSC 150. This case did not involve a COVID-19 vaccination.

4.1 Is there a pressing and substantial objective for the measure?

It should be self-evident that a vaccination-mandate would be based on a pressing and substantial objective. Still, it would be important for the measure to include detailed recitals of the grounds with an emphasis on how it is intended to decrease the risk of harm to members of the campus and broader communities.⁵¹

In a labour arbitration involving flu vaccines, the arbitrator in *Health Employers Assn. of B.C.*, found that patient safety was a pressing and substantial objective.⁵² In *Beaudoin*, a case involving public health orders limiting gatherings for religious services, the judge found that public health was a pressing and substantial objective.⁵³ Colleges and universities would likewise claim that student and staff safety/health is a pressing and substantial objective. In the *Taylor* case involving a woman who was denied entry to Newfoundland for her mother's funeral, the court found that protecting people in the province from illness and death from the importation and spread of COVID constituted a pressing and substantial objective justifying travel restrictions.⁵⁴ A university or college would similarly argue that it seeks to prevent illness and death among its student body and staff.

4.2 Does the measure satisfy the proportionality tests set out in Oakes?

i) Rational connection

An institution will meet this requirement provided that the mandate is supported by scientific evidence regarding the benefits of immunization and alternate requirements like masking and testing in preventing illness and death.

In *Taylor*, the modelling regarding the spread of COVID supported the travel restrictions over a section 6 challenge, as there was a rational connection to the objective. The

⁵¹ The vaccination mandates adopted by universities in the United States provide several useful examples which can be used as models for a corresponding Canadian measure.

⁵² *Health Employers Assn. of B.C.*, *supra* note 27.

⁵³ *Beaudoin*, *supra* note 49.

⁵⁴ *Taylor*, *supra* note 22.

restrictions in *Beaudoin* on religious services were found to be rationally related to its objectives since such gatherings are routes of transmission, and there was scientific evidence regarding the COVID risk for gatherings. In *Health Employers Assn. of B.C.*, the evidence showed the efficacy and beneficial effects of flu immunization and masking.⁵⁵ In evaluating this final proportionality requirement, the court in *Caressant Care* held that it was rational to impose requirements in advance since it was shown that mandatory COVID testing had clear benefits, and given the seriousness of a potential outbreak, waiting until something happens to act was not required.⁵⁶

Given the clear scientific evidence that is now available, it is likely that a court would find that a vaccination mandate would be rationally related to its public health and safety objectives.

ii) Minimal impairment

The next prong of the *Oakes* test requires that the impugned measure impair the protected right as little as possible. This prong, which demands that the measure “pursue the objective by the least drastic means”, has been described as the “heart and soul of s.1 justification.”⁵⁷

A mandatory vaccine policy would likely meet the minimal impairment test provided that it includes reasonable exemptions for those who object to vaccines on human rights grounds, and provided that it is demonstrated that earlier and less intrusive measures were not effective. Accompanying alternative requirements in the nature of accommodations should not burden individuals more than necessary to achieve the

⁵⁵ While one line of labour arbitrations on influenza vaccination or mask policies has declined to uphold these policies on the basis that there is no real safety effect from immunization and masking, some lawyers believe that these cases would be decided differently today: *Sault Area Hospital v Ontario Hospital Assn.*, [2015] OLA No 339; <https://gowlingwlg.com/en/insights-resources/articles/2020/workplaces-vaccination-policies-to-mandate-or-not/>. Decisions that do not uphold influenza vaccination policies are distinguishable given the higher risks associated with COVID, the greater effectiveness of COVID vaccines, and the available evidence on the effectiveness of other measures like masking to curb the pandemic.

⁵⁶ *Caressant Care*, *supra* note 48.

⁵⁷ Hogg, *supra* note 45 at 38-36 (adding that “for the great majority of cases, the arena of debate is the third step, the requirement of least drastic means”).

needed health outcome. In finding that the flu vaccination or mask policy was minimally impairing, the arbitrator in *Health Employers Assn. of B.C.* emphasized the availability of an alternative to getting vaccinated, namely masking.⁵⁸ In *Caressant Care* the arbitrator held that the intrusiveness of a nasal swab every 14 days is minimal compared to allowing the spread of COVID in a nursing home.⁵⁹ The judge in *Taylor* found that sweeping travel restrictions met the minimal impairment test given that some visitors were evading self-isolation requirements and given the exemptions incorporated into the policy.⁶⁰

In *Beaudoin*, the judge emphasized that the provincial health officer made exemptions for religious organizations where appropriate, and that the orders minimized the impact on rights by refraining from restrictions until there was evidence of an exponential increase in cases. However, voluntary attendance at religious services should be distinguished from a campus setting where enrolled students and employed instructors have no choice but to come into contact with others for educational purposes in the course of their employment or studies. The requirements should also be limited in duration with regular reassessment and revision as circumstances change.

It would also be important to document how previous measures including masking and distance requirements are ineffective in light of the COVID-19 variants present in the fourth wave.

iii) Overall proportionate effect

The final prong of the *Oakes* test looks at overall proportionality and compares the negative effects of the restrictions with the value of meeting the stated objectives. It asks whether the Charter infringement is “too high a price to pay for the benefit of the

⁵⁸ *Health Employers Assn. of B.C.*, *supra* note 27.

⁵⁹ *Caressant Care*, *supra* note 48.

⁶⁰ *Taylor*, *supra* note 22.

law,”⁶¹ and it takes into account “the proportionality between the deleterious and salutary effects of the measures.”⁶²

The *Taylor* case emphasised that COVID restrictions serve the common good, and that individual rights may need to give way to the common good given that COVID is a virulent and potentially fatal disease. In the campus context, even if certain students or staff are not personally concerned about catching COVID, they may spread the disease to others, and the now-dominant delta variant is highly contagious and places individuals at increased risk of hospitalization and death, including younger people. Students who do not want to be vaccinated have the option of taking a semester off if they do not wish to abide by any measures intended to curb the spread of COVID on campus.

The observation in *Bedford* that the focus of attention at the section 1 stage of analysis is on the broader public interest in the effects of the measure would be directly relevant in evaluating this final proportionality requirement,

Overall, even if a claimant is able to show a *prima facie* violation of section 7, a vaccination mandate that is based on scientific evidence, which incorporates reasonable exemption provisions, and which follows earlier attempts to control the spread of the virus would be upheld under section 1. As a practical matter, it is difficult to envision a case where the fundamental justice prong of section 7 would not be satisfied. While there are no Supreme Court of Canada decisions arising under section 7 which have been directly upheld under section 1, the language in *Bedford* that the section 1 inquiry is analytically different than the underlying section 7 analysis should provide additional comfort to institutions concerned about Charter liability.⁶³

⁶¹ Hogg, *supra* note 45 at 38-43.

⁶² *Dagenis v CBC*, [1994] 3 SCR 835, 839.

⁶³ The *Bedford* court concluded its discussion on the relationship between sections 7 and by stating “Depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted.” *Bedford*, *supra* note 22 at para 129.

5 Recommendations for Policy Implementation

Once an institution decides that it wants to proceed with some form of a vaccination mandate, there are still several details regarding its implementation that must be addressed. The following seven recommendations incorporate policies that are rooted in the above discussions, and which should be included in university and college vaccination mandates:

Recommendation 1:

The mandate should apply to Fall 2021 or the 2021-2022 academic year when the fourth wave of the pandemic is expected to be in full force. A committee tasked with overseeing the mandate should review the mandate for future semesters based on the state of the pandemic and related medical guidance. Regular oversight informed by scientific recommendations, with adjustments as necessary, will ensure that the mandate remains non-arbitrary and proportionate within the meanings of sections 7 and 1 of the Charter.

Recommendation 2:

Full immunization should be required for all students and staff (including faculty) who will be present on campus. Exemptions may be made for medical reasons corroborated by documentation from a physician, as well as *bona fide* religious objections substantiated by an explanation of the conflict between vaccination and the individual's faith. These exemptions will insulate the mandate from a successful challenge based on the guarantee of freedom of religion in section 2(a) of the Charter or based on the protected grounds of creed and disability under the Human Rights Code.⁶⁴ Exemptions based on non-protected grounds, such as philosophical opposition to vaccines, should not be granted as excessive exemptions dilute the compelling nature of the COVID emergency. Ensuring that all eligible members of the campus community are vaccinated is necessary to achieve the mandate's objectives of campus health and safety and the viability of in-person activities.

⁶⁴ Human Rights Code, RSO 1990, c H19.

Recommendation 3:

Members of the campus community should upload proof of vaccination to an established and secure online portal, such as the institution's student portal (for students) and human resources portal (for staff). Requiring proof of vaccination rather than allowing self-declaration of vaccination status will safeguard the integrity of the mandate by ensuring accurate reporting, again upholding the objectives of health and safety and the sustainability of on-campus activities.

Recommendation 4:

The institution should offer convenient access to vaccines on campus through the health centre or a dedicated campus vaccination clinic. This will remove barriers to vaccination for members of the campus community, such as inability to commute to an off-site clinic due to financial constraints or lack of transport.

Recommendation 5:

The institution should accommodate international students who did not receive a Health Canada or WHO-approved vaccine in their home country by allowing them to receive the first dose promptly after arrival and the second dose as soon as they are eligible. These arrangements will prevent discrimination based on citizenship or place of origin and ensure that the terms of the mandate are rational and proportionate in relation to all individuals covered by its terms.

Recommendation 6:

Individuals with *bona fide* medical or religious exemptions, as well as individuals allowed to obtain their second dose after the semester has started, must abide by additional precautions. This should include masking, testing, and social distancing to the maximum extent possible. Providing reasonable alternatives to eligible individuals while upholding campus safety will help ensure that the mandate meets the minimal impairment test under section 1.

Recommendation 7:

While an institution may consider increasing its online offerings as a practical response to the pandemic, they should not be obliged to offer online substitute courses for students who decline to be vaccinated. As university and college education is not currently recognized as a protected right, the fact that some students who decline the vaccine may need to take a semester off is a personal inconvenience that does not violate their legal rights.⁶⁵

6 Conclusion

In conclusion, a well-drafted campus vaccination mandate will not engage the life, liberty and security of the person interests that are protected under section 7 of the Charter. In any event, so long as there are reasonable procedures for granting limited exemptions, a court would find the violation in accordance with principles of fundamental justice. Further, while it is unlikely that a challenge would turn on section 1, if it were necessary a court would likely find such a measure to be a reasonable measure that is demonstrably justified in a free and democratic society.

While care must be taken in drafting the details underlying any such measure, it is imperative that institutions act in an expeditious manner. We are now entering the fourth wave of the COVID-19 pandemic. Canadian colleges and universities face many difficult challenges. But with a strong will and an ongoing reliance on scientific data and expert opinion, they will be able to ride out the wave.

⁶⁵ As the 7th Circuit concluded in *Klaassen v Indiana University*, “A university will have trouble operating when each student fears that everyone else may be spreading disease. Few people want to return to remote education – and we do not think that the Constitution forces the distance-learning approach on a university that believes vaccination (or masks and frequent testing of the unvaccinated) will make in-person operations safe enough. The motion for an injunction pending appeal is denied.” (Note 27 above at p 4)

We see no reason why a Canadian court would not reach the same result.