

Mandatory Covid-19 Vaccinations and the Charter

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Introduction

A Leger poll taken near the beginning of the Covid-19 pandemic found that 60 percent of Canadians thought that any future vaccine should be mandatory for all citizens.¹ A more recent Nanos poll completed on 2 August 2021 showed that this high level of support did not wane as 53 percent of Canadians fully supported mandatory vaccinations, while a further 21 percent “somewhat support” such a policy.² Although neither the federal nor provincial governments have implemented a generally applicable mandatory vaccination policy, other countries are acting upon similar support. Austria’s Chancellor recently announced that vaccines will be mandatory as of 1 February 2022, making Austria the first of several European countries to adopt a mandatory vaccination policy.³ Indonesia, Micronesia, and Turkmenistan have also

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1 See “Covid-19 Tracking Survey Results” (27 April 2020) at 13, online (pdf): *Leger* <leger360.com/wp-content/uploads/2020/04/tracking_covid19_13386-124_EN_week6-2.pdf> [perma.cc/Q9GB-759G].

2 See Sarah Turnbull, “Majority of Canadians support mandatory vaccinations: Nanos survey”, *CTV News* (5 August 2021), online: <www.ctvnews.ca/health/coronavirus/majority-of-canadians-support-mandatory-vaccinations-nanos-survey-1.5536106> [perma.cc/EFA9-69S6].

3 See Philip Olterman, “Austria plans compulsory Covid vaccination for all”. *The Guardian* (19 November 2021), online: <www.theguardian.com/world/2021/nov/19/austria-plans-compulsory-covid-vaccination-for-all> [perma.cc/5JYH-LMHT]. Subsequently, Greece has required all people over the age of 60 to receive a vaccine, while Italy has voted in favour of making vaccinations mandatory for those over 50. For a more detailed review of the policies in place in Europe, see Lauren Chadwick, “Which countries in Europe will follow Austria and make COVID vaccines mandatory”, *Euro News* (1 February 2022), online: <www.euronews.com/2022/01/06/are-countries-in-europe-are-moving-towards-mandatory-vaccination> [perma.cc/RNQ9-NPA6].

adopted varying policies requiring their citizens to receive a Covid-19 vaccine.⁴ Costa Rica has further mandated vaccines with respect to all children.⁵ In light of this shifting international opinion and the impact of the Omicron variant, Canada's federal health minister recently announced that vaccine mandates are increasingly becoming the only viable pathway out of the Covid-19 pandemic.⁶ The province of Quebec more recently took a step in this direction by suggesting that it will require unvaccinated citizens to make "health contributions" as a result of their refusal to receive the vaccine but ultimately abandoned the policy.⁷

Institutions such as the World Health Organization have nevertheless cautioned against mandating vaccines. In its view, it is better to convince people to voluntarily receive the vaccine than to compel vaccination.⁸ But a global pandemic does not leave time to implement the ideal. The pandemic has taught society many lessons, the most important of which is that many people are subject to misinformation and stubbornly refuse to admit their limited scientific knowledge. This in turn places pressures on all elements of society to determine the extent to which it is willing to require its dissenting citizens to receive a vaccine. In my view, there have been numerous points throughout the Covid-19 pandemic where such a policy would pass constitutional muster. The more pressing question that I consider in this article is what a mandatory vaccine law could constitutionally impose in terms of consequences.

The article proceeds as follows. I begin in Part I by providing a general overview of the policies that have been implemented during the Covid-19 pandemic to incentivize vaccinations. I then consider in Part II whether a mandatory vaccination policy would infringe the most likely rights to be pleaded in response to such a policy: sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*.⁹ I contend that any violation will turn in large part on the consequences resulting from a mandatory vaccination policy. As I conclude that such a policy could violate both rights, I conclude in Part III by considering what types of mandatory vaccination laws would be justified under section 1 of the *Charter*. In my view, so long as the punishments are not too onerous, and are tailored in a manner that is rationally connected to

4 See Robert Hart, "Not Just Austria — Here are the Countries Making Covid-19 Vaccination Compulsory for Everyone", *Forbes* (19 November 2021), online: <www.forbes.com/sites/roberthart/2021/11/19/not-just-austria-here-are-the-countries-making-covid-19-vaccination-compulsory-for-everyone/?sh=554728194bf0> [perma.cc/KJ2Q-MSSZ].

5 *Ibid.*

6 See Peter Zimonjic, "Provinces could make vaccinations mandatory, says federal health minister", *CBC News* (7 January 2022), online: <www.cbc.ca/news/politics/duclos-mandatory-vaccination-policies-on-way-1.6307398?fbclid=IwAR2-6zXvleoYRqG1ibaAuI2LZBk6O8gLzXZi3Oebbia7BbnJXcQOFIOW0dk> [perma.cc/9T5F-24EY].

7 See Verity Stevenson & Isaac Olson, "Unvaccinated Quebecers will have to pay a health tax, Legault says", *CBC News* (11 January 2022), online: <www.cbc.ca/news/canada/montreal/unvaccinated-health-contribution-quebec-1.6311054?fbclid=IwAR0Uocc9jR6scDweqJfxY_qTcg22OLmTvZ4KsfxrtDhEotLmztvwGSumadc> [perma.cc/BVL8-4UT8]. Legault nevertheless appears to be walking back on this suggestion. See Ainslie MacLellan & Laura Marchand, "Quebec scraps planned tax on the unvaccinated", *CBC News* (1 February 2022), online: <www.cbc.ca/news/canada/montreal/vax-tax-nixed-1.6334828?fbclid=IwAR3qC9sOswpXJwGrfapHtXZvNF5EOxEhAJqWyOY9J98JbelH0uhrQEbdg> [perma.cc/Q6B5-E6MU].

8 See World Health Organization, "COVID-19 and Mandatory Vaccination: Ethical Considerations and Caveats" (13 April 2021), online: <www.who.int/publications/i/item/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2021.1> [perma.cc/T5WE-F872].

9 Being schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

the policy's objective of protecting public health, the law would readily survive constitutional scrutiny.

I. Covid-19 Vaccination Policies in Canada

Although an exhaustive overview of the policies enacted by Canadian governments is outside the scope of a short article, a general summary of the main policies will provide a sense of the actions that governments have taken to convince citizens to receive the vaccine. Four main policies have been implemented. First, governments sought to fight disinformation about the efficacy and potential side effects of Covid-19 vaccines. A prime example is the federal government's "Ripple Effect" campaign which explains how the small act of receiving a vaccine will "help reduce infection rates, ease pressure on the health system and create the conditions that will allow us to get back to important social, economic and recreational activities."¹⁰ Subsequently, the federal government's "Ask the Experts" campaign encouraged vaccine uptake by providing members of the public with short videos by trusted experts answering common questions about the efficacy and safety of the Covid-19 vaccination.¹¹ Although these campaigns probably had some impact on vaccine uptake, those with a strong distrust of government and limited scientific knowledge were unlikely to be persuaded by these and similar public health campaigns. It is also unlikely that these ad campaigns adequately reached groups in remote communities, immigrants who speak neither official language, nor homeless people.¹²

Second, due to inadequate uptake, some governments implemented incentive programs to convince citizens to receive the vaccine. For instance, the provinces of Québec, Manitoba, and Alberta offered those receiving vaccines the opportunity to win tickets to sporting events, vacation packages, scholarships, and/or cash prizes ranging from nominal sums to much greater sums up to and including \$1,000,000 prizes.¹³ The academic consensus nevertheless appears to be that these and similar programs offered in the United States only had a negligible impact on peoples' willingness to receive the vaccine.¹⁴

10 See Public Health Agency of Canada, News Release, "Government of Canada Launches New 'Ripple Effect' Advertising Campaign to Encourage COVID-19 Vaccination" (17 May 2021), online: <www.canada.ca/en/public-health/news/2021/05/government-of-canada-launches-new-ripple-effect-advertising-campaign-to-encourage-covid-19-vaccination.html> [https://perma.cc/STA7-9WTM].

11 See Public Health Agency of Canada, News Release, "Government of Canada Launches Ask the Experts Campaign to Encourage Vaccine Uptake" (15 June 2021), online: <www.canada.ca/en/public-health/news/2021/06/government-of-canada-launches-ask-the-experts-campaign-to-encourage-vaccine-uptake.html> [perma.cc/L8CA-MBN5].

12 See e.g., Christy Somos, "Migrants, undocumented workers fear getting COVID-19 could lead to deportation", *CTV News* (6 April 2021), online: <www.ctvnews.ca/health/migrants-undocumented-workers-fear-getting-covid-19-vaccine-could-lead-to-deportation-1.5375993> [perma.cc/AS6D-2PCS]; Wency Leung, "Toronto faces obstacles in vaccinating homeless populations while COVID-19 outbreaks erupt in shelters", *Globe and Mail* (4 May 2021), online: <www.theglobeandmail.com/canada/toronto/article-toronto-faces-obstacles-in-vaccinating-homeless-populations-while/> [perma.cc/83BF-LBWJ].

13 See e.g., Tom Yun, "COVID-19 vaccine lotteries didn't increase inoculation rates: study", *CTV News* (4 January 2022), online: <www.ctvnews.ca/health/coronavirus/covid-19-vaccine-lotteries-didn-t-increase-inoculation-rates-study-1.5727400> [perma.cc/VA7B-4NUN].

14 For a recent summary of the literature, see *ibid.*

Third, governments ramped up the cost of failing to become vaccinated by implementing what are commonly known as “vaccine passports.” These laws effectively prevent unvaccinated citizens from entering public establishments that are considered non-essential, such as restaurants, clubs, gyms, casinos, and sporting events. All provincial governments imposed a vaccine passport law of some sort, though several provinces chose to call their vaccine passport laws by other names.¹⁵ All indicators show that restricting citizens’ ability to attend social establishments had a notable impact on convincing the vaccine hesitant to receive the vaccine.¹⁶ Unfortunately, however, the vaccination rates in Canada remained far below the necessary percentage to achieve population or “herd” immunity. As a result, some governments are making last-ditch efforts to increase the types of places where unvaccinated people cannot attend, such as liquor and cannabis stores.¹⁷ Given the recency of these policies, it remains to be seen whether they will prove efficacious.¹⁸

Finally, some governments have imposed vaccination mandates for those who work in particular sectors. Most recently, the federal government required that all federally regulated employees be vaccinated or be subject to various compliance and enforcement measures, including monetary penalties.¹⁹ These regulations impact 1,300,000 employees who cumulatively account for approximately 8.5 percent of the Canadian workforce.²⁰ Notably, the regulations apply “whether employees are teleworking, working remotely or working on-site.”²¹ Earlier and more limited versions of these laws were challenged under the *Charter* by

15 These governments largely sought to avoid the term for political reasons. See e.g., Hannah Kost, “What we know about Alberta’s new vaccine passport (that’s not being called a passport) so far”, *CBC News* (16 September 2021), online: <www.cbc.ca/news/canada/calgary/alberta-vaccine-passport-restriction-exemption-program-covid-1.6178020> [perma.cc/ZJ5G-8EVH].

16 See e.g., “BC sees big jump in vaccination bookings after announcing COVID-19 vaccine passport”, *CBC News* (25 August 2021), online: <www.cbc.ca/news/canada/british-columbia/bc-sees-big-jump-in-vaccinations-after-covid-19-vaccine-passport-1.6153677> [perma.cc/S7FW-5CSK]; Dylan Short, “Requiring proof of vaccination could improve Alberta’s vaccine rate, says policy expert”, *Calgary Herald* (28 August 2021), online: <calgaryherald.com/news/local-news/requiring-proof-of-vaccination-could-improve-albertas-vaccine-rate-says-policy-expert> [perma.cc/9Z6S-U6WZ]; Jason Herring, “Alberta vaccine uptake up nearly 200 per cent after passport announcement”, *Calgary Herald* (17 September 2021), online: <calgaryherald.com/news/local-news/covid-19-main-september-17> [perma.cc/P9HM-AHVK]; Catherine DeClerq, “Ontario COVID-19 appointments double after province announces passport program”, *CTV News* (2 September 2021), online: <toronto.ctvnews.ca/ontario-covid-19-vaccine-appointments-double-after-province-announces-passport-program-1.5571427> [perma.cc/W6PY-HT5T].

17 See Zimonjic, *supra* note 6.

18 The first evidence suggests that these policies are increasing the number of people signing up for their first vaccination. See “First-dose vaccinations quadruple in Quebec ahead of restrictions at liquor and cannabis stores”, *CTV News* (11 January 2022), online: <http://montreal.ctvnews.ca/mobile/first-dose-vaccinations-quadruple-in-quebec-ahead-of-restrictions-at-liquor-and-cannabis-stores-1.5731327?utm_source=fark&utm_medium=website&utm_content=link&ICID=ref_fark&fbclid=IwAR3ZoddTbbT2_cbncW87Ykta6VOPBhuvtCiQ5AoPDJZaCrYFjm9P-XMMvk> [perma.cc/4HNS-U3H4].

19 See Employment and Social Development Canada, News Release, “Government of Canada will require employees in all federally regulated workplaces to be vaccinated against COVID-19” (7 December 2021), online: <www.canada.ca/en/employment-social-development/news/2021/12/government-of-canada-will-require-employees-in-all-federally-regulated-workplaces-to-be-vaccinated-against-covid-19.html> [perma.cc/TG9Q-SCM6].

20 *Ibid.*

21 *Ibid.*

unvaccinated persons impacted by the law. Given the broader applicability of the new laws, they too are likely to be constitutionally challenged. To date, however, all of these constitutional challenges — primarily maintaining that the federal regulations violate section 7 of the *Charter* — have failed.²²

The inability of the above policies to convince an adequate number of people to receive the Covid-19 vaccine has resulted in dire consequences. The empirical evidence paints a clear picture: those who are vaccinated are *significantly* less likely to become infected with Covid-19 and, those vaccinated citizens who do contract the virus are even *more significantly* less likely to suffer severe health consequences.²³ Take the example of Alberta, the jurisdiction hit hardest during the fourth wave of the pandemic. As one study found, “[r]ecent rates of hospitalization, ... [intensive care unit or “ICU”] admission and death among unvaccinated Albertans have been at least eight times higher — and as much as 60 times higher — compared to the fully vaccinated population.”²⁴ During the fifth wave, Canada’s hardest hit province of Québec noticed a similar trend. As regional authorities recently reported, “half of the people with COVID-19 being admitted to ICUs in the province are unvaccinated.”²⁵ As a result, the health authorities maintain, “new restrictions are needed to slow down hospital admissions.”²⁶

Although the fifth wave is being driven by a supposedly “milder” Omicron variant,²⁷ its drastically increased transmissibility ensures that a far greater number of cases will result. Moreover, it appears that the Omicron variant is very capable of killing those with comorbidities or who remain unvaccinated.²⁸ So long as vaccine numbers remain at current levels, increased hospital admissions are therefore inevitable which will in turn slow down an already overburdened healthcare system. As occurred throughout the pandemic, the effect of increased hospital admissions will continue to severely impact general patient care as those with important surgeries and other health needs will be pushed back to allow for increased focus on those (mostly unvaccinated) people requiring health care services in response to Covid-19. If this prediction holds true, then it is increasingly likely that governments will resort to broadly applicable mandatory vaccination policies to combat the impact of the fifth wave.

22 See e.g., *Lavergne-Postras v Canada (Attorney General)*, 2021 FC 1232; *Wojdan v Canada (Attorney General)*, 2021 FC 1341; *Neri v Canada*, 2021 FC 1443.

23 For a more detailed review, see Colton Fehr, “Vaccine Passports and the *Charter*: Do They Actually Infringe Rights?” (2022) 43 NJCL (forthcoming) [Fehr, “Vaccine Passports”].

24 See Robson Fletcher, “These charts show how much more often unvaccinated Albertans are being hospitalized and dying from COVID-19”, *CBC News* (16 September 2021), online: <www.cbc.ca/news/canada/calgary/alberta-severe-outcomes-covid-vaccination-1.6178449> [perma.cc/8C2R-DYX6]. The extent of the discrepancy turns on several factors most notable of which is the age groups being compared.

25 See Zimonjic, *supra* note 6.

26 *Ibid.*

27 It is not clear that this version is milder at the time of writing, but it is likely true based on available evidence. However, it is notable that health authorities continue to find much more severe affects among the unvaccinated who contract the Omicron variant. For a recent review, see Mike Crawley, “If Omicron is a less severe version of coronavirus, why are so many people dying in Ontario?”, *CBC News* (29 January 2022), online: <www.cbc.ca/news/canada/toronto/ontario-covid-19-omicron-wave-deaths-1.6331430?fbclid=IwAR0cs2q7i-y1vBwHBNw-lIZlZ_u-9cUzNDyV6v_64WuERSBO2zcP9E_qe9A> [perma.cc/N3CC-WKEQ].

28 See Fletcher, *supra* note 24.

II. Mandatory Vaccinations and the *Charter*

Although the term “mandatory vaccination” may conjure up an image of a person being held down against their will while a nurse administers a vaccine, this is not the policy proposal being implemented in foreign jurisdictions or contemplated in Canada. Instead, citizens may be required by law to become vaccinated or be found guilty of an offence that imposes some sort of consequence. The consequences could range from fines, as is currently being proposed in several foreign jurisdictions,²⁹ to more forceful punishments such as house arrest orders or imprisonment.³⁰ This raises the question: would such a law arbitrarily violate the threshold interests protected under section 7 of the *Charter* or the prohibition against cruel and unusual punishment protected under section 12 of the *Charter*?

(a) Section 7

Section 7 of the *Charter* guarantees everyone 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.” To establish a breach, the applicant must first prove that a law or state action engages the applicant’s life, liberty, or security of the person interests. If affirmative, then the applicant must prove that the law operates in a manner that is inconsistent with the principles of fundamental justice.³¹ Although a mandatory law that compels a particular medical procedure — receiving a vaccine — is highly likely to engage the liberty interest,³² the more pertinent effects for determining whether a mandatory vaccination law is inconsistent with the principles of fundamental justice relates to whether such a law would engage the security of the person interest.

For a law to infringe upon an individual’s security of the person interest, it need only cause physical or psychological harm to a single person.³³ Any engagement with the security of the person interest is likely to derive from the potential impact of compelling a person to receive a vaccine. Although there can be no doubt that the Covid-19 vaccines overwhelmingly further the public good, there are exceedingly rare cases where those who receive a vaccine can suffer serious physical consequences, such as heart inflammation, blood clots, Guillain-Barré Syndrome, and even death.³⁴ Moreover, as these consequences are not always foreseeable, it is

29 See Zimonjic, *supra* note 6.

30 The available sentences will be discussed in more detail below.

31 See generally *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536.

32 It would qualify as a decision of “fundamental personal importance.” See e.g., *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385. For a detailed review of this argument in the context of considering whether vaccine passports violate section 7 of the *Charter*, see Fehr, “Vaccine Passports”, *supra* note 23 citing *BR v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1; *Carter v Canada (Attorney General)*, 2015 SCC 5.

33 See *Reference re ss 193 and 195.1(1)(C) of the Criminal Code (Man.)*, [1990] 1 SCR 1123 at 1174, 56 CCC (3d) 65.

34 See e.g., World Health Organization, “Coronavirus disease (COVID-19): Vaccines safety” (24 January 2022), online: <[www.who.int/news-room/q-a-detail/coronavirus-disease-\(covid-19\)-vaccines-safety](http://www.who.int/news-room/q-a-detail/coronavirus-disease-(covid-19)-vaccines-safety)> [perma.cc/F66V-5HZW]; Lauren Pelley, “COVID-19 mRNA vaccines may be ‘new trigger’ for heart inflammation, CDC group says, but benefit outweighs risk”, *CBC News* (23 June 2021), online: <www.cbc.ca/news/health/covid-19-mrna-vaccines-may-be-new-trigger-for-heart-inflammation-cdc-group-says-but-benefit-outweighs-risk-1.6076870> [perma.cc/9DMU-5GC4]; Janyce McGregor, “Applications open for federal vaccine injury compensation”, *CBC News* (4 June 2021), online: <www.cbc.ca/news/politics/friday-covid-vaccine-injury-compensation-1.6052222> [perma.cc/5P4R-89DZ]; “Family feared

impossible to craft an exemption regime that would ensure no one is negatively impacted by a mandatory vaccine. This gives rise to the real possibility that a law compelling a vaccine would result in physical harm to some rare individuals which would be sufficient to engage the security of the person interest.³⁵

Whether a mandatory vaccine law violates fundamental justice will in large part turn on the hypothetical law's objective. In *Lavergne-Postras v Canada (Attorney General)*,³⁶ Justice McHaffie concluded that the objective of the early federal vaccine mandates was to protect public health and safety.³⁷ This conclusion is consistent with the Supreme Court's methodology for determining a law's objective. Writing in *R v Safarzadeh-Markhali*,³⁸ the Supreme Court concluded that a law's objectives must be characterized at an appropriate level of generality. It is therefore necessary to describe the impugned law's objective in a manner that is "precise and succinct" but still captures the law's "main thrust."³⁹ In my view, ascribing to a mandatory vaccine law a narrower objective, such as incentivizing vaccine uptake, does no more than repeat the substance of the law without getting at the heart of why the government wishes citizens to receive the Covid-19 vaccine: to protect public health and safety.⁴⁰

The most likely principle of fundamental justice to be engaged by a mandatory vaccination law is the overbreadth principle. This principle requires that a law apply to every individual in a manner that is connected to its objective.⁴¹ Two facts are key to establishing a violation of this principle. The first is that the law must only operate contrary to its objective as it applies to a single individual.⁴² The second is that the vaccines pose a real risk to at least some individual's security interests. This follows because the adverse consequences from being vaccinated can seriously compromise an individual's physical health in exceedingly rare cases. Such consequences run contrary to a mandatory vaccination law's likely objective of protecting public health and safety. Although such a consequence seems readily justifiable from a societal perspective, the consequence is not erased by the greater public good resulting from mandating vaccines. Such a balancing of interests must instead be considered under section 1 of the *Charter*.⁴³

worst: Alberta woman beats death after device removed COVID-19 blood clot", *CBC News* (19 August 2021), online: <www.cbc.ca/news/canada/calgary/calgary-foothills-embolism-covid-catheter-1.6146602> [perma.cc/UMA3-KN5L]; Wallis Snowdon, "Edmonton woman who died of vaccine-induced blood clot was turned away from ER, friend says", *CBC News* (6 May 2021), online: <www.cbc.ca/news/canada/edmonton/edmonton-covid-astrazeneca-vaccine-blood-clot-death-1.6015535> [perma.cc/2ZYE-W8ML].

35 I made a similar and more detailed argument in Fehr, "Vaccine Passports", *supra* note 23.

36 *Supra* note 22.

37 *Ibid* at para 69.

38 2016 SCC 14.

39 *Ibid* at paras 26, 28.

40 See Fehr, "Vaccine Passports", *supra* note 23.

41 See *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 112-17, 123 [*Bedford*]. It is notable that I have elsewhere expressed doubt about whether this "individualistic" understanding of the overbreadth principle qualifies as a principle of fundamental justice. See Colton Fehr, "Re-thinking the Instrumental Rationality Principles of Fundamental Justice" (2020) 58:1 *Alta L Rev* 133; Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: UBC Press, 2022) at Chapter 3; Fehr, "Vaccine Passports", *supra* note 23. Although I do not repeat those criticisms here, they apply with equal force. As courts have yet to consider such a challenge to the overbreadth principle's constitutional status, however, I will restrict my analysis to the currently applicable legal doctrine.

42 See *Bedford*, *ibid* at para 123.

43 *Ibid* at paras 124-29.

(b) Section 12

Depending on the nature of the consequence for failing to receive a vaccine, it is possible that a mandatory vaccination law could violate the right to be free from “cruel and unusual punishment” contrary to section 12 of the *Charter*. Given the pressing and substantial objective underlying a mandatory vaccination law, a fine (or a “tax” as Premier Legault proposed)⁴⁴ is unlikely to constitute “grossly disproportionate punishment,” the governing standard for determining whether a punishment infringes section 12.⁴⁵ The state may, however, decide to impose a term of imprisonment, or something akin to house arrest, known more formally as a conditional sentence order under section 742.1 of the *Criminal Code of Canada*.⁴⁶ Such a punishment would likely be imposed if a citizen incurred repeated fines and still refused to consent to a vaccination.

In my view, a law that allowed for imprisonment for failing to receive the Covid-19 vaccine would constitute cruel and unusual punishment.⁴⁷ In so concluding, it is necessary to measure whether imprisonment is grossly disproportionate to the moral blameworthiness of the unvaccinated in light of the existing social context driving vaccine hesitancy. The dominant reasons why people refuse to receive the vaccine are because they fail to understand the science underlying the vaccine and do not trust the state’s vaccination program.⁴⁸ The reality of the digital age is that misinformation may be perpetuated at a staggering rate. It is therefore at least understandable why so many people are confused about the efficacy of the vaccine. Moreover, trust in Parliament and political parties has long been low in Canada, which suggests there are external reasons for refusing to trust government authorities.⁴⁹ In my view, both considerations reduce the blameworthiness of at least most of the unvaccinated to a point where imprisonment becomes an unduly spiteful, and unlikely efficacious punishment. Subject to a section 1 justification, such a penalty ought therefore to be removed from the available penalties for remaining unvaccinated.

44 A tax is typically imposed for performing a particular act, not refraining from doing an act. Thus, it seems that the proposed “tax” is really a fine.

45 See *R v Boudreault*, 2018 SCC 58 at paras 45-46.

46 RSC 1985, c C-46 [*Criminal Code*].

47 It is notable that such a punishment is probable under normal principles of criminal law in cases where a person deliberately exposes a person to a dangerous virus such as Covid-19 by way of an affirmative act. Such an act would constitute an assault contrary to *Criminal Code*, *supra* note 46, s 265. For an analogous circumstance, see *R v Mabior*, 2012 SCC 47 (transmission of HIV via engaging in sexual intercourse).

48 See e.g., John Paul Tasker, “Meet the unvaccinated: Why some Canadians still haven’t had the shot”, *CBC News* (25 July 2021), online: <www.cbc.ca/news/politics/meet-the-unvaccinated-why-some-canadians-haven-t-had-a-shot-1.6115270> [perma.cc/AQ9U-VZQT]. As the author observes, it is also notable some forego the shot because of practical considerations such as needle phobia, allergies, or difficulty accessing the vaccine. Still others list dissatisfaction with the current offering of vaccines as driving factors in choosing to remain unvaccinated.

49 See e.g., Angus Reid Institute, “Canadians have a more favourable view of their Supreme Court than Americans have of their own” (17 August 2015), online: <angusreid.org/supreme-court/> [perma.cc/GH28-YAQD]. The number of Canadians with “total” or “quite a lot” of confidence in governing institutions was reported as follows: Supreme Court (61 percent), House of Commons (28 percent), Senate (10 percent), political parties (13 percent), and politicians (12 percent).

III. Proportionality Under Section 1

Section 1 of the *Charter* provides that the rights and freedoms therein are guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” This provision was subsequently interpreted to require that any law that violates a right may be upheld if the violation is proportionate to the law’s ability to achieve its objective.⁵⁰ A proportional law first must possess a pressing and substantial objective. The effects of the law must further be rationally connected to the law’s objective, minimally impairing of that objective, and strike an appropriate balance between its salutary and deleterious effects.⁵¹

In my view, any violation of the overbreadth principle would readily constitute a proportionate response.⁵² As explained earlier, those whose physical security interests are compromised by the Covid-19 vaccine are exceedingly few. This fact has also held true during the onset of the more contagious Omicron variant. At the same time, the medical evidence is clear that the unvaccinated were driving hospital and ICU admissions during the fourth wave, and a similar conclusion is likely to be found when the dust settles on the fifth wave. Early indicators suggest that the severe cases arising from the Omicron variant “look the same as the cases seen during the height of Delta and the first wave” and that the “real differentiators [in terms of outcome] are vaccination status, immune status and age.”⁵³ Thus, those who fail to receive the vaccine remain much more likely to die from Covid-19 and are similarly more likely to take up hospital beds at the expense of others’ legitimate medical needs. Mandating that all people receive the Covid-19 vaccine is therefore logically connected to the objective of promoting public health even if it runs the risk of undermining some narrow minority’s personal health.

The law would also be minimally impairing considering the other policies enacted to encourage citizens to receive the vaccine. Those policies included information campaigns, incentives by way of prizes, vaccine passport systems, and even limited mandatory vaccination orders for those working certain public sectors. At the time of writing, cases are at an all-time high and are only likely to get worse given the highly transmissible nature of the Omicron variant. There are simply no other reasonable options left to ward off the most serious consequences of the fifth wave or any subsequent waves. It is likely that at least some of the remaining unvaccinated people will buckle at the prospect of receiving significant fines for continuing to abstain from receiving the vaccine. Indeed, after Premier Legault suggested he would implement such a policy, more than 7000 people signed up for their first dose of the vaccine the next day.⁵⁴ Although there is only limited evidence to prove the efficacy of mandatory vaccine policies, the novelty of the situation suggests that governments ought to be shown

50 See *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

51 *Ibid* at 135-42.

52 I made a similar argument in considering whether an infringement of section 7 of the *Charter* arising from the vaccine passport laws was justifiable under section 1. See Fehr, “Vaccine Passports”, *supra* note 23.

53 See e.g., Sharon Kirkey, “‘It’s making people really sick in a different way’: How Omicron affects hospital patients”, *Leader Post* (6 January 2022), online: <leaderpost.com/health/we-arent-seeing-as-many-patients-gasping-for-air-how-omicron-is-affecting-hospital-patients> [perma.cc/57C9-XJ3V].

54 See Aaron Wherry, “A tax on the unvaxxed would be legally and ethically questionable — even if it worked”, *CBC News* (13 January 2022), online: <www.cbc.ca/news/politics/legault-tax-unvaccinated-pandemic-covid-omicron-1.6312706> [perma.cc/RWK8-NEMJ].

some deference when it continues its incremental increase of the consequences for remaining unvaccinated.

Advocates nevertheless maintain that a mandatory vaccination law that imposed a fine would unduly impact minority communities who are statistically more likely to abstain from receiving a Covid-19 vaccine.⁵⁵ It is certainly understandable that minority communities are less likely to trust state authority with respect to the efficacy of the vaccine given their often-strained relationship with the state. Yet this impact cannot be sufficient to result in the law failing the minimal impairment test given the high costs on the other end of the scales of justice: serious public health consequences relating to both those who are unvaccinated as well as those who are more vulnerable to Covid-19 or have other pressing medical procedures postponed due to opposition to the vaccine. Moreover, there is a way to ease the burden on those who come from economically disadvantaged communities: ensuring that fines are proportionate to a person's income. As this approach would not affect (often poor) minority communities in an overly punitive manner, it is preferable to imposing a general fine.

Finally, the salutary effects of a mandatory vaccination policy significantly outweigh the miniscule risk that some people will suffer harsh physical consequences as a result of being compelled to receive the vaccine. Even an incremental bump in overall population vaccination status will save the lives of at least some of those who are unvaccinated and prevent transmission to others who are vulnerable either due to failing to receive the vaccine or because of comorbidities that put them at greater risk despite being vaccinated. Significant increases in vaccination rates are also highly likely to reduce the number of critical procedures that are postponed due to unvaccinated patients filling the hospitals. The fact that death is an exceedingly rare consequence of receiving the vaccine, and other rare adverse consequences still allow those affected to “wake up to new tomorrows,”⁵⁶ strongly implies that a mandatory vaccine law's salutary effects greatly outweigh any impact of the law on the physical security interests of a few.

To the contrary, any mandatory vaccination law violating section 12 of the *Charter* is unlikely to be justifiable under section 1. This follows because a more minimally impairing law is readily available: imposition of fines. Unless the government could establish that only the threat of imprisonment could serve the laudable goal of incentivizing enough people to receive the Covid-19 vaccine, any use of imprisonment could not be justified under section 1. This is unlikely to be proven as the pertinent question has not to my knowledge been studied during the Covid-19 pandemic or any analogous circumstance. The government would therefore be incapable of proving that imprisonment constitutes a rational and proportionate means to reach the requisite number of vaccinated citizens to achieve population immunity. Although some degree of deference ought to be afforded to government measures during a pandemic, that deference ought not be extended with respect to the most extreme deprivation of liberty permitted under Canadian law. This is especially true given the lack of evidence that

55 See “Quebec's unvaccinated need education — not a tax, advocates say”, *CBC News* (12 January 2022), online: <www.cbc.ca/news/canada/montreal/education-tax-vaccination-tax-unvaccinated-1.6311830?fbclid=IwAR2vgy9cAi_I3xm3euHcBBm4bF1D3JMj6xsLw42xpp8gq7rsUvtAcGh0RoI> [perma.cc/9Y9G-D7RR].

56 See David M Beatty, “Covid, Courts, Communists and Common Sensez” (2022) 31:1 *Constitutional Forum constitutionnel* 1 at 6.

a mandatory vaccination regime relying upon the imposition of fines is insufficient to achieve population immunity.

Conclusion

The greatest tool in the fight against the Covid-19 pandemic is the vaccine. Despite valiant efforts by the government, vaccine hesitancy persists, causing governments in Canada and around the world to consider whether a mandatory vaccination policy is the only means out of the pandemic. Imposing such a policy nevertheless raises constitutional questions relating to whether such a law would unjustifiably infringe sections 7 and 12 of the *Charter*. In my view, a mandatory vaccination policy that imposed significant fines for refusing to become vaccinated would not unjustifiably violate either of these rights, although any resort to imprisonment would likely constitute an unjustifiable violation of the right to be free from cruel and unusual punishment. Canadian governments should therefore act quickly to follow the lead of many of their international counterparts and enact laws requiring every citizen to receive the Covid-19 vaccine or be subject to fines.

