Section 7 and the Limits of COVID-19 Vaccine Mandates in Ontario Public Schools

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I. Introduction

Ontario parents are divided over whether to vaccinate their children against COVID-19. Despite widespread availability, as of December 18, 2022, just 40 per cent of children between the ages of 5 and 11 have completed the primary series.[1]

The hesitancy is, from one perspective, understandable. Serious negative outcomes from COVID-19 are rare in children. Only 269 of nearly 1.1 million Ontario children between the ages of 5 and 11 had been hospitalized due to COVID-19 as of July 30, 2022.[2] Meanwhile, the COVID-19 vaccines carry a small risk of myocarditis and pericarditis, and the risk may be higher in younger males.[3] The crude rate reported in Ontario after Pfizer-BioNTech Comirnaty between December 13, 2020 and November 21, 2021 was 15.1 per million doses, and 107.5 per million second doses given to males ages 12-17.[4] The crude rate reported after Moderna Spikevax in Ontario was 31.2 per million doses, and 333.9 per million second doses in males ages 18-24.[5]

The widespread hesitancy has not stopped some from advocating that the Ontario

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1 "COVID-19 Vaccine Uptake in Ontario: December 14, 2020 to December 18, 2022", Public Health Ontario, online: <https://www.publichealthontario.ca/-/media/documents/ncov/epi/covid-19-vaccine-uptake-ontario-epi-summary.pdf>.

2 "Ontario COVID-19 data tool", Public Health Ontario, online: <https://www.publichealthontario.ca/en/data-and-analysis/infectious-disease/covid-19-data-surveillance/covid-19-data-tool>.

3 "Myocarditis and Pericarditis after COVID-19 mRNA Vaccines", Public Health Ontario, online: <https://www.publichealthontario.ca/-/media/documents/ncov/vaccines/2021/11/myocarditis-pericarditis-mrna-vaccines.pdf>.

4 "Myocarditis and pericarditis following vaccination with COVID-19 mRNA vaccines in Ontario", Public Health Ontario, online: <https://www.publichealthontario.ca/-/media/documents/ncov/epi/covid-19-myocarditis-pericarditis-vaccines-epi.pdf> at 11. Note: the apparent higher risk of myocarditis and pericarditis with Spikevax led the National Advisory Committee to state that the Comirnaty vaccine is preferred in adolescents and young adults ages 12 to 29 (see p. 8).

5 "Myocarditis and pericarditis following vaccination with COVID-19 mRNA vaccines in Ontario", Public Health Ontario, online: <https://www.publichealthontario.ca/-/media/documents/ncov/epi/covid-19-myocarditis-pericarditis-vaccines-epi.pdf> at 12.

government add COVID-19 vaccines to the list of shots required to attend school under the *Immunization of School Pupils Act*[6] ("ISPA").[7] Former New Democratic Party Leader Andrea Horwath and former Liberal Leader Steven Del Duca both endorsed the proposal before their parties lost the 2022 provincial election. As such, it is worth examining whether it would be unconstitutional to keep children out of classrooms for failing to receive a COVID-19 vaccine. To this end, my analysis in this paper is based on the fictional scenario described below.

In February 2023, Tim, aged 16, has been suspended from in-person schooling because he refused to get a COVID-19 vaccine. The suspension was required by amendments to the ISPA and its regulations that: (1) added SARS-CoV-2 to the list of diseases that students must be vaccinated against; and (2) limited medical exemptions to those that were available under Ontario's vaccine passport (*i.e.*, myocarditis and a confirmed allergy to a vaccine ingredient).[8] The Minister of Health said the goal of the policy change was to protect health, hospitals and the economy. Section 33 of the *Canadian Charter of Rights and Freedoms*, the so-called "notwithstanding" clause,[9] was not invoked.

Tim's school principal told him that he can use Zoom to complete his credits, but he has been forced to quit the basketball team and cannot attend graduation. The weeks that Tim spent at home alone caused him despair. Tim's doctor has diagnosed him with depression. However, Tim refuses to change his position: he has read about the myocarditis/pericarditis risk and believes that he faces a greater risk from the vaccine than from COVID-19 due to his age, sex, and a history of unexplained heart palpitations. Tim has such a strong belief that the vaccine is too risky that he has been left with no meaningful choice: he can either take the vaccine and risk injury (however small) or continue to be excluded from school and suffer the consequent depression. The previous iteration of ISPA would have granted Tim a medical exemption even if COVID-19 had been added to the list of required immunizations because Tim's doctor agrees the vaccine may be detrimental to his health. Tim makes an application to Ontario's Superior Court of Justice for a declaration under section 52(1) of the *Constitution Act, 1982* that the ISPA amendment that removed exemptions other than those prescribed by the minister is of no force and effect.

I argue in this paper that Tim has a chance of succeeding by making three section

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[6] *Immunization of School Pupils Act*, R.S.O. 1990, c. I.1.

[7] Medical Officer of Health, "Response to COVID-19 – September 2021 Update" (September 13, 2021), online: <https://www.toronto.ca/legdocs/mmis/2021/hl/bgrd/backgroundfile-170768.pdf>.

[8] "Medical Exemptions to COVID-19 Vaccination", Ministry of Health (September 14, 2021), online: <https://health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/vaccine/medical_exemptions_to_vaccination.pdf>.

[9] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [hereinafter "Charter"].

7 Charter arguments.[10] First, Tim could argue that his rights to liberty and security of the person have been limited because the amended ISPA has deprived him of the freedom to choose his own medical treatment, and that this is not in accordance with the principles of fundamental justice nor justifiable under section 1. Second, Tim could claim that his right to the physical security of the person was limited when he was forced to choose between the small risk of a serious cardiac side-effect from the vaccine or attending school, and that this limit is neither in accordance with the principles of fundamental justice nor justifiable under section 1. Finally, he could argue that his right to the psychological security of the person under section 7 of the Charter was limited by his exclusion from in-person learning because it caused his depression, and that this limit was neither in accordance with the principles of fundamental justice nor justifiable under section 1.

I further argue that if Tim succeeds on any of his section 7 arguments, he would in part have former Supreme Court of Canada Chief Justice Beverley McLachlin to thank because of the expansive view she took of section 7. Limiting exemptions to myocarditis and severe allergies to a vaccine ingredient leaves Tim, in my view, with *no meaningful choice*, and that deprives Tim of his section 7 rights as Chief Justice McLachlin interpreted them. Although Chief Justice McLachlin recognized that section 7 rights can be limited for the purposes of administrative expediency, and that governments deserve a wide margin of appreciation when making policies, it is still difficult to reconcile a vaccine requirement with such limited medical exemptions to attend school and the holdings of the McLachlin Court's seminal section 7 cases: *Canada (Attorney General) v. Bedford*,[11] *Carter v. Canada (Attorney General)*[12] and *Canada (Attorney General) v. PHS Community Services Society.*[13]

I take no position on whether the Chief Justice's willingness to strike down democratically enacted laws targeting prostitution, drugs and assisted death based on her expansive reading of section 7 rights was *correct*. I do not even take a position on whether the rights to life, liberty and security of the person outlined in section 7 are procedural or substantive. Rather, I simply intend to show that the section 7 framework championed by the former Chief Justice could prevent

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[10] There are good arguments to be made that s. 2(a), which protects freedom of religion and conscience, and s. 15, which protects equality, could also be used to strike down vaccine mandates for school children. However, I decided to focus on the s. 7 arguments because the expansive view of those rights expressed in the Supreme Court's s. 7 jurisprudence during the McLachlin era makes them more likely to succeed.

[11] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.) [hereinafter "*Bedford*"].

[12] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 (S.C.C.) [hereinafter "*Carter*"].

[13] *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.) [hereinafter "*PHS*"].

imposition of mandatory COVID-19 vaccination in public schools, at least without broader medical exemptions than those which existed under Ontario's vaccine passport system. Like it or not — and I suspect some who supported the outcomes in *Bedford*, *Carter* and *PHS* will *not* like it — a principled application of the McLachlin Court's section 7 framework could require courts to strike down some forms of COVID-19 vaccine mandates, such as the hypothetical regime I have described.

II. THE SECTION 7 FRAMEWORK AFTER *BEDFORD*, *CARTER* AND *PHS*

In *Bedford*, McLachlin C.J.C., writing for a unanimous Court, struck down three sections of the *Criminal Code*[14] for limiting the security of the person rights of sex workers; McLachlin C.J.C. held that these limitations could not be upheld under section 1.[15] The three impugned sections made it an offence to be an inmate of a bawdy-house, to live on the avails of another's prostitution, and to communicate in a public place for the purpose of engaging in prostitution or hiring a prostitute.[16] *Bedford* suggests a four-part framework for analyzing section 7 claims:

(1) Is there a *non-trivial or serious* deprivation?

(2) Did the government *cause* the non-trivial deprivation?

(3) Is the deprivation in *accordance with the principles of fundamental justice*?

(4) Can the deprivation be upheld as a *justifiable limit under section 1*?

In *Carter*, the McLachlin Court declared that sections of the *Criminal Code* that made it an indictable offence to aid or abet a person to commit suicide or to consent to having death inflicted upon oneself were void under section 52 of the *Constitution Act, 1982* because they violated the plaintiff's rights to life, liberty and security of the person.[17] The Court reiterated the principle from *C. (A.) v. Manitoba (Director of Child and Family Services)*[18] that "competent individuals are — and should be — free to make decisions about their bodily integrity", and that liberty and security of the person entitle adults "to direct the course of their own medical care".[19] In *PHS*, McLachlin C.J.C., once again writing for a unanimous Court, likewise found that the

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[14] *Criminal Code*, R.S.C. 1985, c. C-46.

[15] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, at para. 2 (S.C.C.).

[16] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 4 (S.C.C.), citing *Criminal Code*, R.S.C. 1985, c. C-46, ss. 210, 212(1)(j) and 213(1)(c).

[17] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 at paras. 19 and 126 (S.C.C.).

[18] *C. (A.) v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, 2009 SCC 30 (S.C.C.) [hereinafter "*A.C.*"].

[19] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 at para. 67 (S.C.C.).

federal Minister of Health's refusal to extend an exemption available under the *Controlled Drugs and Substances Act*[20] to users of a Vancouver injection site was a violation of their security of the person that could not be justified under section 1.[21] It is possible that Tim's three section 7 claims could meet all four requirements of the *Bedford* test, thanks to the expansive nature of section 7 rights outlined in these three decisions.

III. TIM CAN SHOW A SERIOUS DEPRIVATION OF LIBERTY AND SECURITY OF THE PERSON

In *Bedford*, McLachlin C.J.C. said that "*serious* harmful effects" will engage section 7[22] and pointed to *New Brunswick (Minister of Health and Community Services) v. G. (J.)*[23] for the proposition that "[t]rivial impingements on security of the person do not engage s. 7."[24] In other words, section 7 protects against only serious, non-trivial impositions.

In *G. (J.)*, Lamer C.J.C. explained that for a deprivation of security of the person to be considered non-trivial in the *psychological* context, the limit must have a "serious and profound" effect on a person of "reasonable sensibility."[25] Section 7 does not protect "from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action,"[26] although the effect "need not rise to the level of nervous shock or psychiatric illness".[27] In *Blencoe v. British Columbia (Human Rights Commission)*,[28] Bastarache J. appeared to add a second requirement to the threshold test for psychological security of the person claims, namely, that the state-caused prejudice relate to "an individual interest of

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[20] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [hereinafter "CDSA"].

[21] *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44 at para. 3 (S.C.C.).

[22] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 91 (S.C.C.) (emphasis added).

[23] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.) [hereinafter "*G. (J.)*"].

[24] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.), citing *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 at para. 59 (S.C.C.).

[25] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.) at para. 60.

[26] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 at para. 59 (S.C.C.).

[27] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 at para. 60 (S.C.C.).

[28] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, 2000 SCC 44 (S.C.C.) (S.C.C.) [hereinafter "*Blencoe*"].

fundamental importance".[29]

Tim should be able to meet the threshold test of "non-trivial" or "serious" deprivation with regard to his physical security of the person claim. Although the risk of an injury from the vaccine is small, it is nonetheless serious if one follows the logic of *Bedford*. In *Bedford*, the impugned *Criminal Code* provisions materially increased the risk that a sex worker would be injured because she was not allowed to work in a bawdy house, hire a driver or screen clients outdoors, and serious deprivations were found.[30] What matters at this stage of the analysis is the gravity of the impact on the individual should the deprivation occur as a result of the materially increased risk. The impact on Tim of the risk of a cardiac injury due to the vaccine is serious in the same way that the risk of an injury to a sex worker beaten by a client is serious.

Tim's psychological security of the person claim should also meet the non-trivial and serious requirement. Depression has an impact "greater than ordinary stress or anxiety".[31] While the impact "need not rise to the level of a psychological illness",[32] the impact on Tim was a psychological illness. The deprivation of psychological security of the person flows from the decision to avoid vaccination; Bastarache J. gave "making a decision concerning one's body free from state interference" as the paradigm "individual interest of fundamental importance".[33]

Tim's third claim, that his right to make medical decisions protected by both liberty and security of the person, has been interfered with should also satisfy the serious or non-trivial test. This is implied by the reasoning of Phillips J. of the Superior Court of Québec in *Syndicat des métallos, section locale 2008 c. Canada (Procureur général)*,[34] discussed in more detail below.

IV. TIM CAN SHOW THE LAW *CAUSED* THE DEPRIVATION

Tim should be able to meet the second part of the *Bedford* test, which is showing that the deprivations were *caused* by the government's action. There is some jurisprudence from the current pandemic that found that no sufficient causal

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[29] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, 2000 SCC 44 at para. 82 (S.C.C.).

[30] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 63-65 (S.C.C.).

[31] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 at para. 59 (S.C.C.).

[32] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 at para. 60 (S.C.C.).

[33] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, 2000 SCC 44 at para. 82 (S.C.C.).

[34] *Syndicat des métallos, section locale 2008 c. Canada (Procureur général)*, [2022] J.Q. no 6322, 2022 QCCS 2455 (Que. S.C.) [hereinafter "*Syndicat*"].

connection existed between vaccine mandates and alleged deprivations of life, liberty or security of the person. However, those decisions are distinguishable from Tim's case on the facts or, in the case of *Lewis v. Alberta Health Services*,[35] incompatible with *Bedford*, *PHS* and *Carter* and therefore arguably an error in law.

Bedford clarified that the standard for finding causation is "sufficient causal connection",[36] which is satisfied by "a reasonable inference, drawn on a balance of probabilities".[37] In *Bedford*, McLachlin C.J.C. found there was a sufficient causal connection between the three laws in question and the heightened risk of physical violence faced by the applicant sex workers. The provision banning bawdy houses was sufficiently connected because it forced sex workers to undertake dangerous "out-calls" and street prostitution.[38] The ban on living on the avails was likewise sufficiently connected because it prevented hiring body guards, receptionists or drivers who could keep the sex workers safer.[39] The ban on communicating in a public space was sufficiently connected because it meant sex workers could not converse with clients in order to screen for drunkenness.[40]

Chief Justice McLachlin rejected a causation argument put forward by the attorneys general in *Bedford*. This is key to understanding why Tim may succeed in having the school vaccine mandate declared unconstitutional. The Chief Justice rejected the claim that sex workers, rather than the impugned *Criminal Code* provisions, caused the security of the person injuries because sex workers *chose* to engage in a risky activity.[41] The Chief Justice said that women like Ms. Bedford had "little choice" but to engage in sex work to feed themselves. They could not be said to be truly *choosing* a risky line of business.[42] It was, she said, not a "*meaningful*

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[35] *Lewis v. Alberta Health Services*, [2022] A.J. No. 1326, 2022 ABCA 359 (Alta. C.A.) [hereinafter "*Lewis*"].

[36] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 75 (S.C.C.); *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, 2000 SCC 44 at para. 60 (S.C.C.).

[37] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 76 (S.C.C.).

[38] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 62-63 (S.C.C.).

[39] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 66-67 (S.C.C.).

[40] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 69-72 (S.C.C.).

[41] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 79 (S.C.C.).

[42] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 86 (S.C.C.).

choice".[43]

In Tim's case, the government would likely argue that section 7 is not engaged because vaccination was not mandatory in the sense that the law did not require anyone to hold him down and administer the injection, so he still had a choice. In other words, his liberty and security of the person rights remained intact even though he would need to suffer the consequences if he made the wrong choice.

This type of argument was rejected in *Syndicat,* where Philipps J. found a sufficient causal connection between federal orders requiring vaccination to board planes and trains, and the serious deprivation of the section 7 rights of union members who worked in those industries or required trains or planes to get to work.[44] The plaintiffs argued that vaccination was a medical choice protected by liberty and security of the person,[45] and that the choice had been removed if they lost their jobs for exercising that choice.[46] Justice Phillips agreed that although the plaintiffs *theoretically* retained the choice to accept or not accept the vaccine, the consequences were so serious that it was not *truly* a choice.[47] He found a deprivation of their section 7 security and liberty rights on that basis,[48] and also on the basis that the orders caused serious psychological harm.[49] However, Philipps J. also found that the policies accorded with the principles of fundamental justice.[50]

In *Lewis*, a panel of the Alberta Court of Appeal acknowledged that the test for a deprivation of a section 7 right is "sufficient causal connection" between the state action and the prejudice suffered.[51] However, they concluded that there was *no*

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[43] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 86 (S.C.C.).

[44] *Syndicat des métallos, section locale 2008 c. Canada (Procureur général)*, [2022] J.Q. no 6322, 2022 QCCS 2455 at para. 37 (Que. S.C.).

[45] *Syndicat des métallos, section locale 2008 c. Canada (Procureur général)*, [2022] J.Q. no 6322, 2022 QCCS 2455 at para. 48 (Que. S.C.).

[46] *Syndicat des métallos, section locale 2008 c. Canada (Procureur général)*, [2022] J.Q. no 6322, 2022 QCCS 2455 at paras. 51-52 (Que. S.C.).

[47] *Syndicat des métallos, section locale 2008 c. Canada (Procureur général)*, [2022] J.Q. no 6322, 2022 QCCS 2455 at para. 174 (Que. S.C.).

[48] *Syndicat des métallos, section locale 2008 c. Canada (Procureur général)*, [2022] J.Q. no 6322, 2022 QCCS 2455 at para. 179 (Que. S.C.).

[49] *Syndicat des métallos, section locale 2008 c. Canada (Procureur général)*, [2022] J.Q. no 6322, 2022 QCCS 2455 at paras. 176-179 (Que. S.C.).

[50] *Syndicat des métallos, section locale 2008 c. Canada (Procureur général)*, [2022] J.Q. no 6322, 2022 QCCS 2455 at para. 212 (Que. S.C.).

[51] *Lewis v. Alberta Health Services*, [2022] A.J. No. 1326, 2022 ABCA 359 at para. 45 (Alta. C.A.), citing *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, 2000 SCC 44 at para. 60 (S.C.C.); *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 75 (S.C.C.); Robert J. Sharpe & Kent Roach, *The Charter*

sufficient causal connection between the state's decision to deny the plaintiff access to an organ transplant waiting list if she did not submit to vaccination and what they admitted was an "increased risk of death".[52] They upheld the vaccine mandate despite the "virtual certainty" that Ms. Lewis would die without a transplant.[53] They found that the vaccination requirement was not "coercive"[54] and that "Ms Lewis has freely made, and will continue to be free to make, fundamental personal choices without state interference."[55] They also said that "the consequences that flow from [Ms. Lewis'] autonomous decision to refuse the COVID-19 vaccine were not caused by the respondents."[56]

The reasoning in *Lewis* is difficult to square with *Syndicat*, *Carter* and *Bedford*, and, in my view, constitutes an error in law. First, it is difficult to see how post-*Carter* Ms. Lewis has not been deprived of her right to make her own medical choices when she feels so strongly about her desire to avoid the COVID-19 vaccination that she allowed herself to be removed from a waiting list for a life-saving organ for no reason but exercising her choice. In *Carter*, the McLachlin Court reaffirmed that liberty and security of the person protect the right of adults to "direct the course of their own medical care".[57] The court cited *A.C.*, in which Abella J. for the court had cited with approval a passage from the Ontario Court of Appeal decision in *Malette v. Shulman*,[58] which said that this freedom to direct one's own medical care is only "meaningful" if people "have the right to make choices that accord with their own values regardless of how unwise or foolish those choices may appear to others".[59]

The finding in *Lewis* that no section 7 deprivations were caused by the vaccine mandate is inconsistent with McLachlin C.J.C.'s reasoning in *Bedford.* How did the

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of Rights and Freedoms (Toronto: Irwin Law, 2021) at 267.

[52] *Lewis v. Alberta Health Services*, [2022] A.J. No. 1326, 2022 ABCA 359 at para. 45 (Alta. C.A.).

[53] *Lewis v. Alberta Health Services*, [2022] A.J. No. 1326, 2022 ABCA 359 at para. 1 (Alta. C.A.).

[54] *Lewis v. Alberta Health Services*, [2022] A.J. No. 1326, 2022 ABCA 359 at para. 52 (Alta. C.A.).

[55] *Lewis v. Alberta Health Services*, [2022] A.J. No. 1326, 2022 ABCA 359 at para. 56 (Alta. C.A.).

[56] *Lewis v. Alberta Health Services*, [2022] A.J. No. 1326, 2022 ABCA 359 at para. 47 (Alta. C.A.).

[57] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 at para. 67 (S.C.C.).

[58] *Malette v. Shulman*, [1990] O.J. No. 450, 72 O.R. (2d) 417 (Ont. C.A.) [hereinafter "*Mallette*"].

[59] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 at para. 67 (S.C.C.), citing *C. (A.) v. Manitoba (Director of Child and Family Services*), [2009] S.C.J. No. 30, 2009 SCC 30 at para. 199 (S.C.C.).

judges find that it was not reasonable to infer, on a balance of probabilities, that Ms. Lewis was deprived of her liberty and security of the person because of the vaccine requirement when they acknowledged she would have been kept on the waitlist *but for* her decision to avoid vaccination?[60] How did the panel conclude that the decision to remove Ms. Lewis from the waitlist did not "increase her risk of death directly or indirectly",[61] considering that they acknowledged that she will "almost certainly" die without a transplant[62] and "has a greater chance of survival" on the waitlist?[63] How was Ms. Lewis left with a meaningful choice? Chief Justice McLachlin recognized in *Bedford* that a sex worker had no meaningful choice when her options were finding a less risky vocation or enduring the increased risks of violence caused by the impugned sections of the *Criminal Code*. Ms. Lewis was given no meaningful choice when the only options were waiving her right to make medical decisions or foregoing life-saving care. Justice Philips recognized that a vaccine mandate that leads to job loss does not present a meaningful choice, so surely a mandate that leads to almost certain death presents no meaningful choice.

This logic applies to Tim's case. Just as the sex workers in *Bedford* did not have a *meaningful* choice, forcing Tim to choose between risking vaccine injury (and giving up his right to medical autonomy to attend school) or maintaining his right to medical autonomy (and not attending school, resulting in depression) does not leave him with a meaningful choice.

In four other significant section 7 cases, challenged vaccine mandates were similarly upheld, but the facts are distinguishable from Tim's case and the requirement that the medical decision be a meaningful choice was arguably implied in all of them. First, in *Lavergne-Poitras v. Canada (Attorney General)*,[64] McHaffie J. of the Federal Court implied that a government contractor was not given a meaningful choice where he faced the "serious consequence"[65] of loss of employment if he chose not to be vaccinated, resulting in his no longer being able to access federal government workplaces. Justice McHaffie refused to order a stay of the

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[60] *Lewis v. Alberta Health Services*, [2022] A.J. No. 1326, 2022 ABCA 359 at para. 2 (Alta. C.A.).

[61] *Lewis v. Alberta Health Services*, [2022] A.J. No. 1326, 2022 ABCA 359 at paras. 44-45 (Alta. C.A.).

[62] *Lewis v. Alberta Health Services*, [2022] A.J. No. 1326, 2022 ABCA 359 at para. 1 (Alta. C.A.).

[63] *Lewis v. Alberta Health Services*, [2022] A.J. No. 1326, 2022 ABCA 359 at para. 48 (Alta. C.A.).

[64] *Lavergne-Poitras v. Canada (Attorney General)*, [2021] F.C.J. No. 1866, 2021 FC 1232 (F.C.) [hereinafter "*Lavergne-Poitras*"].

[65] *Lavergne-Poitras v. Canada (Attorney General)*, [2021] F.C.J. No. 1866, 2021 FC 1232 at para. 77 (F.C.).

mandate,[66] but accepted that liberty and security of the person *were* engaged.[67]

In *Costa v. Seneca College of Applied Arts and Technology*,[68] Black J. of the Ontario Superior Court of Justice found that section 7 was not engaged, but implied that it would have been had the consequences of the mandate been such that the plaintiffs had no meaningful choice. In *Costa*, Black J. noted that if applicants wished to preserve their medical autonomy, they could avail themselves of leaves of absence for the duration of the vaccine mandate or could transfer to colleges without vaccine mandates.[69]

In *Maddock v. British Columbia*,[70] the plaintiff challenged British Columbia's vaccine passport system because it forced him to choose between maintaining his right to make medical decisions and giving up that right in order to obtain a vaccine passport that would allow him to meet with clients at a restaurant.[71] Chief Justice Hinkson of the Supreme Court of British Columbia found that the vaccine passport did not leave "individuals with no reasonable choice but to accept, or effectively accept, non-consensual treatment",[72] implying that where the meaningful choice *has* been denied, section 7 rights will be engaged.

Finally, in *Canadian Society for the Advancement of Science in Public Policy v. British Columbia (Provincial Health Officer)*,[73] section 7 was similarly not engaged, implicitly because the vaccine passport system left the petitioner with a meaningful choice: exercise his freedom to remain unvaccinated or give that up to get a vaccine passport that would allow him to partake in discretionary activities such as experiencing a candlelight performance of Vivaldi and attending in-person yoga classes.[74]

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[66] *Lavergne-Poitras v. Canada (Attorney General)*, [2021] F.C.J. No. 1866, 2021 FC 1232 at para. 4 (F.C.).

[67] *Lavergne-Poitras v. Canada (Attorney General)*, [2021] F.C.J. No. 1866, 2021 FC 1232 at para. 49 (F.C.).

[68] *Costa v. Seneca College of Applied Arts and Technology*, [2022] O.J. No. 4038, 2022 ONSC 5111 (Ont. S.C.J.) [hereinafter "*Costa*"].

[69] *Costa v. Seneca College of Applied Arts and Technology*, [2022] O.J. No. 4038, 2022 ONSC 5111 at para. 79 (Ont. S.C.J.).

[70] *Maddock v. British Columbia*, [2022] B.C.J. No. 1722, 2022 BCSC 1605 (B.C.S.C.) [hereinafter "*Maddock*"].

[71] *Maddock v. British Columbia*, [2022] B.C.J. No. 1722, 2022 BCSC 1605 at paras. 40-41 (B.C.S.C.).

[72] *Maddock v. British Columbia*, [2022] B.C.J. No. 1722, 2022 BCSC 1605 at para. 78 (B.C.S.C.).

[73] *Canadian Society for the Advancement of Science in Public Policy v. British Columbia (Provincial Health Officer)*, [2022] B.C.J. No. 1723, 2022 BCSC 1606 (B.C.S.C.) [hereinafter "*CSASPP*"].

[74] *Canadian Society for the Advancement of Science in Public Policy v. British Columbia*

Tim has no such meaningful choice. Tim's situation is not like that of the plaintiffs in *Maddock* or *CSASPP*, where the plaintiffs sought to participate in discretionary activities. Attending school is mandatory. His situation is also unlike that of the plaintiffs in *Costa*, who could transfer to another college. The ISPA also applies to private schools.[75] Like the plaintiffs in *Lewis* and *Syndicat*, Tim *technically* had a choice to take the vaccine and risk a side effect while giving up his right to make the medical choice or not take the vaccine and be deprived of school and suffer the consequent depression, but that is not a *meaningful* choice.

V. THE DEPRIVATIONS ARE NOT IN ACCORDANCE WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE

Tim should also be able to meet the third step of the *Bedford* test: establishing that the deprivations of his security of the person do not accord with the principles of fundamental justice. Chief Justice McLachlin's treatise in *Bedford* about how these principles include prohibitions on arbitrariness, overbreadth and gross disproportionality supports Tim's position.

Chief Justice McLachlin said in *Bedford* that a law is arbitrary if the "impugned effect on the individual" impinges on the life, liberty or security of the person interests of a person in a way that "bears no connection to its objective".[76] As in *R. v. Morgentaler*,[77] she explained, a law will lack any connection to its objective where "the effect actually undermines the objective".[78] *Morgentaler* struck down a provision of the *Criminal Code* that had required abortions to be conducted only in accredited hospitals with the approval of therapeutic abortion committees.[79] Chief Justice Brian Dickson had found that the law that had led to Dr. Henry Morgentaler's charges violated women's physical security of the person because it led to delays in receiving abortions, which made abortion more dangerous for the women. It also violated women's psychological security of the person because of the extreme stress created by not knowing whether an abortion would be granted.[80] These violations were established on the principle of fundamental justice against illusory criminal defences,[81] but Dickson C.J.C. said the procedures for approval of abortions under the law were "arbitrary and unfair" and that to the extent that the

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(Provincial Health Officer), [2022] B.C.J. No. 1723, 2022 BCSC 1606 at paras. 143-145.

[75] *Immunization of School Pupils Act*, R.S.O. 1990, c. I.1, s. 1.

[76] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 111 (S.C.C.).

[77] *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) [hereinafter "*Morgentaler*"].

[78] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 119 (S.C.C.), citing *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

[79] *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

[80] *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 at paras. 24-35 (S.C.C.).

[81] *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 at para. 49 (S.C.C.).

provision was "designed to protect the life and health of women, the procedures it establishes may actually defeat that objective".[82] Thus, as McLachlin C.J.C. explained in *Bedford*, the law violated the principle of fundamental justice against arbitrariness.[83]

This logic was used by McLachlin C.J.C. in *PHS* to neutralize drug laws. The objectives of the CDSA were protecting public health and public safety.[84] The trial judge found, based on the facts derived from when Insite had been operating under an earlier CDSA exemption, that a failure to grant a new exemption would lead to a higher risk of death and disease among drug users.[85] Chief Justice McLachlin agreed that the objective of protecting health would be undermined by withholding an exemption, making the decision arbitrary.[86]

Tim could argue that the prohibition on attending in-person schooling without the COVID-19 shot is arbitrary because, in his case, the law undermines its own objective. One of the law's purposes is to protect Ontarians' health, so if the law harms Tim's health by causing depression or materially increasing his risk of myocarditis or pericarditis, the law is arbitrary in the same way that a law purporting to protect the health of drug users or women seeking abortions is arbitrary if it harms their health.

Tim could also mount an overbreadth argument. In *Bedford*, McLachlin C.J.C. said that overbreadth deals with laws that are arbitrary in part, because they include some conduct that bears no relation to the law's purpose.[87] "Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others," she reasoned. "Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose," the Chief Justice explained. "For example, where a law is drawn broadly and targets *some conduct that bears no relation to its purpose in order to make enforcement more practical*, there is still no connection between the purpose of the law and its effect on the specific individual."[88]

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[82] *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 at para. 58 (S.C.C.).

[83] *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 at para. 98 (S.C.C.).

[84] *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44 at para. 129 (S.C.C.).

[85] *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44 at para. 136 (S.C.C.).

[86] *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44 at paras. 131-132 (S.C.C.).

[87] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 112 (S.C.C.).

[88] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 112-113 (S.C.C.) (emphasis added).

In *Bedford*, the "living off the avails" provision was not arbitrary in all cases because it was rationally connected to the purpose of preventing sex workers from being exploited by pimps. However, it was arbitrary *in some cases* because it prevented sex workers from hiring people who could *increase* their safety, such as drivers, managers or bodyguards.[89] This latter conduct bore no relation to the law's purpose, so the law was overbroad, according to the Chief Justice.

Tim could argue that the amended ISPA is overbroad because it bans some conduct that bears no relation to the purposes of the law. The law is not arbitrary in most cases, as the vaccine will reduce infection and transmission of COVID-19 in most children who get it, furthering the goals of protecting health, hospitals and the economy. However, it *does* unnecessarily sweep in Tim, whose health would be better if he were allowed to attend school unvaccinated, as this would allow him to avoid the risk of myocarditis and pericarditis (which his doctor agrees is heightened relative to other children) and depression caused by excluding him from school.

Just like protecting sex workers from exploitation by cretinous pimps can be achieved without outlawing *all* forms of living off the avails of prostitution, the government can achieve its goals of protecting health, hospitals and the economy by requiring that *most* but not all children be vaccinated. These goals can arguably be achieved through vaccinating enough people to reach community immunity,[90] which may require the government to vaccinate some children,[91] but would not require them to also vaccinate even a relatively large minority of children who get medical exemptions that go beyond the two available under the vaccine passport system.

Tim could also argue that the limits violate the principle of fundamental justice against gross disproportionality. Chief Justice McLachlin said that principle is violated when the "law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported".[92] This applies only "in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure".[93] It "is captured by the

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[89] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 142 (S.C.C.).

[90] The National Center for Immunization and Respiratory Diseases defines community immunity as "[a] situation in which a sufficient proportion of a population is immune to an infectious disease (through vaccination and/or prior illness) to make its spread from person to person unlikely." See National Center for Immunization and Respiratory Diseases, *Vaccines & Immunization Glossary*, Centers for Disease Control and Prevention, online: <https://www.cdc.gov/vaccines/terms/glossary.html>.

[91] Statistics Canada, "Table 17-10-0005-01: Population estimates on July 1st, by age and sex" (2021), online: <https://doi.org/10.25318/1710000501-eng>.

[92] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 120-122 (S.C.C.).

[93] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.).

hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk".[94] Like other principles of fundamental justice, "[g]ross disproportionality under s. 7 of the Charter does not consider the beneficial effects of the law for society".[95] Rather, "it balances the negative effect on the individual against the purpose of the law, not against societal benefit that might flow from the law".[96]

In *Bedford*, the "bawdy-house" provision was found to be grossly disproportionate. The law prevented sex workers from doing "in-call prostitution",[97] which offers safety benefits including proximity to others and closed-circuit television.[98] The law was grossly disproportionate[99] because the harm done to a *single* individual who risked violence or murder because he or she could not do "in-calls would vastly outweigh any benefit from achieving the objective of "combat(ing) neighbourhood disruption or disorder and to safeguard public health and safety".[100]

The "communicating for the purposes of prostitution" provision, which prevented screening johns for drunkenness, was also not in accordance with the principle of fundamental justice against gross disproportionality. The violence faced by *one* hypothetical individual sex worker was too high of a price to pay to achieve the objective of preventing nuisance caused by street prostitution.[101] As McLachlin C.J.C. put it, "if screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established".[102] Causing just *one* teenager depression or a materially increased risk of heart damage similarly ought to strike judges as "totally out of sync" with the objective of protecting health, hospitals and the economy.

Tim's claim could also potentially meet the standard set in *R. v. Lloyd*,[103] where

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[94] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.).

[95] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.).

[96] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.).

[97] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 62-65 (S.C.C.).

[98] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.) at para. 134 (S.C.C.), citing *Bedford v. Canada (Attorney General)*, [2012] O.J. No. 1296, 2012 ONCA 186 at para. 427 (Ont. C.A.).

[99] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 133-136 (S.C.C.).

[100] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 132 (S.C.C.).

[101] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 159 (S.C.C.).

[102] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 158 (S.C.C.).

[103] *R. v. Lloyd*, [2016] S.C.J. No. 13, 2016 SCC 13 (S.C.C.) [hereinafter "*Lloyd*"].

McLachlin C.J.C. struck down a one-year mandatory minimum sentence for anyone convicted of possessing drugs if they had previously been convicted of trafficking. Such as sentence "would be grossly disproportionate" and would "shock the conscience of Canadians" if it prevented a *single* drug addict who had completed a drug treatment program from resuming a "healthy and productive life",[104] according to the Chief Justice. If a one-year sentence for possession in the case of an offender who trafficked in lethal drugs is grossly disproportionate, coercing a teenage boy into depression or causing him to accept even a relatively small increased risk of heart damage to prevent whatever marginal COVID-19 risk he poses to health, hospitals and the economy may also be grossly disproportionate. Both ought to "shock the conscience".

VI. LIMITS ON TIM'S SECTION 7 RIGHTS MIGHT NOT BE SAVED BY SECTION 1

There is likewise doubt that these *prima facie* violations of Tim's section 7 Charter rights would be upheld under section 1, which says that those rights can be limited by law, so long as those limits can be shown to be reasonable in a free and democratic society. The government likely would not have trouble meeting the first step of the test from *R. v. Oakes*,[105] which is showing that the objective of its law is pressing and substantial.[106] However, the Crown would potentially fail to justify the law under all three of the prongs of the second step of the *Oakes* test, which requires proportionality to be shown through a rational connection, minimal impairment and overall proportionality.[107]

As Hamish Stewart noted, it was assumed before *Bedford* that if a law was found to violate the section 7 principles of fundamental justice against arbitrariness, overbreadth or gross disproportionality, this law could not be upheld under section 1.[108] "An arbitrary law was not rationally connected to its objective; an overbroad law was not a minimal impairment of the section 7 right; and the deleterious effects of a grossly disproportionate law on the section 7 right would necessarily outweigh its salutary effects on the legislative objective."[109] The Court had, however, left open the possibility that section 7 limitations could be upheld for administrative expediency. *Bedford* made clear that this analysis would happen under section 1, according to Stewart.

Stewart argues that because the Court said in *Bedford* that only the *individual's*

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[104] *R. v. Lloyd*, [2016] S.C.J. No. 13, 2016 SCC 13 at para. 33 (S.C.C.).

[105] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

[106] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 at para. 73 (S.C.C.).

[107] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 at para. 74 (S.C.C.).

[108] Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60 McGill L. Rev. 3, online: <https://lawjournal.mcgill.ca/article/bedford-and-the-structure-of-section-7/>.

[109] Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60 McGill L. Rev. 3, online: <https://lawjournal.mcgill.ca/article/bedford-and-the-structure-of-section-7/> at 588.

right is considered under section 7 of the Charter, it must be possible to uphold section 7 limits under section 1. "There must be room, somewhere in Charter law, to consider what are often called societal or collective interests; that is, interests of persons other than those whose section 7 interests are directly affected by the law in question,"[110] he said. These societal interests could arguably be respected by allowing the government to violate section 7 rights in rare cases — for example, where it is needed for administrative expediency. Stewart suggests that McLachlin C.J.C. was almost certainly talking about administrative expediency in *Bedford* when she said that "enforcement practicality is one way the government may justify an overbroad law".[111]

Stewart offered the following example of how a law that limits section 7 could be upheld under section 1 as minimally impairing and rationally connected, despite being overbroad or arbitrary, if the government can show it was needed for administrative expediency. Section 150.1(1) of the *Criminal Code* makes it a crime for adults to have sex with people under the age of 16, because people under 16 are immature and require legal protection. The law is overbroad and limits section 7 if it takes away the liberty of a *single* adult who is jailed for having sex with a 15-year-old who is mature enough to consent.[112] But the law can nevertheless be justified under section 1. Even though it is not minimally impairing of the *individual* right, and is therefore overbroad, the law is still minimally impairing when *societal* interests achieved through administrative expediency are considered. The government could show that there is no other effective way to achieve its objective of protecting immature children from sexual predators without a "bright line rule".[113] If the law had been written so that it were only a crime to have sex with a child who lacked "sufficient maturity to have sex based on the individual", this would be too difficult to prove beyond a reasonable doubt, stymying the law's pressing objective of deterring adults from having sex with immature teenagers.[114]

"Administrative expediency" is a possible argument in favour of the hypothetical ISPA amendments being upheld under section 1 despite limiting Tim's section 7 rights in ways that are not in accordance with the principles of fundamental justice.

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[110] Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60 McGill L. Rev. 3, online: <https://lawjournal.mcgill.ca/article/bedford-and-the-structure-of-section-7/> at 577.

[111] Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60 McGill L. Rev. 3, online: <https://lawjournal.mcgill.ca/article/bedford-and-the-structure-of-section-7/> at 591, citing *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 144 (S.C.C.).

[112] Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60 McGill L. Rev. 3, online: <https://lawjournal.mcgill.ca/article/bedford-and-the-structure-of-section-7/> at 590.

[113] Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60 McGill L. Rev. 3, online: <https://lawjournal.mcgill.ca/article/bedford-and-the-structure-of-section-7/> at 590.

[114] Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60 McGill L. Rev. 3, online: <https://lawjournal.mcgill.ca/article/bedford-and-the-structure-of-section-7/> at 590.

Reference re Motor Vehicle Act (British Columbia) S 94(2)[115] supports that argument. In that case, Lamer J. held that "Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of section 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, *epidemics*, and the like."[116] If a court finds that the amended ISPA is arbitrary or overbroad, the government will likely argue that the outcome of the law is nonetheless rationally connected to its objective and minimally impairing if one acknowledges the need for administrative expediency. The government might argue, for example, that requiring vaccines for all children except in extremely rare cases such as those with proven myocarditis or allergy to an ingredient is the only *expedient* way to achieve its goals, since many parents might otherwise fake medical exemptions, or because it does have not capacity to do individual assessments of medical exemptions.

However, the argument for administrative expediency in Tim's case is weak. Tim could counter these arguments by showing that the government was able to achieve sufficiently high levels of vaccination before the pandemic for other childhood diseases (such as the measles, which is far riskier in children than COVID-19) without removing broad medical exemptions from the ISPA.

Granted, the ISPA amendments could be found to minimally impair Tim's section 7 rights despite the *prima facie* limitation because legislators are afforded "a margin of appreciation" or "leeway" when forced to weigh a complex set of factors when crafting social policy. In *Hutterian Brethren*, the *prima facie* violation of section 2(a) entitlements was upheld due to this "margin of appreciation". As McLachlin C.J.C. explained, a law that is not the least conceivably impairing option may still be minimally impairing if it falls within a range of reasonable alternatives. "The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary," the Chief Justice noted.[117] "If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement," she continued. "On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."[118]

A "margin of appreciation" argument succeeded in *Gateway Bible Baptist Church*

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[115] *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.) [hereinafter "*BC Motor Vehicle Act*"].

[116] *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 at para. 83 (emphasis added).

[117] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, 2009 SCC 37 at para. 54 (S.C.C.) [hereinafter "*Hutterian*"], citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 at para. 160 (S.C.C.).

[118] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, 2009 SCC 37 (S.C.C.).

v. Manitoba,[119] in which Joyal C.J. of the Manitoba Court of Queen's Bench upheld public health orders that limited religious gatherings despite finding a *prima facie* violation of freedom of religion.[120] Chief Justice Joyal wrote that:

> [i]n attempting to protect the population from the ravages of the pandemic, Manitoba acknowledges that the [Chief Public Health Officer] must attempt to balance a number of competing interests, including economic, social, mental health, limited acute care resources, and as well, the degree of public acceptance and compliance. These are all complex considerations, which Manitoba has argued and I accept, are not amenable to any easy calculous and they are indeed, the type of considerations that commend some deference to state action taken in response to COVID-19.[121]

However, Tim may succeed where the plaintiffs in *Gateway Bible* failed, since the challenged gathering restrictions in place in late 2020 were imposed amid an exponential growth of COVID-19 infections in Manitoba. There were 129 patients in Manitoba ICUs,[122] nearly double the province's normal ICU capacity of 72 patients. Chief Justice Joyal said that it was "critical to remember that the impugned restrictions were of limited duration" and "in effect for only as long as necessary so as to regain control over community transmission and alleviate the intense strain on the hospitals and ICUs".[123] Tim could argue that while the government deserves a wide margin of appreciation when a pandemic is raging, a mandatory vaccination policy to attend school would not be within a range of reasonable alternatives after the acute phase of the pandemic had passed, as it clearly had by February 2023.

The government might also struggle to meet the final step of the *Oakes* test: overall proportionality between the law's salutary effects on health, hospitals and the economy and the deleterious effects on Tim's security of the person and liberty. As Stewart points out, the overall proportionality step mirrors the prohibition against gross disproportionality and, even though societal interests are considered, "it will still be very difficult, if not impossible, for the government to justify a grossly disproportionate law".[124] The government would need to show that the marginally increased vaccination coverage or reduced spread that the law could achieve would

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[119] *Gateway Bible Baptist Church v. Manitoba*, [2021] M.J. No. 308, 2021 MBQB 219 (Man. Q.B.) [hereinafter "*Gateway Bible*"].

[120] *Gateway Bible Baptist Church v. Manitoba*, [2021] M.J. No. 308, 2021 MBQB 219 at paras. 206 and 290 (Man. Q.B.).

[121] *Gateway Bible Baptist Church v. Manitoba*, [2021] M.J. No. 308, 2021 MBQB 219 at para. 300 (Man. Q.B.).

[122] *Gateway Bible Baptist Church v. Manitoba*, [2021] M.J. No. 308, 2021 MBQB 219 at paras. 301-302 (Man. Q.B.).

[123] *Gateway Bible Baptist Church v. Manitoba*, [2021] M.J. No. 308, 2021 MBQB 219 at para. 328 (Man. Q.B.).

[124] Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60 McGill L. Rev. 3, online: <https://lawjournal.mcgill.ca/article/bedford-and-the-structure-of-section-7/> at 592.

protect health, hospitals and the economy enough to outweigh the deleterious effects of forcing Tim to choose between giving up his right to medical decision-making and risk a vaccine side-effect to attend school, or remaining out of school and suffering depression. If even a modest level of immunity has been reached, it would be very hard to see how the minor salutary effects from vaccinating all children as opposed to all children except those exempted could outweigh such harms.

VII. CONCLUSION

I hope that the foregoing hypothetical illustrates the legitimate Charter vulnerabilities of requiring COVID-19 vaccination to attend public schools with the limited medical exemptions that were available under Ontario's vaccine passport system. Although vaccine mandates were upheld in various contexts during the pandemic, those cases were, in my view, either incorrect in law, distinguishable from the fictional scenario posited, or implicitly confirmed that liberty and security of the person rights are deprived when people are not given a meaningful choice about whether to take a vaccine. For better or worse, those seeking to challenge a vaccine mandate with such limited medical exemptions would find support for their position in the expansive view of section 7 taken by former Chief Justice Beverley McLachlin in *Carter*, *PHS* and *Bedford*.