A Constitutional Analysis Of Face Mask Laws

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Introduction

The very word "epidemic" can strike fear and even panic into the most stolid of individuals. Yet, the human experience with epidemics has a long history, with recorded epidemics going back to 412 BC and ample evidence of earlier but unrecorded epidemics.[1] In 412 BC, Hippocrates first coined the word "epidemic" for medical purposes and noted the symptoms of the earliest example we now have on record. The language of transmittable disease has shifted, and since 412 BC, we have used terms including plague, outbreak, pestilence, virus, crowd disease, and infectious disease. In more recent times, epidemics and pandemics (an outbreak over a wide

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[1] Laura Spinney, *Pale Rider: The Spanish Flu of 1918 and How it Changed the World* (New York: Hachette Book Group, 2017).

geographic area or the world) have entered the public lexicon with brief descriptions of the disease itself, such as Ebola, Spanish Flu and COVID-19. No matter how we describe them, epidemics and pandemics have significantly impacted human development and history.

Using face masks to combat diseases was a late development in the history of airborne diseases. Mask use developed as an early attempt to fight "corrupt air" that began in the 1600s. Cambridge graduate Lien-teh Wu made a pivotal breakthrough to fight a plague in Manchuria in 1910.[2] Wu designed what would later be modified into the N95 mask, which is now widely used worldwide.[3]

Both government and legal responses to pandemics began to crystallize and take greater hold at the time of the Spanish flu. Mask laws came into effect in various parts of the world, with varying degrees of enforcement and success. History appears to repeat itself with the legal response in the context of a pandemic, including mask-wearing ordinances being implemented.

For example, at the time of COVID-19 pandemic, governments throughout North America mandated wearing a mask in specified circumstances. The magnitude of the government response to COVID-19 has resulted in face mask laws coming under sharp scrutiny and focus. Canadian case law is developing on this issue at the time of writing. Reported decisions of legal challenges from the United States and commonwealth jurisdictions demonstrate potential trends Canada may experience.[4] The Florida decision in *Machovec et al v Palm Beach County* dealt with the constitutionality of a mandatory face-covering law enacted in response to the COVID-19 pandemic.[5] The Circuit Court of the Fifteenth Judicial Circuit for Palm Beach County, Florida, noted that the respiratory illness spreads quickly from person to person, causing severe illness and deaths.[6] The Court also recognized that there was no known cure, no effective treatment, and no vaccine at the time.[7] The spread can occur when asymptomatic people unknowingly infect others.[8] Based on this background and its analysis of the Mask Ordinance, the Court concluded that "no

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[2] Ruth Rogaski, "The Manchurian Plague and COVID-19: China, the United States, and the 'Sick Man,' Then and Now" (March 2021) 111:3 Am J Public Health at 423–429. See also Christos Lynteris, *Ethnographic Plague: Configuring Disease on the Chinese-Russian Frontier* (University of Cambridge: Palgrave Macmillan, 2016).

[3] Rogaski, *supra* note 2.

[4] *Machovec et al v Palm Beach County*, 2020-CA-006920-AXX [*Machovec*]; The Constitutional Court of Bosnia and Herzegovina, 22 December 2020 (2021), Official Gazette of Bosnia and Herzegovina, BIH-2021-1-002 (Bosnia and Herzegovina); The Constitutional Court, 14 September 2020 (2020), Bulletin 2020/3, CRO-2020-3-007 (Croatia).

[5] *Machovec, supra* note 4.

[6] *Ibid* at 2.

[7] *Ibid*.

[8] *Ibid.*

constitutional right is infringed by the Mask Ordinance's mandate to wear a facial covering, and that the requirement to wear such a covering has a clear, rational basis based (*sic*) on the protection of public health."[9] The Court cited three other Florida courts which have addressed the same issue and came to the same conclusion and decision.[10]

Wearing a face mask in public spaces is no longer foreign to Canadians after the outbreak of COVID-19. What has been the public health justification for the mask mandate? As of the date of writing, there seems to be strong support from the medical community that the face mask primarily protects others and prevents transmission with a dual purpose of protecting the wearers.[11] From a legal and philosophical perspective, the private right gives way to the public good. This approach is consistent with the philosophical stance of limiting harm. One consistent theme that tips the balance as we shall see is an implied or an explicit endorsement of duty to others throughout the jurisprudence. This duty to others and to protect others is the prevailing theme where there is uncertainty or when rights are in dispute in the circumstances of public protection. The balance of interests in all diverse cases is no easy task for an elected official or court to achieve, as demonstrated throughout this paper. The focus of this article is not on the political debate of whether a face mask law should or should not be enacted; instead, the focus is on the constitutional legal analysis of the law once it is passed.

The question that arises explicitly concerning the mask laws in Canada is this: Are mandatory face mask laws constitutional and in accordance with the *Canadian Charter of Rights and Freedoms* at the time of an epidemic or pandemic?

The framework for this paper will be a brief examination of the public health law in Canada and the authority of each level of government: Federal, Indigenous, Provincial, and Municipal, to mandate a mask law and the constitutional jurisdiction for such a mandate. The following section considers the impact of relevant health measures imposed by governments that have fallen under the scrutiny of the *Canadian Charter of Rights and Freedoms*.[12]

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[9] *Ibid* at 7.

[10] *Green v Alachua Cty.*, No 0102020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020); *Ham v Alachua Cty. Bd. Of Cty. Comm's*, No 1:20-ev-00111-MW/GRJ (ND Fla. May 30, 2020); *Power v Leon Cty*, No 2020-CA-001200 (Fla. 2d Cir. Ct. July 10, 2020).

[11] John T Brooks & Jay C Butler, "Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2" (February 10, 2021) 325:10 JAMA at 998–999; Lawrence O Gostin, Glenn Cohen & Jeffrey P Koplan, "Universal Masking in the United States: The Role of Mandates, Health Education, and the CDC" (10 August 2020) 324:9 JAMA at 837–838; Yafang Cheng et al, "Face masks effectively limit the probability of SARS-CoV-2 transmission" (20 May 2021) American Assoc for Advancement Sci; Sarah Addleman et al, "Mitigating airborne transmission of SARS-CoV-2" (8 June 2021) 193:23 CMAJ E1010.

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

Several authors have examined the constitutional tension between public health and civil liberties.[13] The literature, however, is not extensive. Indeed, the specific topic of the constitutionality of face mask laws has not been the subject of a detailed analysis.[14] This article provides a detailed doctrinal analysis of how Canadian courts are likely to look at some of the more pertinent *Charter* issues in the context of pandemics or epidemics and potential challenges to mandatory face mask laws based on analogues from the legal precedents. The analysis includes specific focus and consideration of *Charter* sections 1, 2, and 7. Finally, this article concludes with a constitutional analysis of the developed case law to determine if challenging government-imposed face mask requirements are likely to succeed. Throughout, we tackle key arguments that could be made in support or opposition. Unique circumstances could bring many additional sections of the *Charter* under scrutiny. However, this paper discusses the broad challenges that could be seen once the laws are enacted, focusing on more relevant and applicable areas.

The authors conclude that each level of government in Canada has constitutional authority to enact face mask laws to combat an epidemic or pandemic, and such laws will survive Constitutional and *Charter* scrutiny provided the law is supported by reasonable evidence and tailored for the circumstances. We conclude the potential *Charter* challenges have merit, but in each case, the section 1 proportionality test lands in favour of upholding face mask laws to protect public health.

Public Health in Canada

The book *Canadian Health Law and Policy* introduced "public health" as "what we, as a society, do collectively to assure the conditions for people to be healthy."[15] The public health law has been defined as the "study of legal powers and duties of the state to promote the conditions for people to be healthy… and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally

[13] Colleen M Flood, Bryan Thomas, & Dr Kumanan Wilson, "Civil Liberties vs. Public Health" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: The University of Ottawa Press, 2020) at 249; Vanessa MacDonnell, "Ensuring Executive and Legislative Accountability in a Pandemic" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: The University of Ottawa Press, 2020) at 141; Colleen M Flood, Bryan Thomas, & Kumanan Wilson, "Mandatory vaccination for health care workers: an analysis of law and policy" (2021) 193:6 CMAJ E217; Elizabeth Pendo, Robert Gatter & Seema Mohapatra, "Resolving Tensions Between Disability Rights Law and COVID-19 Mask Policies" (2020) 80:1 Md L Rev Online 1; British Columbia's Office of the Human Rights Commissioner, "A human rights approach to mask-wearing during the COVID-19 pandemic" (10 December 2020) online (pdf): <bchumanrights.ca/wp-content/uploads/BCOHRC_Nov2020_Mask-Policy-Guidance_FINAL.pdf>.

[14] However, see Colleen M Flood et al, "Reconciling Civil Liberties and Public Health in the Response to COVID-19: An RSC Policy Briefing" (September 2020) at 12, online: *Royal Society of Canada* <rsc-src.ca/sites/default/files/CL%20PB_EN.pdf>.

[15] Joanna Erdman, Vanessa Gruben & Erin Nelson, *Canadian Health Law and Policy*, 5th ed, (Toronto: LexisNexis Canada Inc, 2017) at 481 [*Health Law and Policy,* 5th ed].

protected interests of individuals for the protection or promotion of community health".[16]

From this definition, we can see that public health law in Canada is dedicated to studying the balance between societal interests and individual interests in public health matters. Society has placed limitations on personal interests to protect societal interests. Society is interested in protecting and promoting public health, sometimes by curtailing individual interests protected by laws. However, the idea that rights and freedoms are bound to an extent by the rights and freedoms of others is not foreign to most living in a democracy. For instance, individuals cannot infect others with viruses or diseases. It is an offence for a person with HIV to expose another person to a significant risk of infection of this disease through sexual intercourse without the prior informed consent of the other person.[17] Even if the complainant is not infected, the courts have held that "the realistic possibility of transmission of HIV" would be considered "a significant risk of serious bodily harm."[18] It is also an offence for a person to inject another person with a needle full of infectious viruses.[19] Legislation in some provinces mandates immunization against diseases and viruses either generally or in an emergency.[20] Laws that prohibit a person from smoking or vaping in enclosed indoor workplaces and public spaces are prevalent across Canada and have been ruled constitutional time and again.[21] These are merely instances where societal interests in public health outweigh individual interests in autonomy over one's body regarding immunization, privacy in one's health status, or liberty in personal choices such as smoking or vaping.

Federal, Indigenous, Provincial, and Municipal Authorities under the Constitution

One constitutional challenge to a mask mandate would be whether its issuing government has the authority to enact face mask laws in the circumstances of an epidemic or pandemic. Canada has four distinct levels of government that can independently or in concert potentially pass face mask laws. This section examines

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[16] *Ibid.*

[17] See *R v Cuerrier*, [1998] 2 SCR 371, [1998] SCJ No 64.

[18] See *R v Mabior,* 2012 SCC 47.

[19] See *R v Phelan*, 2013 NLCA 33, [2013] NJ No 247.

[20] See *Public Health Act,* RSA 2000, c P-37, s 38(1)(c); *The Public Health Act,* CCSM c P210, ss 43(2)(c), 49(2)(c), 64(8)(d), 67(2)(e)(i); *Public Health Act, 1994,* SS 1994, c P-37.1, s 45(2)(d)(i); *Public Health Act*, RSPEI 1988, c P-30.1, s 49(3); *Health Protection Act*, SNS 2004, c 4, s 53(2)(i). See also *Health Law and Policy*, 5th ed*, supra* note 15 at 495–498.

[21] See *Restaurant and Food Services Assn. of British Columbia v Vancouver (City)*, [1998] BCJ No 53, 155 DLR (4th) 587 (BCCA); *Albertos Restaurant v Saskatoon (City)*, 2000 SKCA 135; *Pub and Bar Coalition of Ontario v Ottawa (City)*, [2002] OJ No 2240 (Ont CA); *Filos Restaurant Ltd v Calgary (City),* 2007 ABQB 97. See also Jocelyn Downie, Timothy Caulfield & Colleen M Flood, *Canadian Health Law and Policy*, 4th ed (Toronto: LexisNexis Canada Inc, 2011) at 563–569 [*Health Law and Policy*, 4th ed]

whether each level of the government has the constitutional ground to enact such face mask laws.

Federal Authority

The division of powers within Canada fosters intergovernmental collaboration. For example, the Supreme Court summarized Canadian federalism in References re *Greenhouse Gas Pollution Pricing Act*:

> Federalism is a foundational principle of the Canadian Constitution. It was a legal response to the underlying political and cultural realities that existed at Confederation, and its objectives are to reconcile diversity with unity, promote democratic participation by reserving meaningful powers to the local or regional level and foster cooperation between Parliament and the provincial legislatures for the common good: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*"), at para. 43; *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22.

In the same case, the Court explained the role of the court in interpreting federalism:

> As this Court observed in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 124, courts, as impartial arbiters, are charged with resolving jurisdictional disputes over the boundaries of federal and provincial powers on the basis of the principle of federalism. Although early Canadian constitutional decisions by the Judicial Committee of the Privy Council applied a rigid division of federal-provincial powers as watertight compartments, this Court has favoured a flexible view of federalism — what is best described as a modern form of cooperative federalism — that accommodates and encourages intergovernmental cooperation: *2011 Securities Reference*, paras. 56-58. That being said, the Court has always maintained that flexibility and cooperation, while important to federalism, cannot override or modify the constitutional division of powers. As the Court remarked in *2011 Securities Reference*, "[t]he 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state"…[22]

This understanding of Canadian federalism has a significant impact on the federal jurisdiction to legislate in health care. As discussed below, the inherent nature of federalism informs the national concern doctrine and the principles underpinning it. Arguably, the national concern doctrine is one of the stronger arguments that could be made for a federal duty and authority to legislate a mask mandate.

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[22] References re *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 48–50 [*Reference re Greenhouse Gas Pollution*].

Case law establishes that the interpretation of the *Constitution Act, 1982* and specifically the Peace Order and Good Government (POGG) section in the preamble of section 91 contains three branches of power: residual/gap, national concern, and emergency.[23] The residual/gap power under POGG clarifies that the matter must not come within a provincial head of power to be considered residual. However, health has been found to fall within both provincial and federal heads of power. Thus, the federal residual/gap power under POGG cannot be used in an epidemic or pandemic. The national concern power and emergency power are, however, essential considerations in an epidemic or pandemic.

When applying the national concern power, the Court in *R v Crown Zellerbach Canada Ltd* (*Zellerbach*) stated the following: "For a matter to qualify as a matter of National Concern in either sense it must have a singleness, distinctiveness, and indivisibility that distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the *Constitution*. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from a matter of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter."[24]

Professor Hogg notes explicitly that the ineffective prevention of an epidemic in one province and its extra-provincial impacts as an example of the "provincial inability":

> There are, however, cases where uniformity of law throughout the country is not merely desirable, but essential, in the sense that the problem is beyond the power of the provinces to deal with it. This is the case when the failure of one province to act would injure the residents of the other (cooperating) provinces. This provincial inability test goes a long way toward explaining the cases. The often-cited case of an epidemic of pestilence is a good example. The failure by one province to take preventative measures would probably lead to the spreading of the disease into those provinces which had taken preventative measures.[25]

The decision of References re *Greenhouse Gas Pollution Pricing Act* subsequently summarized the court's approach to national concern:

> "Parliament has jurisdiction to enact this law as a matter of national concern under the 'Peace, Order, and good Government' clause of s. 91 of the Constitution. National concern is a well-established but rarely applied

[23] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[24] *R v Crown Zellerbach Canada Ltd* 1988 1 SCR 401, [1988] SCJ No 23 at para 33.

[25] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Carswell, 2007) vol 1 at 516 [*Constitutional Law of Canada*].

> doctrine of Canadian constitutional law. The application of this doctrine is strictly limited in order to maintain the autonomy of the provinces and respect the diversity of Confederation, as is required by the principle of federalism. However, Parliament has the authority to act in appropriate cases, where there is a matter of genuine national concern and where the recognition of that matter is consistent with the division of powers."[26]

This national concern doctrine involves a three-stage analysis.[27] First, Canada must establish that the matter is of sufficient concern to the country as a whole. This stage is also known as the threshold test. Second, the court must consider whether the matter is of "singleness, distinctiveness and indivisibility." The principles underpinning this stage must be explained. The first principle is that federal jurisdiction based on the national concern doctrine should be found to exist only over a "specific and identifiable matter that is qualitatively different from matters of provincial concern." The second principle is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter, which is also called the "provincial inability test."

Lastly, the final step involves determining whether "the scale of impact of the proposed matter of national concern is reconcilable with the division of powers." This step requires the court to balance "the intrusion onto provincial autonomy" against "the extent of the impact on the interests that would be affected if Canada were unable to constitutionally address the matter at a national level."[28]

Whether the national concern doctrine can be applied to support a valid federal mask mandate across Canada depends on the pith and substance of the empowering legislation. In References re *Greenhouse Gas Pollution Pricing Act,* the narrow issue before the Court was whether establishing minimum national standards of greenhouse gas price stringency to reduce greenhouse gas emissions is a matter of national concern.[29] This statement of the issue is contrasted with the regulation of greenhouse gas emissions generally, arguably a provincial head of power. Therefore, what the federal mask mandate seeks to "cure" is a crucial aspect of its constitutionality. If a potential federal mask mandate aims to prevent transmission of infectious disease, then it will likely meet the three-stage analysis of the national concern doctrine. As infectious diseases have no geographical boundaries, they can spread to other provinces if one province does not take sufficient action. The COVID-19 pandemic has seen such widespread effect of the disease. There is a potential inability of provinces to control the spread of the disease independently and adequately. If one province does not have a mask mandate, it is more likely to experience a higher rate of affected persons. When these people travel to other parts

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[26] *Reference re Greenhouse Gas Pollution*, *supra* note 22 at para 4.

[27] *Ibid* at paras 162–166.

[28] *Ibid* at para 161.

[29] *Ibid* at para 168.

of Canada, they potentially affect populations across different provinces. The grave consequences of such spread include morbidity, mortality, hospital backlogs, and economic impacts. These factors support the application of the national concern doctrine to a federal mask mandate.

POGG also contemplates emergencies. In *Toronto Electric Commissioners v Snider*, the Privy Council describes that the emergency powers under the POGG approach might have been regarded as appropriate when the National Parliament needed to be called on to intervene and protect the nation from disaster so severe and pressing.[30] The Privy Council considered that "[a]n epidemic of pestilence" might have been analogous.[31] Given this comment, there appears to be a presumption that an epidemic or pandemic would qualify to justify emergency power use.

In *Ontario (AG) v Canada Temperance Federation,* the Privy Council held that: "[t]o legislate for prevention appears to be on the same basis as legislation for cure. A pestilence has been given as an example of a subject so affecting, or which might so affect, the whole Dominion that it would justify legislation by the Parliament of Canada as a matter concerning the order and good government of the Dominion. It would seem to follow that if the Parliament could legislate when there was an actual epidemic it could do so to prevent one occurring and also to prevent it happening again."[32]

The counter position would be borne out by any evidence that the issue is not severe or pressing as contemplated and interpreted or that the dominant impact is confined to a single province. There would need to be evidence supporting either position. Still, the case law and commentary appear to presume that the federal power will apply in circumstances such as an epidemic or pandemic. If the disease is extra-provincial, there is a presumption of federal authority. The above-cited case law appears conclusive that a federal law enacted to prevent or control an epidemic is constitutionally permitted, as interpreted by section 91 as falling within either a national concern or an emergency.

Indigenous Authority

There are several sources of authority Indigenous peoples may rely upon to enact health measures on reserves.[33] The primary authority is within the inherent right of

[30] *Toronto Electric Commissioners v Snider*, [1925] AC 396, [1925] 2 DLR 5 at para 25.

[31] *Ibid*.

[32] *Ontario (Attorney General) v Canada Temperance Federation*, [1946] JCJ No 7, [1946] AC 193 at para 10.

[33] Naiomi Metallic, "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211; Aimée Craft, Deborah McGregor & Jeffery Hewitt, "COVID-19 and First Nations' Responses" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: The University of Ottawa Press, 2020) 49 [Craft]; Jeremy Webber,

self-government, further supported by the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and section 35 of the *Constitution*. Additional authority comes from section 81(1) of the *Indian Act*. S. 35 of the *Constitution* protects both treaty rights and Indigenous rights. Although historical treaties do not recognize the rights of First Nations to self-government, modern treaties protected under s.35 recognized their right of self-government. The Federal government recognized in 1995 that s. 35 includes the right of self-government for the Indigenous peoples of Canada.[34] Furthermore, courts have affirmed that pre-existing laws of the Indigenous peoples survived the Crown's assertion of sovereign authority.[35] Finally, another authority derives from modern treaties and self-government agreements.[36] Each of these sources supports First Nations' self-determination in matters of health. Regardless of which references the First Nations rely upon for their authority, they can enact mandatory face mask bylaws based on the need for nimble and tailored measures to protect the health and safety of residents on reserves. The other levels of the Canadian government should respect the First Nations' jurisdiction regarding the broader public health and the importance of a multilevel response. An emergency such as an epidemic or pandemic calls for a unified response with proper delegations to the local communities that are best positioned to make bylaws or rules in response to the transmission of a threatening virus.

Section 81(1) of the *Indian Act* provides that "The council of a band may make bylaws not inconsistent with this *Act* or with any regulation made by the Governor in Council or the Minister," "(a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases" and concerning "(c) the observance of law and order." The decision in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* which dealt with the delegated powers of a municipality to make bylaws to "secure peace, order, good government, health and general welfare," informs the interpretation of section 81(1).[37] The bylaw, which arose in response to many residents' concerns about pesticide use, was found to be a valid exercise of municipal powers. Furthermore, the majority decided that the "open-ended" or "omnibus" language found in the empowering legislation "confer on municipalities the ability to address new challenges" and allow the bylaw powers to adapt to changing social conditions. Section 81(1) of the *Indian Act* has similar language found in the "omnibus" clause in *Spraytech*. Therefore, the "health of residents on the reserve" and "health and general welfare in the territory of the

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"Frustrations of Federalism, Frustrations of Democracy: Trudeau, Transformative Change and the Canadian Constitutional Order" (2020) 99 SCLR (2d) 101 at 109–10.

[34] Government of Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (15 September 2010) online: *Crown-Indigenous relations and Northern Affairs Canada* <www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>.

[35] See *Mitchell v MNR*, 2001 SCC 33.

[36] Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape" (2018) 51 UBC L Rev 105 at paras 39–42.

[37] Metallic, *supra* note 33 at 227; Craft, *supra* note 33 at 59, 63.

municipality" are arguably similar and should be interpreted similarly. Therefore, First Nations band councils have the authority to make bylaws that fall within the "health of residents on the reserve." The need for prompt and strict health measures is especially dire given the population's vulnerability on reserves where fundamental human rights remain outstanding such as housing and clean water.[38]

Section 81 authority under the *Indian Act* concerning mask bylaws has yet to be directly tested in courts. However, the Federal Court of Appeal in *Canada (Attorney General) v Bertrand* implied that the COVID-19 pandemic would empower a Band Council to take specific measures to prevent the spread of the coronavirus under section 81(1) of the *Indian Act*.[39] Many First Nations have enacted COVID-19 related bylaws under s.81, including mask rules.[40]

While the *Indian Act* bylaw powers are subject to the Parliament and provisions of the *Indian Act* (including section 73(1) that gives the Governor in Council regulatory powers), the bylaw powers supersede conflicting provincial legislation as a matter of paramountcy.[41] Although the bylaw powers are a legitimate source of authority, there are some shared concerns when Indigenous peoples use this authority. As rightly put by one commentator, "The *Indian Act* bylaw powers' status as a delegated form of governance, as opposed to a recognition of an inherent right to self-government, is a principled objection that First Nations governments who explore such powers will have to be prepared to address."[42] Furthermore, there are potential enforcement issues with bylaws enacted through s. 81. Additionally, there are jurisdiction issues as to who should enforce those bylaws.[43]

Several other interesting, complex questions also arise in this area of the law that extend beyond the scope of this paper. One of those questions is: what happens if the bylaw conflicts with the *Charter*?[44] Further consideration will be if the *Charter* applies, whether striking down a law passed by a First Nation according to an Indigenous right of self-government would violate s. 25 of the *Charter,* which

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[38] Craft, *ibid* at 52.

[39] *Canada (Attorney General) v Bertrand*, 2021 FCA 103 at paras 8–12.

[40] Many existing bylaws under section 81 can be found on the First Nations Gazette website, online: <www.fng.ca>.

[41] Metallic, *supra* note 33 at 218.

[42] *Ibid* at 232.

[43] John Provart, "Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada" (2003) 2 Indigenous LJ 117–169.

[44] For case law that agrees the *Charter* applies to *Indian Act* band councils and their bylaws, see *Gitwangak Indian Band v Davis*, 2017 BCSC 744, *Horse Lake First Nation v Horseman*, 2003 ABQB 152, *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30. For discussion on *Charter* inapplicability, see Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34:1 Osgoode Hall LJ 61. *Charter* application to self-government agreements can be found in the decision of *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22.

constituted respect for Aboriginal difference.[45] Another consideration is that British Columbia and the federal government must take necessary measures to ensure their laws are consistent with UNDRIP, including the right of self-determination.[46] As a result, all public health legislation in these jurisdictions must be consistent with Indigenous rights of self-determination and health-related provisions of the UNDRIP. These are, again, very fraught and complex issues beyond the scope of this article.

While the discussion concerning the authority of First Nations peoples in making bylaws or comparable rules will probably continue, it is undeniable that Indigenous governments have the authority to enact mandatory face mask laws on reserves in the circumstances of an epidemic or pandemic. As well, the trend in case law is that there is an expanding acknowledgment of constitutionally protected Indigenous rights in Canada.[47] We believe that based on existing sources of law, these constitutionally protected rights include the right to enact laws protecting the health of Indigenous peoples.

Provincial Authority

Canada's *Constitution Act, 1867* does not address the distribution of health or health care.[48] Professor Peter W. Hogg describes health or health care as an "'amorphous topic' distributed to the federal Parliament or the provincial Legislature depending on the purpose and effect of the particular health measures in issue."[49] The absence of a specific allocation of health reflected the views as to the role of government in the health of individuals of society.

The courts have reviewed the allocation of health in several cases. The case of *Schneider v The Queen (Schneider)* discusses the historical constitutional framework as it relates to health:

> The Royal Commission on Dominion-Provincial Relations (the Rowell-Sirois Commission) in 1938 commented on this absence of a specific head of power dealing with the administration of public health at pp. 32-33:
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> > In 1867 the administration of public health was still in a very primitive stage, the assumption being that health was a private matter and state assistance to protect or improve the health of the citizen was highly exceptional and tolerable only in emergencies such as

[45] Timothy Dickson, "Section 25 and Intercultural Judgment" (2003) 61 UT Fac L Rev 141.

[46] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, s 3; *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s 5.

[47] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

[48] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

[49] *Constitutional Law of Canada*, *supra* note 25 at 547.

> epidemics, or for purposes of ensuring elementary sanitation in urban communities. Such public health activities as the state did undertake were almost wholly a function of local and municipal governments. It is not strange, therefore, that the British North America Act does not expressly allocate jurisdiction in public health, except that marine hospitals and quarantine (presumably ship quarantine) were assigned to the Dominion, while the province was given jurisdiction over other hospitals, asylums, charities and eleemosynary institutions. But the province was assigned jurisdiction over "generally all matters of a merely local or private nature in the Province," and it is probable that this power was deemed to cover health matters, while the power over "municipal institutions" provided a convenient means for dealing with such matters.
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> The Rowell-Sirois Commission recommended, at p. 34, that "Provincial responsibilities in health matters should be considered basic and residual. Dominion activities on the other hand, should be considered exceptions to the general rule of provincial responsibility…[50]

The Supreme Court of Canada in *Schneider* endorsed the view that the general jurisdiction over health belonged to the Provinces; however, the federal Parliament has limited jurisdiction over health matters either ancillary to the express heads of power in s. 91 of the *Constitution* or the emergency power under the Peace, Order and Good Government clause (POGG).[51] Furthermore, the Court's decision in *Schneider* demonstrates that where one province's inability to deal with a health care matter "will not endanger the interests of another province," the national concern doctrine does not apply.[52] In other words, only when the health care matter becomes a national concern can the federal authority step in.

There is little doubt as a result that Provinces remain the critical deliverer of health services in Canada. As noted by Keri Gammon, "the provinces enjoy jurisdiction over health insurance programs, the regulation of health professionals, hospitals and similar institutions, and the provision (and in some cases, enforcement) of treatment."[53] While health matters do not have a specific allocation in the Constitution, the authority of provinces to legislate on health matters is grounded in section 92(16) of the *Constitution*, where provinces can make laws on "all matters of

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[50] *Schneider v The Queen*, [1982] 2 SCR 112 at 136, [1982] SCJ No 64.

[51] *Ibid* at 137.

[52] *Ibid*.

[53] Keri Gammon, "Pandemics and Pandemonium: Constitutional Jurisdiction Over Public Health" (2006) 15 Dal J Leg Stud 1 at 3.

a merely local or private nature in the province."[54] Thus, the provincial authority to mandate a mask law is firmly grounded in section 92(16) and case law.

Municipal Authority

Municipal authority arises under section 92(8) of the *Constitution* as a delegated power of the province in which the municipality exists. Municipalities are, in many cases, the front line of response to issues that arise and the nimblest to react. As Gammon notes: "A municipality is best positioned to know its residents, identify risks as they arise, and respond in the manner best suited to that community's unique needs and culture. People are likely to rely first and foremost on their closest level of government to protect them from such risks."[55] Supporting this statement were several cases that upheld municipal bylaws in controlling infectious diseases.[56] One such case is the *Canadian Pacific Navigation Co v Vancouver (City)*, where a municipal bylaw directed to "stop, detain, and examine every person, or persons, freight, cargoes, boats, …coming from a place infected with a pestilential or infectious disease, in order to prevent the introduction of the same into the city".[57] The British Columbia Supreme Court varied the bylaw to allow detention of people who are believed on "reasonable ground" to be infected.

As Gammon notes, one case even found provincial authority over public health because of the municipal role regarding health care activities.[58] Many municipal bylaws touch on some aspects of health—limits on smoking being but one prominent example. Municipal authority to respond to epidemics or pandemics appears to be constitutional as a subset of the provincial authority.

The counter position would be an overreaching argument. Other levels of government are better positioned to act and have directly recognized constitutional authority. Under this argument, municipalities should defer to those in a superior position to act. The difficulty with the position is when the other level of government fails to act. The municipality will, by its nature, have better local information about the needs of residents. In addition, citizens who demand action will not always have the ability to lobby either the province or Federal government. If the argument were taken further, then the municipality would rarely act if they had to defer to another level of government and await action. On almost all matters, other levels of government are in a better position to act. A more tenable line of attack on

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[54] *Constitutional Law of Canada*, *supra* note 25 at 889.

[55] Gammon, *supra* note 53 at 32.

[56] *Bowack (Re),* [1892] BCJ No 33, 2 BCR 216; *Canadian Pacific Navigation Co v Vancouver (City)*, [1892] BCJ No 27, 2 BCR 193 [*Canadian Pacific*].

[57] *Canadian Pacific*, *supra* note 56 at para 1.

[58] Gammon, *supra* note 53 at 31.

municipalities is a failure to account for human rights legislation or other laws so that the mask law itself conflicts with the legislation of a superior jurisdiction.

Given the strength of the existing case law and the breadth of municipal bylaws, one can conclude that municipalities are constitutionally authorized to initiate a face mask bylaw when faced with an epidemic or pandemic, subject to the limits of the Constitution and legislative enactments by superior levels of government.

The *Charter of Rights and Freedoms*

All laws in Canada must comply with the *Charter of Rights and Freedoms* as part of the Canadian *Constitution*. The *Charter* is applicable even in the face of a global pandemic. In examining the legal issues of infectious disease prevention and control, there is a recurring theme involving "tensions between the rights and interests of individuals, and the protection of others or the population as a whole; for example, when it is justified to subject an individual to an unwanted immunization or restrict the individual's freedom of movement to prevent the spread of disease."[59]

As a result, there have been academic and public discussions about whether a requirement that people wear face masks or face coverings in public would infringe on their *Charter* rights.[60] For some, the intrusion and infringement will be too significant, and this will require both careful drafting of any such law and the consideration of exceptions as to who should be exempt. The absence of any other alternative effective measures that could easily prevent and control the spread of the disease will likely contribute to the constitutional analysis and any potential judicial deference.

Section 1 of the Charter - the Limitation Clause

Section 1 of the *Charter* is understood to have a dual role. On the one hand, it guarantees the rights and freedoms expressed within it; on the other hand, it expressly contemplates that the rights and freedoms expressed within may be subject to "reasonable limits."[61] The general limitation function of the section applies to all rights enumerated in the *Charter* and has two components. First, the government's limits on individuals' rights must be "prescribed by law," meaning that the limit must be provided for in a statute or a common law rule. Also, the rule of law values such as

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[59] *Health Law and Policy*, 5th ed*, supra* note 15 at 482.

[60] Josh Dehaas, "Are mandatory masks constitutional? Most likely yes, but with limits" (10 June 2020), online: *Canadian Constitution Foundation* <theccf.ca/are-mandatory-masks-constitutional-most-likely-yes-but-with-limits/> (See comments of law professor Kerri Froc from the University of New Brunswick).

[61] Halsbury's Laws of Canada (online), *Constitutional Law (Charter of Rights)*, "Limitation of Rights: General" at HCHR-16 "Section 1 as guarantee and as limit" (Cum Supp Release 50).

accessibility and intelligibility are applied.[62] Second, the limits must be "demonstrably justified in a free and democratic society."

The legal framework for the "reasonable limits" analysis is found in the seminal decision of Dickson C. J. in *R v Oakes*.[63] The first step in the framework is to determine whether the purpose of the law is sufficiently pressing and substantial to warrant overriding the right being infringed; second, whether the limit is proportionate, which has three aspects: 1) there must be a rational connection between the impugned law containing the limit and the objective of the law, 2) the degree of infringement must be minimal when compared to other available alternatives, and 3) there must be an overall proportionality between the deleterious and salutary effects of the law.

It becomes apparent that "rights are not absolute and that it is sometimes necessary to limit rights to advance or protect collective interests."[64] Thus, if the court concludes that a substantive right or freedom guaranteed by the *Charter* is in breach, a section 1 analysis is a significant consideration in determining whether a face mask law is constitutional.

Section 7 of the Charter - The Right to Life Liberty and Security of the Person

It may be argued that a mandatory face mask law violates section 7 of the *Charter,* which guarantees "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." There may be several claims within a section 7 challenge. For instance, the right to life may be argued where the law or government action causes death or an increased risk of death, either directly or indirectly.[65] This argument is sound if a person required to wear a mask consequently faces death or severe health issues posing an increased risk of death.

The liberty interest protected under section 7 has at least three aspects. The first aspect is about protecting individuals in a physical sense in that individuals are free from physical restraint imposed by the government, such as imprisonment, detention, and extradition. The second aspect is about personal autonomy. Personal autonomy means the ability to make "inherently private choices" that go to the "core

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[62] *Ibid* at HCHR-18 “Prescribed by law”.

[63] *R v Oakes,* [1986] 1 SCR 103, [1986] SCJ No 7.

[64] Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law Inc, 2017).

[65] See also *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 62 [*Carter*]; *Chaoulli v Quebec (AG)*, 2005 SCC 35 at paras 112–124, 200 [*Chaoulli*].

of what it means to enjoy individual dignity and independence."[66] The personal autonomy aspect of section 7 rights will be most likely argued by those who seek to submit that state compulsions or prohibitions may affect their personal choices, going to the core of what it means to be free and independent. The third aspect of the liberty interest under section 7 includes the right to refuse medical treatment and the right to make reasonable medical choices without the threat of criminal prosecution; however, it does not capture lifestyle choices such as smoking marijuana. Wearing face masks is fashioned as a medical choice by some who oppose face mask laws. However, it is unlikely for face masks to be found explicitly as intrusive medical choices, given their transient nature.

The right to "security of the person" is given a broad interpretation and has physical and psychological aspects. This right includes a person's ability to control their own physical or psychological integrity and is engaged when the state interferes with that autonomy. Also, the right to "security of the person" is involved when state action causes serious and profound psychological harm to the individual.[67] The face mask laws arguably pose a limit on one's physical and psychological integrity. However, their position is weak given that past decisions finding a violation of one's physical or psychological integrity involve a state prohibition of assisted suicide or abortion or imposition of unwanted medical treatment.[68] Although privacy is specifically protected under section 8 of the *Charter* ("the right to be secure against unreasonable search or seizure"), the Supreme Court of Canada has accepted that privacy can be a protected component of the "liberty" and "security of the person" interests.

Analytical Framework of Section 7

It is important to note the structure and internal limits of the protected rights within section 7. Whereas section 1 provides external limits to a justified infringement of a right, section 7 provides its own internal limits. A section 7 infringement is met only when a law or government action both (1) affects life, liberty or security of the person, and (2) does so in a manner inconsistent with the principles of fundamental justice.[69] The internal limits are the "principles of fundamental justice" because an impact on a person's life, liberty or security is not a section 7 infringement unless there is also a

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[66] *Godbout v Longueuil (City)*, [1997] 3 SCR 844, [1997] SCJ No 95 at para 66; *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55 at para 49.

[67] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 60–61 [*Blencoe*].

[68] *R v Morgentaler*, [1988] 1 SCR 30, [1988] SCJ No 1 at para 56; *Carter, supra* note 65; *Rodriguez v British Columbia*, [1993] 3 SCR 519, [1993] SCJ No 94; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at paras 100–102; *Blencoe, supra* note 67 at para 55.

[69] Halsbury's Law of Canada, *supra* note 61 at HCHR-54 "Structure of s.7 analysis".

violation of a principle of fundamental justice.[70] Some well-established principles of fundamental justice are that the impacts on section 7 rights must not be arbitrary[71], vague or overly broad[72], or grossly disproportionate[73]. The list is not exhaustive, and the legal test for identifying principles of fundamental justice allows for further identification.[74] The Ontario Court of Appeal in *R v Michaud* summarized the three principles.[75] The internal limits of section 7 make challenging face mask laws more difficult. At the same time, when a section 7 breach is found, the government has a more challenging time justifying the breach.

Relationship between Section 7 and Section 1

The Supreme Court of Canada stated that a breach of section 7 of the *Charter* could not be easily saved by section 1 of the *Charter* in *New Brunswick (Minister of Health and Community Services) v G (J).*[76] The question was whether the New Brunswick government was under a constitutional obligation to provide a parent with provincially funded counsel in child custody proceedings involving the government. After assuming that the policy objective was pressing and substantial, a rational connection between the policy and the objective existed, and the policy minimally impaired the rights, the Court found that "the deleterious effects of the policy far outweigh the salutary effects of any potential budgetary savings."[77] In finding a breach to the parent's right to a fair hearing, the Court stated: "First, the rights protected by s.7 - life, liberty, and security of the person - are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society."[78] Nevertheless, the Court acknowledged "extraordinary circumstances where concerns are grave and the challenges complex" that may call upon the courts to justify violations of the principles of fundamental justice under section 1.[79]

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[70] *Reference re Motor Vehicle Act (British Columbia), s 94(2)*, [1985] SCJ No 73, [1985] 2 SCR 486 [*Reference re MVA*].

[71] *Chaoulli, supra* note 65 at paras 129–133.

[72] *Carter, supra* note 65 at para 85.

[73] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 120–122.

[74] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4.

[75] *R v Michaud*, 2015 ONCA 585, leave to appeal refused [2015] SCCA No 45 at paras 68–71[*Michaud*].

[76] *New Brunswick (Minister of Health and Community Services) v G (J),* [1999] SCJ No 47, [1999] 3 SCR 46.

[77] *Ibid* at para 98.

[78] *Ibid* at para 99.

[79] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 66.

Michaud is the only case where a section 7 violation is justified under section 1. This case involved a commercial truck driver (the appellant). The Ontario *Highway Traffic Act* required that the appellant's truck have a speed limiter set to the maximum speed of 105 km/hour. The appellant's speed limiter was set to 109.4 km/hour and, as a result, was charged with an offence under the law. The appellant appealed that the law violated his section 7 rights because it did not allow him to speed above the maximum speed to avoid collisions in certain circumstances. The Court found a section 7 breach on appeal because acceleration above the maximum speed was needed to prevent a collision in about two percent of traffic collisions. This evidence is sufficient to meet the first branch of the section 7 test because it shows that an individual's security of the person is negatively affected.[80] The Court also found the law to be overreaching in some cases. By not considering the two percent of traffic collisions that require acceleration, the law violated section 7 in its overbreadth.[81] This overbreadth has satisfied the second branch of the section 7 test.

Although the Court found a section 7 breach, it found that the breach was justified under section 1. The Court accepted that the legislators' goals — "to improve highway safety by preventing accidents and reducing the severity of collisions and to reduce greenhouse gas emissions" — were pressing and substantial.[82] The evidence before the court showed that the use of speed limiters did contribute to increased safety on the roads and a reduced carbon footprint. This evidence established the rational connection between the infringement imposed by the law and the purpose of the law. The Court found that the law also minimally impaired the rights. Legislators have the powers to choose the types of regulation: "ex ante" or "precautionary," "ex post" or "deterrent to be enforced solely by penalties," or hybrid.[83] The court must defer to legislators who chose the hybrid form of regulation by requiring a speed limiter and an offence chargeable. When it came to the proportionality aspect of the section 1 test, the Court found that "forced speed reduction for trucks saves lives."[84] The accepted evidence demonstrated that speed limiters decrease the frequency and severity of accidents. Thus, the salutary effects of the legislation on public safety outweigh its deleterious effects on individuals within the two percent anomaly. Furthermore, the leave to appeal was rejected by the Supreme Court of Canada.

Later decisions have distinguished *Michaud* on several grounds. A key factor is that Michaud did not involve the need for the government to implement clear rules in the context of high risk and high uncertainty.[85] A bright-line rule is necessary for

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[80] *Michaud*, *supra* note 75 at para 73.

[81] *Ibid* at para 75.

[82] *Ibid* at para 115.

[83] *Ibid* at para 126.

[84] *Ibid* at para 142.

[85] *R v Chan*, 2020 ONCA 333 at para 291 [*Chan*] (This case found that section 33.1 of the *Criminal Code* — removal of non-mental disorder automatism as a defence where state of automatism was self-induced — violated section 7 rights but was not saved by section 1); *R v Kovich*, 2016 MBCA 19 at para 141 [*Kovich*]

complex regulatory matters that involve risk and uncertainty. There may not be a clear answer as to why a particular limit is set in specific circumstances. However, a "margin of appreciation" is provided to the legislators, and it is intended that they are best positioned to make the decisions given the benefits of the evidence. Also, the nature of the rights plays an essential role in the deference to the legislators.[86] Thus, it is not surprising that the decisions that explicitly distinguished Michaud were concerned with the liberty interest of criminal offenders when considering pre-trial custody credit or the principles of presumption of innocence and voluntariness in the criminal law context.[87]

Courts have examined section 7 in several contexts that will help analyze face mask laws. We will explore these individually first. Then, in the end, we will provide a concluding discussion of how the principles in these cases can be applied to determine whether face mask laws are *Charter*-friendly.

a. No Visitor Rule

When examining case law that considers the constitutionality of pandemic-related restrictions, the decision *Sprague (Litigation guardian of) v Ontario (Minister of Health)* stands out.[88] In that case, an elderly patient brought a challenge under sections 7 and 15 (equality rights) of the *Charter* to a no-visitor rule at a hospital. The no-visitor rule had certain exceptions which did not apply to the elderly patient. The Ontario Superior Court of Justice rejected the challenges. Notably, the Court emphasized the principle of deference, stating:

> Finally, I would observe that the applicant's criticisms of the Visitor Policy, and its alleged inconsistencies and logical flaws, are really an attempt to engage the Court in a re-weighing of the complex and often difficult factors, considerations and choices that must be evaluated by a hospital administration during a pandemic. This is not the Court's role. The Hospital has enormous expertise and specialized knowledge available to it in exercising its discretion around hospital administration issues during a pandemic, only one of which is visitor policy. Significant deference must be afforded to the Hospital in the circumstances. There is ample evidence to support the conclusion that the Visitor Policy to limit visitors was founded on sound medical, scientific and epidemiological evidence, not on presumed characteristics of persons suffering historical disadvantage."[89]

(This case found that section 719(3.1) of the *Criminal Code* violated the principle of proportionality in sentencing and was not saved by section 1).

[86] *Kovich*, *supra* note 85 at para 142.

[87] *Chan, supra* note 85; *Kovich, supra* note 85.

[88] *Sprague (Litigation guardian of) v Ontario (Minister of Health),* 2020 ONSC 2335.

[89] *Ibid* at para 45.

The Court went on to consider the section 7 challenge and stated:

> The Visitor Policy is not arbitrary. An arbitrary rule is one that is not capable of fulfilling its objective and exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law. Therefore, the Visitor Policy would only be arbitrary if there was no link between the decision to restrict visitors and the severe health outcomes of being unable to limit the spread and contagion of the virus. The evidence is entirely to the contrary.
>
> The policy to limit visitors is also not overbroad. An overbroad rule is one that takes away rights in a way that generally supports the object of the rule but goes too far by denying the rights of some individuals in a way that bears no relation to the object. For example, the policy to restrict visitors might be overly broad if it never provided for any consideration of exceptions. Here, the Visitor Policy is tailored to consider exceptions to (1) low risk groups where the visitors are involved in care on wards where the risk to other patients is not as severe and (2) for patients at end-of life, as a matter of compassion, even though this does expose staff to an increased risk of infection.
>
> A rule is grossly disproportionate if the negative effects on the rights of the claimant are out of sync with the object of the law, taking the object of the law at "face value." On the evidence, the Visitor Policy is not a grossly disproportionate response to the pandemic.[90]

The above decision is notable in that it dealt with an extreme limitation on the rights of the elderly patient. Indeed, the patient was not allowed any visitors to the hospital. Thus, he was essentially confined incommunicado. However, the Court deferred to those with professional expertise in finding that such a rule was constitutional, given that it was not arbitrary, overly broad or grossly disproportionate.

b. Isolation Orders

Public interest in protecting community health seems to override any section 7 challenges to date. Isolation orders as restrictions on personal liberty have been challenged as violating *Charter* rights, but to date, not successfully. In *Toronto (City, Medical Officer of Health) v Deakin*, the public health legislation required Deakin, who had contagious tuberculosis, to be detained and treated.[91] Deakin objected to treatment and isolation and even escaped on one occasion. On several occasions, he had been shackled when he became violent. Deakin argued that his detention violated his right to liberty under section 7. However, the Ontario Court of Justice decided that the breaches under the *Charter,* in this case, were justified. The occasional use of

[90] *Ibid* at paras 48–50.

[91] *Toronto (City, Medical Officer of Health) v Deakin*, [2002] OJ No 2777.

restraints was necessary and limited to outbursts of violence.[92] Even in a potentially indefinite period of detention, the Ontario Court in *Toronto (City) Medical Officer of Health v McKay* approved the extension of a detention order for an individual diagnosed with extensively drug-resistant tuberculosis (XDR-TB).[93] This disease cannot be effectively treated. As a result, the Court concluded that "this lethal virus may be unwittingly spread among the general population, creating a public health crisis of enormous proportions."[94]

c. HIV Testing

As for intrusions into personal privacy challenges under section 7, they also seem to be justified for public health objectives. The Ontario Court of Justice in *Canadian AIDS Society v Ontario* ruled that "[t]he Ontario mandatory-reporting provisions of people with HIV withstood a constitutional challenge."[95] In that case, the Red Cross had tested samples of donated blood for HIV without the donors knowing or consenting to the testing. The legislation required the health professionals to report positive results to public health authorities. On behalf of donors, the Canadian AIDS Society argued that this was contrary to sections 7 and 8 ("right to be secure against unreasonable search or seizure") because the testing violated donors' right to privacy and caused them significant stress. The Court held that both sections 7 and 8 challenges failed. The testing and reporting did not offend the principles of fundamental justice required in section 7. The Court stated: "The legislation provides a balance between respecting the individual's right to privacy, with the Province's objective of promoting public health."[96] The applicant also failed to prove that the seizure was unreasonable. More specifically, the Court stated: "the objectives of promoting and protecting public health in this context outweigh the individual's right to privacy."[97] Given the select case law, it is unlikely that a Court will accept that a right to privacy would prevail over a significant public health concern.

d. Mandatory Helmet Laws

It is important to look at analogous circumstances where the legislature has imposed mandatory clothing requirements based on safety concerns and whether such legislation was upheld. One that comes to immediate attention is the requirement for motorcycle drivers to wear a helmet on a public road. The courts have rejected almost

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[92] *Ibid* at para 31.

[93] *Toronto (City) Medical Officer of Health v McKay*, 2007 ONCJ 444.

[94] *Ibid* at para 31.

[95] *Health Law and Policy, 5th ed, supra* note 15 at 488. See also *Canadian AIDS Society v Ontario*, [1995] OJ No 2361, 25 OR (3d) 388 [*Canadian AIDS Society*].

[96] *Canadian AIDS Society*, *supra* note 95 at para 189.

[97] *Ibid* at 191.

all challenges arguing against mandatory helmet requirements on a public road premised on section 7. The early decision in *R v Fisher and Prest* on the *Charter* issues is notable.[98] In that case, the defendant argued "that the helmet makes the occurrence of an accident more likely and thus exposes him to physical injury. This result, he claims, deprives him of his right to security of the person and is not in accordance with the principles of fundamental justice."[99] One could make a similar argument with mask laws and assert a face mask does not prevent infection, and in fact, makes it more likely. However, this argument does not have any scientific evidence to support it.

Moreover, the public health justification for mandatory face mask laws is to protect others by limiting or preventing onward transmission. The Manitoba Court of Queen's Bench noted that the challenge to the helmet law was "simply an attack on the accuracy of factual assumptions which are said to underlie the exercise of legislative judgment and a claim that the Charter is offended because this defendant is endangered."[100] The Court pointed out that "the individual in society cannot demand that Utopian justice provide him with a shield bearing his personal coat of arms."[101] The Court adopted a position of not second-guessing the legislature on the safety benefits of the requirement while noting that:

> The Charter is an instrument of engineered imprecision. As a compass, it shows only the general direction of the destination. The selection of the route requires guides who are familiar with the type of terrain and climate. The judiciary is not the only guide in town. The broad road to constitutional validity must not be narrowed to an uncertain path by an elite veto veiled in traditional judicial reasoning.
>
> To strike this legislation down would be to exercise just such a veto. There will be cases where statistics may assist the court in testing the constitutionality of legislation, but this is not such a case. Genuine as the defendant is in his position, his claim is a self-centred assertion of a virtually absolute right to the security of his own person — as he himself defines it — whenever he chooses to travel on the public highway. The concept of rights makes sense only in society and that very setting negatives absolutes. The subway is not for hermits. For the general good of the defendant himself and his fellow citizens, as not unreasonably perceived and determined by the elected legislators, he must — even if his own presentation is sound — endure the statistical risk of an accident for the statistical benefit of living through it. The provision requiring the wearing of a helmet is an integral part of a broad legislative scheme to promote highway safety and to minimize the overall human and economic cost of accidents. On an unselfish, moderate and practical understanding of the right to security of

[98] *R v Fisher and Prest*, [1985] MJ No 454, 37 Man R (2d) 81.

[99] *Ibid* at para 3.

[100] *Ibid* at para 10.

[101] *Ibid*.

> the person, such provisions *create duties to others* which in no way affect Charter rights [emphasis added].[102]

The above principles have been affirmed in more recent case law. This duty to others is what we see as a critical element of judicial reasoning in the circumstances of a pandemic. This same element arises with face mask laws. It is the protection of others, as noted by the Court, that these cases demonstrate that it is unlikely that any deprivation here would violate the principles of fundamental justice. For instance, in *R v Warman*, the British Columbia Supreme Court noted that "Mr. Warman submits that in refusing to wear a helmet he was exercising his free choice, which he says is his fundamental right in a democratic society."[103] The Court rejected the validity of this argument by stating:

> However, while acknowledging the importance of Freedom of choice, I conclude that society in the public interest must occasionally place constraints on this Freedom. An argument similar to that advanced here by Mr. Warman is found in R. v. Kennedy (1987), 1987 CanLII 2453 (BC CA), 18 B.C.L.R. (2d) 321, a decision of the B.C. Court of Appeal, with leave to appeal denied by the Supreme Court of Canada, cited at [1988] S.C.C.A. No. 10. Kennedy addressed the constitutional validity of British Columbia's seat belt legislation and Carrothers J.A., for the Court of Appeal, referred with approval to the statement of County Court Judge Wong (as he then was) that:
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> > I think the trial judge was correct in his conclusion. The provision requiring the wearing of a seatbelt is an integral part of a broad legislative scheme to promote highway safety and to minimize the overall human and economic cost of accidents. The alleged infringement of the appellant's right of 'free choice' for the liberty and security of his person is so insubstantial that it cannot be considered a measurable breach of those rights.[104]

The Courts have not supported the position that mandatory helmet laws breach *Charter* rights considering the public interest in road safety.

e. Prohibition against Unpasteurized Milk

While laws requiring motorcyclists to wear helmets are often challenged under the *Charter*, laws prohibiting the sale and distribution of unpasteurized milk are another area that has seen similar challenges. These challenges, identical to the ones brought against the mandatory helmet laws, were also unsuccessful in the face of public health

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[102] *Ibid* at paras 11–12.

[103] *R v Warman*, 2001 BCSC 1771 at para 3.

[104] *Ibid* at para 5.

and safety concerns. *R v Schmidt* involved a milk farmer who produced and advocated the consumption of unpasteurized milk.[105] In his appeal in the Court of Appeal of Ontario, he argued that consuming unpasteurized milk had potential benefits, including possible protection against asthma and allergies. However, there was a preponderance of evidence suggesting that unpasteurized milk contained pathogens dangerous to human health, giving rise to the impugned legislation.[106] The appellant's evidence even indicated that the risks associated with unpasteurized milk outweigh the potential health benefits if there were any. Despite the substantial evidence against the consumption of unpasteurized milk, the appellant held "a sincere and honest belief in the benefits of unpasteurized milk."[107] The appellant sold unpasteurized milk to consumers through a "cow-share arrangement," giving each consumer a share of interest in cows.[108] The Court did not accept the appellant's argument that the cow-share arrangement was a "private arrangement" that fell within the exemption permitting the consumption of unpasteurized milk and products from one's own cow.[109]

It is important to note in *Schmidt* the discussion of whether face masks laws could withstand *Charter* challenges because the Court ruled that a violation of "the right to life, liberty and security of the person" cannot be made out based on an individual's subjective belief.[110] The Supreme Court of Canada has refused the appellant's leave to appeal.[111] The appellant contended that the impugned legislation violated his and his customers' rights to security of the person by depriving consumers of the right to acquire a product they deem beneficial to their health. In response to this, the Court, citing its past decisions, stated:

> I disagree with that submission. The impugned legislation prohibits the appellant from selling or distributing a product that certain individuals think beneficial to their health. As this court held in *R. v. Mernagh*, 2013 ONCA 67 at paras. 66 to 74, dealing with the consumption of marijuana, a s. 7 violation cannot be made out on the basis of an individual's subjective belief that a banned substance would benefit his or her health. There is no scientific or medical evidence of the kind contemplated in *Mernagh* to support the proposition that consumption of unpasteurized milk would benefit the health of any cow-share member. This case is readily distinguished from *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.) where there was medical evidence to substantiate the claim that the health of the right's claimant would improve if he were allowed to consume marijuana.

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[105] *R v Schmidt*, 2014 ONCA 188 [*Schmidt (ONCA)*].

[106] *Health Protection and Promotion Act*, RSO 1990, c H7; *Milk Act*, RSO 1990, c M12.

[107] *Schmidt (ONCA)*, *supra* note 105 at para 21.

[108] *Ibid* at paras 6–8.

[109] *Ibid* at paras 25–26.

[110] *Ibid* at para 35.

[111] *R v Schmidt*, [2014] SCCA No 208, [2014] CSCR No 208.

> Nor does the ban on the sale and distribution of unpasteurized milk constitute an infringement of security of the person akin to that encountered in cases where the state seeks to administer medical treatment without the individual's consent: see e.g., *Fleming v. Reid*, (1991), 4 O.R. (3d) 74 (C.A.). In those cases, by administering unwanted medical treatment, the state interferes with the individual's bodily integrity. In this case, the ban simply prevents an individual from acquiring a product that the individual subjectively believes would be beneficial.[112]

The Court also rejected the argument that the impugned legislation infringed the appellant's right to liberty due to the limitation on one's ability and Freedom to make "a decision of fundamental personal importance." The Court stated the limits of personal autonomy:

> I also agree with the respondent that preventing an individual from drinking unpasteurized milk does not fall within the "irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference": *Godbout v. Longueuil (City)*, [1997] 3 SCR 844 at para. 66. In my view, the appellant's argument to the contrary cannot be accepted in the face of the holding in *R. v. Malmo-Levine*, 2003 SCC 74, at para. 86, that "the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle." Lifestyle choices as to food or substances to be consumed do not attract *Charter* protection as "[a] society that extended constitutional protection to any and all such lifestyles would be ungovernable." Such choices, held the court, citing *Godbout* at para. 66, are not "basic choices going to the core of what it means to enjoy individual dignity and independence." [113]

What can be seen from *Schmidt* is the court's deference to the legislature's decision to ban the sale and distribution of unpasteurized milk in an attempt to protect and promote public health. This legislation does allow exemptions for individuals to consume unpasteurized milk and therefore is not primarily aimed to protect consumers themselves. With wearing masks during a pandemic, the argument is even stronger when there is no consent by others. While some may hold the honest and sincere belief that wearing face masks do not prevent, or even exacerbate, the spread of the disease, the courts are likely to defer to the legislature's decision to mandate wearing face masks in public spaces if it is founded upon statistical evidence, research and medical advice. Deference to legislation is likely in the case of credible or sufficient evidence or response to a government-declared emergency.

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[112] *Schmidt (ONCA)*, *supra* note 105 at paras 35–36.

[113] *Ibid* at para 40.

f. Mandatory Vaccination or Face Mask Policies

Policies that require healthcare workers to undergo annual vaccination or wear masks during flu season have also been challenged based on violations of section 7. In *Health Employers Assn of British Columbia v Health Sciences Assn (Influenza Control Program Policy Grievance)*, the union submitted that being compelled to undergo "an invasive medical procedure" (i.e., vaccination) or to wear a "stigmatizing mask" violates the rights to liberty and security of the person and is not in accordance with the principles of fundamental justice.[114] The arbitrator of the case disagreed with the union's submission. The arbitrator concluded that health care workers had a choice to immunize or mask, so vaccination is not mandatory. The arbitrator also did not consider the mask as an invasive procedure or stigmatizing since health care workers have to wear masks on many other occasions, even when they are vaccinated. Thus, it is the arbitrator's view that even though mandatory masking does restrict one's Freedom of choice, "[t]he mandatory aspect is not …in itself sufficient to trigger a violation of s. 7."[115]

On the contrary, *Sault Area Hospital v Ontario Hospital Assn (Vaccinate or Mask Grievance)* is an example of a successful challenge to a mask policy. The reasoning concluded that the hospital failed to establish sufficient scientific evidence demonstrating the effectiveness of masking and a "freestanding patient safety purpose."[116] The arbitrator concluded that mandatory masking was implemented to drive up vaccination rates among health care workers instead of achieving patient safety based on supporting evidence.

While considering that arbitration decisions do not form binding precedents on the courts, the contrast between the cases suggests that the weight of supporting evidence and the purpose of vaccination or mask policies may make the difference between constitutional or unconstitutional policies. Thus, strong supporting evidence as to the efficacy of masking and a rational connection between public health concerns and masking are arguably critical for face mask laws to withstand *Charter* challenges.

e. Restrictions on Smoking

Another area analogous to mandatory face mask laws is smoking bans. Second-hand smoke has been found to cause serious health issues, including lung cancer and cardiovascular disease. These medical costs are borne by those who contribute to the medical coverage for their care through tax dollars. As a result, all levels of the

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[114] *Health Employers Assn of British Columbia v Health Sciences Assn (Influenza Control Program Policy Grievance),* [2013] BCCAAA No 138, 237 LAC (4th) 1 at 254 [*Influenza Control Program Policy Grievance*].

[115] *Ibid* at 255.

[116] *Sault Area Hospital v Ontario Hospital Assn (Vaccinate or Mask Grievance),* [2015] OLAA No 339, 262 LAC (4th) 1 at paras 13, 312.

government, federal, provincial/territorial and municipal, have imposed restrictions on smoking to varying degrees in many public places, workplaces, and most recently, some private spaces.[117]

Several lawsuits have unsuccessfully challenged municipal bylaws that ban smoking.[118] Most of these decisions considered the importance of a municipality's role in protecting the public from the deleterious effects of second-hand smoke in public spaces. More contentious cases involve smoking restrictions in areas that implicate conflicting interests and rights of different groups of individuals.[119] For example, residential care facilities or correctional facilities are workplaces for some and homes or living spaces for residents or inmates. The workers' right to workplaces free of smoking and non-workers' rights to Freedom of lifestyle in the comfort of their homes needs to be balanced.

At the heart of these decisions is a key principle. What are the Constitutional limits on Freedom? The Supreme Court of Canada in *Blencoe v British Columbia (Human Rights Commission)* stated that the liberty interest protected under section 7 does not mean mere freedom from physical restraint but the Freedom to "live his or her own life and to make decisions that are of fundamental importance."[120] However, this right to make "fundamental personal choices free from state interference" is "not synonymous with unconstrained freedom."[121]

One can see that the similarity with mask laws and the potential harm to others and oneself and the larger community puts smoking laws squarely in the same field of analysis as might occur for face mask laws. Freedom to harm others is not unconstrained. Once again, the law looks outward at the impact on others. This is consistent with John Stuart Mill's fundamental principle of constraints on freedom. If smoking laws were the only guiding comparative law, then one could readily see how these same philosophical and legal underpinnings would support the basis of a mask law. It could be seen that regulation in public spaces is justified based on public health and safety concerns. However, the weight of such justifications weakens as the impact on others is not identified. One analogy is the taxpayer cost associated with medical care. This argument is difficult to overcome. Unconstrained freedom, whether it relates to smoking or a pandemic, will have an impact on others. The cost is not necessarily immediate or easy to quantify but should not simply be ignored.

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[117] *Health Law and Policy*, 4th ed, s*upra* note 21 at 563–564.

[118] *Ibid.*

[119] *Mercier v Canada (Correctional Service)*, 2010 FCA 167; *Union of Canadian Correctional Officers v Canada (Attorney General)*, 2008 FC 542.

[120] *Blencoe, supra* note 67 at para 49.

[121] *Ibid* at para 54.

Concluding Comments on Section 7

As the case law above demonstrates, it would be a rare situation that a law that breaches a principle of fundamental justice could be saved under section 1 of the *Charter*. However, one rare instance identified by the Supreme Court of Canada in 1985 was the onset of an "epidemic." This instance is mentioned briefly in *Reference re Motor Vehicle Act (British Columbia) S 94(2)* as an example of what would trigger section 1's "reasonable limits" justification in the context of a section 7 breach: "Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, *epidemics*, and the like" (emphasis added).[122] Some earlier decisions have characterized the special circumstances as similar to wars or national emergencies.[123] This characterization appears to be conclusive that a section 7 violation would generally be saved by a section 1 analysis depending on the nature of the violation. However, because the circumstances outlined are rare exceptions, the proposition has not been tested to date. Nevertheless, a Supreme Court justification signalling that law responds to the epidemic will survive a section 7 challenge. Based on the *Michaud* analysis, if the face mask law at issue is crafted based on statistical evidence and the purpose of the law is to protect the interests of the public, it is more apt to survive *Charter* scrutiny.

Section 2a of the Charter - Freedom of Conscience and Religion

It may be argued that a mandatory face mask law violates section 2a of the *Charter,* which guarantees "freedom of conscience and religion." There are at least two propositions that might be advanced to assert a *Charter* breach on this basis. The first is that a mask law interferes with praying or participating in religious activities such as choir singing. This position was advanced unsuccessfully in the United States in the case of *Tillis v Manatee County*.[124] A further position that could be argued is that a mask mandate is expressly prohibited by religion. For example, this position could arise due to religious clothing requirements or that wearing a face-covering is counter to a religion.

The Supreme Court of Canada has adopted the following test for determining whether there has been an infringement:

> Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general,

[122] *Reference re MVA, supra* note 70 at para 83.

[123] *R v Heywood*, [1997] SCJ No 95, [1997] 3 SCR 844.

[124] *Joel D. Tillis v Manatee County*, 2020-CA-002849-AX.

> subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will Freedom of religion be triggered.[125]

The Supreme Court has often stated that Freedom of religion can be limited where it interferes with the fundamental rights of others. On this point, Justice Iacobucci writing for the majority of the Supreme Court in *Amselem,* noted:

> In this respect, it should be emphasized that not every action will become summarily unassailable and receive automatic protection under the banner of Freedom of religion. No right, including Freedom of religion, is absolute: see, e.g., *Big M*, *supra*; *P. (D.) v. S. (C.)*, 1993 CanLII 35 (SCC), [1993] 4 S.C.R. 141, at p. 182; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, at para. 226; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 29. This is so because we live in a society of individuals in which we must always take the rights of others into account. In the words of John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it": *On Liberty and Considerations on Representative Government* (1946), at p. 11. In the real world, oftentimes the fundamental rights of individuals will conflict or compete with one another.

The Supreme Court has interpreted section 2(a) broadly with a stated preference for leaving competing government interests, including competing rights, to be reconciled under section 1. Thus, a law limiting freedom of conscience and religion will be valid under section 1 if it comes within the ambit of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

We will now examine how courts have examined objections based on "freedom of religion" claims and the societal balance the Court strikes.

Wearing of a Kirpan

The Supreme Court considered wearing a Kirpan by a 13-year-old orthodox Sikh to school in the 2006 case of *Multani v Commission scolaire Marguerite-Bourgeoys.*[126] The Court noted:

> This Court has clearly recognized that Freedom of religion can be limited when a person's Freedom to act in accordance with his or her beliefs may

[125] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 56.

[126] *Multani v Commission scolaire Marguerite-Bourgeoys,* 2006 SCC 6.

> cause harm to or interfere with the rights of others (see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 337, and *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47, at para. 62). However, the Court has on numerous occasions stressed the advantages of reconciling competing rights by means of a s. 1 analysis.[127]

Two elements of the section 1 analysis to be applied were noted at paragraph 43:

> ...two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be proportional to the objective in question: *Oakes*; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

In *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, the Supreme Court defined the proportionality test as follows:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. 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…

The Court indicated the matter was best resolved by a section 1 analysis and ultimately noted that an absolute prohibition on a kirpan should fail. There was a lack of evidence of the risks associated with wearing a kirpan, and the proportionality test was not met.

Mandatory Helmet Laws

The Ontario Court of Justice in *R v Badesha* curtailed the Freedom of religion and upheld the constitutionality of mandatory helmet laws.[128] There, religious Sikhs sought an exemption from a mandatory helmet law on the basis that their religion required them to wear a turban with no additional encumbrance placed on their head. The Court noted that the law "may impose a burden or cost on a certain number of devout Sikhs, but such a burden or cost, at the most, could only be described as trivial or insubstantial."[129] The Court also explained that "[a]ny limitation in the case at bar is a limitation on an individual's ability to ride a motorcycle in the fashion that he chooses, not a limitation on his right to worship or practise any belief associated with his religion.[130] The Court continued to note that the impugned legislation prevented the

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[127] *Ibid* at para 26.

[128] *R v Badesha*, 2011 ONCJ 284.

[129] *Ibid* at para 66.

[130] *Ibid* at para 67.

accused from driving a motor vehicle for pleasure, recreation or transportation, which is a privilege and not a right in and of itself.[131] In considering whether the limitation was valid under the *Charter*, the Court pointed to "the pressing and substantial objective" of the law, which was "directed toward not just highway safety for motorcycle riders but protecting motorcycle riders from head injury."[132] The Court further noted that because the legislation's objective was to guard against fatalities and head injuries, it is difficult to imagine how the impugned legislation could do so without the mandatory helmet law.[133] Thus, the helmet law is not overly broad or irrationally connected to its objective. For a mask law, one could foresee a comparable analysis occurring with a section 2a challenge.

Section 2b of the Charter - Freedom of Speech

The *Charter* provides at section 2b that everyone has the following fundamental freedoms: "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." A potential *Charter* challenge is that mask wearers may be sick or infectious, and wearing a mask communicates that status as a form of compelled speech.

Canadian courts have interpreted section 2(b) very broadly, often finding a *prima facie* breach readily. The Supreme Court has adopted the following test for analyzing section 2(b):

> In sum, to determine whether an expressive activity is protected by the *Charter,* we must answer three questions: (1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2 (*b*) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action? (*Criminal Lawyers' Association*, at para. 32, summarizing the test developed in *City of Montréal*, at para. 56).[134]

If a measure is found to contravene section 2b, then the analysis moves to section 1. Therefore, a potential section 2b breach by a mask law will likely turn on a section 1 analysis.

The Court of Appeal for British Columbia noted in *R v Spratt* that the right to state one's views publicly is protected only where a member of the public may "effectively avoid further bombardment of their sensibilities simply by averting their

[131] *Ibid* at para 70.

[132] *Ibid* at para 77.

[133] *Ibid* at para 85.

[134] *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2 at para 38.

eyes."[135] Therefore, "protesters are not entitled to a captive audience. Those receiving the message should be free to avoid the message if they so choose." However, in nationwide and even a worldwide pandemic, people cannot simply "avert their eyes" to protect themselves from contracting the disease.

A person who objects to wearing a face mask may respond by stating that any person who feels unsafe could stay at home. However, public spaces are available to everyone. Therefore, there must be respect for reasonable restrictions necessary to maintain that equilibrium to protect the rights of others. This respect for some rules is clear from the decision of the Supreme Court of Canada in *Committee for the Commonwealth of Canada v Canada where* the court noted:

> The fact that one's Freedom of expression is intrinsically limited by the function of a public place is an application of the general rule that one's rights are always circumscribed by the rights of others. In the context of expressing oneself in places owned by the state, it can be said that, under s. 2(b), the Freedom of expression is circumscribed at least by the very function of the place.[136]

Moreover, the objective of the mandatory face mask laws might be viewed as compelling — namely, to prevent physical harm rather than to restrict the ideas and opinions of others. This is a crucial distinction. The Supreme Court of Canada noted in *Irwin Toy Ltd v Quebec (Attorney General)*: "If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict Freedom of expression. Suppose the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee."[137] Thus the mask law will survive the analysis if the purpose was not aimed to control or limit expression. The objective is a crucial aspect when considering the challenge to a mask law on an expression basis. If the goal is to limit virus spread rather than impact expression, then a challenge rooted on this ground will not prevail.

Mandatory Vaccination or Face Mask Policies

As mentioned above, the mandatory vaccination or face mask policies in health facilities have been challenged based on a violation of the person's right to liberty and security. Therefore, it may be of surprise that such policies have also been challenged under section 2b of the *Charter*. In *Influenza Control Program Policy Grievance*, as

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[135] *R v Spratt*, 2008 BCCA 340 at paras 83–84.

[136] *Committee for the Commonwealth of Canada v Canada*, [1991] SCJ No 3, [1991] 1 SCR 139 at para 19.

[137] *Irwin Toy Ltd v Québec (Attorney General),* [1989] SCJ No 36, [1989] 1 SCR 927.

introduced above, the union contended that the mask itself is "a form of forced speech" and a "particularly stigmatizing one." Health workers who wear masks are seen as different from their co-workers who are not vaccinated. The Court concluded that masking in this context should be characterized as a form of forced speech, as it would signal workers' vaccination status to co-workers and possibly others, given the fact of the policy and signage publicizing it.[138] However, without deciding that the policy infringed section 2, the analysis concluded that the policy was saved under section 1. The policy was saved under section 1 because the policy had a "sufficiently important" objective, namely patient safety, to justify the forced expression; there was extensive evidence that supported the rational connection between the vaccination or mask policy and the policy that minimally impaired the right to expression.[139]

Whether courts will follow this arbitration decision in Canada is uncertain. However, it does raise awareness that face masks policies or laws could potentially raise freedom of expression issues. However, as remarked by the arbitrator in the preceding case, the forced expression could be justified under section 1.[140] In addition, the public is less likely to view mask wearers as sick or infectious if there is a mandatory face mask law in place for everyone with limited exceptions. Informed citizens with adequate knowledge of epidemics or pandemics and the uses of face masks will also reduce the stigma of face masks.

Conclusion

While the popular stance may be that the experience of the COVID-19 pandemic has thrust humankind into an extraordinary crisis, the global pandemic has significant precedent throughout human history. Moreover, similar pandemics have provoked conversations from the public and academics alike about the public health measures taken to control contagion.

As the case law and legislation in public health matters in this paper have demonstrated, the courts are more likely to defer to legislatures and law-making institutions when public health is at risk and the chosen measures are reasonably tailored to tackle these health issues. Although the *Constitution* does not specifically speak to public health in the circumstances of an epidemic or pandemic, it is clear from the body of law that has developed that there will be a degree of deference where the evidence supports the necessity. This deference is reinforced by case law in comparable circumstances as set out in this paper.

The *Constitution* supports face mask laws enacted to combat an epidemic or pandemic by each level of government, provided it is supported by reasonable

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[138] *Influenza Control Program Policy Grievance, supra* note 114 at para 237.

[139] *Ibid* at paras 244–253.

[140] *Ibid* at paras 240–242.

evidence and tailored for the circumstances. The details of such a law may come under great scrutiny depending on the breadth of the conflict with other established laws such as the *Charter*. The conflict with the *Charter* is likely to be saved by section 1 of the *Charter*. In addition, the Supreme Court has specifically identified an epidemic as a circumstance justifying special judicial treatment. Although not thoroughly tested, it is a clear signal.

While the *Constitution* supports face mask laws, adopting an adherence and acceptance of these laws is subject to matters beyond their legality. Perhaps the most distinctive aspect of the COVID-19 pandemic is the widespread availability of social media, which has created fertile ground for an open dispute over the constitutionality of face mask laws. These disputes are often grounded in firmly and genuinely held subjective beliefs and opinions. Many of these opinions and beliefs centre on the concept of freedom of lifestyle, freedom of choice, and personal autonomy, and yet as Albert Camus penned in *The Plague*: "They fancied themselves free, and no one will ever be free so long as there are pestilences."