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Article

Vaccines Mandates and Legal Immunity for Ontario's School Boards

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The plight of schools has been a major concern throughout the COVID-19 pandemic. Initially, stakeholders constantly weighed the ills of remote learning versus the risk of spreading the virus. More recently, public policy has turned its attention to the COVID vaccines. In particular, Ontario now requires school boards to implement a vaccine policy that is subject to provincially imposed minimum standards. For school boards, this de facto mandate has undoubtedly mitigated a contentious issue. As will be discussed, mandates from the government provide better indemnity than ones imposed by an employer. However, even government vaccine mandates, including the concomitant indemnity they provide school boards, are not foolproof. Correspondingly, this article explores the limiting principles that govern a provincial vaccine mandate. It also attempts to gauge the degree of "legal immunity" the current regime provides, and to what extent school boards may expect it to withstand legal challenge. Similarly, the article considers the degree of indemnity school boards will receive when they are directed by their local public health units to impose a vaccine mandate that is more stringent than the provincial mandate in place. Lastly, the article offers a précis of the statutory and common law hurdles that would likely plague a COVID- or vaccine-injury-based claim for damages.

Le sort des écoles a été une préoccupation majeure tout au long de la pandémie de COVID-19. Au départ, les parties prenantes ont constamment pesé les maux de l'apprentissage à distance par rapport au risque de propagation du virus. Plus récemment, la politique publique a tourné son attention vers les vaccins COVID. En particulier, l'Ontario exige désormais des conseils scolaires qu'ils mettent en œuvre ***2** *une politique de vaccination assujettie à des normes minimales imposées par la province. Pour les commissions scolaires, ce mandat de facto a sans aucun doute atténué une question litigieuse. Comme nous le verrons, les mandats du gouvernement offrent une meilleure indemnité que ceux imposés par un employeur. Cependant, même les mandats gouvernementaux en matière de vaccins, y compris l'indemnité concomitante qu'ils offrent aux conseils scolaires, ne sont pas infaillibles. En conséquence, cet article explore les principes limitatifs qui régissent un mandat provincial en matière de vaccins. Il tente également d'évaluer le degré d'<< immunité juridique >> offert par le régime actuel et dans quelle mesure les conseils scolaires peuvent s'attendre à ce qu'il résiste à une contestation judiciaire. De même, l'article examine le degré d'indemnisation que les conseils scolaires recevront lorsqu'ils seront dirigés par leurs bureaux de santé publique locaux pour imposer un mandat de vaccination plus strict que le mandat provincial en place. Enfin, l'article propose un résumé des obstacles statutaires et de common law qui entraveraient probablement une demande de dommages-intérêts basée sur le COVID ou le vaccin.*

> *Though nothing can be immortall, which mortals make; yet, if men had the use of reason they pretend to, their Common-wealths might be secured, at least, from perishing by internall diseases.*

--Thomas Hobbes, *Leviathan*

1. INTRODUCTION

In September 2021, students in Ontario returned to in-person learning after COVID-19 had forced the closure of schools. [1] School boards, like countless employers throughout Canada, have grappled with different policy options to safely reopen their doors. [2] However, by virtue of September 2021 instructions issued by the provincial Chief Medical Officer of Health ("CMOH"), Ontario school boards, unlike many other employers, have effectively had the controversial mandatory vaccine issue decided for them. The instructions outline minimum standards for a given school board's mandate. Essentially, child-facing staff must get vaccinated, provide a valid medical exemption, or attend an educational session about vaccines. Moreover, staff relying on the latter two options must undergo weekly antigen tests.

***3** For many school boards, the instructions come as a blessing. There are two obvious benefits to having board employees vaccinated. First, according to provincial health experts, "vaccines reduce COVID-19 transmission, either by preventing infection by severe acute respiratory syndrome coronavirus 2 (SARSCoV-2), or by reducing the incidence of symptomatic and asymptomatic disease." [3] Of equal, if not greater importance, the instructions will likely indemnify boards from vaccine-related grievances. However, the scope, as well as the origin of a provincial vaccine mandate, invariably influences whether it will pass judicial scrutiny. Put another way, how a mandate comes into being will determine whether it provides lasting indemnity for Ontario's school boards.

Therefore, to add a fresh perspective to the vaccine-mandate conversation, this article will examine the degree of protection Ontario's school boards may anticipate from the current provincial mandate, as compared to or in conjunction with a mandate imposed by a public health official. The article will also explore COVID-related liability for boards considering a supplementary mandate of their own.

2. PUBLIC MANDATES AND INDEMNITY

On September 7, 2021, the CMOH provided rules stating that every "covered organization," which includes school boards as defined by the *Education Act*, [4] "must establish, implement, and ensure compliance with a COVID-19 vaccination policy requiring"

> a) proof of full vaccination against COVID-19; or
>
> b) written proof of a medical reason, provided by a physician or registered nurse in the extended class that sets out: (i) a documented medical reason for not being fully vaccinated against COVID-19, and (ii) the effective time-period for the medical reason; or
>
> c) prior to declining vaccination for any reason other than a medical reason, proof of completing an educational session about the benefits of COVID-19 vaccination .... The approved session must, at minimum, address:
>
> i. how COVID-19 vaccines work;

ii. vaccine safety related to the development of the COVID-19 vaccines;

iii. the benefits of vaccination against COVID-19;

iv. risks of not being vaccinated against COVID-19; and

***4** v. possible side effects of COVID-19 vaccination. [5]

Importantly, this policy is applicable only to child-facing staff. Moreover, section 2 of the instructions specifies that individuals who are required to get vaccinated and opt to rely on a medical or educational session exemption must undergo weekly testing.

Put simply, Ontario wants school board employees vaccinated. At the same time, the province's mandate provides an alternative mechanism for employees incapable of, or uninterested in, receiving the COVID vaccine. For school boards, this vaccine mandate provides a wellspring of indemnity. Unlike an internally imposed mandate, a vaccine mandate that comes from the province, either legislatively or through a public health order, is better suited to indemnification of school boards from litigation initiated by unionized employees who remain unvaccinated. As articulated by Member Goodfellow in the Ontario arbitration decision of *North Bay General Hospital v. C.U.P.E., Local 139*, [6]

> It is trite law that obligations imposed by a collective agreement are subordinate, and must give way, to the terms of a statute and its regulations. The fact that the statute law may be subject to a constitutional challenge, that the challenge may have merit, that other employers in the province may have chosen (or felt operationally compelled) not to comply with the law, that non-compliance with the law, in the circumstances, may not have raised any substantial concerns or consequences for the party to whom it applies (in this case, the Hospital) or the public, and any of the many other factors relied on by the Union, are [*sic*] irrelevant. [7]

Moreover, other recent labour arbitration decisions reflect the inherent uncertainty that is endemic to internal COVID vaccine mandates. On the one hand, Arbitrator Von Veh had no problem upholding a strict COVID vaccine mandate (human rights codes-based exemptions only) in *UFCW, Local 333 and Paragon Protection Ltd. (Covid-19 Vaccination Policy), Re*. [8] Most notably, the collective agreement in this grievance had previously established that employees must get vaccinated if inoculation was required to access worksites. Furthermore, the employees in question were security guards who were regularly contracted to work at sites that had their own COVID vaccine requirements in place. Unsurprisingly, the employer's mandate was considered reasonable. On the other hand, in *E Electrical Safety Authority and Power* ***5** *Workers' Union (ESA-P-24), Re*, [9] the union successfully challenged an employer's vaccine policy. In this decision, Arbitrator Stout found the policy unreasonable because the majority of the work had been effectively transitioned to remote work, the vast majority of the employees were vaccinated,

the employer's previous policy of having regular testing as an alternative to vaccination was sufficient, and unvaccinated employees were not significantly interfering with the company's business.

Taken together, these two decisions show that an internal mandate's validity is subject to the requirements of the job, the terms of the collective agreement, and the surrounding general circumstances. As Arbitrator Stout observed in *ESA*, "It must also be noted that circumstances at play may not always be static. The one thing we have learned about this pandemic is that the situation is fluid and continuing to evolve. What may have been unreasonable at one point in time is no longer unreasonable at a later point in time and vice versa." [10] Such a pronouncement, while understandable, hardly provides clear guidance for school boards. The greater certainty afforded by regulations (compared to collective agreements) likely explains why the president of the Ontario Public School Boards' Association sent Premier Ford a letter on August 13, 2021, requesting that the province impose a vaccine mandate on public school staff. [11]

That said, legislative mandates cannot be carelessly imposed on employees. After all, the province must take countervailing interests into consideration (e.g., bodily autonomy, accommodation, privacy, alternative safety measures, etc.). The following sections will explore principles that may limit vaccine mandates imposed by the province or a public health official, with a mind to determining whether the current mandate falls within the permissible range of such possible limitations, and whether a supplementary mandate imposed by a local health unit would similarly fall within it.

(a) Vaccine Mandates and Paramedics

Paramedics are a prime example of unionized workers who have been subject to a legislative vaccine mandate. Section 6(1)(h) of O. Reg. 257/00 provides that

> [a]n emergency medical attendant and paramedic employed, or engaged as a volunteer, in a land ambulance service shall, hold a valid certificate signed by a physician that states *that the person is immunized against diseases listed in Table 1* to the document entitled "Ambulance Service ***6** Communicable Disease Standards", published by the Ministry, as that document may be amended from time to time, or that such immunization is contra-indicated. [12]

The jurisprudence specifically dealing with the province's authority to require this mandate is sparse. However, *Kotsopoulos v. North Bay General Hospital* [13] provides some insight. In this case, a paramedic who was fired because he was unvaccinated for influenza sought an interlocutory injunction reinstating him to his position with the respondent hospital. [14] Justice Karam framed the case as "whether the [influenza vaccine] requirement creates a Charter breach." [15] However, because this was an injunction application rather than a formal challenge under the *Canadian Charter of Rights and Freedoms*, [16] Justice Karam subjected the applicant's claim to the *RJR-MacDonald* test. [17] Importantly, the third step of the test--whether granting the injunction would create a greater inconvenience for the applicant or the respondent--was, *ab initio*, tilted in favour of the provincial intervener. As observed by the court, "In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant." [18] In coming to his decision to deny the injunction, Justice Karan remarked that he was

> satisfied on the basis of the evidence provided to [him], that influenza is an extremely infectious disease, often leading to hospitalization and death. *It is particularly dangerous to the elderly*. There is no question that paramedics in the course of their duties are often confronted with health situations involving the elderly. *This regulation is clearly designed for no other purpose than to control the disease by taking steps to*

> *control its spread. Influenza vaccine is the primary defence in preventing its spread. Immunizing health care workers is one step in that direction*. [19]

However, the court fell short of an unqualified endorsement of vaccine mandates:

> ***7** The real issue is whether the applicant should be required, against his wishes, to expose himself to immunization, in the interests of what the Province sees as the necessity to protect the public. Whether the legislation can be justified on the basis that it intrudes upon the rights of an individual not to have substances introduced into his body against his will is a very important issue, *but not one that can properly be dealt with on an interlocutory application.* [20]

Although provincially imposed COVID vaccine mandates for school boards are somewhat distinguishable, the *Kotsopoulos* decision is nonetheless revealing. The Superior Court upheld the government's authority to mandate the influenza vaccine despite this regulation's stark incongruities. As the applicant pointed out, no other medical, emergency, or critical care personnel were required by statute or regulation to obtain a flu shot. Moreover, the applicant paramedic had three unvaccinated colleagues who were permitted to work around elderly patients because the influenza vaccine was deemed medically contra-indicated given the paramedics' health situations. [21] While acknowledging that an in-depth hearing was the appropriate forum to hear the constitutionality of the regulation, the court remained unwilling to reinstate the applicant as it "would clearly interfere with the approach that has been adopted toward universal immunization." [22] Put another way, the Superior Court saw the mandate as a public good with an admirable goal. As such, the court forgave the regulation's myriad inconsistencies and ultimately found that the government's objective trumped the inconvenience of the individual paramedic. One can fairly assume that similar rationales would come into play if a unionized teacher attempted to challenge the current provincial mandate.

(b) Vaccine Mandates and the *Charter*

Although predicting the future is typically a fool's errand, especially in the case of future litigation, it is certainly plausible that someone will challenge COVID vaccine mandates under section 7 or 2(a) of the *Charter*. [23] The former, which provides "the right to life, liberty and security of the person," is the section on which the applicant in *Kotsopoulos* intended to rely. [24] The latter section provides "freedom of conscience and religion." Freedom of conscious is a particularly attractive argument for *Charter* applicants considering the broad definition that courts have historically given it. For example, in the Supreme Court of Canada's judgment in *R. v. Videoflicks Ltd.*, Chief Justice Dickson stated that the purpose of section 2(a) is "to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, ***8** humankind, nature, and, in some cases, a higher or different order of being. *These beliefs, in turn, govern one's conduct and practices*." [25] In *Syndicat Northcrest c. Amselem*, the Court further emphasized the subjective component of section 2(a) by explaining that

> [t]he emphasis then is on personal choice of religious beliefs. In my opinion, these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion. *Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion,* nor is such an inquiry appropriate for courts to make. [26]

Put another way, courts will give much deference toward individuals who strongly profess a particular religious belief. Therefore, a sincere disinclination to get the CVOID vaccine couched in religious belief may constitute a breach of section 2(a).

However, even a compelling section 2(a) challenge is still subject to analysis under the *Oakes* test. As summarized in Halsbury's Laws of Canada,

> The accepted test for justification under s. 1 is the Oakes test. The Oakes test has two parts. First, it requires that the objective pursued by the limit be of sufficient importance as to warrant overriding the right. Second, the limit must be proportionate, which has three aspects: there must be a rational connection between the measures containing the limit and the objective pursued; the degree of infringement must be minimal; and there must be an overall proportionality between the deleterious and salutary effects of the measure. [27]

The *Oakes* test has been judicially considered thousands of times. However, it might be helpful to think of it less as a test and more of a broad consideration of whether a particular piece of legislation properly balances individual rights with ***9** societal interests. As Justice LeBel pointed out in dissent in *Hutterian Brethren of Wilson Colony v. Alberta*,

> In order to determine whether the measure falls within a range of reasonable options, courts must weigh the purpose against the extent of the infringement. They must look at the range of options that are available within the bounds of a democratic Constitution. A deeper analysis of the purpose is in order at this stage of the proportionality analysis. The stated objective is not an absolute and should not be treated as a given. Moreover, alternative solutions should not be evaluated on a standard of maximal consistency with the stated objective. An alternative measure might be legitimate even if the objective could no longer be obtained in its complete integrity. At this stage of the proportionality analysis, the overall objective of the s. 1 analysis remains constant: to preserve constitutional rights, by looking for a solution that will reach a better balance, even if it demands a more restricted understanding of the scope and efficacy of the objectives of the measure. In this sense, *courts must execute a holistic proportionality analysis with different legal and analytical components, which remain tightly woven*. [28]

It is clear that, in a holistic analysis, courts will take COVID (i.e., societal interests) seriously. For example, in *Spencer v. Canada (Health)*, [29] the federal government's previous quarantine requirement of having international travellers stay in a "COVID hotel" were not found to breach the *Charter*. It should be noted, however, that the *manner* in which the requirements were carried out in this case, specifically, failing to inform the applicant where the COVID hotel was located, did result in a *Charter* breach. [30] Superficially, *Spencer* indicates that a section 1 analysis on the issue of a COVID vaccine mandate may tilt in favour of the government. At the same time, there is arguably a temporal element to the analysis. A mandate's reasonableness will wax or wane in concert with the pandemic itself. In other words, the issues of hospital capacity, the severity of COVID's health consequences, the extent to which a mandate violates someone's beliefs, and the relative threat that the unvaccinated pose to society, at any given time, may all influence whether a policy is considered a justified *Charter* breach. As such, a material change in those and other relevant factors at the time of the section 1 analysis will certainly affect the analysis and possibly determine the outcome.

***10** In summary, it is not guaranteed that the court's decision in *Kotsopoulos* would have been the same under a constitutional (as opposed to an administrative law) analysis. However, one may still reasonably conclude that the Superior Court would have

readily recognized the public good of stopping a disease that is "particularly dangerous to the elderly." Moreover, there is a clear judicial willingness to uphold a legislative mandate, even if the regulation itself is flawed and the inconvenience imposed on the unvaccinated individual is substantial. There is also some support for the proposition that a COVID precaution that breaches the *Charter* may well be justifiable under the *Oakes* test given the magnitude of the public interests at stake. On the other hand, a COVID vaccine mandate that remains in place after the pandemic no longer necessitates that the unvaccinated regularly test themselves may encounter a section 2(a) challenge that will not be defeated by section 1.

(c) Mandates and School Pupils

Notwithstanding COVID's absence from the *Immunization of School Pupils Act*, [31] judicial attitudes toward the province's use of the *ISPA* reveal a bench that is quite sympathetic to vaccine mandates as a means of safeguarding public health. [32] In particular, section 3(1) of the *Act* requires parents to immunize their children against specific diseases designated by the province. Although exemptions based on religious/conscientious belief and medical grounds may be granted, a medical officer of health may override them. Indeed, a provincial medical officer may order a school operator to exclude unvaccinated pupils from its school(s) if there is an outbreak of a designated disease, an immediate risk of an outbreak of a designated disease, or the parents have failed to properly file the exemption on which they rely. [33]

It is important to note that courts are loath to recognize exceptions other than those delineated in the *ISPA*. For example, in the family law case of *Di Serio v. Di Serio*, [34] the father had "the right to participate in all the major decision making for matters *regarding the health,* education, religious and other extra-curricular activities regarding the children." [35] Despite this right, the court rejected the father's opposition to vaccinating his children against the designated ***11** diseases listed in the *ISPA*. In particular, the court found none of the *ISPA*'s exemptions were available to the father because his "*opposition to immunizations [was] couched exclusively in terms of health concerns* and his view of what [was] in the children's best interests. There [was] not a hint of religious, conscientious, moral or even philosophical opposition to immunizations." [36] Judicial reluctance to undermine the public policy thrust of the *ISPA* is also reflected in Justice Harper's comment in *G. (C.M.) v. S. (D.W.)* [37] that "[e]ven with the exemption, *the emphasis [of the ISPA] is on prevention by vaccination of disease outbreak*." [38] As such, mandates that emphasize vaccination as a means of prevention will not easily give rise to interpretations that seek to circumvent the mandate by a broad reading of its exceptions.

(d) Concluding Thoughts on the Government's Ability to Impose Vaccine Mandates

As demonstrated above, Ontario has taken an active approach with regard to vaccinating paramedics and school children. Notably, there are other examples of provincially imposed vaccine mandates; however, they have more limited relevance to the focus of this article. [39] The case law discussed thus far should alert school boards to the fact that courts will respect legislative vaccine mandates that seek to prevent disease outbreak and protect the vulnerable. However, even if it can be assumed a mandate passes *Charter* scrutiny, care must be taken to also ensure its modes of execution do so as well. Lastly, to the extent that the legislature carves out exemptions for the unvaccinated, the courts are unlikely to engage in an overly broad reading of them.

Hence, it is almost certain that the discussed provincial vaccine mandate falls within legally acceptable parameters. Undoubtedly, the mandate's intention is the reduction of COVID, as well as the protection of the vulnerable. Moreover, staff disinclined to get jabbed still have the option to submit to regular antigen testing. As such, the likelihood that a court would strike down such a mandate, especially as dangerous variants of COVID continue to arise and spread, is minimal.

*12 3. MANDATES UNDER THE *HEALTH PROTECTION AND PROMOTION ACT*

(a) Overview

The legislature is not the only branch of the provincial government capable of imposing vaccine mandates. Provincial public health authorities have broad discretion to order mandatory vaccination or other actions to control outbreaks of communicable diseases. Section 22 of Ontario's *Health Protection and Promotion Act* [40] provides as follows:

> (1) A medical officer of health, in the circumstances mentioned in subsection (2), by a written order *may require a person to take or to refrain from taking any action* that is specified in the order in respect of a communicable disease.
>
> (2) A medical officer of health may make an order under this section where he or she is of the opinion, *upon reasonable and probable grounds,*
>
> (a) that a communicable disease exists or may exist or that *there is an immediate risk of an outbreak of a communicable disease* in the health unit served by the medical officer of health;
>
> (b) that the communicable disease *presents a risk to the health of persons* in the health unit served by the medical officer of health; and
>
> (c) that the requirements specified in the order are *necessary in order to decrease or eliminate the risk* to health presented by the communicable disease ...
>
> (4) An order under this section may include, but is not limited to ...
>
> (h) *requiring the person to whom the order is directed to conduct himself or herself in such a manner as not to expose another person to infection*.

These provisions have been used by Ontario's public health officials to exclude unvaccinated individuals from their places of work. For example, in *Loder v. Huron (County) Health Unit*, [41] the Ontario Health Services Appeal and Review Board ("OHSARB") upheld an order by a county public health official that required sending home all nursing home staff members who were both unvaccinated against influenza and unwilling to take the antiviral drug Tamiflu. Importantly, this order was made amidst an influenza outbreak and was intended to last only for the duration of it. [42]

***13** With regard to COVID, a public health official, acting under the *HPPA*, may opt to enact a supplementary vaccine mandate that is stricter than the CMOH's instructions. For example, a health official may elect to remove the antigen testing option for unvaccinated teachers. [43] This may especially be the case if a particular region or school board is seeing a large uptick in COVID cases. Therefore, school boards may benefit from knowing whether a supplementary vaccine mandate order issued by a health official may ultimately be upheld.

(b) Guidance on HPPA Orders

An abundance of helpful interpretive guidance on the *HPPA* can be extracted from the *Loder* decision. With regard to section 22(2)(a), the review board found that it "does not require that an outbreak be *confirmed* prior to issuing the order, only that there are reasonable and probable grounds for the opinion that an 'immediate risk' of outbreak exists." [44] However, a health minister's order that unvaccinated school staff must vaccinate against COVID may still be reasonably challenged under both paragraphs 22(2)(b) and (c).

In *Loder*, influenza was deemed to be a risk to the health of long-term care facility residents; the board accepted expert evidence that "the elderly can suffer mortality rates from outbreaks as high as 20%." [45] By contrast, COVID has been remarkably benign for most school-age children. According to Health Canada, as of November 26, 2021, out of the 377,401 Canadians 19 years of age and under who have contracted COVID, 19 have died (or 0.005%). [46] Given these statistics, one could imagine a plausible challenge to the proposition that COVID's health risk to students warrants mandatory vaccination. However, students are not the only consideration. Public health officials may also want to institute a supplementary vaccine mandate in order to protect elderly or immunocompromised people working in schools or living with students.

*14 (c) Potential Challenges

A vaccine mandate under the *HHPA* must satisfy section 22(2)(c). Put simply, the COVID vaccine mandate must be seen as "necessary in order to decrease or eliminate the risk to health presented by the communicable disease." In *Loder*, the OHSARB quoted two studies that showed that "vaccinating health care workers is more effective than merely vaccinating residents." [47] For context, the board found that the influenza vaccine offered *less* overall protection to the elderly as compared to the general population. [48] Indeed, it is precisely because the influenza vaccine was less effective for the elderly that the board ultimately concluded that the "annual influenza vaccination of health care workers is an important and reasonable tool to *reduce the spread*, and prevent the impact, of influenza outbreak for elderly LTCF residents." [49] One might argue that it is unclear whether the vaccine mandate would have been seen as a "reasonable and important tool" if the influenza vaccine protection had been uniform or if it had not helped to stop the spread of the disease. Although the COVID vaccine's protection is not necessarily inverse to age, there is evidence that it may wane more quickly for older individuals. [50] Similarly, school board staff who are immunocompromised may also receive *less* protection from the vaccine, thereby making a general vaccine mandate more justifiable under the *Loder* analysis. [51]

Inoculation against COVID does not inevitably mean the spread of the virus will be completely negated. It is still unknown what proportion of new COVID cases are transmitted by vaccinated people. [52] The March 31, 2021, Report of the Chief Science Advisor of Canada observed that there is still uncertainty surrounding whether "vaccinated individuals become the equivalent of asymptomatic carriers who can continue to infect others." [53] This uncertainty has been exacerbated by the Delta variant of the virus. Emerging reports indicate ***15** that vaccinated individuals can be significant spreaders. For example, an August 6, 2021, report from the Centers for Disease Control (CDC) found that three quarters of individuals who got COVID after attending large gatherings in a Massachusetts town during the summer of 2021 were fully vaccinated. [54] Similarly, in Israel, more than half of the country's new COVID cases come from vaccinated individuals. As Uri Shalit, a bioinformatician at the Israel Institute of Technology (Technion) who has consulted on COVID-19 for the government, put it, "One of the big stories from Israel [is]: 'Vaccines work, but not well enough.'" [55]

Depending on how the scientific consensus ultimately rules on these issues, one might attempt to challenge a supplementary mandate under the *HPPA* on the grounds that even vaccinated individuals spread COVID. Such a challenge may rest on the argument that vaccines are not truly *necessary* to protect immunocompromised staff, or even necessary to eliminate risk. Seemingly, the virus would continue to spread and the immunocompromised would remain vulnerable irrespective of whether the challenger got vaccinated. Similarly, one can also imagine challengers arguing that unvaccinated staff who submit themselves to regular testing are less likely to unknowingly transmit COVID.

(d) Deference Given to Health Officials

Anyone challenging an order from a public health official must contend with the fact that the latter, operating under the *HPPA*, must meet a fairly low standard of proof to justify their order. In particular, "the standard of proof that must be met by a MOH or public health inspector in order to justify an order before the HSARB is significantly less than either the criminal standard of proof or the ordinary civil standard of proof on a balance of probabilities." [56] Moreover, mustering an expert and/or study to contradict an *HPPA* order would likely be insufficient to overturn the order. As the OHSARB stated in *481799 Ontario Ltd. v. Waterloo (Region) Public Health*, [57]

> I accept that one purpose of the Act is, as its name suggests, the protection of public health. It is consistent with this purpose that the proof of a health hazard need not be actual; no one need have died or have become sick before the public health inspector is authorized to act ***16** under section 13. *It is sufficient if the public health inspector establishes that his or her concern for a health hazard is informed by scientific literature and exercised fairly and suitably under the circumstances*. [58]

Identifying disagreement or uncertainty within the scientific consensus does not guarantee the vitiation of an *HPPA* order. The overwhelming consensus about the dangers posed by COVID, as well as the benefits associated with the vaccines, will likely ensure that a supplementary vaccine mandate under the *HPPA* will be upheld. A public health official need only be backed by some science and is not required to satisfy every expert in the field.

The significance of the deference enjoyed by public health officials under the legislation and limited jurisprudence is underscored by the August 2020 Ontario Divisional Court decision in *Schuyler Farms Limited v. Dr. Nesathurai*, [59] which would further hinder any attempts to challenge a supplementary vaccine mandate made under the *HPPA*. The court reviewed an OHSARB decision dealing with section 22 of the *HPPA* in the context of COVID. In this case, the appellant public health official issued a *HPPA* order circumscribing the quarantine conditions of migratory foreign workers. The appellant required that the respondent employer "[e]nsure only a max of 3 seasonal workers to a bunkhouse." [60] The respondent challenged this order on the basis it was arbitrary. The OHSARB concluded that the respondent lacked "reasonable and probable grounds" to believe that the limit was necessary to decrease or eliminate the risk to health presented by COVID. [61] In reversing the board's decision, the Divisional Court stated that

> [t]he scheme of the HPPA recognizes that different MOHs may take different approaches based on the same set of circumstances. Because s. 22 requires a MOH to have only reasonable and probable grounds for his or her opinion, this suggests that in many cases there are a variety of different approaches that can be justified. There is rarely a single right answer to any public health question--*and this is particularly true in the midst of a pandemic involving a novel disease, where knowledge is evolving daily.* [62]

Therefore, to the extent that our knowledge of COVID and its corresponding vaccines may continue to evolve, the Ontario Divisional Court has given clear guidance that a high level of deference must be afforded to public health officials, even if there are some in the scientific/public health community who see things differently.

*17 (e) Limits on *HPPA* Orders

Judicial deference does not mean, however, that public health officials may act with impunity. Even when mandates are justified according to the *HPPA*, there appears to be little judicial tolerance for medical officers who exercise their powers capriciously. For example, in *H. (M.) v. Durham (Region) Department of Health*,[63] a medical officer sought to remove an unvaccinated child from school as a consequence of her father's refusal to have his Statement of Conscience or Religious Belief sworn or affirmed. In rescinding the health official's order, the OHSARB found that "it is not reasonable to issue a suspension order as against M.H. [the unvaccinated student] to address the noncompliance of her parent insofar as he refuses to have his Statement of Conscience or Religious Belief sworn or affirmed."[64] In plain language, overzealous and unreasonable enforcement of a vaccine mandate by medical officers on mere technicalities will not hold water.

(f) HPPA and the Charter

There have also been two *Charter*[65] challenges to COVID restrictions imposed by provincial medical officers. The health orders in *Beaudoin v. British Columbia*, which restricted religious communal worship, were deemed a breach of section 2(a) of the *Charter*.[66] And, in *Taylor v. Newfoundland and Labrador*, the medical officer's orders, which restricted the ability of out-of-province Canadians to enter Newfoundland and Labrador, were found to violate section 6(1) of the *Charter*.[67] However, in both cases, the courts upheld the breaches under section 1.[68]

It is worth briefly recounting the *Beaudoin* court's section 1 reasoning, which buttresses the conclusions reached above. Because Chief Justice Hinkson characterized the Public Health Officer's ("PHO") orders as administrative in nature, he was obliged to apply the framework for section 1 analysis set out by the Supreme Court of Canada in *Doré*.[69] According to *Doré*, "the issue is not ***18** whether the exercise of administrative discretion that limits a *Charter* right is correct (i.e., whether the court would come to the same result), but whether it is reasonable (i.e., whether it is *within the range of acceptable alternatives once appropriate curial deference is given*)."[70] Whether it is tested under the *Oakes* or *Doré* formula, an impugned action or decision "will be reasonable if it reflects a proportionate balancing of the Charter right with the objective of the measures that limit the right."[71] But the question is not whether the PHO "reached the correct balance, but whether, on the information available to her, she acted within the reasonable range of alternatives."[72] Chief Justice Hinkson had no difficulty finding that the governmental objective behind the public health measures was compelling:

> Containing the spread of the Virus and the protection of public health is [*sic*] a legitimate objective that can support limits on *Charter* rights under s. 1. An outbreak of a communicable disease is an example of a crisis in which the state is obliged to take measures that affect the autonomy of individuals and of communities within civil society. The constitutional importance of combating the COVID-19 pandemic has been stated by courts across the country.[73]

As for the rationality or reasonableness of the measures, the court found that the PHO's reasoning had met *Vavilov*'s[74] dual requirements of internal rationality and tenability in light of the relevant facts:

> I have concluded that Dr. Henry's reasons, both in the preambles to the orders and in the media events, do not exhibit a failure of internal rationality. Gatherings and events are a route of transmission. Whether measures less intrusive than prohibition are effective depends on the prevalence of the Virus in the community and behavioural factors. Dr. Henry responded to evidence of accelerating transmission when she made the orders, and she has explained her reasoning.

> ***19** I find that in making the impugned G&E Orders, Dr. Henry assessed available scientific evidence to determine COVID-19 risk for gatherings in B.C. including epidemiological data regarding transmission of the Virus associated with religious activities globally, nationally and in B.C., factors leading to elevated transmission risk in religious settings, and COVID-19 epidemiology in B.C.

> I also find that in making the impugned G&E Orders Dr. Henry was guided by the principles applicable to public health decision making, and in particular, that public health interventions be proportionate to the threat faced and that measures should not exceed those necessary to address the actual risk. Her orders are limited in duration and constantly revised and reassessed to respond to current scientific evidence and epidemiological conditions in B.C. [75]

In a useful summary of his reasoning for his section 1 justification of the PHO's orders, Chief Justice Hinkson stated,

> The dangers that Dr. Henry's G&E Orders were attempting to address were the risk of accelerated transmission of the Virus, protecting the vulnerable, and maintaining the integrity of the healthcare system. Her decision was made in the face of significant uncertainty and required highly specialized medical and scientific expertise. The respondents submit, and I agree, that this is the type of situation that calls for a considerable level of deference in applying the *Doré* test. [76]

Even if a supplementary mandate (or even the directive in place) were found to be a *Charter* breach, there is good cause to believe, based on the existing jurisprudence, that it would be upheld under the reasonable limits provisions of section 1. The following factors must be seen as weighing heavily in favour of the justification of an impugned measure: the requirement that a governmental decision or measure need only fall within a *reasonable range* (as opposed to being the correct or best decision or measure) and be based on the *evidence available at the time*, the judge of whose validity will generally be the *experts behind the measure, toward whom the courts are directed by precedent to show substantial deference*.

(g) Concluding Thoughts on a COVID Vaccine Mandate Made under the *HPPA*

It is likely that a supplementary *HPPA* vaccine mandate affecting school board staff would be upheld. However, it is important to keep in mind that as knowledge of the COVID vaccines (to say nothing of the virus itself) continues to evolve, the section 22 *HPPA* considerations may need to be revisited. At the same time, the mere existence of experts and scientific studies contradicting an ***20** *HPPA* order would not guarantee the order's demise. So long as an *HPPA* order is underpinned by

reasonable grounds and some science, the OHSARB will likely uphold it. Similarly, recent orders of provincial medical officers that were found to breach the *Charter* were ultimately saved under the reasonable limits clause. Therefore, school boards subject to a section 22 *HHPA* order may reasonably rest assured that it would likely survive any challenges brought against it.

4. COVID LIABILITY FOR SCHOOL BOARDS WITHOUT A COVID VACCINE MANDATE

Understandably, schoolboards may be reticent to impose their own supplementary vaccine mandates that go beyond the provincial mandate. Far from having guaranteed indemnity, an internally imposed vaccine mandate may engender endless and uncertain litigation with unionized employees. [77] On the other hand, school boards may be nervous that the absence of a mandate will expose them to COVID-related litigation. This fear is not unfounded given boards' statutory and common law duties to keep their employees safe. [78] To date, the Toronto and Ottawa district school boards have opted to enact a staff vaccine mandate that is stricter than the provincial mandate. [79] As such, it is important to highlight the current statutory scheme for COVID-related liability and how it relates to school boards.

(a) Supporting Ontario's *Recovery Act* [80]

A large portion of COVID-related liability is circumscribed by the *Supporting Ontario's Recovery Act.* This legislation indemnifies a school board from liability surrounding students or teachers who have been infected or exposed to COVID on or after March 17, 2020, as a direct or indirect result of an act or omission on the part of the board. [81] Notably, a school board would be entitled to statutory protection so long as it made a *good-faith effort* to act in ***21** accordance with public health recommendations and not engage in "gross negligence."

However, even plaintiffs who can establish damages (a big assumption), as well as "gross negligence" on the part of the school board, will still face the daunting task of proving causation. For example, if two teachers in the same school test positive for COVID, one cannot presume that one infected teacher transmitted the disease to the other. Similarly, it is also not automatically the case that a school's lack of a supplementary vaccine mandate is what led to both teachers' infection with COVID. Each teacher may have contracted the disease from a host of other places. This fact alone may frustrate any attempt to satisfy the "but for" test for causation. However, the historical ascendancy of the "but for" causation standard has been questioned in some instances. As the Supreme Court articulated in *Clements (Litigation Guardian of) v. Clements*,

> Exceptionally, however, courts have accepted that a plaintiff may be able to recover on the basis of "material contribution to risk of injury", without showing factual "but for" causation .... *[T]his can occur in cases where it is impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it.* In these cases, the goals of tort law and the underlying theory of corrective justice require that the defendant not be permitted to escape liability by pointing the finger at another wrongdoer. Courts have therefore held the defendant liable on the basis that he *materially contributed* to the risk of the injury. [82]

The Court further found that "[material contribution to risk of injury] imposes liability not because the evidence establishes that the defendant's act caused the injury, but because the act contributed to the risk that injury would occur." [83]

With these pronouncements in mind, a plaintiff may be able to argue that a school board's failure to impose a supplementary mandate materially contributed to their risk of COVID-related injury, and that liability should therefore be imposed based on the material contribution standard. Then again, so long as school boards continue to make good-faith efforts to follow public health guidelines, the likelihood of success of this kind of litigation appears to be quite remote.

(b) Liability from a Vaccine-Related Injury

A supplementary vaccine mandate may open up a different avenue of civil liability for school boards. In particular, an unvaccinated employee who receives ***22** the jab solely to satisfy a school board's strict supplementary mandate, and is injured in the process, may be tempted to pursue a claim against the school board.

As of November 19, 2021, 6,268 (or 0.007%) of 59,635,768 vaccine doses administered in Canada have resulted in serious adverse effects.[84] Under Health Canada's definition, "serious" includes results in death; is life-threatening (an event/reaction in which the patient was at real, rather than hypothetical, risk of death at the time of the event/reaction); requires in-patient hospitalization or prolongation of existing hospitalization; results in persistent or significant disability/incapacity; or results in a congenital anomaly/birth defect.[85] In response to the albeit extremely rare potential of COVID vaccines to cause serious harm, the federal government established a compensation fund for individuals who experience serious adverse effects.[86] Arguably, the mere existence of this program does not automatically preclude a simultaneous civil action against a school board by a teacher who suffers serious side effects from a vaccine. Moreover, unlike in the case of liability for someone's contracting COVID, causation would be relatively simple to prove in most instances. Presumably, any teacher who would not have gotten the vaccine "but for" a school board's strict mandate could establish causation. However, a plaintiff would also have to prove that it was the vaccine or vaccination process that caused their illness or injury. Moreover, an individual who is compensated for a vaccine injury under the government scheme would undoubtedly have their damages mitigated in any subsequent civil action.[87] Currently, the program seeks to compensate an injured individual with income replacement indemnities; injury indemnities; death benefits; coverage for funeral expenses; and reimbursement of other eligible costs such as otherwise uncovered medical expenses.[88] Given the ***23** program's broad compensation scheme, it is not clear there would be much left to litigate.

As noted above, individuals who have already been vaccinated will be less likely to suffer serious consequences (or to be able to prove any damages) from COVID.[89] Therefore, a school board's vaccine policy must contemplate the projected approximately 20 per cent of staff who will not be vaccinated in the fall of 2021 (assuming school staff falls under the same distribution of hesitancy that, at the time of writing, applied to the general population).[90] This population group is simultaneously at a greater risk for developing serious COVID complications and also capable of suffering serious adverse effects from vaccines taken as the result of a school board's mandate. However, from a liability point of view, an internal mandate, unlike a government-imposed mandate, is more likely to court grievances without any obvious upside. Similarly, the presence or absence of an internal mandate should not create significant risk for the board. The school is covered either by statute (i.e., for COVID-induced injury) or by the vaccine compensation scheme (i.e., for vaccine-induced injury). Therefore, subject to changes in either regime, school boards would be best served by continuing to strongly recommend vaccination without adding a supplementary mandate. This policy would maintain the indemnity provided by the *Supporting Ontario's Recovery Act*, while also shielding the school board from an uptick in grievances.

5. CONCLUSION

Many have warned that COVID may result in a "lost generation" of youth.[91] Unsurprisingly, reopening schools has been an important step forward out of this pandemic and getting back to normal. However, as school boards navigate the post-lockdown environment, due consideration must be given to the kinds of policies they opt to implement. Aside from issues relating to human rights and privacy, potential civil liability must be taken into account.

Beneficially, the instructions from the CMOH would provide solid indemnity and likely withstand any immediate legal challenges. Moreover, as illustrated by cases involving the *ISPA*--notably the *Kotsopoulos* decision--courts are generally sympathetic to the societal good achieved by vaccination. Courts are also not keen to expand enumerated exceptions.

Recent litigation has also witnessed *Charter* breaches having been ruled reasonable and demonstrably justified in the context of COVID. Similarly, the ***24** high level of judicial deference given to public health officials would likely mean that a supplementary mandate would be upheld as well.

Lastly, it appears unlikely that school boards would attract liability under the status quo. The *Supporting Ontario's Recovery Act* and the compensation fund for individuals who receive vaccine-related injuries all but ensure that an injurious result from either COVID or a vaccine would not create a significant risk of liability for school boards. As such, at least for the time being, a strong recommendation for employees to get vaccinated would be a school board's best way forward. Such a policy promotes health and safety, while gracefully sidestepping protests and grievances.

Footnotes

a1 Baruch Wise is a third-year law student at Osgoode Hall Law School, York University, Toronto. He received his bachelor's degree in psychology from York University in 2019. Having worked as a summer student at Borden Ladner Gervais LLP, Toronto, Baruch will return to the firm for his articles. The author wishes to make the following acknowledgments. "While timely, I had never envisioned spending so much time researching the legality of government vaccine mandates. In fact, I originally broached the issue as a mere summer student taking on a small project for Borden Ladner Gervais's Education Law newsletter. I was graciously invited by Professor Dickinson and Eric Roher to turn my work into a proper journal article. However, their generosity did not stop there. Professor Dickinson kindly walked me through the process and provided this neophyte with thoughtful feedback on several drafts. Similarly, Mr. Roher provided important direction and shared essential caselaw with me. Additionally, Professor Wayne MacKay, another subject matter expert, made important comments *vis à vis* the constitutional portions of my article. I would also like to thank my mother, Dr. Sherri Wise (a lifelong educator) who provided helpful editing suggestions. While I am indebted to the aforementioned for their valuable insights, any errors or omissions are my own. Lastly, I thank my wife, a true woman of valour, who held down the Fort in good humour while I wrote this piece."

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38 *Ibid.* at para. 104.

39 See s. 57 of O. Reg. 137/15 under the *Child Care and Early Years Act, 2014*, S.O. 2014, c. 11, Schedule 1. See also s. 229(10) of O. Reg. 79/10 under the *Long-Term Care Homes Act*, S.O. 2007, c. 8. Arguably this falls short of an absolute mandate. The provision is as follows: "There must be a staff immunization program in accordance with evidence-based practices and, if there are none, in accordance with prevailing practices." As there is no caselaw interpretation, it is difficult to say what this means in practice.

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