

# Eliminating Religious and Philosophical Exemptions: The Next Step in Ontario's Campaign against Vaccine Hesitancy

Mettre fin à l'exemption pour motifs religieux ou philosophiques : prochaine étape de la campagne ontarienne contre la réticence à la vaccination



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## Abstract

Ontario families are required to provide up-to-date vaccination records as children begin schooling. Exemptions are allowed on both medical and nonmedical (religious or philosophical) grounds. In a recent report, Toronto Public Health (2019) called for an end to nonmedical exemptions – a proposal some allege infringes the *Canadian Charter of Rights and Freedoms* right to freedom of religion and conscience. This paper explores whether and to what extent vaccine refusal is protected under the *Charter* and argues that the elimination of nonmedical exemptions can be justified under Section 1 of the *Charter*. The issue of mandatory vaccination may take on special urgency in the coming months and years, if and when a vaccine is found for COVID-19.

## Résumé

Les familles ontariennes doivent présenter un carnet de vaccination à jour au moment où les enfants commencent l'école. Certaines exemptions sont toutefois accordées, que ce soit pour des raisons d'ordre médical ou pour des motifs religieux ou philosophiques. Dans un rapport récent, l'organisme de santé publique Toronto Public Health (2019) demande la fin des exemptions non médicales; proposition qui, selon certains, enfreint la liberté de conscience et de religion protégée par la *Charte canadienne des droits et libertés*. Dans cet article, on cherche à savoir dans quelle mesure le refus à la vaccination est effectivement protégé par la *Charte*. On y avance aussi que l'article 1 de ladite *Charte* peut être invoqué pour l'élimination des exemptions non médicales. La question de la vaccination obligatoire pourrait prendre une importance particulière dans les mois ou années à venir, si un vaccin contre la COVID-19 est mis au point.

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## Introduction

Mass immunization is one of the great triumphs of modern medicine – so much so that it risks becoming a victim of its own success. Through a complex mix of complacency about infectious disease outbreaks, mistrust of mainstream medicine and a consumerist orientation toward healthcare, a growing number of parents are declining to have their children immunized (Dubé et al. 2016). This exposes the individual child to infection and weakens “herd immunity,” raising the ambient risk for groups that cannot be vaccinated for medical reasons, such as infants, pregnant women and those with compromised immune systems. Failure to vaccinate costs our healthcare system as well: every dollar invested in immunizing children against measles, mumps and rubella returns \$16 in healthcare savings down the road (Public Health Agency of Canada 2016). In recent years, Ontario and other provinces have wrestled with outbreaks of measles, mumps, whooping cough and other preventable-by-vaccine diseases, as Canada fails to meet targets for childhood vaccinations (OECD 2020).

## Discussion

As we write, the issue is again making headlines in Ontario, with reports that over 10% of students at 12 Toronto alternative schools have not received their vaccinations (Brockbank 2019). This is despite the fact that Ontario is one of the handful of provinces that have made childhood immunization compulsory: under the *Immunization of School Pupils Act (ISPA)* [1990]), parents must furnish vaccination records at the time of school enrolment, or the students must face a 20-day suspension from school and \$1,000 fine. Students can be exempted from the aforementioned penalty if they submit a form signed by a physician or a registered nurse either stating that an immunization would be dangerous or an unnecessary by-reason of past infection, or showing laboratory evidence of immunity. More controversially, parents

who object to vaccination on grounds of religion or conscience can request a nonmedical exemption. While only 2.5% of Ontario children receive such nonmedical exemptions (Public Health Ontario 2019), they can be clustered geographically, or gravitate to alternative schools, presenting an outsized risk of outbreak – as is now the case at Toronto’s alternative schools.

This has been an ongoing challenge, and Ontario has enacted previous legislative reforms in an effort to overcome vaccine hesitancy and reach the target rates of 95% vaccination. A 2017 amendment to the *ISPA* requires parents to attend education sessions and learn the facts on immunization before receiving a nonmedical exemption. Yet, the number of parents seeking nonmedical exemptions continues to rise, according to the head of the Ontario Medical Association (Payne 2019). Thus, Toronto Public Health (2019) recently made a controversial recommendation that Ontario eliminate nonmedical exemptions altogether.

Two questions come to mind in evaluating this proposal. First, will the elimination of nonmedical exemptions be *effective* in meeting the target rates for vaccination? Second, supposing this approach holds promise, can the elimination of nonmedical exemptions be squared with the *Charter of Rights and Freedoms* Section 2(a): protections for freedom of religion and freedom of conscience? The two questions are interrelated, of course – if eliminating the exemptions is demonstrably ineffective, government will have a very difficult time answering a *Charter* challenge. Let us nevertheless take the questions in turn.

About the *effectiveness* question, skeptics worry that eliminating the exemption will make vaccine-hesitant parents all the more strident (Sibbald 2016). Yet, it is not clear how this increased stridency will undermine the effectiveness of mandatory vaccination – on the face of it, the options would be home-schooling or seeking out a (possibly falsified) medical exemption.

In 2015, California eliminated nonmedical vaccine exemptions for students entering school and saw vaccination rates rise from 92.8% to 95.1% over two years as the use of religious and philosophical exemptions dropped (Mohanty et al. 2018); an earlier systematic review of evidence from all US states likewise found a correlation between allowing nonmedical exemptions and decreased vaccination (Wang et al. 2014). True, it appears that some percentage of these California families sought out *medical* exemptions from sympathetic doctors to replace nonmedical exemptions, but this trend was not enough to offset the overall improvement in vaccination. Moreover, if it appears that students previously exempted on nonmedical grounds are making illegitimate use of medical exemptions, there is always the option of tightening up the rules governing medical exemptions. Indeed, California’s experiment has been criticized precisely for allowing too many loopholes, loosening criteria for medical exemptions and allowing unvaccinated students already enrolled in school to be grandfathered. There may, however, be subtler effects worthy of consideration – such as the policy wisdom of having school administrators put in an adversarial position toward vaccine-hesitant parents (Mello et al. 2015).

Accepting, for the sake of argument, that eliminating nonmedical exemptions shows promise for improving vaccination rates, our second question is whether the change can withstand the *Charter* scrutiny. There are multiple *Charter* values at stake here, arguably, such as the Section 7 guarantee of “life, liberty and security of the person” and the Section 15 right to “equal benefit of the law ... without discrimination based on ... religion.” However, the most directly applicable *Charter* protection – and the focus of our discussion – is the Section 2(a) right to freedom of religion and freedom of conscience.

A preliminary point here is that the majority of nonmedical exemptions do not appear to be *religiously* motivated – as explained, the rise in vaccine hesitancy is primarily rooted in philosophical skepticism, incorporating concerns about the safety of vaccines and the pharmaceutical industry's trustworthiness. This difference may matter to the *Charter* analysis. The Supreme Court has granted very wide protections for bona fide *religious* convictions – requiring that claimants merely show a “nexus” between the impugned legislation and their beliefs about the divine (*Syndicat Northcrest v. Amselem* 2004). There is scant Supreme Court jurisprudence on freedom of conscience, but it seems doubtful to us that vaccine hesitancy will qualify.

Though it lacks the precedential force of a Supreme Court ruling, consider, by analogy, the 2004 Alberta Provincial Court ruling, *R. v. Locke* (2004), where the plaintiff, skeptical of the science behind seatbelts, claimed that mandatory seatbelt laws infringed his freedom of conscience. The court rejected the claim, reasoning that the *Charter's* protection of conscience extends only to “comprehensive value systems,” reflecting “profoundly personal beliefs that govern one's perception of oneself, humankind, nature.” This language draws from the Supreme Court of Canada's jurisprudence on religious freedom, in *R. v. Edwards Books and Art Ltd* (1986). Seatbelt hesitancy does not meet this test, according to the court, and we suspect that similar reasoning might apply to knock down claims by vaccine-hesitant parents at the infringement stage.

Of course, it is possible (and even likely) that the claimants in a *Charter* challenge will be a mix of religious and philosophical objectors to vaccination. If so, the Supreme Court may be inclined to acknowledge an infringement and proceed to a Section 1 analysis: the rights set out under the *Charter* are not absolute trumps – impugned legislation can be saved if government can show that it is “reasonably justified in a free and democratic society.” The onus will be on government lawyers to show that mandatory vaccination of school children, with no religious or philosophical exemptions, is a proportionate response to the threat posed by vaccine-preventable diseases.

*Charter* proportionality analysis proceeds in four stages, interrogating whether the government action is (1) in pursuance of a “pressing and substantial” objective; (2) rationally connected with that objective; (3) minimally impairing the *Charter* right in question; and (4) whether the impact on the *Charter* right is proportionate overall to the importance of the objective. Government lawyers will have no difficulty in establishing that meeting vaccination

targets is a pressing and substantial objective – the protection and promotion of public health is a core responsibility of the government. Likewise, the “rational connection” test will be easily met, it seems – not least because outbreaks of measles and other diseases have coincided with a documented increase in Ontario parents’ use of nonmedical exemptions (Wilson et al. 2015).

The government’s attempts to defend legislation against the *Charter* challenge often fail at the “minimal impairment” stage, as the plaintiffs’ lawyers may present evidence from other jurisdictions – other provinces or comparator countries – that have achieved the sought-after objective with lesser or no infringement of rights. Of course, this is a complex question with plenty of confounding factors at play. Across Canada, provinces vary significantly in their approach toward encouraging childhood vaccination, with Alberta using a scheme that tracks children from birth and relies on a series of reminders from public health nurses to encourage vaccination; Alberta has not made vaccination compulsory at school entry. While Alberta has achieved slightly higher childhood vaccination rates (Public Health Agency of Canada 2019), there are a host of contextual factors – immigration levels and the geographic distribution of vaccine-hesitant people – that caution against apples-and-oranges comparisons to Ontario. Whether courts are up to the task of sorting out these nuances is an open question.

There is also a risk that the government – in its effort to *minimize* its application of coercion in this area – may run afoul of other *Charter* values. One way to minimize coercion is to target compulsory vaccination – and deny religious and philosophical exemptions – only in communities or schools that fall dangerously below the target vaccination rates. This was the approach taken by New York State recently, as the state targeted mandatory vaccination at the zip codes that are home to the Hasidic Jewish communities that had seen a measles outbreak. The move invited charges of discrimination, including those from prominent public health advocates who worried that it might be “challenged as unequal and arguably unfair” (Gostin and Hodge 2019). An attempt by the Ontario Government to impose mandatory vaccination in a manner that targeted religious or immigrant communities would invite a challenge under Section 15 of the *Charter*.

Should the Ontario Government opt to eliminate nonmedical exemptions and weather a constitutional challenge, its attempts to justify the move as minimally impairing will be bolstered by evidence showing that past less-coercive measures – for example, the requirement that parents participate in an education session before receiving a nonmedical exemption – have not succeeded in bringing childhood vaccination rates in line with targets for herd immunity. At the fourth and final stage of Section 1 analysis, the overall proportionality of eliminating nonmedical exemptions can be supported by evidence linking nonmedical exemptions to disease outbreaks (Wilson et al. 2015) as well as evidence from the US showing a correlation between nonmedical exemptions and lower rates of vaccination (Wang et al. 2014). Ontario’s effort to demonstrate that mandatory vaccination is evidence-based and proportionate overall may be hamstrung by its haphazard and anachronistic

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approach toward tracking childhood vaccination, relying on yellow cards collected by parents and shared with school administrators. As a first step, the province would be wise to adopt a more rigorous approach to record keeping, commensurate with this issue's importance to public health and the gravity of the human rights implicated by mandatory vaccination.

### Conclusion

The issue of mandatory vaccination may take on a special urgency in the coming months and years, if and when a vaccine is found for COVID-19. There, the potential legal challenges will extend beyond the classroom, as individuals may be compelled to be vaccinated as a precondition of returning to work, visiting long-term care facilities, travelling by air, and so on – engaging *Charter* rights and human rights protections that apply to the private sector. Our analysis, suggesting that mandatory vaccination can withstand *Charter* scrutiny does not necessarily carry over to these other contexts. As explained, the devil is very much in the details when it comes to assessing the proportionality of mandatory vaccination for various diseases in varying contexts.

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