

A Threat to Liberty and Bodily Autonomy: Compelling Individuals to Choose Between Vaccinations and Public Education

Submissions on Bill 39:
An Act Respecting Proof of Immunization

Brief to the Standing Committee on Law Amendments

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Introduction

Bill 39: *An Act Respecting Proof of Immunization*, proposes to remove all non-medical exemptions to vaccination for children attending daycare and public school in New Brunswick. As such, Bill 39 will change the status quo in New Brunswick, which currently permits parents and children to freely choose whether or not to receive vaccinations and still fully participate in public life and equally benefit from public services provided by the Province, such as public education. In place of that status quo, Bill 39 will introduce a repugnant regime where some individuals, based on their choice to not receive even one of the nine required vaccinations, will no longer equally benefit from government services they would otherwise be entitled too.

The result of Bill 39, which is not currently to be found elsewhere in Canada, is that some parents will, in effect, be compelled by the state to make choices they should never be forced to make. Some may have to choose between public education and adhering to their beliefs. Some may have to choose between public education and protecting the health of their children; some may have to choose between public education and a career; some may have to choose between public education and affording a car, sports for their children, or even putting enough food on the table. Some will have to choose between public education and all these things.

Presumably the intentions motivating Bill 39 are good. Intentions to, ostensibly, decrease childhood illnesses, improve public health, protect vulnerable children, etc. But, of course, the road to hell is paved with good intentions and the state rarely takes away individual freedoms without claiming some terrible calamity will be avoided or some greater good accomplished.

Barring emergencies or exceptional circumstances, the proper role for government—for the New Brunswick Government—if it is convinced of a position in regard to an issue of public interest, including public health, is to attempt to persuade its citizens of its position, and no more. The legislative assembly of New Brunswick ought to be extremely wary of engaging in compulsion, lest it become complicit in creating a society that is no longer free and democratic.

These brief written submissions are provided to the Standing Committee on Law Amendments to assist the Committee in evaluating the constitutionality of Bill 39 and in making recommendations to the Legislative Assembly regarding the Bill. The conclusion reached herein is that Bill 39 infringes the constitutional rights of New Brunswick citizens as protected by sections 2(a) and 7 of the *Canadian Charter of Rights and Freedoms*, and, if challenged, will not withstand *Charter* scrutiny and therefore be struck down.

Bill 39: *An Act Respecting Proof of Immunization*

New Brunswick requires that children receive a set of particular vaccinations prior to being permitted to attend daycare or public school but permits both medical and non-medical exemptions to this requirement. If parents object to their children receiving vaccinations, they

are able to obtain a non-medical exemption. Such exemptions are sometimes sought as a result of religious or conscientious beliefs.

Currently, there are three New Brunswick statutes that contain provisions regarding non-medical exemptions. These are the *Education Act*, the *Public Health Act* and Regulation 2018-11, which regulates the licencing of daycares in New Brunswick. Subsections 47(2)(b) of Regulation 2018-11 and 10(2)(b) of the *Education Act* permit a child to attend daycare and public school without showing proof of having received the required vaccinations if that child's parent provides a written statement, in a prescribed form, communicating the parent's "objection for reasons of conscience or religious belief to the immunizations required by the *Public Health Act* or the regulations under that *Act*". Subsection 42.1(3)(b) of the *Public Health Act* states that a child is permitted to attend a daycare or public school without showing proof of having received the required vaccinations if the child's parent provides a written statement, in a prescribed form, communicating the parent's "objections to the immunizations".

The prescribed form required by the New Brunswick Government for non-medical exemptions requires a parent to state that they "object to the administration of vaccine" to their child. The form does not request parents to specify whether the exemption is the result of religious or conscientious beliefs.¹

The "immunizations" referred to in the above legislation are specified in section 12(1) of *Reporting and Diseases Regulation*, Regulation 2009-136. There are a total of nine illness and infections for which children are required to receive vaccinations, if they are not exempt, in order to attend daycare or public school.

Bill 39 proposes to remove all non-medical exemptions by repealing subsection 47(2)(b) of Regulation 2018-11, subsection 10(2)(b) of the *Education Act* and subsection 42.1(3)(b) of the *Public Health Act*. The effect of Bill 39 is that all children who are unable to obtain a medical exemption must either receive all the required vaccinations, if they are to attend a daycare or public school, or stay home (and be home-schooled if they are of school age). Parents who object to their children receiving vaccinations will no longer be permitted to send their children to public school unless they act contrary to their objections. Parents who are unwilling to do that must arrange for their school aged children to attend a private school or be homeschooled.

The circumstances that Bill 39 will create, if enacted, implicate the constitutional rights of children and parents as protected by sections 2(a) and 7 of the *Charter*. It is a serious intrusion by the state to demand that a person inject a set of substances into their body or the body of their child they do not want or need in order to access basic public benefits. The withholding of government services from citizens who are otherwise entitled to such services in order to compel compliance with a government policy represents government overreach for which there is rarely justification in a free and democratic society.

¹ New Brunswick Immunization Exemption Form for School Entry and Immunization Exemption Form for Day Care.

The analysis provided herein will discuss how Bill 39 infringes *Charter* rights and whether such infringements are capable of being upheld by section 1 of the *Charter* as demonstrably justified in a free and democratic society.

The Interests of Parents and Children as Protected by Section 7 of the *Charter*

The Constitution is the supreme law in Canada, it represents Canada's political and legal foundation. It exists to put a check on the arbitrary exercise of government power. The *Charter* constitutionalizes many individual rights and fundamental freedoms. One of the primary purposes of the *Charter* is to protect Canadians from being restrained in their choices by government and from being coerced by government to make choices they do not want to.² All legislation and government action must accord with the *Charter* by not infringing any of the rights protected thereunder, unless doing so can be justified in a free and democratic society.

Whether or not the non-medical exemptions currently in place in New Brunswick were designed to exclusively protect freedom of religion and conscience, the reality is that non-medical exemptions also incidentally uphold the rights and interests protected by section 7 of the *Charter*, which protects the rights of all Canadians 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".

While children benefit from the *Charter*, they are unable to exercise their section 7 liberty and security interests, and, as such, the state recognizes the right and autonomy of parents to raise children, make decisions for them, care for them and protect them. Children do not have legal rights that are independent of the obligations and rights of parents to raise and care for their children, nor should they. A child has no right to make significant decisions effecting their life until the child has sufficient decision-making capacity.³

The rights of children and parents are not opposed to each other, or in conflict. Rather, they are symbiotic. The rights of children to life and security are protected by their parents' section 7 rights, specifically parents' liberty interests. Parents represent the strongest and last defence a child has from a state that is seeking to implement its objectives even at the cost of infringing some of its citizens' rights.

The recognition of parental autonomy by the law is based on a fundamental and immutable fact: it has always been, and always will be, parents who bring children into this world and care for them the most, not the state. With few exceptions, it is parents who raise their children, make countless sacrifices for them, are deeply invested in them, and who know and love them more than anybody else. It is not the state. The government is not capable of doing a better job than parents at determining and protecting the best interests of children.

² *R v Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 at para 95.

³ *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 46.

According to the Supreme Court, the vital and sacred link between parent and child may only be interfered with by government on a case by case basis when “necessity” is demonstrated, and it is justified in doing so.⁴ Justice La Forest of the Supreme Court has found:

I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent. ... The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being. ...the parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.

...

While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society. As already stated, the common law has always, in the absence of demonstrated neglect or unsuitability, presumed that parents should make all significant choices affecting their children, and has afforded them a general liberty to do as they choose. ...our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, parental decision-making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter*.⁵

Bill 39, if enacted, will infringe the liberty interests of parents by intruding on the autonomy and right of parents to make decisions for their children. The Bill will do this because of the choices it will compel parents to make, or, conversely, the choices it will remove from parents. For parents who have made a decision to selectively vaccinate or not vaccinate their children (and who are unable to obtain a medical exemption—which is extraordinarily difficult), they will be compelled to choose between adhering to that decision and accessing public education. If they choose the former, they will be required to arrange for the private- or home-schooling of their child. And yet, be it finances, geography, special needs or a combination of these and other factors, this is simply not feasible for many New Brunswickers.

Unless the New Brunswick government can demonstrate that compelling parents to make such a decision is in accordance with the principles of fundamental justice, Bill 39 will be found by a

⁴ *R.B. v Children's Aid Society of Metropolitan Toronto*, [1995] SCR 315 at para 85.

⁵ *R.B. v Children's Aid Society of Metropolitan Toronto*, at paras 83-85.

reviewing court to infringe section 7 of the *Charter*.⁶ The reality is that, for many, the choice to selectively vaccinate or not vaccinate is a serious decision that is taken to avoid risks of harm, to act in accordance with deeply-held beliefs, or both—it is not taken lightly. Bill 39 imposes unnecessary burdens, barriers and risks upon families that make such a choice. For the reasons that follow, the deprivation of the liberty of parents that Bill 39 will affect is not in accordance with the principles of fundamental justice.

According to the Supreme Court of Canada, the principles of fundamental justice “are about the basic values underpinning our constitutional order.”⁷ The Court has recognized a number of principles of fundamental justice, but three have “emerged as central... laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object.”⁸

Although the immediate goal of Bill 39 is not entirely clear, the ultimate objective appears to be the increased health of children in New Brunswick. Bill 39 is likely to increase vaccination rates among children, but there is evidence that such an increase will not result in significantly less incidences of the spread of communicable illnesses. There is also evidence that some illnesses for which children will be required to be vaccinated pose no real threat to the health and safety of school age children. Further, contrary to repeated assertions otherwise, there is evidence that at least some of the nine required vaccinations carry risks of harm. Further still, it is arbitrary to prohibit unvaccinated children from attending daycare and public school, but not to attend sports, church, public events, after-school programs and the many other activities, events and facilities where children come into prolonged close contact with each other. There is no real connection between reality, the objective of the proposed law and the actual effect. As such, the Bill is arbitrary. It will not likely improve the overall health of New Brunswick children and may in fact reduce it due to the potential harm that some children may suffer as a result of receiving vaccinations they would otherwise not have absent Bill 39.

Bill 39 is also potentially overbroad. The Bill requires children be vaccinated for a total of nine illnesses and infections. But, as mentioned above, some of these illnesses pose no threat to the life or long-term health of school aged children. Only some vaccinations provide a measure of protection against serious infections and against illnesses that, although no more than an inconvenience for many children, can be serious for a minority of children, such as children under one year of age, due to complications. Mandating all nine required vaccinations for all children that attend any daycare and any public school is overbroad as it mandates vaccinations unnecessary to reasonably protect the overall health of children in New Brunswick.

Lastly, and most importantly, Bill 39 is grossly disproportionate. As the Supreme Court recently ruled, “if the impact of the restriction on the individual's life, liberty or security of the person is

⁶ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras 74-78.

⁷ *Bedford* at para 96.

⁸ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para 72.

grossly disproportionate to the object of the measure”, the restriction will not be found to accord with the principles of fundamental justice.⁹ The Court further found:

The inquiry into gross disproportionality compares the law's purpose, "taken at face value", with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law.¹⁰

By demanding—as a precondition to accessing basic government services—that the bodies of children be injected with substances which they do not necessarily need, which their parents do not want or willingly consent to and which are potentially harmful, Bill 39 is an egregious intrusion on the bodily autonomy, security and liberty of parents and children. Such a significant breach of fundamental interests regarding what does and does not enter one’s body is only remotely acceptable in extreme or emergency circumstances.

Such circumstances are entirely absent in New Brunswick. There is no evidence that significant numbers of children are suffering irreversible consequences or long-term harm to their health as a result of the choice of some not to vaccinate or to vaccinate selectively. The inconvenience and anxiety caused by the recent incidents of child illnesses in New Brunswick has not been shown to have been caused by a lack of vaccination. Further, such unfortunate but temporary experiences do not begin to meaningfully compare to the prejudice that will be experienced by citizens of New Brunswick if the overreach of government in mandating vaccinations for school and daycare attendance is implemented. As in *Canada (Attorney General) v. PHS Community Services Society*, the legislative response, in the form of Bill 39, is so extreme as to be disproportionate to any legitimate interest the New Brunswick government has in the increased overall health of children.¹¹

It has been argued that Bill 39 is required to protect the small minority of children who are medically unable to receive vaccinations. Whether that is so or not, such circumstances do not excuse such severe deprivations of the security and liberty interests as violating bodily autonomy.¹² Further, “[g]ross disproportionality under s. 7 of the *Charter* does not consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, not against societal benefit that might flow from the law.”¹³

If enacted and if challenged, Bill 39 will likely be found to infringe section 7 of the *Charter*.¹⁴ Section 1 of the *Charter* permits laws to be upheld, despite the limits on constitutional rights occasioned by the law, if government can demonstrate such limitations are justified in a free and

⁹ *Carter* at para 89.

¹⁰ *Carter* at para 89.

¹¹ 2011 SCC 44 at para 33.

¹² *Carter* at para 90.

¹³ *Bedford* at para 121.

¹⁴ It is almost certain the legislation changes implemented by Bill 39 will be the subject of a court challenge: oral submissions of Ted Kuntz, VP of Vaccine Choice Canada, before the Standing Committee on Law Amendments, August 28, 2019.

democratic society. Notwithstanding the unsupported assertions to the contrary,¹⁵ the infringement of section 7 due to Bill 39 will not likely be upheld under section 1 of the *Charter*. Such an occurrence is “rare”.¹⁶ As the Supreme Court has stated regarding this issue:

It is difficult to justify a s. 7 violation: see *Motor Vehicle Reference*, at p. 518; *G. (J.)*, at para. 99. The rights protected by s. 7 are fundamental, and “not easily overridden by competing social interests” (*Charkaoui*, at para. 66). And it is hard to justify a law that runs afoul of the principles of fundamental justice and is thus inherently flawed (*Bedford*, at para. 96).¹⁷

Given the problems with Bill 39 analyzed above, it is difficult to see how the Bill would satisfy the rigorous test used to determine if a law is justified under section 1. In order for impugned legislation to be upheld, it must pass a multi-step test to show that it furthers a pressing and substantial objective, is rationally connected to meeting that objective, is minimally impairing of the *Charter* right or freedom infringed and that its overall benefits outweigh its overall drawbacks (overall proportionality).

A law that is grossly disproportionate, arbitrary and likely overbroad is not a law that can readily be demonstrated to be rationally connected to its objective, minimally impairing, or proportionate. Whether or not a law can be upheld is informed by the severity of the infringement. Here the infringement is of the utmost severity, impinging upon bodily autonomy and withholding public benefits to affect compliance with a policy goal. Bill 39 is not likely to withstand *Charter* scrutiny.

Freedom of Conscience and Religion as Protected by Section 2(a) of the *Charter*

As the Supreme Court of Canada has found, “the right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is a fundamental aspect of freedom of religion.”¹⁸

Some individuals in our society hold to religious or conscientious beliefs that have implications for vaccination. They object to themselves or their children receiving vaccinations for any number of reasons that relate to their beliefs. They may object to the biological ingredients in some or all vaccines, they may object to the method that some or all vaccinations are produced, or they may object to any foreign substance being injected into the body. They object to receiving vaccines because of their religious beliefs, not necessarily because they doubt the safety and efficacy of vaccines.

¹⁵ In oral submissions provided to the Standing Committee on Law Amendments on August 28, 2019, Norman Bossé, Q.C. of the New Brunswick Child and Youth Advocate opined that Bill 39 would be upheld under section 1 of the *Charter* if challenged.

¹⁶ *New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.]*, [1999] 3 S.C.R. 46 at para 99.

¹⁷ *Carter* at para 95.

¹⁸ *R.B. v Children's Aid Society of Metropolitan Toronto* at para 105.

There is little doubt that the removal of non-medical exemptions to vaccines will be found by a reviewing court to be an infringement of section 2(a) of the *Charter*. As Chief Justice Dickson, as he then was, stated in paragraphs 94-95 of the seminal case of *R v Big M Drug Mart Ltd*:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms...

...

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, **coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.** [emphasis added]

Coercion and the constraint of choices is what Bill 39 will impose upon the citizens of New Brunswick. No citizen should be compelled to choose between violating their conscience or foregoing basic public services except in great need. Absent real and demonstrable risk of harm to the public interest or the interests, rights, health or safety of others, the infringement of the *Charter* rights of those who object to vaccines on religious or conscientious grounds cannot be justified. The obligation to show such harm to the public interest or the interests of others lies with the government. Again, although perhaps not as severe as the section 7 rights infringement described above, it remains difficult to see, given the problems discussed, how a violation of section 2(a) in the context of requiring multiple vaccines for school and daycare attendance could be justified.

Conclusion

History bears witness to the reality that governments—even ones with ostensibly benevolent goals—tend to seek ever increasing power at the expense of the rights of their citizens. Only the vigilant defense of individual liberty can maintain a free society in which citizens are able to exercise their freedom and bodily autonomy to make choices and organize their lives in ways that the majority or the government disapproves of. The withholding of essential government services is a tool that should only be used in response to a genuine crisis.

There is no public health crisis in New Brunswick that would remotely legitimize the denial of public education to those who choose to selectively vaccinate or not vaccinate. There is no evidence that the exercise of this choice has ever directly caused death, irreversible harm, or long-term negative health outcomes in New Brunswick. Nor is there evidence that increasing vaccination rates will substantially improve the positive health outcomes of New Brunswickers.

The choice to vaccinate—the choice of what will and will not enter one’s body or the body of one’s child—must remain a free one, not one that results in exclusion from public life for those who do not choose as the state prefers.

The Standing Committee on Law Amendments is therefore urged to recommend to the Legislative Assembly that Bill 39 be rejected in its entirety and that attempts to mandate vaccinations as a pre-condition to participating in public education be abandoned as a measure repulsive to a free and democratic society.