Legal Analysis / L'analyse juridique

How the Supreme Court of Canada Would Rule on TransLink's Mandatory Mask Policy

Colin Schuler Ram

Keywords: Mask mandates, COVID-19, Charter of Rights and Freedoms, Freedom of expression, Reasonable limitations, Supreme Court of Canada.

Mots-clés: Mandats des masques, COVID-19, Charte des droits et libertés, liberté d'expression, limites raisonnables, Cour Suprême du Canada

I argue TransLink's COVID-19 August 2020 mask mandate would be found to infringe the Canadian Charter of Rights of Freedoms section 2(b)—freedom of expression—but upheld as a reasonable limitation under section 1 as it serves important public health purposes. I conduct a legal analysis with a blended approach, using scientific evidence on mask effectiveness and the experience of TransLink and other jurisdictions alongside reasoning from analogous cases given a dearth of Canadian mask mandate jurisprudence. I pay specific attention to the role of court deference. Evidence supported that an infringement of s. 2(b) would be found; not wearing a mask is potentially a political statement, and expression is compelled by effect by forcing mask-wearing. Despite controversy, I believe the Supreme Court of Canada would uphold TransLink's policy under section 1 of the Charter, at least on a s. 2(b) challenge. Lowering the incidence of COVID has been recognized as a highly pressing and substantial goal. The Court would likely defer to the government's evidence and accept a rational connection based on past cases involving public health and medical evidence. The means are within reasonable alternatives given how widespread mask policies are, the exceptions delineated, lack of apt substitutes, and non-overbreadth/vagueness. The limitation is proportional given the Court's import given to COVID against the low value of the suppressed speech.

Je soutiens que le mandat de masque COVID-19 mis en oeuvre par Translink en août 2020 serait considéré comme une infraction de l'article 2(b) de la Charte canadienne des droits et libertés –– celle qui porte sur la liberté d'expression –– mais constituerait une limitation raisonnable en vertu de l'article 1, car le mandat répond aux objectifs importants de santé publique. J'aborde une analyse juridique avec une approche mixte en utilisant des preuves scientifiques sur l'efficacité des masques ainsi que l'expérience de Translink et d'autres juridictions, accompagnée d'une logique basée sur des cas analogues, étant donné

l'absence de jurisprudence canadienne sur le mandat des masques. Je porte une attention particulière à la retenue judiciaire. Des preuves ont démontré qu'une infraction de l'article 2(b) serait constatée; ne pas porter un masque est potentiellement une déclaration politique, et le fait de rendre le port du masque obligatoire contraint l'expression de chacun. Malgré la polémique, je crois que la Cour suprême du Canada défendrait la politique de Translink en raison de l'article 1 de la Charte, au moins en contestant l'article 2(b). Réduire l'incidence de la COVID a été reconnu comme un objectif très urgent et considérable. Il est probable que la Cour s'en remette aux preuves du gouvernement et accepte un lien rationnel basé sur des cas précédents concernant la santé publique et des preuves médicales. Étant donné la généralisation concernant la politique du port du masque, les exceptions définies, l'absence de substituts appropriés et l'ambiguïté font en sorte que les moyens sont dans des limites raisonnables. La limitation demeure proportionnelle compte tenu de l'importance que la Cour suprême accorde à la COVID par rapport à la faible valeur du discours supprimé.

Introduction

The COVID-19 pandemic requires no introduction. The disease has severe and sometimes fatal health effects and has devastated multiple economies and industries. As of this writing (November 30, 2020), there is no widely-available vaccine and over 400,000 Canadians have contracted the disease with over 12,000 dying from it (Reynolds 2020)[1]. Canada has recently federally recommended—though not mandated—multi-layer cloth mask (hereinafter, 'masks') use to slow the spread of the novel virus. Many municipalities, agencies and businesses globally within the past few months have gone further and put into effect mandatory mask policies. TransLink is one such agency.

The debate over the necessity/effectiveness of such policies is widespread, current and contentious. Many maintain mask policies are essential to stop COVID's spread. Others argue they disproportionately affect certain groups such those with disabilities, or unjustifiably impair rights and freedoms such as expression—or that they are simply ineffective (Bogart, 2020). The last point at least holds merit: the effectiveness of masks in stopping the spread of respiratory illnesses is not an entirely settled issue, with studies finding mixed results (see Chughtai, Seale, & Macintyre 2020; extensive examination in later-discussed arbitration cases). This is, however, a secondary point to my paper's scope.

The question this paper seeks to answer is: how would the Supreme Court of Canada (hereinafter, SCC) rule if legal challenges to TransLink's mandatory mask policy were brought

[1] I cite a Canadian COVID case tracker found at the bottom of the article. The case tracker updates regularly and thus no longer reflects the given number of 12,000 deaths.

before it? To date, there have been no Canadian court rulings related to mask mandates—though there have been arbitration cases about mask policies for unvaccinated healthcare workers (HCWs), along with American cases upholding similar policies. Given opponents' dialogue centering of speech and opinion, I focus on the right to freedom of expression found under the Charter of Rights and Freedoms section 2(b). I argue TransLink's mask mandate would be found to infringe Charter section 2(b) but upheld as a reasonable limitation under section 1 as it serves important public health purposes.

I begin with discussing my scholarly and substantive contribution through a literature review. I then set out the law at issue and briefly overview analogous rulings. I then provide an overview of my data sources and analytical method. From there, I move into testing whether the SCC would find an infringement of s. 2(b) of the Charter. With a violation established, I assess whether it would constitute a reasonable limit of expression rights under s. 1 of the Charter. Throughout my analysis, I consider potential counterarguments. I finally provide an overall conclusion with limitations and suggestions for future inquiry.

Literature review

Mask effectiveness

What is under examination here are multi-layer cloth masks as opposed to medical-grade masks. COVID is primarily transmitted through droplets expelled from the mouth or nose that disperse roughly six feet from an individual. The theory behind universal mask-use is to provide a physical barrier to filter out these droplets, and thus reduce the spread of COVID—especially as asymptomatic or presymptomatic carriers could infect others. Indeed, the CDC estimates 50% of transmissions can be attributed to such carriers (Centers for Disease Control and Prevention, 2020). Masks are just one component of the public health response to this pandemic (Reynolds, 2020).

The picture emerging from my research is that fabric masks provide protection sufficient for public use but not for HCWs (see Chughtai, Seale, & Macintyre 2020). America's CDC recommends their use in community settings (ibid). In their meta-analysis, masks blocked 50-80% of droplets expelled, and up to half inhaled; they also point to numerous observational studies showing reduced risk (Centers for Disease Control and Prevention, 2020). One such study in Ontario found a 25-31% decrease in weekly-new COVID-19 cases in areas that imposed mask mandates immediately after the implementation of such policies (Karaivanov et al. 2020, 1). Expert evidence adduced in HEABC and HSA (2013) suggests masks may have some value in limiting droplet transmission.

Debate over constitutionality

Within the academic sphere, this is a new area of inquiry, and I will contribute to the fledgling debate. There is debate regarding whether mask mandates are constitutional under the Charter in Canada. Groups such as the Canadian Constitution Foundation believe they may be valid with amendments to narrow their application. They believe the right to liberty under s. 7 is violated by mask mandates as forcing face covering interferes with bodily integrity (Van Geyn 2020, 1). They also charge that mask mandates violate ss. 15 and 8, the rights to equality and to be secure from unreasonable search and seizure, respectively as they have a disproportionate impact on those with disabilities—they necessarily disclose private medical information by not wearing a mask where others do (1). They moreover believe the low rate of COVID transmission does not warrant such a mandate, nor is the mandate minimally impairing given it requires masks at all times and thus the law cannot be saved under s. 1 (2-3). Other groups such as the Canadian Civil Liberties Association (CCLA) charge they are overbroad, based on questionable evidence and thus not minimally impairing nor rationally connected under s. 1 (Canadian Civil Liberties Association 2020).

Relevant law and legal cases

TransLink's regulations & applicability of the Charter

TransLink is a publicly funded agency created and governed by the BC Transportation Authority Act. The case of Canadian Federation of Students v. Greater Vancouver Transportation Authority (2009) (hereinafter, GVTA) established "TransLink [is] government within the meaning of s. 32 of the Charter" and thus Charter review of its policies/actions may be conducted (para. 24). Section 6 of the Greater Vancouver Transit Conduct and Safety Regulation authorizes any transit employee to require customers to obey TransLink's signs or comply with its rules. Recent signs placed on transit vehicles require all persons travelling on transit to wear a mask or face covering unless exempted from the mandate by reasons such as medical condition, disability, or age—with enforcement including fines up to $230 or being required to leave (Tindale 2020). The full text is provided in Appendix A.

Overview of analogous cases

Similar mask mandates have been upheld on public health grounds in American cases such as Machovec v. Palm Beach County (2020). There is yet to be a Canadian ruling on mask mandates, though Vaccine Choice Canada has filed a legal claim against such policies in Ontario (Butler 2020). The only processed challenge to a COVID-related rights restriction I located was Taylor v. Newfoundland, which relates to provincial border closures. The Newfoundland Supreme Court found these infringed s. 6(1) rights but upheld the closure under s. 1. I will

discuss the reasoning more in-depth later and apply some of the judge's reasoning to the present issue of mask mandates in Canada which does not appear to have been addressed yet.

I found three relevant arbitration cases dealing with vaccinate-or-mask (VOM) policies. Broadly, these required HCWs who did not receive the influenza vaccine to wear a surgical mask when working with the goal of reducing the transmission of influenza (which transmits in the same manner as COVID). One case upheld the policy, finding it reasonable (HEABC). Two struck it down as unreasonable: Sault Area Hospital and Ontario Nurses' Association (2015); and St. Michael's Hospital and Ontario Nurses' Association (2018). Arbitration cases are of course not binding on courts, but contain reasoning that will likely be applicable/relevant given the lack of domestic cases on mask requirements.

Of relevance to my paper, in HEABC the policy was challenged under Charter s. 2(b). Arbitrator Diebolt found even if the policy forced expression infringing s. 2(b), it was saved by s. 1 as a reasonable limitation (114). The goal was clearly pressing/substantial given influenza's harm. Evidence that masks reduce infection rates proved the VOM policy was rationally connected to its goal. Concerning minimal impairment, VOM policies existed in numerous jurisdictions and the employer attempted other voluntary measures which fell short. Requiring masks if not immunized was a reasonable, proportional balance given the importance of patient safety against minor uncomfortable effects to HCWs wearing them.

In Sault Area Hospital, the policy was challenged under labour-relations law. Arbitrator Hayes undertook an in-depth analysis of the expert evidence which largely explains the difference in outcome from HEABC. He found the union's evidence of masks' ineffectiveness to undermine the employer's such that the policy was irrational. Mask use was moreover found too onerous due to many union members finding them uncomfortable, and essentially operated as a consequence for refusing to get the vaccine (107-109). It was then deemed inconsistent with the collective agreement as it essentially coerced immunization, which was optional for HCWs (108-109). St. Michael's Hospital was highly similar. Even additional evidence adduced was insufficient to establish unvaccinated HCWs pose a substantial risk when asymptomatic/presymptomatic and that masks significantly prevent the spread of influenza. It was thus not an evidence-based policy, and when balanced against its effects (mainly discomfort) on HCWs, was found to be unreasonable (52-53).

Substantive contribution

Given how current and polarizing this issue is today and that it affects nearly the entire population of Canada, my research will be of great use for many groups. It is useful as a reference for members of the public to use in debating the issue, especially as I have tried to make the paper accessible to those without much background knowledge. My finding that mandates would likely be upheld provides proponents' arguments a stronger evidentiary basis.

The results also serve pragmatic functions. TransLink—and members of any level of Canadian government—could use the findings in improving or drafting and implementing new policies. Lawyers or interested parties could derive inspiration from the challenges and precedents contained within in drafting arguments before Canadian courts.

Research methods

My paper is mainly a legal analysis. I use Taylor as it is the only case I could find dealing with a pandemic-related rights restriction in Canada, and its reasoning is used extensively in s. 1 analysis. I use Machovec and Jacobson v. Massachusetts (1905) as they illustrate persuasive approaches from a similar legal system to adjudicating a similar issue. The arbitration cases were chosen as they focus on issues analogous to mask mandates for the purpose of s. 1 analysis, and are the only ones I could find. RJR-MacDonald Inc. v. Canada (AG) (1995) and Canada (AG) v. JTI-Macdonald Corp (2007) are selected as they discuss how the SCC balances public health interest against rights-infringements under s. 1; I felt these best to apply given they balance compelled expression against public health, which is the present issue. Other cases, such as Irwin Toy Ltd. v. Quebec (AG) (1989), R. v. Keegstra (1990), Carter v. Canada (AG) (2015), and GVTA were selected as they expand on s. 2(b) and/or provide discussion of the SCC's approach to deference in s. 1 analysis. None of these cases have been overturned.

Evidence supporting my thesis includes COVID-related rights restriction cases and/or vaccinate-or-mask policies and/or other analogous issues being found to infringe section 2(b). Logically, it is vice-versa for evidence refuting it. Judicial reasoning employed in s. 1 analysis upholding a law would also serve as evidence. I especially look to that which explains how courts balance competing rights or objectives, or where they are deferential—for example, how the SCC handles policy based on complex evidence. Other evidentiary sources also provide support for my thesis, such as medical evidence speaking to the effectiveness of masks.

My method of analysis is as follows: I first lay out the test the SCC has developed for section 2(b), along with cases that expand and clarify upon it. I then deliberate whether an infringement would be found using this test, using claims from opponents with reasoning from analogous issues. I then turn to s. 1 to assess whether the infringement be upheld. I take a blended approach, using scientific evidence on mask effectiveness and the experience of TransLink and other jurisdictions alongside reasoning from analogous cases. I pay specific attention to the role of deference—in this case, to the executive.

Findings & discussion

Is freedom of expression violated?

Section 2(b) of the Charter provides that everyone has the fundamental freedom of expression. Its aim is to protect the search for truth, artistic self-fulfilment, and participation in social and political life—all of which have value to the community and individual. It is seen as fundamental to democracy and thus presumed protected and upheld stringently (Keegstra 1990, 699, 729).

Expression is defined very broadly; to qualify, something must simply attempt to convey meaning (Keegstra 1990, 698). It could entail silence or intentional omission (HEABC; JTI-Macdonald, para. 132). If something is deemed to be expression, it is then considered whether it has been restrained. This can be explicitly or by effect. If by effect, a claimant must show the law infringes on the ability to participate in political debate or democratic discourse, or that it inhibits their autonomy and self-fulfilment (Keegstra 1990, 729-730). As a note, certain forms of expression are held to not be protected (and thus limitable without justification), such as that which promotes violence or that which is incompatible with the historical and current function of a venue/location (GVTA, para. 28). Moreover, not all restrictions "rise to the level of interfering with how [one chooses] to express themselves" (JTI-Macdonald, para. 132). If an infringement is established, a s. 1 analysis is conducted to determine if it will be upheld.

Is it expression?

It could be contended that requiring one to wear a mask is a form of compelled expression, and this form of expression is held to be protected (RJR-Macdonald). In the absence of the mandate, one could elect not to wear one. It is a statement in itself to not wear a mask; some choose to not wear it as a symbol of resisting perceived tyranny (Bogart 2020). There is thus expressive content to wearing (or opting to not wear) a mask.

How is it restrained?

It is not TransLink's purpose to force expression, but rather unquestionably to uphold safety given their COVID-19 Safe Operations Program's goals (2020). Expression is then restrained by effect. Most notably, it affects an individual's autonomy/self-fulfilment, which entails the ability to develop and articulate ideas as one sees fit (Keegstra 1990, 763). Statements made during the "March to Unmask" event such as "I believe that masks should be totally freedom of choice", illustrate this line of thinking (Bogart 2020, 1). By forcing one to wear a mask, this is hindered; individuals are not being given a choice to express themselves in the way they wish by virtue of law. Moreover, mask usage is a politicized viewpoint, and the state

ought not hinder/condemn a political view (Keegstra 1990, 764), which is arguably what mask mandates do.

For thoroughness, the location where expression is seemingly infringed upon does not invalidate its protection. As noted in GVTA, the historical and actual function of a place's compatibility with expression must be considered along with whether other aspects of it undermine the values underlying free expression (para. 39). When related to the present issue, the primary and historical function of Translink's buses and trains are "[vehicles] for public transportation" (paras. 42-43). They are public spaces by nature (ibid). There is then nothing to suggest it is incompatible with expression.

Freedom of expression conclusion

There thus seems to be expression that is at face value protected and infringed upon. That said, in HEABC it was speculated forced masking likely would not rise to the level of values protected by s. 2(b) and thus a challenge to mask mandates would have no constitutional basis (p. 111). I do not think a court would agree with his speculation. The context of such a mask mandate has changed. Given it relates to COVID-19 and all transit riders, it is undoubtedly a more widespread political issue that impacts a much broader population. Even if I am wrong in this prediction, the SCC will likely have legal challenges that result in an infringement found, or they may simply assume an infringement of freedom of expression and consider the claim under s. 1.

Would infringements be upheld?

As Diebolt notes in HEABC, one does not have "an unfettered right to be free from forced expression" (108). Indeed, as JTI-Macdonald illustrates, some compelled expression may be upheld in the interest of public health or other fundamentally important collective goals (in that case, requirements for prominent health warnings on cigarette packaging to promote public health) (para. 37). To determine if a rights infringement can be upheld, courts use section 1 of the Charter, which provides any right or freedom is limitable when the limit prescribed by law and demonstrably justified within a free and democratic society. The interpretation of this section was set out in the case of the Oakes decision (as cited in para. 36 of JTI-Macdonald), which briefly requires:

I. Infringements must be created through law;
II. Infringements to have sufficiently important goals: be "pressing and substantial";
III. Means chosen to have a rational connection to achieving those goals;
IV. Means employed to be within a range of reasonable alternatives;
V. Proportionality between the benefit to society against the value/worth of the individual's right.

I will now consider each component of section 1 analysis. I believe each stage will be met.

Prescribed by Law

The limitation of free expression is created through law in the Safety Regulation. As recognized in GVTA, the policies of TransLink delineate the rights of individuals who use their services, are general in scope, and are sufficiently accessible and precise (para. 72). They thus satisfy the requirement of "prescribed by law" for s. 1 purposes.

Pressing & substantial goal

While not directly stated in the Safety Regulation, TransLink's aim can be inferred to be to reduce the spread of COVID on its premises given its aforementioned Safe Operations Program (2020). The SCC will undoubtedly find this to be "pressing and substantial", as Canadian courts seem to assign great importance to containing COVID.

In Taylor, Justice Burrage opened with "it is difficult to overstate the global impact of … COVID-19 … it has claimed the lives of close to one million, hospitalized many times that number, and left entire economies shaken" (para. 1). COVID was moreover characterized as a public health emergency. It remains a serious issue, especially in the jurisdiction TransLink serves. I unfortunately could not locate the rate of transmission on transit, but the number of daily cases is high, with nearly 8,000 active cases (Lindsay 2020)[2]. Even in the absence of such statistics, mere presence of potential cases was sufficient to establish a pressing and substantial goal in Taylor (paras. 426-437).

Rational connection

It was largely at this stage where analogous arbitration cases were struck down—with the exception of HEABC—albeit under different evidentiary standards. As noted before, the arbitrators in Sault Area Hospital and St. Michael's Hospital carried out extensive reviews and weighing of evidence. Notably, they found there was a dearth of evidence speaking to masks' effectiveness and asymptomatic transmission rates. The present evidence regarding mask use however appears much stronger. There are now numerous credible medical bodies globally that speak to the effectiveness of masks in reducing COVID's spread such as the Public Health Agency of Canada and the CDC. There is moreover estimation by the CDC (2020) that those who have no symptoms account for 50% of all transmissions.

[2] The source was revised after this paper was written, the actual case numbers at the time of writing were 7,360.

It is of course possible to point to contradictory evidence such as mask ineffectiveness or potential low rates of transmission on transit. Even then, the SCC will likely adopt a highly-deferential stance in favour of TransLink here. In RJR-Macdonald, the Court delineated that schemes for public health do not require precise scientific proof; the government need only show there is a causal connection between the infringement and the benefit sought "on the basis of reason or logic" (para. 153). This view was affirmed in JTI-Macdonald: "at the very least, it must be possible to argue that the means may help to bring about the objective" and significant deference is required in allowing establishing a rational connection when considering a complex social problem (para. 40-41). Carter, which similarly dealt with complex evidence, also held this view at paras. 99-101.

I am further inclined to predict this deferential approach being taken in the present case as it was adopted in Taylor, dealing with the same social problem: the COVID-19 pandemic. Indeed, Justice Burrage notes that s. 1 analysis must be undertaken with attention to context, and the nature of the social problem changes the nature of the evidence relied upon (para. 404). He concluded based on his contextual analysis that evidence must only establish it is reasonable to suppose a connection, not guarantee it—and accepted less conclusive evidence given it is an emerging problem. It was not necessary for him to do an in-depth examination and weighing of the evidence (para. 438).

With the social problem and objective of the Safety Regulation being the same as in Taylor, it is likely the test for rational connection will be met. TransLink would be able to make a reasoned argument, and thus the court would defer; TransLink would need not show how common/deterministic the relationship is. It moreover is unlikely a court, with its noted lack of medical expertise will find against a policy in-line with a recommendation by its country's own Public Health Agency (Taylor para. 458). Additionally, the appellant would be unable to argue use of other measures makes the policy illogical. In Taylor, it was recognized that other preventative measures can be successful, and these don't make other measures unnecessary (para. 441). Put another way, TransLink is permitted to employ many methods to achieve its goal.

Within reasonable alternatives

Even if means to achieve the pressing and substantial objective are found to be rationally connected, they must be shown to be minimally impairing, or within a range of reasonable alternatives when considering social policy (Irwin Toy, as cited in para. 43 of JTI-Macdonald). This is likely to be the most critical/contentious part of the Court's analysis. The SCC would afford some degree of deference here, but less-so than at the previous stage. In Irwin Toy the SCC recognized the courts are not positioned to second guess parliament's decisions in social policy cases (989). They set out then that courts should afford greater

deference in such cases, as social policy's creation requires mediating between competing groups' claims on the basis of conflicting scientific evidence while balancing limited resources (993-994). Furthermore, in Taylor Justice Burrage noted "a degree of flexibility in crafting a solution to the spread of COVID-19 [is necessary]" (para. 454). It was acknowledged that restrictions related to COVID are essentially medical decisions made on best evidence available—of course, TransLink is not a medical body, but it is following national/provincial health guidelines. That said, the "court must not abdicate its responsibility as guardian of the Constitution and rule of law" by affording total deference (Taylor, para. 460). There are many ways TransLink could defend itself.

As noted in JTI-Macdonald, the reasonableness of legislation may be supported by other jurisdictions having adopted similar restrictions (para. 138). TransLink would have no trouble showing this, both domestically and globally. British Columbia and multiple municipalities in Ontario have adopted mask mandates, along with 37 of America's states—most of which extend to transit (Bogart 2020; Markowitz 2020)[3]. This is likely solely insufficient to establish minimal impairment as in JTI-Macdonald, the Court considered other factors, so I will turn to whether TransLink could show there are not suitable alternatives.

The means chosen to deal with a social problem need not be the literally least-impairing. Also, as mentioned earlier, multiple interventions can rightly be used in targeting it—especially where public health is concerned. Indeed, in Taylor Justice Burrage recognized, "there is no simple one size fits all solution to the effective management of a pandemic … A variety of public health measures are required in combination" (para. 469). TransLink does take multiple measures including frequent cleaning, limiting capacity, and installing signage (TransLink 2020). It would be easy to show that not one of these is a substitute given recognition of a comprehensive approach's necessity and that relying solely on measures such as self-isolation/contact tracing is insufficient (Taylor).

Also supporting TransLink's policy is its effectiveness in achieving its aim compared to less coercive prior attempts. TransLink had previously employed a voluntary mask policy, which around 30-40% of transit riders followed (Zytaruk 2020). A month following the mandatory policy, 92-95% rates were achieved (ibid). Making the policy optional would then render it far less effective.

The SCC appreciates deliberate attempts to impair rights as little as possible. Consider the legislative response of R.J.R-Macdonald and JTI-Macdonald. In the former, despite having a highly pressing/substantial public health goal, the government had created legislation that was overbroad and failed to establish that certain forms of advertising led to increased

[3] The Markowitz source is now out of date, as the article updates regularly. The most recent update occurred on May 7th 2021.

consumption of tobacco, thus their scheme was struck down. Parliament in effect implemented the Court's recommendations in the latter's legislation, which the Court specifically makes reference to in upholding it (para. 7).

Of course, there is no former case to refer to here. In fact, the current mask policy is broader than what was seen in earlier-discussed arbitration cases. That said, the Court is sure to positively consider TransLink's attempts at creating exceptions for certain groups. These do not necessarily relate to expression, but reflect an attempt to minimize the impact on various groups that would be otherwise disproportionately affected—especially those with disabilities and medical conditions. Without these exceptions, it is likely that overbreadth could be found, which I will discuss below.

Two other considerations that may arise in s. 2(b) challenges are overbreadth, which considers "whether the provision … catches more expression than necessary", and vagueness, whether "the language is vague [and could] be applied … beyond the legislator's stated goals" (JTI-Macdonald, para. 78). These can be shown not to be the case by arguing "adequate guidance [was provided] to those expected to abide by it" and that it "[limits] the discretion of [those] responsible for its enforcement (ibid. para. 79).

TransLink's Safety Regulation by necessity compels some expression, but is not overbroad given its exceptions. A potential challenge could be to require an exception for conscientious objectors to masks. This group however is qualitatively different from those currently-exempt, such as: those with disabilities; young children; and public servants during an emergency. It is only an inconvenience for conscientious objectors to wear a mask, rather than an inability or act of urgency. The Court would likely be unpersuaded.

Van Geyn (2020) suggests a similar mask-mandate is too broad. She suggests remedying it by adding in masks are only mandatory "when six feet of social distancing is not possible" (3). It is unlikely a court will be persuaded by this argument in the present case. Even if six feet of distance were theoretically possible, it may not be adhered to and masks provide extra safety in that case. Moreover, distance is not an effective substitute here. Rising transit demand prevents TransLink from reducing capacity further than it has to allow for six feet between all passengers (Little 2020). Increasing the number of transit vehicles to adhere to social distancing guidelines would result in inordinate financial losses to TransLink. It would also bring about greater delays to those using or relying on transit, especially if TransLink could not increase service to accommodate reduced capacity. Moreover, masks are relatively cost-efficient, highly-feasible and effective (Karaivanov et al. 2020, p. 3).

The wording on s. 11 of the Safety Regulation is highly precise in delineating when and who must wear a mask. This will likely be sufficient to show the Regulation is not vague, especially as this was the case in Machovec (p. 9). Taken together with above considerations

and likely deference, the Safety Regulation would be found minimally impairing. The last step is to consider its proportionality.

Proportionality

Courts consider the benefit to society against the value/worth of an individual's right. Logically, it seems the greater the violation, the greater the benefit/importance must be (JTI-Macdonald). Additionally, it appears that the further expression is removed from its core values, the easier it is to justify an infringement (Keegstra 1990, p. 787).

While it may be for political purposes, the expression in question, not wearing a mask, may place others at least at risk of great mental harm through fear of potentially contracting COVID and is thus probably of low value. Moreover, opponents have numerous other forums in which to take issue with the policy; their expression is not totally stifled. When balanced against COVID, "a virulent and potentially fatal disease" of highest importance, the common good will undoubtedly override individual rights—especially as a travel ban, which is arguably more drastic an infringement on rights, was upheld in Taylor. Jacobson, in which the U.S. Supreme Court upheld mandatory smallpox vaccinations in favour of public health would likely also be referred to. Given that a mandatory vaccination is clearly far more intrusive than a face covering, it is likely to in part persuade a Canadian court to the proportionality of masks. A mask mandate was also upheld in the American case of Machovec, which employed a balancing test similar to Oakes further reinforcing my prediction. Sault Area Hospital and St. Michael's Hospital would be distinguished from, given that discomfort of wearing a mask would not be at issue here, as (non-cruel nor unusual) discomfort is not constitutionally protected.

Conclusion

Mask mandates like TransLink's are undoubtedly controversial. My paper is one of the first to provide a balanced examination of the issue in the Canadian legal context. The evidence supported that an infringement of s. 2(b) would be found; not wearing a mask is potentially a political statement, and expression is compelled by effect by forcing mask-wearing. Despite controversy, I believe the SCC would uphold TransLink's policy under section 1 of the Charter, at least on a s. 2(b) challenge. Lowering the incidence of COVID has been recognized as a highly pressing and substantial goal. The Court would likely defer to the government's evidence and accept a rational connection based on past cases involving public health and medical evidence. The means are within reasonable alternatives given how widespread mask policies are, the exceptions delineated, lack of apt substitutes, and non-overbreadth/vagueness. The limitation is proportional given the Court's import given to COVID against the low value of the suppressed speech.

This provides supporters of mask mandates (and potentially other pandemic-related rights restrictions) good evidence from a legal lens—though with limitations. Notably, I am not a lawyer. I also only had a modestly-sized case selection and used analogous or persuasive cases at best being a novel issue. There are moreover a myriad of other legal challenges and arguments available. I only looked at sections 2(b) and 1 of the Charter on one mask mandate. Other issues likely would arise if TransLink's policy were challenged, especially ss. 7 (right to life, liberty and security of the person), 8 (privacy), and 15 (equality), but I did not have the space nor time to examine them. I also did not consider procedural matters, such as how TransLink verifies a claim of disability and enforces the policy and whether legal challenges could be brought there. These all warrant future inquiry. Another note is the scope of my scientific evidence was narrow. This was partially because of word limitations, but also as I am not trained in epidemiology nor biological sciences. I also believe the SCC will ultimately be deferential to evidence adduced by the state given decades of precedent on social policy.

References

Bogart, Nicole. 2020. "Anti-mask rallies held across Canada despite increased support for mandatory masks." CTV News. Bell Media. https://www.ctvnews.ca/health/coronavirus/anti-mask-rallies-held-across-canada-despite-increased-support-for-mandatory-masks-1.5031078

Butler, Colin. 2020. "Details emerge of Vaccine Choice Canada lawsuit over coronavirus response." CBC News. CBC. https://www.cbc.ca/news/health/coronavirus-charter-challenge-1.5680988

Canada (Attorney General) v. JTI-Macdonald Corp., 2007 SCC 30, [2007] 2 SCR 610. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2369/index.do

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

Canadian Civil Liberties Association. 2020. "On mandatory masks." https://ccla.org/on-mandatory-masks/

Canadian Federation of Students v. Greater Vancouver Transportation Authority, 2006 BCCA 529. https://www.canlii.org/en/bc/bcca/doc/2006/2006bcca529/2006bcca529.html

Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do

Centers for Disease Control and Prevention. 2020. "Scientific brief: Community use of cloth masks to control the spread of SARS-CoV-2." CDC. U.S. Department of Health & Human Services. https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html

Chughtai, Abrar, Holly Seale and C. Raina Macintyre. (2020). "Effectiveness of cloth masks for protection against severe acute respiratory syndrome Coronavirus 2." Emerging Infectious Diseases, 26(10), 1-5. https://wwwnc.cdc.gov/eid/article/26/10/20-0948_article

Greater Vancouver Transit Conduct and Safety Regulation, SBC 1998, c 30. https://www.bclaws.ca/civix/document/id/complete/statreg/87_99

HEABC and HSA, 2013. http://www.heabc.bc.ca/public/News/2013/A09-2013-Influenza%20Control%20Program%20Policy%20Grievance.pdf

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 SCR 927. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/443/index.do

Jacobson v. Massachusetts, (1905) 197 U.S. 11. https://supreme.justia.com/cases/federal/us/197/11/

Karaivanov, Alexander, Shih En Lu, Hitoshi Shigeoka, Cong Chen, and Stephanie Pamplona. 2020. "Face masks, public policies and slowing the spread of COVID-19: Evidence from Canada." NBER. Advance online publication. https://doi.org/10.1101/2020.09.24.20201178

Lindsay, Bethany. 2020, November 23. "17 people die of COVID-19 in B.C. over the weekend, as 1,933 new cases confirmed." CBC News. CBC. Last updated November 26th 2020. Retrieved November 24, 2020, from: https://www.cbc.ca/news/canada/british-columbia/bc-coronavirus-update-november-23-2020-1.5812556

Little, Simon. 2020. "TransLink ups bus capacity to two-thirds, begins collecting fares Monday." Global News. Corus Media Inc. https://globalnews.ca/news/7009033/coronavirus-translink-bus-capacity/

Machovec v. Palm Beach County, (2020) 2020CA006920AXX. https://www.floridacivilrights.org/wp-content/uploads/2020/07/Order-Denying-Temporary-Injunction.pdf

Markowitz, Andy. 2020, November 25. "State-by-state guide to face mask requirements." Last updated May 7th 2021. Retrieved November 25, 2020, from: https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html

Reynolds, Christopher. 2020, November 4. "3-layer masks with filter now recommended, Canada's top doctor says." Global News. Corus Media Inc. Retrieved November 11, 2020, from: https://globalnews.ca/news/7441131/coronavirus-three-layer-face-mask-filter/

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1290/index.do

R. v. Keegstra, [1990] 3 SCR 697. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/695/index.do

Sault Area Hospital and Ontario Nurses' Association, 2015 CanLII 55643 (ON LA). https://www.canlii.org/en/on/onla/doc/2015/2015canlii62106/2015canlii62106.pdf

St. Michael's Hospital Association and Ontario Nurses' Association, 2018 CanLII 82519 (ON LA). https://www.canlii.org/en/on/onla/doc/2018/2018canlii82519/2018canlii82519.pdf

Taylor v. Newfoundland and Labrador, 2020 NLSC 125. https://www.canlii.org/en/nl/nlsc/doc/2020/2020nlsc125/2020nlsc125.pdf

Tindale, Kathryn. 2020. "TransLink updates mandatory mask policy to include boarding, waiting for transit." City News. Rogers Media. https://www.citynews1130.com/2020/11/27/translink-mask-policy-updated/

TransLink. 2020. TransLink COVID19 Safe Operations Program (Report No. P097). https://www.translink.ca/-/media/translink/documents/rider-guide/covid19/covid19-safe-operations-program.pdf

Van Geyn, Christine. 2020. "Re: June 12 order for mandatory masks." https://theccf.ca/wp-content/uploads/Letter-with-blackline-june2020.pdf

Zytaruk, Tom. 2020. "TransLink CEO asks riders not to enforce mask rules after Surrey bus punch-up." Surrey Now-Leader. Black Press Media. https://www.surreynowleader.com/news/translink-ceo-asks-riders-not-to-enforce-mask-rules-after-surrey-bus-punch-up/

Appendix A: Relevant provisions of the Greater Vancouver Transit Conduct and Safety Regulation

6(1) If the authority or one of its subsidiaries makes rules, or posts signs on transit vehicles or other transit property, for the safety, good order or convenience of persons while they are on, entering or leaving a transit vehicle or other transit property, a transit employee may require, as a condition of allowing any person to enter or remain on the transit vehicle or transit property, that the person obey the signs or comply with the rules.

(2) If a person does not obey a sign or comply with the rules when required to do so by a transit employee acting in accordance with subsection (1), any transit employee may do any of the following:

(a) refuse that person permission to enter the transit vehicle or other transit property;

(b) order that person to leave the transit vehicle or other transit property;

(c) order that person not to enter any transit property or not to enter specified transit properties for a period not exceeding 24 hours from the time the order was made.

…

The sign provides that:

11. All persons travelling on transit vehicles, including any bus, SkyTrain, SeaBus, or train, will be required to wear a mask or face covering while on board, unless they are exempted by one of the categories below: (a) anyone with an underlying medical condition or disability which inhibits the ability to wear a mask or face covering; (b) persons unable to place or remove a mask or face covering without assistance; (c) children under 5 years of age; (d) transit employees working behind a physical barrier or within areas designated for transit employees and not for public access; (e) police, transit employees, or first responders in an emergency situation.