

Deference in the Public Health Context

Jacob Shelley

News media report on a daily basis about real or perceived public health threats - including infectious and chronic diseases, environmental pollutants and novel biotechnologies. Governments, public health officials and regulators must address public health risks and in so doing, often implement legislative, policy and operational actions that restrict fundamental rights and freedoms. In response, the legal legitimacy of those actions may be constitutionally challenged, leading to the problem of balancing individual rights with public health protection.

How ought legal principles, particularly those related to constitutional rights protected under the *Charter of Rights and Freedom*,¹ be interpreted and applied to safeguard rights and freedoms in the public health context? This article will review some of the key points of a larger study currently underway that is examining the degree of deference courts have typically given to public health actors,² particularly when such actions impinge on the rights of individuals. The study is attempting to better understand what role deference has played by examining court decisions in which judges have been confronted with determining whether restrictions on individual rights are justified to promote the health of the community. The aim is to better understand how the courts might respond in situations where public health initiatives infringe upon constitutionally guaranteed rights.

Before proceeding, it is necessary to first clarify what is meant by “public health” and “deference”. The field of public health encapsulates those practices intended to improve and protect the health of an entire community.³ Public health law, therefore, is the “study of the legal powers and duties of the state to assure the conditions for people to be healthy . . .

and the limitations on the power of the state to constrain autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals for the protection or promotion of community health.”⁴ Deference can be defined as the submission of one to the judgment of another. In the judicial context, deference has been defined as a form of lower level constitutional review.⁵ In a recent Supreme Court of Canada decision, the need for deference was determined to arise in situations where the government was “required to mediate between competing interests and to choose among a number of legislative priorities.”⁶ In the public health context, judges must determine if public health actions warrant deference.

The need to show deference in the public health context has been amplified since 1982 with the addition of the *Charter* to the Canadian constitution. Public health actions are now subject to an additional constitutional review, as they can be scrutinized if they are perceived to violate the rights of an individual protected by the *Charter*. To be sure, not all *Charter* rights come into play in the public health context. Generally, liberty rights are implicated more often, as the freedoms people would normally enjoy are restricted in order to safeguard the public’s health.

Consequently, the *Charter* challenges most often before the courts involved section 7, “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” This is understandable given that many public health crises involve communicable diseases or other situations requiring mandatory treatments or detention. It would be erroneous, however, to suggest that this was the extent of



challenges brought before the courts. Other *Charter* challenges have been instigated on the grounds that the following rights have been violated: the freedom of conscience and religion, s. 2(a)⁷; the freedom of thought, belief, opinion and expression, s. 2(b)⁸; the right to be secure against “unreasonable search or seizure”, s. 8⁹; the right not to be arbitrarily detained, s. 9¹⁰; the right not to be “subjected to any cruel and unusual treatment or punishment”, s. 12¹¹; and the right to equality before and under the law, s. 15¹². Other *Charter* challenges may be raised, but these sections represent the majority of cases identified by this study thus far.

To determine whether a particular act done in the interests of public health is justified despite the infringement of a *Charter* right requires the court to ask if such an act is reasonable and justified. This entails, as with all *Charter* challenges, the court examining whether the infringement can be justified under section 1 of the *Charter*, which “guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹³ In *R. v. Oakes*, the Supreme Court of Canada posited a test for undertaking a section 1 analysis.¹⁴ There are four criteria to the *Oakes* test:

First, the impugned governmental action must be directed at a pressing and substantial concern; second, its goal must be rationally connected to the limitation imposed on an individual’s rights; third, the limitation must impair the individual’s rights in a minimal fashion; and, fourth, there must be proportionality between the benefits of the limitation and its harmful impact.¹⁵

Considerations regarding deference enter the *Oakes* test specifically in the minimal impairment analysis. Here the court is to ask the question of “whether the government had a reasonable basis, on the evidence tendered, for concluding that [the act] impaired [the right] as little as possible given the government’s pressing and substantial objective.”¹⁶

Guy Davidov argues that the reasonable basis component “dramatically softens the test.”¹⁷ It grants the state more leeway in infringing rights, requiring only that there be a reasonable basis for deciding upon one particular action against another. Davidov also argues that deference allows the court to approach the matter more subjectively. “Instead of examining the legislation itself directly and independently, the court tries to look at the legislation through the legislature’s eyes.”¹⁸ Subsequently, the court is concerned with whether a particular action has been undertaken in good faith. Within the public health context this means that those actions infringing an individual’s rights which are reasonably chosen and undertaken in good faith will often be deferred to by the courts. A few case examples are provided below.

In *Toronto v. Deakin*¹⁹ a patient diagnosed with tuberculosis challenged a four-month extension to an existing detention order for the purpose of undergoing treatment. Having already been in hospital for four months, the patient viewed the extension as a violation of his

right to liberty under the *Charter*. Although the Court accepted that the detention was in fact a breach of his rights, it nevertheless concluded that such an infringement was justified under section 1 as it was done “for the protection of public health and the prevention of the spread of tuberculosis.”²⁰

In *Betram S. Miller Ltd. v. R*²¹ a challenge was brought before the Court that inspectors, authorized by the *Plant Quarantine Act*²², had violated s. 8 of the *Charter* by failing to obtain a warrant when inspecting the plaintiff’s nursery. Subsequent to the search, a quantity of stock suspected to be infested with the Gypsy Moth larvae were order destroyed. The plaintiff brought the action claiming to have been subject to an unreasonable search and seizure. The trial judge agreed, finding s. 6(1)(a) and s. 9(4) of the *Plant Quarantine Act*, which allowed warrantless searches, to be inoperative due to their inconsistency with the *Charter*. On appeal, however, the actions of the officials were defended. In the words of Justice Ryan, “the public interest in preventing the spread of infestation is sufficiently strong to warrant this rather low standard.”²³

*Considerations regarding
deference enter the Oakes
test specifically in the
minimal impairment
analysis.*



These are but two cases illustrating the role deference plays in determining the legitimacy of public health actions. In both situations, the court was willing to accept the impugned actions as necessary for the protection of the public's health. Numerous other situations have been brought before the courts. For example, a court has been required to determine when it is justifiable to: prevent people from smoking in public places²⁴; order farmers to cull their herd because of BSE fears²⁵; require residents to keep yards free of excessive weeds²⁶; and to fluoridate the public water supply to promote dental hygiene²⁷, among many other scenarios. In each situation, the court is forced to decide whether it is appropriate to show deference in the interests of public health, or to deem such actions as unjustifiable and therefore a breach of an individual's rights protected by the *Charter*.

The preliminary conclusion this study has reached is that in circumstances of potential risk, courts are usually willing to give deference to public health officials, provided they have engaged in a *bona fide* exercise of authority, are not discriminating arbitrarily and have scientific evidence to support their actions or are operating under scientific uncertainty or are faced with an imminent public health emergency.

Jacob Shelley, Research Assistant, Health Law Institute and third-year law student, University of Alberta, Edmonton, Alberta.

Funding support provided by the Canadian Institutes of Health Research.

1. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter].
2. This includes the actions of public health officials as well as the government and those responsible for the drafting and implementation of legislation and policies with respect to public health. It may also include executive branches enforcing said legislation and policies, and ultimately, the judiciary which often acts in the capacity of a health official in making determinations involving court orders, such as quarantines.
3. For a more detailed discussion see, Tracey M. Bailey, Timothy Caulfield & Nola M. Ries, eds., *Public Health Law & Policy in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005).

4. L.O. Gostin, *Public Health Law: Power, Duty, Restraint* (Berkeley: University of California Press, 2000) at 4.
5. Guy Davidov, "The Paradox of Judicial Deference" (2000-2001) 12 N.J.C.L.133 at 133 (Davidov argues that deference is a relaxed and more lenient form of constitutional review).
6. *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 at para. 94.
7. *S.J.B. (Litigation Guardian of) v. British Columbia (Director of Child, Family and Community Service)* (2005), 42 B.C.L.R. (4th) 321, 2005 BCSC 573 (This case involves a 15 year old Jehovah's Witness refusing a blood transfusion and challenging the *Child, Family and Community Service Act* as violating s. 2(a), the freedom of religion. The plaintiff also challenged the legislation as violating s. 7 and s. 15(1) of the *Charter*).
8. *Bell v. Toronto (City)*, [1996] O.J. No. 3146, 65 A.C.W.S. (3d) 502 (Ont. Ct. Prov. Div.) (The plaintiff here brought a challenge under s. 2(b) when her naturalized garden was found to violate a city by-law because of its appearance. Here, the goals of the by-law were not found to be sufficiently important to justify overriding the plaintiff's right to express her values and beliefs through her garden. It was noted, however, that had health hazards been identified as the rationale for the by-law that this would be considered as sufficiently pressing and substantial to justify interfering with her *Charter* rights).
9. An example of a *Charter* challenge involving s. 8 is given below: *Betram S. Miller Ltd. v. R.*, *infra* note 21.
10. Section 9 was brought up as an alternative challenge in *Toronto (City, Medical Officer of Health) v. Deakin*, *infra* note 19, where s. 7 was the primary grounds for the *Charter* challenge. *Toronto v. Deakin* is discussed in detail below.
11. See *Yellowknife (City) v. Denny*, [2004] N.W.T.J. No. 16, 2004 NWTTC 2 (where a challenge is brought using s. 12, along with ss. 2(b), 7, 15, and 24(1), to challenge a conviction for smoking in a non-smoking area, contrary to by-law no. 4276).
12. *Millership v. Kamloops (City)*, [2003] B.C.J. No. 109, 2003 BCSC 82 (Here s. 15 was invoked in an action to prevent fluoridation of public water supplies in Canada).
13. The option is always before governments, provincially or federally, to invoke s. 33 of the *Charter*, the "notwithstanding clause", which allows for any legislative act of the legislature to operate notwithstanding that it in effect violates s. 2 or s. 7-15 of the *Charter*,



for a period of five years. Use of this provision has historically been limited and would likely not be used, perhaps with the exception of an imminent public health emergency.

14. *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7 [Oakes].
15. Nola M. Ries, “Legal Foundations of Public Health in Canada” in Tracey M. Bailey, Timothy Caulfield & Nola M. Ries, eds., *Public Health Law & Policy in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) 7 at 28.
16. *Irwin Toy Ltd. v. Québec*, [1989] 1 S.C.R. 927 at 994, [1989] S.C.J. No. 36 [Irwin Toy cited to S.C.R.].
17. Davidov, *supra* note 5 at 138.
18. *Ibid.* at 139.
19. *Toronto (City, Medical Officer of Health) v. Deakin*, [2002] O.J. No. 2777 (Ct. J.) (Q.L.).
20. *Ibid.* at para. 26.
21. [1986] 3 F.C. 291 (F.C.A.).
22. R.S.C. 1970, c. P-13.
23. *Supra* note 14 at para. 80.
24. *Yellowknife (City) v. Denny*, *supra* note 11. See also *Restaurant and Food Services Association of British Columbia and the Yukon v. Vancouver (City)* (1998), 155 D.L.R. (4th) 587, 43 B.C.L.R. (3d) 178 (C.A.).
25. *Kohl v. Canada (Department of Agriculture)*, [1995] F.C.J. No. 1076, 185 N.R. 149 (F.C.A.), rev’g [1994] F.C.J. No. 1053 (T.D.) (Although there was no *Charter* challenge brought in this case, it is nevertheless a useful case for our study as it speaks to how Courts should show deference to public health officials. The Court of Appeal held that it is the Court’s responsibility to verify that ministers and officers have acted in good faith, and are not called upon to agree with the decision-maker’s appreciation of the facts. Consequently, the Court of Appeal reversed the decision of the trial judge who quashed the minister’s decision on the grounds that it was patently unreasonable).
26. *Supra* note 8.
27. *Millership v. Kamloops (City)*, *supra* note 12. See also *Locke v. Calgary* (1993), 147 A.R. 367, [1993] A.J. No. 926 (Q.B.).

