What the pandemic means for civil liberties in Canada

Christine Van Geyn
The Canadian Constitution Foundation
www.TheCCF.ca
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The Author's Note

My name is Christine Van Geyn, and I am the Litigation Director for the Canadian Constitution Foundation. Thank you for downloading our eBook!

The CCF is a non-partisan legal charity that defends the constitutional rights and freedoms of Canadians in the courts of law and public opinion.

This book is the culmination of several months work of work on COVID issues. It will begin with an introduction that describes the structure of Canada’s constitution. It’s really important to understand how our rights are actually structured before we get into the specifics like COVID lockdowns, mandatory masking closed borders.

I also want to add a disclaimer – these are issues that have mostly not been addressed by courts. A lot of the questions raised by this book involve speculation. Nothing in this book should be construed as legal advice. If you believe your rights have been violated, please contact a lawyer.

Our work would not be possible without the help of our research assistant, Josh Dehaas, or without the support of our donors. Please consider donating to our work at www.TheCCF.ca/donate

Knowing your rights is the first step you can take to protect them.

This book will conclude by talking about what we can do to protect our rights as citizens. Knowing more is the first step, and by reading this book, you’ve already taken it.

- Christine Van Geyn
CCF Litigation Director

Knowing your rights is the first step you can take to protect them.
Canada's Constitution

For the purposes of this book, we need to discuss two parts of our constitution. These two parts provide different types of restraint on government power. We need to understand;

The Constitution Act 1867; and

The Canadian Charter of Rights and Freedoms.
Constitution Act, 1867

Government restraint through the division of power

The main type of restraint in the Constitution Act that is relevant for us today is the division of powers in s. 91 and 92.

This sets out what powers belong to the federal government and what powers belong to the provincial government.

When one level of government legislates in an area of authority that belongs to another level of government, the law is unconstitutional.

The federal government has the powers of quarantine, the powers of citizenship, and the powers of “works connecting provinces, and works beyond the boundaries of one province”.

This means the federal government has the power over interprovincial modes of transportation, while the provinces have control over intraprovincial transportation. In other words, travel between provinces vs travel within provinces.

The provinces have the powers to regulate “property and civil rights”, “all matters of a local or private nature in the province”, and “matters of local public health”.

Pith & Substance

If a law appears to fall under both a federal and provincial power, the court will do what is called a "pith and substance" analysis. They will examine:

- The purpose of the law
- The legal effect of the law (the expected impacts)
- The practical effect of the law (which may arise from imperfect administration).

If the effect of the law is merely “Incidental” to another level of government’s head of power, it is not unconstitutional.
The rights that are relevant for this eBook are:

Section 2 - Fundamental freedoms like freedom of conscience, religion, freedom of thought, belief, expression, speech, freedom of the press, and freedom of assembly.

Section 6 - Mobility rights. The right of Canadian citizens to enter, remain in and leave Canada and to take up residence in any province.

Section 7 - Right to life, liberty and security of person.

Section 8 - Freedom from unreasonable search and seizure, which is where we find our privacy rights.

Section 15 - Equality rights. This includes equal protection and benefit of the law without discrimination.

Reading through these, you can probably already see how many of these rights are engaged by a lot of government action during COVID.

But our Charter has something called the limitation clause, which is contained in s. 1. The limitation clause allows governments to justify certain infringements of Charter rights.
Limits on Charter Rights

The limitations clause in s. 1 of the Charter says: “the Charter guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

The courts have developed a test (called the "Oakes Test") to determine whether a limit on our rights is “justified”.

A law that limits our rights must be:

- Prescribed by law. It cannot be vague, and it must actually be a grant of the authority being exercised;
- The law must serve a “pressing and substantial” objective;
- The means of the law must be “rationally connected” to that objective;
- The law must “minimally impair” the right; and
- There must be proportionality between the limit on our rights and the benefit gained.

“the Charter guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.
Business Closures

Business closures violate our right to free assembly

In March, Canada’s premiers were faced with apocalyptic images of overwhelmed hospitals in Italy. They responded by shutting down as many businesses as they could. The idea was that by keeping most of the population at home, they could stop the spread of COVID.

These emergency orders seem to have helped Canada avoid the worst case scenario, but they created some unfair hardship for small business owners. Just to give one example, between March 24 and May 8, stand-alone garden centres were deemed “non-essential” in Ontario and faced fines of up to $10 million for defying the emergency order. Meanwhile, big-box stores like Loblaws and Costco were allowed to remain open and sell plants.

A spokesperson for the flower industry told Global News that the industry makes 60 per cent of its yearly sales between Easter and Mother’s Day. That suggests the arbitrary distinction put some independent garden centres under financial strain, and maybe even bankruptcy.

That seems intuitively unfair but is it unconstitutional?

Section 7 does not protect economic interests, so even if businesses suffer economic harm from the shut downs, this does not trigger s. 7 right.

However, other rights are implicated.

Section 7 of the Charter protects our right to life, liberty and security, but these are individual rights. They are not possessed by businesses.
The section 2 rights to freedom of assembly and freedom of association are implicated by business closures. These are rights for both business owners and their clientele.

Depending on the type of business, freedom of expression and freedom of religion will also be engaged, and there is even an argument for customer’s s. 7 right to life, liberty and security.

For example, some fitness styles, like yoga and martial arts, have a deep spiritual element that could trigger rights to freedom of expression or freedom of religion. Many people rely on group fitness for their mental health, which could potentially trigger a s. 7 right. And the government direction to hospitals to stop non-urgent medical care can trigger patients’ right to life and security.

All of these arguments have potential, especially given that the business closures seem inconsistently applied. In Ontario in particular, the government has given an exemption for dance studios. It’s hard to understand the rationale for allowing dance studios to open, but not yoga studios or martial arts. The decision seems arbitrary and a result of political pressure.

There is also an argument that business owners’ s. 7 right to liberty can be triggered because the penalty for violating a business closure order in many provinces includes a terms of imprisonment.

The risk of a term of can trigger s. 7 individual rights. In order to be saved the restriction would need to comply with the principles of fundamental justice (it cannot be arbitrary or overbroad).

As explained, there is a huge arbitrariness problem with the business closure orders in several provinces.

In order to justify the closures, governments will need to show that the lockdowns are not arbitrary, and that they are minimally impairing. They will need to provide evidence to support their position.
Limits on Gatherings

Gathering limits must be enforced consistently

Canadian provinces have a variety of gathering limits, which have fluctuated as case counts rise and fall.

These gathering limits are a restriction on our right to freedom of assembly and freedom of association. The question becomes are these reasonable limits on our rights.

A court would likely give more weight to a gathering for religious or political purposes than it would give to a social gathering. The nature of the gathering will have an impact on both whether the court finds there is a violation and if the violation is justified.

But if the government treats gatherings differently, for example laying charges at protests for some causes but not others, this undermines the government’s public health rationale.

COVID does not spread more easily at an anti-lockdown protest than at a black lives matter protest. And citizens at both have a right to free assembly. The government needs to enforce gathering limit consistently or risk a finding of arbitrariness.

There is potential for an argument that gathering limits are not minimally impairing. For example, that self-isolation and masking could achieve the same purpose.

Or that the gathering restrictions need to be more narrowly tailored. For example, some provinces, like Alberta, only have gathering restrictions in the cities with large numbers of cases. Meanwhile Ontario has a province-wide restriction.

Oakes Test

Is there a “pressing and substantial” objective?

Is the limit on our rights “rationally connected” to that objective?

Does the law “minimally impair” the right?

Is there proportionality between the limit and the objective?
Limits on Gatherings

Narrowly tailored gathering limits are more likely to survive a challenge, but it is still possible that broad limits may survive.

Maxime St-Hilaire, a constitutional law professor at the Université de Sherbrooke, says he believes even the infringement on freedom of religion would be easy for a government to justify under section 1 of the Charter.

St-Hilaire points out that the Supreme Court has said on numerous occasions that a limit may still be considered minimally impairing even if the claimant can think of less intrusive ways for the government to achieve its goal. After all, we elect legislators to weigh different considerations and make the calls about where to draw the lines.

However, should a challenge be brought, the government needs to provide the evidence to justify the limit. As it stands, there is significant debate over the evidence and many members of the public do not view the limits on gatherings (or the business closures) as reasonable.

The government would be better served by presenting consistent and reasoned evidence to justify the various gathering limits now, before any challenge is brought. This would do more to get public support on side with gathering limits.

The penalties for gathering limits may also offend the requirement for proportionality. Some communities have imposed incredibly onerous fines for violating gathering orders. Infamously, Brampton, Ontario, has a $100,000 fine for violating gathering orders.

There are also issues with enforcement. Early on in the pandemic there was a lack of clarity around enforcing provincial emergency orders. It was unclear if people could even sit on park benches or walk on public grass.

As a result, there were high fines and arbitrary enforcement. Those types of challenges to individual tickets could be successful.
Case Study

An Alberta man was arrested for protesting COVID lockdowns. Can they really do that?

Cody Haller, an Alberta oilsands workers, is skeptical of his government’s response to COVID. He worries that prolonged shutdowns of businesses are doing unnecessary damage to the province’s already ailing economy. To make his views known, Haller got up early on May 10 and went to a plaza outside the legislature in Edmonton to protest the government’s response.

Just as Haller was expressing himself, three sheriffs walked up and said that he was contravening an order made under the province’s Public Health Act. At the time, Alberta’s chief medical officer of health had ordered people not to gather in groups of more than 15 and to stay two metres apart.

When Haller refused to end his protest, the sheriffs picked him up by the arms and legs, carried him to a vehicle, and drove him to a downtown police station where he was charged with contravening the Public Health Act and obstructing, molesting, hindering or interfering with enforcement. The fines appear to be $0, but the tickets say that he must attend court on Sept. 1.

At least two videos captured the arrest. Neither video shows Haller within two metres of another person. The charge appears to be related to the size of the gathering, which Haller says ended up with about 40 to 50 people spread out across a large open space. Haller insists that the limit on the size of gatherings contravenes his constitutional right to protest. He’s almost certainly right.

“It is my freedom and my right to assemble and to express my concerns as well as any objections that I have to a government that portrays itself to be acting in all our best interests,” Haller said.

Haller’s arrest led to an outcry. Premier Jason Kenney said he would consider modifying public health orders “to clarify that it is acceptable for individuals who are respecting physical distancing guidelines to be present in outdoor public venues, including for the purpose of protesting.” A few days later, the province changed the order so that up to 50 people can gather in one place outdoors, but the order did not clarify whether even larger protests are allowed.

In enforcing gathering restrictions, the government cannot act inconsistently, as they appeared to in this case. If they do, the restrictions are open to being challenged for arbitrariness.
Mandatory Masks

There has been some confusion about mandatory mask orders, especially because there is overlap between government orders requiring masking and stores having their own policies on masking.

In many of instances, both are in play. If there is a store policy requiring masking, your Charter rights are not implicated. Stores get to decide how to conduct business, and subject to human rights legislation, can choose to require their customers and employees wear masks.

Stores also have an obligation to protect the health and safety of their own employees, and requiring masking is one way they may choose to achieve that.

Your Charter rights are only implicated to the extent that a store is enforcing a government order requiring masks. And it is likely that a court would find masks to be as a reasonable limit on s. 7 liberty.

The issue we have seen with mandatory masks is that it can trigger the s. 15 right to equality.

Individuals who cannot wear masks for real medical reasons cannot be discriminated against on the basis of their disability. The CCF has spoken to people with such conditions, including;

- Children with autism who have sensory processing challenges that make masking impossible;
- People with breathing impairments (although they realistically are the most important to mask);
- People who are hearing impaired and need masks removed to read lips;
- People who have PTSD related to a breathing impairment - for example, a sexual assault survivor.
Mandatory Masks

We worked on this issue after being contacted by a number of people who for true medical reasons cannot wear a mask.

We wrote letters to municipalities asking for mandatory mask orders to include medical exemptions, and that the medical exemptions be granted at face value. This is so that it is minimally impairing.

People should not need to reveal their personal medical history in order to shop for toilet paper.

Provincial laws and municipal bylaws and public health orders for the most part have all adopted the approach we recommended in our letters.

Claims for medical exemptions are accepted, and many of the laws explicitly state that exemptions must be granted at face value.

In our view, this solves the major constitutional problem presented by mandatory masks.
Privacy Rights

We have privacy rights that are protected by s. 8 of our Charter, which protects against unreasonable search and seizure. This includes the search of personal information.

Few things are as private and personal as health information. And during this crisis there have been some instances of unjustified snooping of personal health records by police.

Early on in the pandemic, the Ontario provincial government granted emergency services access to a public health database that held the records of information for each person who had tested positive for COVID. The rationale for access was so that emergency responders could protect themselves from COVID. If they had an emergency call, they would be able to look up that person or address in the database to determine if they had COVID, and take the appropriate precautions.

For a lot of reasons, this is a bad idea.

Ultimately, the police were caught misusing the information. Through the freedom of information process the CCF was able to find a letter from the Solicitor General to Ontario Chiefs of Police that said police had been looking up names unrelated to service calls, addresses outside their service area, and doing wholesale postal code searches.

This is a violation of our s. 8 right to privacy, and it’s also a violation of specific health privacy legislation.

Police access to the database has now ended, but it just shows how important it is to have good privacy processes in place.
Privacy Rights

The Quebec government has pondered aloud about warrantless searches

There is also concerning talk in Quebec about warrantless searches. Right now parts of Quebec are “red zones” with strict gathering restrictions. The police in Quebec are taking an enforcement heavy approach. They have been given access to rapid “telewarrants”, which allow police to rapidly obtain a warrant over the phone.

Because the underlying laws are so broad, there are many “suspicious” gatherings that the police may want to investigate. The potential for abuse is immense.

But even telewarrants aren’t enough for the Quebec government. The government has pondered aloud about warrantless searches.

Quebec’s public safety minister has said she would consider granting police the power to enter homes without a warrant if the pandemic worsens “dramatically”. This would be unconstitutional, and would not be likely to survive s. 1 scrutiny. To achieve it the government in Quebec would need to rely on the notwithstanding clause.

The notwithstanding clause is in section 33 of the Charter, and it allows parliament or provincial legislatures to derogate from certain sections of the Charter. So a government may enact legislation that violates these rights if they make a declaration under s. 33, and that law will be valid for 5 years.

There has been no public discussion of using s. 33 in the current crisis, and it would be surprising if it were used in the coming months. However, governments are most prone to grabbing power during emergencies, so citizens need to keep a watchful eye on their governments.
International Border Closures

If you are a Canadian citizen, you have a constitutional right to enter and remain in Canada at any time. The federal government has imposed border restrictions under the Quarantine Act, but that does not take away any of those rights that citizens to enter and remain in the country.

There are restrictions on non-citizens and non-residents. However there are many exceptions. For example, a non-citizen may still enter as a family member, international student, for compassionate reasons, as a temporary worker or people travelling from the US for an essential purpose (not tourism for entertainment).

These restrictions and exceptions do not present constitutional problems.

There were calls early in the pandemic to close the borders completely. The government did not listen to calls to prohibit Canadian citizens from returning to their own country, which were frankly absurd and would have been illegal.
Under the Quarantine Act, the federal government is requiring travelers from abroad to self-isolate for 14 days, even without COVID symptoms.

The 14-day self-quarantine requirement for those who travel to and from countries with similar or lower COVID rates maybe an unconstitutional restriction on the right to mobility and the right to liberty guaranteed under sections 6 and 7 of the Charter.

Liberty can only be restricted “in accordance with the principles of fundamental justice,” and that includes the principles that laws must not be overbroad or arbitrary.

Self-quarantine restrictions may be rational for those travelling from risky places, but they may be overbroad or arbitrary if they apply to people traveling from places that pose no increased risk. Some scholars have also suggested the 14-day self-quarantine may count as an arbitrary detention under section 9 of the Charter.

To best protect our rights, the government should follow the approach many European countries are taking. This approach allows travellers to enter without quarantining so long as they’re coming from a country that has a lower or similarly low infection rate, a downward trend in cases, and proper testing, social distancing and contact tracing in place.

Alternatively, Canada could follow the Icelandic approach. In Iceland, tourists from countries it considers very safe—currently Denmark, Finland, Germany and Norway—can enter without restrictions, while those from other relatively safe countries such as Canada, Japan and South Korea can opt for two COVID-19 tests—one at the border and another five days later—instead of 14 days of house arrest. In Canada, this could include Canadians who travel to safer parts of the United States.

Offering border testing for returning Canadians could also keep the risk low and it would be a much less serious infringement on our rights.
Provincial Travel Restrictions

The interprovincial border restrictions have all been in eastern Canada, and these restrictions are unconstitutional. Some of these restrictions have already been challenged in court (albeit unsuccessfully so far).

At one point Quebec had closed its border to Ontario. Nova Scotia never closed its borders, but travellers have been required to self-isolate for 14 days. New Brunswick had periods where the borders were completely closed for non-essential travel, as did Newfoundland and PEI.

There is an “Atlantic Bubble”, which permits travel between the Atlantic provinces. Travellers from outside of the Atlantic provinces are subject to various restrictions. Newfoundland is the most restrictive, with travel limited to those from the Atlantic bubble or essential workers. Anyone else must seek approval from the Chief Medical Officer for “extenuating circumstances”. A funeral or impending death is not always considered extenuating.

A number of these restrictions are unconstitutional.

First, they are outside the power of the provincial government. The federal government has the power of quarantine, the powers of citizenship, and the powers of “works connecting provinces, and works beyond the boundaries of one province”. Travel between provinces is a federal power that the provinces do not have authority to regulate.

Second, these restrictions are an infringement on Charter-guaranteed s. 6 mobility rights.

Section 6 of the Charter guarantees the right of Canadian citizens to enter, remain in and leave Canada and to take up residence in any province.
The question then becomes if the provincial travel restrictions are a “reasonable limit” under section 1.

The Canadian Civil Liberties Association took on the most restrictive province – Newfoundland and Labrador.

On the division of powers question, the Newfoundland court found that the law was in pith and substance about public health and therefore within the proper jurisdiction of the provinces.

The court also noted that while the federal government could also regulate interprovincial travel, they had declined to do so. Since the feds had not “entered the field”, it was left to the provinces to devise their own solutions in response to local conditions.

This line of argument is not convincing. The decision by the federal government not to regulate is largely political. It would be open to the federal government to regulate interprovincial travel, but their decision not to do so does not change the division of powers and cede that authority to the provinces.

It is also an open question as to whether such an extreme travel ban would be constitutional if it were imposed in a province like Ontario, where the consequences would be on a much larger scale. In such a case, the court could very well have come to a different conclusion. This should not be the case. One province does not have more power to regulate in the federal sphere than another province.

The Newfoundland court also considered the Charter arguments on mobility and found that there was indeed a violation. But the court found that the violation is justified under section 1. However, in our view the travel ban is not minimally impairing. There are many alternatives to a total lockdown of the island.

The decision is being appealed, so this court is not the final word on the constitutionality of the travel ban.
What Can You Do?

The most important thing you can do is be aware of your rights, and you’ve already taken an important first step by reading this book.

If you believe your rights are being violated, remain calm and courteous. Assert your rights, and if your rights are denied seek legal advice.

You can continue to learn more by signing up for our weekly Freedom Update at www.TheCCF.ca

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