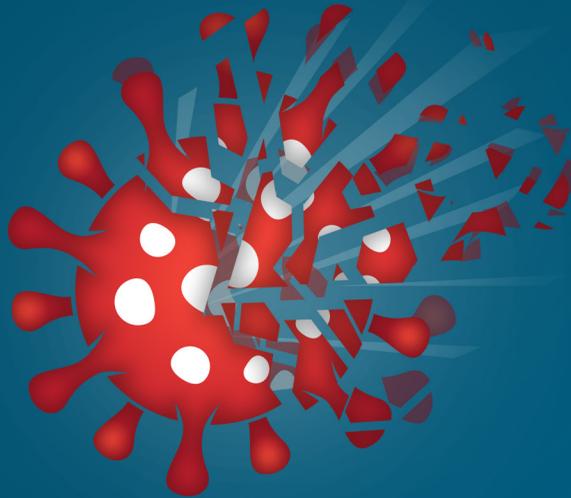


# Life After **COVID**

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What's next for Canada?



– May 2021 –

This book was a collaboration between  
the following organizations:

Canadian Constitution Foundation  
Canadian Taxpayers Federation  
Justice Centre for Constitutional Freedoms  
Montreal Economic Institute  
SecondStreet.org

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# Introduction

It's difficult to predict the future.

Just ask your local weatherman, an honest tarot card reader or one of the many Wall Street “experts” who completely missed predicting the housing bubble crash back in 2008.

Most governments weren't planning on a global pandemic gripping the world in 2020 either. But it happened.

And now that Canada appears to slowly be turning the corner on COVID-19, it's equally difficult to know exactly how our country will fare over the next few years. But at this point, we certainly expect some serious challenges ahead.

Unemployment is high in Canada and many businesses are on the brink – each public health-mandated closure has come with job losses. The federal government's debt is also of serious concern and many provincial governments have also been loading up their respective credit cards. Newfoundland and Labrador is on the brink of insolvency. Lenders have turned their backs on the beleaguered province.

Many individual taxpayers are also tapped out financially. They're getting by thanks to government assistance, which is obviously not a long-term solution. Property tax increases in many cities haven't helped the situation.

Turning to government services, one must consider our health care system. Provincial governments postponed upwards of four hundred thousand non-COVID surgeries and procedures across the country. Those appointments must now be rescheduled on top of growing demand.

The aforementioned challenges are clearly formidable and deserve serious attention and discourse.

That's why we decided to write this book.

We wanted to articulate some of the major obstacles our nation faces over the next few years and identify possible solutions for mitigating those problems. Anyone can critique government decisions as they're announced, but it's more constructive to offer remedies ahead of time.

This book is a collection of essays, authored by five different organizations and one guest author:

- » Canadian Taxpayers Federation
- » Montreal Economic Institute

- » SecondStreet.org
- » Justice Centre for Constitutional Freedoms
- » Canadian Constitution Foundation
- » Toronto Sun columnist Anthony Furey

As much as this book was written for policy makers and those in power to consider, it's equally meant for everyday Canadians – we will all be affected in the aftermath of COVID-19 in one way or another. Voters especially should understand the difficulties that lie ahead so they can assess each political party's plan to address them.

We *Life After COVID*, examine options to get government finances under control and reform health care to improve outcomes for patients. We also take a look at how governments can drive economic growth – not by cutting cheques to businesses – but by cutting red tape and getting out of the way so that it's easier for entrepreneurs to get their new ventures off the ground and hire workers.

These are important areas for governments to focus on over the next few years. However, we can't forget what just happened.

This book examines what went wrong during COVID-19 in terms of the government's response to the pandemic. Why was the government's response so disjointed? Why weren't many "emergency plans" followed?

Similarly, we examine the numerous infringements on Canada's Charter of Rights and Freedoms during the pandemic and examine

decisions by governments to sidestep our democratic processes.

To be clear, this book is a joint effort by several organizations. We may not agree 100% with everything that other contributors have written, but we do agree that there needs to be more public discourse and debate about the issues raised in this book.

Most of all, it is equally imperative for governments to learn from their mistakes during the pandemic.

Who knows when another pandemic or some kind of other emergency might come along?

It certainly doesn't hurt to be prepared.

CHAPTER 1

# Tough times ahead

On January 25, 2020, Canada’s federal government confirmed our nation’s first case of COVID-19.<sup>1</sup>

Shortly after, Edmonton MP Matt Jeneroux asked the first question in the House of Commons about the situation and the potential for the virus to spread in our country:

*“How can Canadians be assured that this spread is being properly contained?”*

Canada’s Minister of Health, Patty Hajdu, told Jeneroux and the House: *“The risk to Canadians remains low.”*<sup>2</sup>

At the time, China had banned non-essential travel in and out of Wuhan, the epicentre of the outbreak. Taiwan had also banned visitors from Wuhan and Japan had long since been conducting additional screening for travellers from the region.<sup>3</sup>

For the next two months, Canada’s airports continued to allow air

travel indiscriminately, with little to no precautions in place to protect against the spread of the virus. It wasn't until mid-March that the federal government began to restrict international air travel to Canada.

But by then it was too late.

The virus had spread from coast-to-coast in Canada and would go on to cause more than 20,000 deaths – particularly in long-term care homes. As of April 26, 2021, Canada has now had over one million cases and government measures to control the virus have turned society upside down.<sup>4</sup>

Like dominos tumbling across the country, governments decided to close schools and place varying restrictions on retail outlets, restaurants and pubs. Bars were ordered closed and professional sporting events and concerts were also prohibited. Attendance at religious services was capped across the country and governments postponed thousands of surgeries and procedures unrelated to COVID-19 in the health care system.

Quebec imposed curfews on its citizens and many cities closed parks and playgrounds. The Ontario government went so far as to allow police forces to pull people over randomly to ensure they were only out of their home for an essential reason.

As our economy struggled, governments handed out billions of dollars in financial assistance to seemingly everyone. Federal debt, for the first time in history, passed \$1 trillion and is on its way to \$1.4 trillion by 2026 (roughly double pre-pandemic levels).<sup>5</sup>

Since March, 2020, the long tentacles of government have extended deep into every sector of society, nation-wide.

Fortunately, there are signs we are inching towards a post-COVID period.

South of the border, where the government has vaccinated a much higher percentage of citizens, life has started to return to normal – Americans are attending professional sporting events once again in large numbers, friends and families are once again dining out and socializing regularly, and over 3,000 theatres are showing the new release: *Godzilla vs Kong*. The latter may not be everyone's cup of tea, but it's a positive sign.

While much of Canada still remains under strict “third wave” restrictions, it appears we too may soon be able to enjoy the same activities as more and more Canadians are vaccinated.

But when we do finally reach that point in time, it won't all be fun and games – our nation will still face many significant challenges:

## **Health care**

One of Canada's most significant challenges prior to COVID-19 concerned our nation's aging population. Simply put, after World War II, Canada experienced a large influx of child births that lasted

for several years before petering out. This generation, known as the “baby boomers,” grew up, hit the work force in droves and then began reaching the ripe age of 65 back in 2011.<sup>6</sup>

The following Statistics Canada figures help demonstrate the magnitude of the baby boom generation. The following figures represent the percentage of Canadians who are 65 years of age and older, and show how the baby boom generation is changing the make-up of our nation:<sup>7</sup>

- » **1966:** 7.7% (when Canada’s *Medical Care Act* was passed)
- » **2001:** 13.0%
- » **2021:** 18.7%

This is a challenging phenomenon for our health care system as people tend to require, on average, more health care services, and more costly health procedures as they grow older. According to the Canadian Institute for Health Information (CIHI), the average patient in the 20-24 years old category cost the health care system \$2,157 in 2018.<sup>8</sup> Someone in the 50-54 age bracket cost the system \$3,546 and those in the 75-79 bracket cost \$11,333. The oldest of the baby boomers started to hit the latter category this year.

In the years ahead, more and more boomers will shift into the 75-59 age bracket (and older age brackets), putting considerable demands on our health care system. To be sure, this is not a criticism of the baby boom generation. Growing old is a fact of life. The problem is that governments never planned for this challenge ... despite having 75 years to do so.

While the baby boomer challenge is formidable in its own right, SecondStreet.org research shows that governments postponed over 353,000 non-COVID surgeries and procedures in Canada during the first half of 2020.<sup>9</sup> The true total will be higher as the second half of 2020 was not part of the study period and Ontario announced in 2021 that it would once again be postponing non-COVID surgeries and procedures.

Governments must now find a way to reschedule all their postponed appointments – on top of growing demand. Put simply, every day that goes by in Canada, more and more Canadians grow older and require hip operations, cancer treatment, and other health services. Demand for services is higher than it's ever been.

But it's not just traditional health care services that will feel the strain, mental health and substance abuse services will also face mounting pressure in the months and years ahead. COVID-19 has had a significant impact on the psyche of our nation in countless ways – children missing out on opportunities to socialize and develop with their peers, households facing untold stress levels due to financial problems, business owners struggling with depression after watching their ventures file for bankruptcy and more.

Consider that a March 2021 poll by Leger found that just 32 per cent of Canadians rated their mental health as “good” or “excellent” – far lower than the 46 per cent of Canadians who said “good” or “excellent” in May 2020.<sup>10</sup> Similarly, research by the Canadian Mental Health

Association found that while 2.5 per cent of Canadians had experienced suicidal thoughts in 2016, the number had climbed to 10 per cent as of September 2020.<sup>11</sup>

## **The economy and government debt**

Many economists are expecting that Canada's economy will grow quite well in the next few years.

So, what exactly is the problem?

First, readers should note that the post-COVID "boom" that some people speak of will merely help make up for the 5.4 per cent contraction of our economy in 2020.<sup>12</sup> By 2024, Canada's economy will not be better off than pre-COVID estimates; we'll actually be a little bit worse.<sup>13</sup> Still, that's not bad considering what our business sector went through over the past year.

The problem of course is that much of Canada's "boom" is artificial – it's supported in large part by \$700 billion in government debt. If you do the math, the federal government alone is on pace to incur an extra \$18,000 in debt for every man, woman and child in Canada ... if you include provincial debt, the total rises.

As a result, many economists are now expecting that Canadian households and businesses will face tax increases in the years ahead to help pay for all the additional debt.

How well will this sit with struggling businesses and households? Not well. We also can't forget that growth in the years ahead will not evenly be felt. It will likely be quite a while before all consumers feel completely comfortable with flying, visiting a movie theatre and other pre-COVID activities.

Many parts of our economy are still quite vulnerable.

Note that the Canadian Federation of Independent Business (CFIB) has estimated that small businesses in Canada have incurred \$135 billion in debt due to the pandemic and government lockdown measures.<sup>14</sup> In April 2021, the CFIB noted that “one in six” businesses are considering permanent closures.<sup>15</sup>

According to a March survey by Statistics Canada, 51 per cent of businesses do not “know how long they could continue to operate at their current level of revenue and expenditures before considering closure or bankruptcy.” How many will shut down before the virus is fully contained in Canada?

In recent history, the knee-jerk political reaction to economic slowdowns in Canada has been for governments to borrow billions of dollars – with no plans to repay the funds – and spend the money as part of an effort to “stimulate” the economy. This occurred in 2009 after the “great recession” across the political spectrum. We're once again seeing signs the same will occur again as our nation comes out of the COVID-19 pandemic.

Fortunately, there are alternatives to government-driven “stimulus” spending in the years ahead. In chapter four, we explore some alternative ideas that governments could consider to drive growth without requiring additional spending. In chapter two, we examine how governments could reduce their own spending to get our nation’s debt situation under control and mitigate future tax increases.

## **What if there’s another emergency?**

It’s critical for governments to not just focus on improving our health care system, economic growth and rising debt levels, but to plan responsibly for another emergency. It’s critical for governments to begin examining what went wrong with their response during the pandemic, what went right and what needs to change in the event of another pandemic or emergency?

In chapter five, Anthony Furey examines what happened to plans governments had spent years refining in the event of a pandemic. In chapters six and seven, we examine how governments infringed upon Canadians’ rights beyond reasonable means and sidestepped democratic processes during the pandemic.

These chapters are crucial as no one knows what to expect post-COVID, or even what 2022 will bring. Will a COVID variant mutate and become stronger than the vaccines being administered? What if COVID-22 or some other pandemic emerges? What if Canada faces some other emergency?

For these reasons and many others, it's important for governments to examine these issues in a timely manner.

Now, let's take a closer look at government finances and what can be done to rein in spending in the years ahead.

CHAPTER 2

# Getting government spending under control

*By: Aaron Wudrick and Franco Terrazzano,  
Canadian Taxpayers Federation*

The effects of the COVID-19 pandemic have turned the global economy upside down, with governments everywhere piling up debt. The resulting challenge of recovery will be of a scale never before seen and Canada will be no exception.

As Canada begins to reopen its economy, the federal government will be facing a fiscal situation that has deteriorated dramatically from just a few short months ago. In a little over a year, federal debt ballooned from \$721 billion to more than \$1 trillion while the deficit leapt from \$39.4 billion to \$354.2 billion.<sup>1</sup>

Tinkering at the margins will not suffice. Tough choices lie ahead. Bold policies are required. The scope of the challenge differs from previous economic downturns in a number of ways: the sheer size of the deficit; the severity of the economic downturn; and perhaps most uniquely, a continuing uncertainty looming over both businesses and consumers holding back the prospect of a so-called textbook economic

recovery. Accordingly, the government faces daunting tasks on both the spending and revenue sides.

This challenge needs to be addressed in two primary ways. First, the federal government must move swiftly to reduce costs by winding down emergency spending measures and then moving to impose additional spending discipline across the entire government. Second, to boost the economy, rather than taking the failed approach of government-led stimulus spending, politicians should implement a suite of bold tax reduction measures designed to facilitate a private sector-led recovery by incentivizing immediate economic activity and helping businesses first survive and ultimately thrive.

## **Fiscal snapshot (Budget 2021)**

The federal government's 2020 deficit totaled \$354.2 billion. The feds are projecting another large deficit of \$154.7 billion in 2021.<sup>2</sup> Of this, the Parliamentary Budget Officer (PBO) estimated that temporary emergency spending measures are estimated to account for well north of \$200 billion of the 2020 deficit.<sup>3</sup> Reduced revenues accounted for \$37.9 billion.

Accordingly, the PBO estimated that the feds could get back to roughly pre-pandemic deficits in 2024 if emergency spending measures are wound down.

There is no getting around the need for future spending restraint. Even prior to the pandemic, the federal government's expenditures had

been rising and leaving deficits even while the economy was growing. In fact, before COVID-19 had touched down, the feds' spending had reached heights never before seen in Canada's modern age, with Ottawa spending more than it did during any single year during the Second World War, Korean War, or during recessions in the 1980s, 1990s and 2000s (and yes, that's after accounting for population growth and inflation).<sup>4</sup>

With the reduction in revenues as a result of the pandemic-induced economic contraction, the gap has been greatly exacerbated. Simply put, we could not even afford the government we had before COVID-19, and we definitely cannot afford to indefinitely sustain higher spending levels after the pandemic. The government will have to put the brakes on spending.

## **Ways the federal government can save taxpayers money:**

In addition to keeping temporary COVID-19 measures temporary, here's a list of other ways the government can reduce spending:

### **Reduce overall operating expenses (including employee salaries and benefits) to 2016-2017 levels**

Employee salaries and benefits are the single largest direct expenditure by the federal government, and we simply cannot afford to continue to pay as many people as much money. The pandemic has forced

many businesses to downsize their workforces and trim salaries. Government – which is ultimately paid for with revenue generation by the private sector – must follow suit. Alternatively, the government could reduce the overall number of government employees by 15 per cent, with the remaining 85 per cent of employees taking an average compensation reduction of 15 per cent. Based on an estimated 368,000 employees<sup>5</sup> at an annual cost of \$51 billion,<sup>6</sup> this would result in savings of approximately \$14.3 billion.

Many Canadians outside of government have taken a pay cut, or lost their job or their business during the COVID-19 downturn. But government employees have largely got through the downturn unscathed. In fact, the federal government has no records of its unionized employees ever receiving a pay cut, according to research from Secondstreet.org.<sup>7</sup>

Federal employee defined benefit pensions are a major cost. A top priority for the Trudeau government should be to negotiate an end to these extremely expensive pension plans and transition federal employees to more sustainable RRSP-style pension plans.

### **Cut the size of the equalization program by 25 per cent (savings: \$5 billion)**

While the structure of Canada's equalization program remains a subject of intense debate and calls for reform, drastically diminished revenues should also be reflected in the program's size and take into

account the reduced capacity of the federal government. Between 2011-12 and 2020-21, total equalization dollars transferred ballooned by more than 40 per cent, from \$14.6 billion to 20.5 billion.<sup>8</sup>

### **Index transfers to the provinces to the rate of inflation (savings: ~\$3 billion)**

In July, 2020, the federal government announced \$19 billion in one-off pandemic funding for the provinces. The two largest annual federal transfers, the Canada Health Transfer and the Canada Social Transfer, total \$66.8 billion in 2020-21. Budget 2019 projected to increase those transfers by between 2.5 and 3.7 per cent annually. Indexing future annual transfers to the rate of inflation would provide better predictability and stability without requiring Ottawa to constantly renegotiate transfer amounts.

### **Cut Canadian Heritage's budget by 50 per cent (savings: \$650 million)**

Many of the programs and activities run by this department are nice-to-haves at a time when core government programs and services need to be the priority. Canadian Heritage was also responsible for spending \$8.2 million on an outdoor ice rink on Parliament Hill.<sup>9</sup>

### **Cut Global Affairs Canada's budget by 25 per cent (savings: \$1.5 billion)**

With millions of Canadians struggling, the federal government needs to prioritize spending on Canadians. Moreover, Global Affairs Canada has an appalling track record of wasting taxpayer dollars, from spending outrageous sums on cushions<sup>10</sup> and crystal stemware,<sup>11</sup> to flying chefs around the world and subsidizing jazz tours.<sup>12</sup>

### **Eliminate corporate welfare (savings: \$3.2 billion<sup>13</sup>) and eliminate regional development (savings: \$1 billion)**

Measures to assist business during and after the pandemic need to be fair to all and harness positive incentives. Pork-barrelling and picking favourite businesses and industries to receive special taxpayer handouts has always been bad industrial policy. Business subsidies should be eliminated in exchange for broad-based tax relief.

### **Cut aggregate appropriations for Crown corporations by 25 per cent<sup>14</sup>: (savings: \$2.275 billion)**

Many Crown corporations are heavily subsidized and duplicate services provided by the private sector.

**Cut the CBC's subsidy by 50 per cent:  
(savings: \$600 million)**

Despite an extra \$150 million in annual funding since 2016, the CBC's viewership continues to fall, with one internal ratings report showing that in April, 2020, the CBC's share of Canada's TV audience was as low as 3.8 per cent<sup>15</sup> while local CBC TV newscast viewership dropped 27 per cent between 2017 and 2019.<sup>16</sup> Especially when CBC has seven vice-presidents, 10 directors general and five directors of finance, the government should be able to reduce the amount of money it sends to CBC.<sup>17</sup>

**Cut VIA Rail's budget by 50 per cent  
(savings: \$280 million)**

VIA Rail set a ridership record in 2019 and yet still lost more than \$400 million before taxpayer subsidies.<sup>18</sup>

**Cut the Canada Council for the Arts budget by 50 per cent  
(savings: \$150 million)**

The Canada Council for the Arts saw its taxpayer subsidy leap by 13 per cent between 2018 and 2019. The council spends \$19 million on administration costs.

**Cut Marine Atlantic's budget by 50 per cent  
(savings: \$60 million)**

Marine Atlantic continues to lose money while subsidizing freight rates to undercut private sector competition.<sup>19</sup>

**Abolish the National Capital Commission  
(savings: \$120 million)**

The duties performed by the NCC duplicate work that could be performed by Canadian Heritage and provincial and municipal bodies.

**Abolish Telefilm Canada (savings: \$100 million)**

Private sector investment in Canada's TV and film production are at record levels.<sup>20</sup> There is no need to spend \$100 million of taxpayer money on cultural content Canadians are not willing to pay for directly when they are spending far more voluntarily through subscription streaming services.

**Cut Member of Parliament and Senator salaries by 20 per cent (savings: \$16 million)**

Members of Parliament and Senator salaries cost taxpayers \$80 million annually. In many other countries, politicians have taken

pay cuts to show leadership and solidarity and our own politicians would do well to follow suit.<sup>21</sup> While the impact on the bottom line is small, symbolically it would be significant and provide much needed moral authority to implement necessary spending cuts elsewhere. Unfortunately, so far during the COVID-19 downturn MPs have received two pay raises ranging from \$6,900 to \$13,800.

### **Cut the Senate's operations budget by 20 per cent (savings: \$19 million)**

The unelected and unaccountable senate should limit itself to discharging its basic constitutional functions. With a current budget of \$114 million<sup>22</sup> and exempting senator salaries (which we propose to reduce by 20 per cent), a 20 per cent reduction in Senate operations would save taxpayers around \$19 million.

### **Cut the Office of the Governor General's budget by 50 per cent (savings: \$11 million)**

We can't afford to spend \$22 million annually on an office which performs ceremonial duties, and taxpayers certainly should not be spending \$140,000 to draft plans for an unbuilt staircase.<sup>23</sup>

## **Sell off federal buildings (savings: hundreds of millions)**

Before the COVID-19 pandemic, federal government employees occupied approximately 30 per cent of all office space in greater Ottawa. If a significant portion of the region's federal employees can work remotely, it does not make sense for taxpayer to pay for millions of square feet of office space.

While the federal government has racked up a tonne of red ink during the COVID-19 downturn, it is not the only government with shaky finances in Canada. Fortunately, local and provincial governments can find savings as well. Here's five concrete ways provincial and municipal governments can save taxpayers money:

1. *Politicians can lead by example and take a pay cut:* While a number of politicians in Canada have taken a pay cut during COVID-19, such as councillors in Halifax, Lethbridge and Burnaby, there are still many provincial and municipal politicians that haven't been willing to make the same financial sacrifice that they've asked their constituents to make.
2. *Government employees should take a pay cut:* According to research from Secondstreet.org, many city and provincial governments have no records of their employees ever taking a pay cut.<sup>24</sup> With labour costs making up a huge chunk of these budgets, politicians will need to take some air out of their ballooning bureaucracies to avoid tax hikes.

3. *Make government benefits fair for taxpayers:* While less than a quarter of private-sector workers are covered by a workplace pension, the vast majority of government employees will receive a defined-benefit pension when they retire.<sup>25</sup> Furthermore, some governments offer their employees second or third top up pensions.<sup>26</sup> Ending these second and third pensions should be a no-brainer for these governments. Furthermore, politicians should start moving new employees into RRSP-style pensions, similar to reforms the province of Saskatchewan initiated in the 1970s.<sup>27</sup>
  
4. *End corporate welfare:* Politicians can help with economic recovery by setting the right conditions for growth, such as low taxes and minimal red tape. But politicians should not pretend to be investment bankers with our tax dollars. In the 1990s the Alberta government introduced a law to limit corporate welfare. All governments can follow suite and prohibit their politicians from wasting taxpayers' money on business ventures.
  
5. *End the obvious waste:* There have been numerous examples of Canadian politicians claiming the cupboards are bare then spending taxpayers' money on frivolous expenses. Some examples of this problem come from Vancouver and Montreal city halls. Vancouver's city employees spent more than \$300,000 on luxury chairs and office furniture during the pandemic and Montreal city hall commissioned a \$600,000 art piece only a few weeks after claiming it was cash strapped.<sup>28</sup>

## **Taxpayer–friendly recovery**

While the government can play a role in helping the economy recovery, it should do so by supporting a competitive business environment, such as removing costly interprovincial trade barriers and red tape around resource development.

With Finance Minister Chrystia Freeland herself acknowledging that households have saved money during the pandemic, we especially don't need politicians to be throwing out more so-called stimulus spending to get the economy firing again.

The government should also look to reduce taxes. The easiest and fastest way for the government to help Canadians is by simply leaving more money in our pockets and businesses.

In August 2020, Trudeau insisted he would not raise taxes.<sup>29</sup> The reason is obvious: there would be no surer way to kill a nascent economic recovery than by crushing it with higher taxes. In spite of this, he proceeded to increase a number of taxes, including the federal carbon tax, the escalator tax on alcohol, and payroll taxes.

The first step in helping the economy recover should be reversing these tax hikes, along with scrapping the carbon tax altogether. For further relief, the government should consider the following tax relief options (the following benefits were estimated based on the data used in the Canadian Taxpayers Federation's Roadmap to Recovery published in September 2020):

**Temporarily elimination of the nine per cent small business tax rate (benefit: \$6 billion)**

Most small businesses have been through the most difficult period of their existence and it will be months, if not years, before they fully recover. The CTF proposes to temporarily eliminate the small business tax rate for all businesses in Canada under the \$500,000 annual threshold for the next two years.

**Cut the general business tax rate from 15 per cent to 10 per cent (benefit \$7.4 billion)**

Many large businesses have also been hit hard by the economic shutdown, and before the pandemic, more than 7.5 million Canadians worked for businesses with over 500 employees.<sup>30</sup> Helping those businesses become more viable will mean more jobs kept and more rehiring of those laid off. It will also provide the signal to international investors that Canada is a competitive place to invest and establish a business.

**Reduce every income tax bracket by one percentage point (benefit: \$6.7 billion)**

Millions of Canadians have taken pay cuts or lost hours. Cutting them a small break on their taxes will help make reduced incomes stretch a little further.

### **Scrap the federal carbon tax (benefit: at least \$118 million in reduced GST/HST)<sup>31</sup>**

The federal carbon tax has virtually no impact on global climate change, but serves as an unnecessary source of federal-provincial tension. The Trudeau government should scrap it and allow provinces to design climate change policies tailored to their own circumstances. Furthermore, scrapping this tax will put less jobs at risk. Trudeau's massive carbon tax hike to \$170 per tonne is expected to cost Canadians more than 180,000 jobs.

### **Scrap the beer escalator tax (benefit: \$35 million)**

Escalator taxes are a terrible precedent and let governments do an end run around transparency and parliamentary accountability. The government should scrap the alcohol tax that rises every year automatically without even requiring a vote and give consumers a break.

### **Reform the tax code to eliminate loopholes and reduce offshore tax evasion**

While largely a long-term project which will take years, the government should look to eliminate large tax loopholes that benefit special interests in exchange for broad-based tax relief that treats Canadian families and businesses fairly. Priority boutique measures to eliminate could

include the Labour Sponsored Venture Capital Corporation credit, which crowds out funding of private venture capital while giving large tax breaks to a handful of wealthy investors and costs taxpayers \$165 million annually, and the deduction of union and professional dues which costs taxpayers more than \$1 billion annually.<sup>32 33</sup> The use of offshore tax havens can also be dramatically reduced by eliminating the many loopholes that enable their exploitation through aggressive tax planning.<sup>34</sup>

## **Conclusion**

These ideas do not represent an exhaustive plan – they are important examples of the types of spending and tax decisions governments can take to get our economy back on track. But they underscore that it is possible to think boldly, question assumptions, and reimagine ambitious policy as being more than simply having government expand endlessly by spending money we do not have. The Trudeau government faces a stark choice. It can kick the can down the road and take the politically easy route of promising a chicken in every pot by paying for it with borrowed money. Or it can think outside the box, take tough but necessary steps to control spending, and empower Canadian families and businesses to lead the economic recovery by leaving more money in their pockets.

## CHAPTER 3

# Health reform

*By Krystle Wittevrongel, with the collaboration of Peter St. Onge,  
Montreal Economic Institute*

## **Introduction/synopsis**

During the COVID-19 pandemic, many Canadians have felt disappointed by a health care system that perennially underperforms despite decades of generous budgets. This chapter illustrates how Canadian health care was falling short even prior to the pandemic. We then address pressures the system faces due to COVID-19, compounded by ongoing cost drivers such as Canada's rapidly aging population. We end by proposing several reforms that could dramatically improve the care Canadians receive.

## **Responsibility for health care in Canada**

Health care in Canada is a universal, taxpayer-funded system, with each province and territory responsible for its provision, operation, and management. Structured almost entirely by provincial legislation, Canada's health care system is thus actually an assortment of provincial and territorial insurance plans reinforced by the *Canada Health*

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*Act* (CHA). The federal government's responsibility, therefore, lies exclusively in its role governing provincial access to federal money by defining the criteria that provinces and territories must adhere to in order to qualify for Canada Health Transfer funds.<sup>1</sup>

## **Pre-COVID underperformance**

Canadian health care is based on the core principle of accessibility and access according to need rather than ability to pay. The structural features of this system result in increased demand, resource shortages, and increased health system costs that are managed through rationing. With global budgets dictating hospital financing and expenditure caps to contain health care spending, rationing in Canada takes the form of wait lists to allocate care. As a result, despite having one of the most expensive universal health systems in the OECD, timeliness of care in Canada is among the worst among universal health care systems in high-income countries.<sup>2 3</sup>

Consequently, Canadians are plagued by long wait times that continue to grow. The median wait time for medically necessary surgery in 2019 was 20.9 weeks from referral to treatment, which does not include the time it takes to see the referring physician in the first place.<sup>4</sup> It does include 10.1 weeks between referral from a general practitioner and getting a consultation with a specialist (over 2.5 times longer than in 1993), and another 10.8 weeks between seeing the specialist and receiving the actual treatment.<sup>5</sup>

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In addition to long wait times, non-price rationing takes the form of underinvestment in equipment and a reduced incentive for health care innovation. As a result, despite spending substantially more than other universal systems, hospitals and clinics across the country have been perpetually packed to or beyond capacity for decades, with third-world levels of key medical equipment such as MRI machines, and with some of the lowest rates of hospital beds and medical staff per capita of any industrialized country.<sup>6</sup>

A CBC News analysis of 169 Ontario hospitals published just before the first COVID-19 case was reported in Canada illustrates the matter. It found that in the preceding six months, nearly half of the hospitals (83) were beyond full capacity for more than 30 days, while nearly a quarter (39) had hit 120% capacity or higher for at least one day, and about the same number (40) actually averaged 100% capacity or higher.<sup>7</sup>

According to the Canadian Association of Emergency Physicians (CAEP), “The COVID-19 pandemic has rightly called into question the ability of Canadian emergency departments—and the healthcare system as a whole—to handle any potential large surge of patients presenting to our doors.” The CAEP specifically criticized the lack of a “buffer” due to existing overcrowding, and pleaded that, post-crisis, we do not go back to being complacent about capacity. The CAEP report notes that these problems long predated the pandemic; the occupancy rate of a hospital, according to mathematical models and the CAEP, should be 85%, yet in Canadian hospitals even pre-COVID, it habitually exceeded 100%.<sup>8</sup>

Beyond unresponsive and politically-determined global budgeting, restrictions and over-regulation exacerbate these inefficiencies and shortages. Restrictive licensing of health professionals, rigid regulations limiting what nurses or pharmacists are allowed to do, and the near-prohibition of private care all conspire to prevent effective allocation of the many resources that taxpayers have paid for, yet remain underused while patients languish. All of these factors have long starved the system of baseline capacity to treat Canadians promptly in normal times; in response to COVID-19, they have yielded catastrophic results by hobbling the system's ability to quickly expand capacity.

## **History is the greatest teacher, unless it's ignored**

In 2009, the world faced the H1N1 pandemic. Like COVID-19, H1N1 ('Swine Flu') brought with it the very real potential for exceeding the capacity of Canadian emergency department and intensive care units.<sup>9</sup> Lessons from this episode could have borne fruit in Canada during COVID-19, notably the need for increased surge capacity.

Surge capacity refers to the ability of a health care system to rapidly increase staff, space, and medical resources to respond to temporary needs. Every country has some degree of surge capacity, often optimized for natural disasters or terror incidents. But Canada's ability to surge during this pandemic has been very mediocre, implying that the lessons from H1N1 in this context do not appear to have been learned.<sup>10</sup>

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An April 2020 paper by a group of academic and government-affiliated researchers predicted that Canada would run out of ICU capacity in a matter of weeks. At peak crisis, and even with the most stringent distancing in their model, their projections meant that the four largest provinces would need to increase existing ICU beds by between 62% and 154%, which translated to a needed surge capacity of between 310% and 746% of the stock of vacant ICU beds at that time.<sup>11</sup>

While other countries were able to double or triple capacity during COVID-19, these projections were enough to send the Canadian system, effectively, into panic.<sup>12</sup> Over 350,000 surgeries and procedures were postponed across the country between February and June 2020, while frail and vulnerable seniors were transferred en masse from hospitals to unprepared and understaffed senior centres, where the pandemic spread like wildfire.<sup>13 14</sup> The consequences, in terms of delayed treatment and worsening health conditions, are expected to result in considerable pressures on Canadian health care for years to come.

## **New pressures/costs**

### **Direct costs**

The direct costs associated with COVID-19 include the treatment of afflicted individuals, testing and contact tracing capacity, personal protective equipment (PPE), medical supplies, and pharmaceuticals, among other costs.<sup>15</sup>

A September 2020 Conference Board of Canada publication posits health care cost estimates directly tied to COVID-19 over three years (2020 to 2022) in three potential scenarios. The first scenario is an optimistic trajectory, whereby periodic outbreaks are well contained and a vaccine becomes available in 2021. The second, more pessimistic trajectory sees outbreaks escalate to the point where the disease is on the verge of not being contained, although a vaccine still becomes available. The third scenario, now obsolete, assumed there would be no vaccine, so we will only describe the first two scenarios, listed in Table 1.

### **Table 1:**

#### **New health care costs related to COVID-19, scenario 1 and scenario 2 (thousands of dollars)**

	<b>SCENARIO 1</b>	<b>SCENARIO 2</b>
2020	17,779,983	23,592,186
2021	12,503,119	17,660,446
2022	3,102,561	3,102,561
<b>TOTAL</b>	<b>33,385,663</b>	<b>44,355,193</b>

Source: The Conference Board of Canada, *Health Care Cost Drivers in Canada: Pre- and Post-COVID-19*, September 2020, p. 16.

Additional costs associated with the vaccination of individuals are listed in Table 2.

**Table 2:**

**Crude vaccine costs, scenario 1 and scenario 2 (thousands of dollars)**

	<b>2020</b>	<b>2021</b>	<b>2022</b>
<b>Vaccine cost (C\$22.50 per dose)</b>	0	855,000	1,752,750
<b>Vaccine dispensing and administering (C\$22.50 per patient)</b>	0	855,000	1,752,750
<b>Total costs of COVID-19 vaccine</b>	0	1,710,000	3,505,500

Source: The Conference Board of Canada, *Health Care Cost Drivers in Canada: Pre- and Post-COVID-19*, September 2020, p. 17.

In either of these two scenarios, the expected costs projected to be spent by governments on initiatives to directly combat the impact of COVID-19 are significant, some \$39 billion and \$50 billion over the three-year period, respectively.

## Indirect costs

Beyond these costs directly linked to COVID-19, there are a number of long-term indirect costs expected by provinces and territories related to the pandemic, including costs associated with new and exacerbated health problems (including mental health problems), the backlog of cancelled or postponed surgeries,<sup>17</sup> rising technological costs connected to digital technologies and telemedicine, and behavioural changes related to the COVID-19 pandemic.

While costs for exacerbated health problems are difficult to nail down, the expected long-term consequences resulting from lung, cardiac, renal, and neurologic COVID-19 complications are estimated to be in the range of \$160 million to nearly \$240 million dollars, depending on the scenario (see Table 3).

**Table 3:**

### Estimated costs of lung, cardiac, renal, and neurologic COVID-19 complications, (millions of dollars)

	<b>Total 2020-2022</b>
<b>Scenario 1</b>	160.2
<b>Scenario 2</b>	239.6

Source: Author's Calculations.; The Conference Board of Canada, *Health Care Cost Drivers in Canada: Pre- and Post-COVID-19*, September 2020, pp. 19-23.

This is likely an enormous undercount, going by recent studies. For example, one recent British study estimated a 20% rise in cancer deaths from delayed treatment due to COVID-19 capacity constraints.<sup>18</sup> Given that Canadians suffer approximately 85,000 cancer deaths per year, this would equate to nearly 17,000 additional cancer deaths in Canada.<sup>19</sup> That is just one condition; many other chronic conditions also require timely treatment and intervention, from heart conditions to diabetes, Alzheimer’s disease, and stroke, so we might expect that death toll to increase considerably.

Furthermore, baseline hospital capacity in the UK is substantially higher than in Canada, averaging 50% more hospital discharges per capita.<sup>20</sup> This means that the number of such delay-related deaths may actually be substantially higher in Canada. Table 4 provides an estimate of the increased costs resulting from postponed surgeries across Canada.

**Table 4:**  
**Estimated costs of lung, cardiac, renal, and neurologic COVID-19 complications, (millions of dollars)**

	<b>Total 2020-2022</b>
<b>Scenario 1</b>	3,945
<b>Scenario 2</b>	6,047

Source: Author’s Calculations.; The Conference Board of Canada, *Health Care Cost Drivers in Canada: Pre- and Post-COVID-19*, September 2020, p. 26.

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Long-term projections that take COVID-19 costs into consideration estimate that provincial and territorial health care costs will increase by at least 5% per year.<sup>21</sup> However, in addition to expected cost pressures related to COVID-19, there are a number of traditional cost drivers that may exert greater pressure on health expenditures, including inflation, population aging, population growth, and policy decisions aimed at increasing access and improving health outcomes.<sup>22</sup> This is why the provincial and territorial Premiers across Canada called on the federal government to increase the Canada Health Transfer, to ensure citizens would have the access to health care they need, without taking resources away from other key areas of provincial jurisdiction.<sup>23</sup>

## **Throwing more money at the problem**

A commonly proposed solution is more money, with critics accusing politicians of proffering “austerity” budgets.<sup>24</sup> The truth is that our provincial health care systems have achieved mediocre results despite consistently high health spending over the years, which as a share of Canada’s GDP has been trending sharply upward: The CIHI estimated 2019 health care spending at 11.5% of Canada’s GDP, up from around 9% in the early 2000s, and just 7% in the 1970s.<sup>25</sup> This spending had grown to account for fully 37% of provincial budgets in 2017—up from approximately 33% in 1993—and has been projected to climb as high as 42% by 2030.<sup>26</sup>

Far from austerity, the Canadian health care system is today among the most expensive universal systems on earth, spending nearly 30%

more than the OECD average.<sup>27</sup> Prior to the pandemic, Canadian health care cost more as a share of gross domestic product (GDP) than many other high-performing OECD countries. In fact, according to the OECD (whose numbers differ slightly from CIHI numbers), in 2019, Canada's health expenditures represented 10.8% of its GDP, compared to the OECD average of 8.8%.<sup>28</sup>

These figures suggest that spending is not the issue. Throwing more money at the problem has not worked in the past. It is high time to introduce structural reforms aimed at enhancing the efficiency and sustainability of our health care systems across Canada.

## **Reform is needed**

As noted above, health care is a provincial jurisdiction, which makes reform a provincial matter. A number of reform options are available to not only insulate Canada from the impacts of future crises, but also get more bang for the taxpayer's buck year in and year out. These options include the use of activity-based funding so that budgets follow the patient, liberalizing the use of existing resources including nurses and pharmacists, and bringing new resources into play by allowing entrepreneurs to lend a hand.

### **Activity-based funding**

Global budget hospital financing and expenditure caps made it much harder to quickly expand capacity during the early days of COVID-19,

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both because Canada's baseline capacity was lower, and because instead of funds being tied to the treatment of patients, they are determined by historical budgets and politics.<sup>29</sup> Under a system of global budgets, a hospital or organization gets a set amount of money, typically a yearly budget, setting up a temptation to control health care costs by simply cutting budgets. Unfortunately, if the number of patients goes up, or if the mix of treatments costs more due to Canada's aging population, funds prove insufficient. In practice, the easiest solution is to use waiting lists to limit patient numbers, while also using older equipment or outdated drugs to save more money, potentially putting patients' lives at risk.<sup>30</sup> This means that even though Canadian doctors, nurses, administrators, and other staff seek to do their best for patients, the incentives built into global budgeting punish such patient-centred care.

In contrast, activity-based funding matches funds to patients' needs. If a hospital has "too many" patients, it automatically gets the funding to treat those patients. And if it has "too few" patients, either due to outside factors or because service is poor or waiting times too long, it automatically gets a lower budget. This incentivizes hospitals to do what they're supposed to do: treat as many patients as they can, at a level of quality that makes them happy. Patients become valued clients rather than costs to be cut.

Most high performing universal health care systems use some sort of activity-based funding to remunerate hospitals, and empirical studies have demonstrated that this reduces waiting lists, increases quality of hospital care, and enhances the transparency and efficiency of hospital activity in an effort to attract patients.<sup>31</sup>

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## **Expanding the use of existing resources**

### Nurses and pharmacists

In Canada, both nurses and pharmacists are highly trained and increasingly qualified, with medical training that can approach that of doctors in certain regards. In some countries, both nurses and pharmacists already diagnose, prescribe for, and even treat a majority of patient ailments.<sup>32</sup>

While Quebec has expanded the scope of work for “super nurses” (specialized nurse practitioners),<sup>33</sup> there remains room to quickly expand the range of diagnoses and treatments that can be performed both by nurse practitioners and, depending on the complexity of the task, by other categories of nurses. Studies have shown that nurses are well-qualified to take on many more tasks that currently occupy doctors.<sup>34</sup>

A second category of underused medical professionals in Canada is pharmacists, who number over 45,000 across the country.<sup>35</sup> Pharmacists have medical training approaching that of doctors when it comes to diagnosing and prescribing for routine conditions.

Making full use of existing resources by expanding the scope of practice of nurse practitioners and pharmacists could also lead to substantial savings. After all, they cost far less than doctors. They are also easier to access nights and weekends, and are fully trained for many of the simpler conditions that occupy doctors who are desperately needed elsewhere.

## Telemedicine

Beyond scope of work, a second area that can be quickly disentangled from irrational regulation is telemedicine, which is the provision of medical services over the internet or by phone. Telemedicine is popular for its convenience, with over three-quarters of patients supporting virtual care in a Canadian Medical Association (CMA) poll.<sup>36</sup> Unfortunately, the CMA itself has demanded detailed oversight that had effectively strangled the adoption of telemedicine in Canada even as proponents have argued for years that it could lower costs and make better use of Canada's doctors.<sup>37 38</sup> During the COVID-19 pandemic, however, because of the communicable nature of the disease, provinces relaxed restrictions on telemedicine on an emergency basis.

The pandemic has highlighted two important benefits of telemedicine. First, it allows more intensive use of specialists; general practitioners, and even nurse practitioners, can be assigned the simplest and most common cases, while specialists can spend their time dealing with patients whose conditions match their expertise, wherever they may be located.<sup>39</sup> This is particularly important in remote areas, where patients may otherwise have to travel long distances to see a specialist, which can deter them from seeking treatment or even be impossible if their condition has deteriorated. Second, and specific to COVID-19, telemedicine allows staff to diagnose and to some extent treat many patients without themselves being exposed to contagion.

According to the CMA poll,<sup>40</sup> since the start of the pandemic, telemedicine services have become much more common, and the

level of satisfaction is high. Moreover, virtual consultations produce higher satisfaction among health care users than an ER visit since the start of the COVID-19 crisis. In Quebec, 52% of respondents would prefer to use telemedicine as the first way of communicating with a doctor.<sup>41</sup> If half of Quebecers were to adopt this technology, the savings would be huge.

Although adopted as emergency measures, the current liberalization of telemedicine by the provinces should be maintained after COVID-19 so that Canadians can continue to have improved access to general practitioners and specialists without having to languish on waiting lists. So far, a number of provinces have discussed making telemedicine permanent, and Alberta has committed to doing so.<sup>42</sup>

### Bring in the entrepreneurs

Finally, allowing private entrepreneurs to provide health care services covered by the universal system would increase the system's capacity almost overnight. This would naturally be on terms that are acceptable to the Canadian public, meaning private sector provision with strict quality and pricing standards, combined with universal coverage of medically necessary care. This model of entrepreneurial care by the private sector is already the standard in universal systems such as Sweden, Germany, France, and the UK.<sup>43</sup>

To a far greater degree than other universal health care systems, Canada erects barriers to the contribution of entrepreneurs and

innovative providers. Even in normal times, monopolistic government regulations reduce competition and starve patients of the additional capacity that investors and doctors are eager to provide. In contrast, European systems such as France's have been ahead of the game for nearly two decades. Since the mid-2000s, the French health system has included over one thousand private clinics offering treatment as a complement to the public system.<sup>44</sup>

In Germany, coverage is universal, with income-based contributions and private clinics.<sup>45</sup> Patients have freedom of choice, doctors can practise in both public and private sectors, and patients can buy supplemental private insurance to cover optional procedures. Waiting times are practically non-existent—it takes a median of four days to see a doctor, and once at the doctor's office, the wait time is just 33 minutes.<sup>46</sup>

In the United Kingdom's universal, tax-financed system, doctors can work in both public and private sectors, and there is competition between private and public providers. General practitioners in the UK must offer a choice of four providers when referring patients, with patients free to choose among private and public providers, which forces those providers to compete on features like shorter waiting times.<sup>47</sup> And when the UK introduced activity-based funding in 2003, waiting times for surgeries dropped by two-thirds, which suggests that a system that allows private sector provision paired with activity-based funding can substantially improve baseline capacity.<sup>48</sup>

## **Conclusion**

For decades, Canada's monopolistic and over-regulated health care system has done a poor job of providing timely care and maintaining sufficient capacity, despite its high costs. COVID-19 has brought that failure into stark relief, with tragic consequences. If there is a silver lining to the crisis, we hope it might lead to permanent liberalization and reform of our health care system so that it can respond, not only to future crises, but to Canadians' day-to-day needs, and provide them with the responsive, humane, and attentive care that they deserve.

CHAPTER 4

# Economic growth through less government

*By: Colin Craig, President – SecondStreet.org*

When politicians don't know what to do about a problem, they often reach for your wallet and announce funding for a new government program.

This approach works well for elected officials, since they know their announcement will likely receive significant media coverage and may even bring them a few votes. Best of all, this approach is easy, and it rarely draws significant scrutiny.

Politicians across the country are preparing to deploy this tactic once again in an effort to tackle Canada's current economic woes.

Several politicians have already committed to billions in "stimulus" spending to "help" our nation's economy recover from COVID-19. For instance, Canada's federal government has already committed \$100 billion in stimulus spending.<sup>1</sup>

For perspective, each Canadian's share of that bill works out to more than \$2,600. If you're married with a couple of children, your household's share of that bill will surpass \$10,000 ... plus interest.

But what if there was a better way to stimulate the economy – one that didn't involve your wallet?

What if the solution wasn't *more* government but *less*?

Research suggests there are countless ways governments could stimulate our economy simply by getting out of the way – thereby making it easier for entrepreneurs to get their projects off the ground or to engage in additional commercial activities. The potential is staggering.

This chapter explores four major examples of these suggestions. The best thing about them is that none of them require the use of taxpayers' money.

The public also doesn't have to worry about their hard earned dollars being poorly spent or given out to well-connected friends of politicians in power.

## **1. Cutting red tape**

Weeks before COVID-19 took off in Canada, Tony Siwicki knew something was up.

Tony's family has operated the successful Silver Heights Restaurant and Lounge in Winnipeg since the 1950s. He has been involved in the family business for years and has his finger on the pulse of what is going on in his community. Towards the end of February 2020, Tony started to receive calls from customers cancelling their dine-in reservations and their catering orders for March. His customers were growing concerned with COVID-19 even though the pandemic hadn't yet taken hold in Canada.

Tony told SecondStreet.org:

*“By the second week of March, all of our reservations were cancelled. It was just more people phoning and saying ‘we can’t come out, we can’t come out. It’s not about your restaurant, we just can’t take the chance.’ We lost 900 people in caterings in three to four weeks.”*

Government lockdown measures added to Tony's problem and the challenges faced by thousands of other businesses in Canada. For countless businesses, lockdown measures sealed their fate, and they simply went bankrupt.

The merits of lockdowns will be debated for years to come, but there was something the government did that clearly helped businesses like Tony's ... and it didn't cost taxpayers a cent. The government simply allowed Tony's restaurant to start selling alcohol with delivery and takeout orders.

*“It was a nice feeling that the city and the province were actually helping restaurants that are suffering to make a little bit more money. It worked out good. We’re selling wine and beer and coolers with pretty much 10% of our orders. That little bit of money paid for employees. It paid for lights, gas, the vendors that we owed money to. It’s \$100 here, \$200 there. The red tape was cut, just for this little bit of time, at the perfect time.”*

The archaic law preventing alcohol sales with takeout and delivery orders was not only suspended in Manitoba, but it was also put on ice nation-wide. And lo and behold, the sky didn’t fall.

In Prince Edward Island, pub owner Brett Hogan told SecondStreet.org that being allowed to sell alcohol with takeout and delivery orders meant he had enough revenue to hire back a worker.<sup>2</sup> In Toronto, the owner of the Comrade restaurant told CTV News, “this will be a new... revenue stream. Moving forward it will have to be part of the new hybrid of the business model.”<sup>3</sup>

By simply cutting red tape and getting out of the way, governments across Canada helped thousands of businesses stay afloat and keep people employed.

But this wasn’t the only move made to help businesses and consumers during the lockdown. There were numerous other examples of governments cutting red tape across the country.

For example, many cities in Canada allowed restaurants and pubs to expand their patios – a move that helped offset revenue losses

from limits imposed on indoor capacity. In Ontario, the government suspended an old regulation that required cider distilleries to grow five acres of apples on site if they wanted to sell their products directly to customers.<sup>4</sup> (Just imagine if Dairy Queen was required to have a barn full of dairy cows at the back of each location!)

At the federal level, the government made the approval process much easier for alcohol distilleries to begin producing hand sanitizer. Not only did this give those businesses an additional revenue stream, but it also helped increase supplies of hand sanitizer in Canada and ease the shortage during the early days of COVID-19.

Cutting red tape helps businesses, but many of the changes were also popular with the public. SecondStreet.org hired Leger to poll the public in May 2020 on ten examples of red tape reductions after COVID emerged. Our study found a majority of Canadians supported each of the ten cuts to red tape.<sup>5</sup> Fortunately for consumers and businesses, governments have announced that many of these “temporary” cuts to red tape are now permanent cuts to red tape.

Make no mistake – problems with red tape in Canada go far beyond rules for alcohol sales and patio sizes.

The Canadian Federation of Independent Business (CFIB), an advocacy group that represents more than 95,000 small businesses across Canada, has studied government regulations for decades. In fact, each year the CFIB hands out a tongue-in-cheek Paper Weight Award for some of the nation’s most frivolous regulations that businesses have to endure.

To be clear, the CFIB is not opposed to having sensible regulations in place. It's the nonsensical and obstructive rules they oppose. According to CFIB research, compliance with government regulations cost businesses \$38.8 billion in 2020, with unnecessary red tape accounting for \$10.8 billion of the total.<sup>6</sup>

Identifying and eliminating red tape in Canada could therefore unleash billions of dollars in economic activity, and *without* requiring any tax dollars.

In the past, governments have struck red tape review committees to identify and eliminate unnecessary red tape. While such exercises can produce some promising results, too often these committees are temporary and disband once their reports have been released, allowing for red tape to grow once again.

For example, the City of Winnipeg established a red tape review commission in 2004, and committee members issued their report in 2005.<sup>7</sup> However, the city's next formal red tape review process didn't occur until 2019.

An alternative approach would be for governments to establish permanent committee structures that regularly review – and act on – red tape concerns that are raised by the public. This Kaizen-like dedication to constant improvement could help ensure government regulations keep up-to-date with technological advancements, societal change and the speed of business.

## **2. Eliminating interprovincial trade barriers**

While running a local business can be frustrating when it comes to red tape, entrepreneurs who operate in multiple provinces experience government-induced headaches on a completely different level.

In fact, it's far too often easier for Canadian businesses to engage in commerce south of the border than it is for them to do business with other firms in Canada.

Consider how Garrison Brewing, a Nova Scotia brewery, is affected by interprovincial trade barriers.

According to a 2016 Senate report, the brewery wanted to expand into the Newfoundland and Labrador market. However, as Newfoundland and Labrador had a different standard for bottles, it would mean the brewery would have to establish a separate production system – with smaller bottles – just for that one province. Instead of making such an investment, Garrison Brewing ultimately decided to focus on exporting its product to the United States.

The Senate report details all kinds of other regulatory barriers in Canada that make it difficult for Canadian businesses to operate in multiple provinces. In fact, the report even includes a *“Top 10 Weirdest Barriers to Trade”* list as an addendum. The list describes how truckers have to stop and change their tires at the border of some

provinces where the jurisdiction doesn't allow their "high-tech fuel-efficient tires." Another entry describes how provincial, territorial and federal standards for maple syrup grades all differ from one another. A more common problem that made their list is the fact that businesses often have to register in every province or territory in which they do business.

According to the report, interprovincial trade barriers cost our economy upwards of \$130 billion each year.

As noted earlier, the federal government is planning on spending \$100 billion to stimulate our economy. If it merely facilitated the tearing down of trade barriers within Canada, and if provincial governments made this issue a priority, governments could achieve even greater economic stimulus without costing taxpayers a cent.

The Senate report describes several measures to address internal barriers. One is a tool called "mutual recognition," something that is in place in the European Union:

*"Mutual recognition – whereby a person, good, service or investment that conforms with a standard or standards-related measure in one province/territory is deemed to be conforming with that in another province/territory without the need for modification, testing, certification, re-naming or undergoing any additional assessment procedure..."*

### **3. Stalled natural resource projects**

Every year, more and more cell phones, bicycles, homes and other products are produced for consumers around the globe.

These products are of course made with metals, minerals, wood, oil and gas. While demand for these resources continues to rise, government bodies in Canada continue to obstruct and reject major natural resource projects that could supply those materials:

\$1.5 billion Ajax Copper Mine in B.C. – Cancelled<sup>8</sup>

\$20 billion Teck Frontier Oilsands mine in Alberta – Cancelled<sup>9</sup>

\$4.4 billion Black Thor Chromite mine in Ontario – Cancelled<sup>10</sup>

\$340 million Matoush Uranium mine in Quebec – Cancelled<sup>11 12</sup>

\$15 billion Energy East Pipeline from Alberta to New Brunswick – Cancelled<sup>13</sup>

The list goes on and on. Canada has become a nation of “no.”

Investors of large natural resource projects know that it’s far easier to develop resources in other countries. Why spend millions of dollars and several years trying to get a large project off the ground in Canada when the government might shrug its shoulders and reject it?

While environmental extremists often celebrate the cancellation of natural resource projects in Canada, in many cases these cancellations have simply led to job losses without any environmental benefit. In some cases, they may have even caused more harm for the environment.

Consider that in 2018, the Globe and Mail ran a story about half a dozen oil and gas companies in Alberta moving their drilling rigs down to Texas. Citadel Drilling cited many government policies, including carbon taxes, as contributing factors to their decisions.<sup>14</sup>

In this case, there were no environmental gains. The rigs will still produce oil and release emissions – they’ll just do it in Texas now. Plus, they’ll now pay taxes in the U.S. and employ American workers. All Canada achieved was a loss of jobs and economic activity.

But it’s not just Americans that are cashing in on stalled natural resource projects in Canada.

In February 2020, mining giant Teck Resources announced they had pulled the plug on their \$20 billion oil sands project in Alberta. Environmentalists had dogged the proposed project, and Canada’s federal government was anything but supportive.

Yet later that year, Russia announced that a new oil project in the Arctic was moving forward with operations – a project roughly seven times larger than the cancelled Alberta project.<sup>15</sup> Environmentalists might want to reflect on how Russian environmental policies compare with Canada’s stringent regime.

The cancelled \$36 billion Petronas liquid natural project from British Columbia is also worth noting.<sup>16</sup> The project would have exported natural gas to southeast Asia, helping to displace coal-powered

electricity and at the same time reducing both CO<sub>2</sub> emissions and smog. Rather than championing projects such as Petronas, environmental extremists have consistently opposed natural gas exports in British Columbia.

These anecdotes are troubling enough, but they still don't tell the whole story. In 2020, SecondStreet.org made a list of major natural resource projects in Canada that had been stalled or delayed by government policies between 2014-2020.

The total loss of potential investment due to government roadblocks came to an astounding \$215 billion. Even so, the list is incomplete, as many investors don't put out press releases when they decide to abandon projects they're considering in Canada.

For perspective, politicians often crow about "all the jobs" that are created when a professional sports arena or stadium is built. Consider, the new arena the Calgary Flames are planning on constructing (in part with funds from city hall) comes with a price tag of about \$550 million.<sup>17</sup>

Thus, the obstructed natural resource projects in Canada between 2014-2020 works out to the equivalent of building an NHL-sized arena every day for a year.

Think about all the jobs and other benefits Canada has missed out on. And of course, each of these projects would pay large sums in taxes and royalty payments to governments – funds that could be used to

pay for social services, reduce debt and allow for more tax relief.

Now ask yourself, what has been the gain?

If governments worked to create a more investor-friendly regulatory environment, some of these projects could potentially be resurrected.

This is yet another example of how billions of dollars of economic activity could be unleashed without spending a cent of taxpayers' money.

## **4. Stalled local projects**

In 2019, several Winnipeg businesses became so fed up with chronic problems with the City of Winnipeg's building permits department that they hired a private investigator.

They wanted to know why their building permits were taking so long to process. What were staff doing all day?

What they learned was shocking.

Private investigators documented how many city staff had been running personal errands on the clock – going to Costco, cutting their grass and even going to their personal gyms. On one occasion, investigators documented how an employee took a two-hour lunch at Costco and then headed to Starbucks for an hour coffee.<sup>18</sup> The

investigation was scathing – especially as it wasn’t just an incident here or there. Employees were routinely wasting countless hours on personal activities routinely.

The City of Winnipeg subsequently accepted the evidence from the private investigation and later fired eight staff and suspended seven others.<sup>19</sup>

While the city did not release figures on the economic costs of their delinquent employees’ behaviour, one should note that it’s not just the business owners and contractors who are affected. Delayed construction permits also affect suppliers, the lunch spots employees visit on their breaks, the stores they shop at and more.

It is vitally important for governments to approve projects in a timely fashion. Too often in Canada, we seem to be missing the mark.

In 2018, the Residential Construction Association of Ontario (RESCON) released a report that examines how construction projects could proceed more smoothly in the province. Littered throughout the report is a startling statistic:

*“The World Bank currently ranks Toronto (representing Canada) at 54th among 190 countries regarding development approval efficiency for routine building projects. Approval of innovative building projects is often slower than in many other jurisdictions.”<sup>20</sup>*

To be clear, there’s no indication that Ontario municipalities have

the same problem that Winnipeg had with widespread “slacking” employees, but the RESCON report shows there’s plenty of room for improvement when it comes to moving projects forward in Canada’s largest province.

Again, instead of “stimulus” spending, governments could focus on how to improve existing processes so that construction projects move forward in a more expedient manner. This could help with constructing everything from a detached single-family home or an apartment building to an office tower or a local retail outlet.

## **Conclusion**

As this chapter demonstrates, there are numerous ways that governments could stimulate our economy without spending taxpayers’ money.

All we need is for governments to make implementing the policy options a priority.

Best of all, if they do act on the ideas we’ve documented, the changes will deliver ongoing benefits to businesses and consumers, unlike one-off grants from the government which often fizzle out after they have made their way into the hands of the well-connected.

CHAPTER 5

# We need to determine what governments did right, wrong

*By: Anthony Furey, Toronto Sun Columnist*

Over a year ago a mysterious virus first hit Canada and public health officials appeared at a complete loss for what to do.

The initial go-to line was to insist that the nation had learned its lessons from the SARS outbreak from over 15 years before, and that therefore whatever it was that was coming would be mild and handled well if and when it finally landed in Canada.

Then, when the situation that started in China moved on to Italy, France and other nations and started looking grim, Canadian officials acknowledged things might get tough here but began flip-flopping on what exactly to do.

They said border closures didn't work — with some commentators calling them unconstitutional and racist. And then they suddenly changed their minds and the borders were abruptly closed.

They did the same with masks. Canadians were told they were ineffective, or might even make things worse. Then, for a few months, they were merely recommended as an added layer of protection. Then by around July, masks became mandatory and people were even physically removed from stores by police for not wearing them. As early 2021 rolled around, the shift on masks had become so severe that people even started wearing multiple masks at the same time — even outdoors. Public health officials encouraged these seemingly symbolic gestures.

But after issuing inconsistent recommendations on borders, masks and more for a couple of weeks, they finally settled on a plan in the middle of 2020: Lockdowns. Officials all lined up behind the opinion that quarantining entire populations of healthy people for prolonged periods of time was the most viable solution to the problem. Many even passionately argued it was the only possible solution.

Who can blame them though? It's not like they'd ever faced anything like this before. It's not like they had a plan for how to deal with such an event. Right? Or did they? Canadians might be surprised to learn this, but governments did have a plan to deal with a pandemic. In fact, they had many plans. A federal plan. One in every province. And many put together by local public health units across the country.

These weren't plans that were done as make-work projects by junior staff members years ago and then were forgotten to sit around and collect dust. They were a huge undertaking.

The preface from the current federal plans explains, in this mouthful of a paragraph, that it “was first published in 2004. In 2006, the Pan-Canadian Public Health Network (PHN) Council approved an updated version of Canadian Pandemic Influenza Preparedness (CPIP) as an evergreen document to be updated as required. In 2009, Canada’s pandemic preparedness efforts were tested for the first time, with the emergence of the H1N1 influenza pandemic. In 2012, a CPIP renewal process was initiated by the PHN Council. This latest version of CPIP was approved by Federal/Provincial/Territorial Deputy Ministers of Health in 2014, with further updates in 2018. It incorporates evidence from H1N1 lessons learned reviews conducted at the F/P/T and international levels and by various stakeholder groups, and scientific advances. As an evergreen document, the CPIP main body and each annex will be reviewed every 5 years, with updates made between review cycles, if necessary.”<sup>1</sup>

What this lengthy jumble of bureaucratic jargon shows is that a lot of people from different areas of the government put a lot of time into continually revising and reflecting on Canada’s pandemic preparedness plans.

Yet, we now find those very same officials complicit in a response that is entirely different — in some ways opposite — from the one these documents advocate. What exactly do these plans recommend? Why did they abandon the plans? And, most importantly, where do we go from here?

The simplest way to compare Canada’s plans to what actually happened

is as follows: the plans anticipate a scenario worse than what Canada has experienced, but recommends measures less severe than the ones that were rolled out.

The 2018 report describes the worst case scenario as follows: “this scenario involves an influenza virus with high transmissibility and high virulence, and its anticipated impact is much worse than that of seasonal influenza outbreaks. It would cause severe stress on health care services, and high absenteeism would put all sectors and services under extreme pressure.”

It also anticipates how “mass fatalities may overwhelm death care services (e.g. funeral homes, mortuaries)”.

This scenario involves a population clinical attack rate — the percentage of people across the country who contract the virus — to be 25% - 45% throughout the course of the pandemic. That’s a massive infection rate.

However, 14 months into the pandemic, the percentage of Canadians who contracted the virus sat at about 3%. In other words, the plan was to manage a situation that was tenfold in volume than the one that came to pass.

What does it mean to put all sectors under extreme pressure? It doesn’t mean that they need to be shut down, that’s for sure. The report goes on to flag how “workplace absenteeism may be higher than the estimated clinical attack rate because of caregiving or concern about

personal safety in the workplace in addition to worker illness.” This is an acknowledgement that some persons may not wish to attend work, but not a sign that the government should criminalize the regular in-person functioning of the workplace.

One aspect of the plans that must be addressed is the use of the phrase influenza. Are these plans irrelevant because the current pandemic relates to a coronavirus as opposed to an influenza? That does not appear to be the case. All of the characteristics of how the report describes the virus are near identical to what has happened with COVID-19.

For instance, it explains how “persons at high risk for complications from seasonal influenza are expected to also be at increased risk of severe disease and complications from pandemic influenza infection”. According to a Statistics Canada report that analyzed COVID-19 deaths, this is also an accurate description of the current situation. It appears that the only reason there is no report discussing the eventuality of a coronavirus pandemic is because it was not anticipated to be the same as an influenza pandemic.<sup>2</sup>

Perhaps the most interesting part in studying these documents is there is no mention at all of any sort of lockdown. Instead, they discuss how “social distancing measures or strategies may be used to minimize close contact among persons in public places, e.g., pro-active school closures; cancellation or modification of public gatherings; and alternative workplace approaches, such as teleconferences and working from home.”

It should be noted that the only reason school closures are discussed is because they anticipate children will suffer significant mortality, which has not been the case with COVID-19.

Another striking thing about the federal plan is that while it clearly focuses on minimizing illness and death it's also concerned with broader societal problems, whether it's keeping all sectors of society smoothly functioning or the "psychosocial distress" that they anticipate people will experience. There has been none of that concern from Canadian officials during COVID-19.

All of the above is not unique to the federal report either — near identical notes are sounded in the various provincial, regional and municipal plans that can readily be found online.

To read these reports is a refreshing experience in that it confirms for those who feel that repeated blunt lockdowns are not the wisest path forward are correct but it's also maddening to know that a better way could have been pursued and was not.

It's difficult to get at why officials deviated from the better way outlined in the plans. Because it's not like we were always headed on autopilot towards lockdowns. YYes, Canada abruptly shut everything down in March 2020, however a report a month later from Dr. Tam shows that the Public Health Agency of Canada (PHAC) clearly did not consider lockdowns a long-term strategy. A modelling update report released by PHAC and Dr. Tam offers no mention of cementing lockdowns as a long-term strategy.<sup>3</sup> Instead, it highlights "physical (social) distancing,

detection and isolation of cases, tracing and quarantine of contacts, and preventing importation of infection from other countries”. Dr. Tam appeared poised to return to her original refrain about increased hygiene and keeping ones distance as the primary interventions.

This would have been consistent with recommendations released by the World Health Organization (WHO) two weeks prior to the PHAC report, on April 14, 2020.

“Shutdowns and lockdowns can slow COVID-19 transmission by limiting contact between people,” the WHO document reads. “However, these measures can have a profound negative impact on individuals, communities and societies by bringing social and economic life to a near stop.”

The WHO highlighted the “urgent need to plan for a phased transition away from such restrictions that will enable the sustainable suppression of transmission at a low-level whilst enabling the resumption of some parts of economic and social life.”

Both the PHAC and WHO releases are entirely reasonable approaches, and consistent with the long-held established views of the public health community. Yet by the time the fall second wave materialized, the notion of perpetual lockdowns aimed at a near total suppression of the virus gained traction as both lay persons and members of the medical community started clinging to it with an almost ideological zeal.

Various public opinion polls have since indicated that a sizeable percentage of Canadians — a majority, in some polls — support strict

and aggressively enforced lockdowns that stay in place for a great period of time.

It would be difficult to chart precisely how and why this transition in public opinion happened, but this deeply entrenched mindset makes it all the more difficult to return to traditional public health principles that call for targeted approaches. Despite the growing chorus of reports about the harms of lockdowns, there is very little acknowledgement from both media and officials about the damage caused to society from the prolonged locking down of healthy persons who are not believed to be infected with the virus.

So what would it mean for Canada's health officials to evolve their pandemic response to one more in alignment with the plans? In practice, it simply means stepping back from broad-based lockdowns and instead dealing with the problems in a targeted fashion: identify and micro-target hotspots where the virus is actually spreading and support the hospital system to deal with any surge in patients, all while empowering people with the information needed to develop their own personal risk assessment to the virus and make life choices accordingly.

Now that the government response to the pandemic is without a doubt politicized and perspectives on the virus have been self-sorted along ideological as opposed to evidence-based lines, it will be considerably difficult to achieve widespread public buy-in. There are people who are more willing to see their communities destroyed than, say, be seen to hold an opinion that is somewhat similar to those held by former U.S. President Donald Trump.

This author's experience as a journalist who receives considerable public feedback both directly and via social media is that a major impediment to pivoting away from lockdowns is how poorly basic facts about the virus, who is affected by it and how it spreads has been communicated by officials and the media.

Here are some examples:

People wildly over-estimate the number of school-aged children who have died of COVID-19 across Canada. The answer is technically two individuals, although in the case of at least one of them Toronto Public Health was explicit that the virus was not the cause of death. So the number could very well be zero.

There is the inaccurate impression that if someone contracts COVID-19 there are good odds that they will be hospitalized with the virus and die from it. The truth is there is not a single demographic that comes close to having a 50% chance of death. The closest number is individuals in the 100+ age cohort, where approximately a third of the persons infected have died of the virus. The hospitalization rate of identified cases has consistently hovered just below the 5% mark.

A sizeable percentage of persons are under the impression that they have a good chance of contracting the virus when out and about in general society, walking down the street or shopping for groceries. However, public health officials have stressed that the combination of risk factors is prolonged, indoor close contact — which rarely occurs in such settings and is extremely easy for a person to avoid.

The federal government's COVID-19 alert app only registers a contact between two persons who have been within six feet of each other for 15 minutes or longer. This means even if you are beside someone for, say, five minutes who later tests positive for the virus, the app will not even alert you to this because public health does not believe there is a chance you will have contracted the virus from that person.

While these are indisputable facts, millions of Canadians are completely unaware of or even in denial of them. This author has even received angry correspondence after having calmly articulated these basic truths during appearances on Canadian radio programs.

This is why even if public health officials such as Dr. Tam would prefer to return to the original plans and think it a better approach for the overall health of the population, they may feel unable to do so given the current psychological climate of the nation.

While there is great anger among some members of the public about the havoc lockdowns are having on their lives, there is also anger among others that Canada is not locking down even more aggressively and doing more to punish those who skirt restrictions.

Canada's pandemic preparedness plans are clearly superior to lockdowns in that they take a holistic look at society as opposed to singularly focusing on eliminating the virus at all costs. They would also potentially be more effective at beating back the virus, as they focus on hot spots as opposed to society-wide measures.

The challenge though is getting to a position where more Canadians are able to embrace this better way. It will require more accurate and honest reporting from the media, bravery from public health officials and leadership from politicians.

One way to accomplish this is to prioritize the need for independent reviews of how governments have responded to COVID-19. While a Royal Commission seems inevitable, these are ultimately backwards looking affairs that reflect on what has happened long after the fact. There will be great value in such an exercise, but it's also important to engage in similar urgent exercises in the here and now, so governments can immediately pivot.

A lot of what was done during the second wave was supposedly to prevent the occurrence of a third wave. That clearly failed. Governments that have consistently misled the public by claiming a restriction will only be imposed for “two more weeks” are clearly in need of scrutiny and must face greater accountability.

What if there is a fourth wave and so on? What if endemic COVID-19 is such that there continues to be a sizable number of persons who must enter hospital in the winter of 2022, 2023, etc.? To say it is not acceptable to shut down society every winter due to hospital capacity issues would be beyond an understatement.

Honest reflection, commissions, independent reviews and broader accountability are needed now – and don't be surprised if such reviews recommend a response that is more in-line with what government officials had planned to do all along, before COVID-19 emerged.

**CHAPTER 6**

# Rights review

*By: Christine Van Geyn, Canadian Constitution Foundation*

COVID-19 is an extremely contagious virus that has been deadly for thousands of Canadians, and millions of people globally. The Canadian and provincial governments, along with governments around the world, have imposed health measures that are designed to deal with the risks of this virus.

Given the real nature of the threat of COVID-19, some reasonable health measures are warranted. And the Canadian Charter allows the government to impose limits on our rights when those limits are justified.

The fundamental question civil libertarians are faced with in this era is which of these health measures are justified, what must the government show to justify them, and where has the government gone too far. This chapter will conclude that there are certain restrictions that have struck the wrong balance. These are restrictions that limit

our rights more than is necessary, should never have been imposed, and should be prevented in the future.

## **1. How Canada's Charter works**

The COVID-19 pandemic has resulted in severe restrictions on the basic and most fundamental rights of Canadians. There have been restrictions imposed on entering the country and moving between provinces, on public gatherings including the right to protest and worship, there have been provinces that imposed curfews and stay at home orders, and mandatory masking orders. The penalties for violating these new and frequently changing public health orders can be extremely high, and some even carry jail time. The penalties also seem to vary at the discretion of government official issuing the fine. While many of our most fundamental rights are violated by the variety of government acts in response to COVID, the Charter has something called the limitation clause in section 1.<sup>1</sup> This allows governments to justify infringements of certain rights. The courts have developed a test to determine whether a limit on our rights is justified. The law must serve a pressing and substantial objective, it must be rationally connected to that objective, the law must minimally impair the right, and there must be proportionality between the limit on our right and the benefit gained.

Controlling the spread of COVID is an important objective, and it is an objective that itself engages our *Charter* rights, including the right to life and security. These limits on our rights are imposed in

the name of saving lives. When balancing competing fundamental rights, courts will likely show considerable deference to government attempts to craft proportionate responses, and minimal impairment does not require perfection.

It must also be noted that the Charter protected right to life, liberty and security may also be limited when such limits are consistent with the principles of fundamental justice.<sup>2</sup> The principles of fundamental justice require that the limit to this right cannot be arbitrary, vague, or grossly disproportionate.

If government restrictions on our rights do not pass the scrutiny of the section 1 test, these limits are unconstitutional.

A number of health measures across Canada have indeed gone too far. It is in those cases where the limits have been challenged. Many government imposed restrictions, made in the name of public health, implicate our fundamental rights protected by the Charter. For example, health measures infringe on the mobility right to enter Canada, the right to protest covered by the right to free assembly and expression, the right to liberty, to equal protection under the law, the right to be free from arbitrary detention and arbitrary search and seizure, and the right to worship covered by freedom of religion.

This section will examine a variety of cases where challenges have been brought against government imposed restrictions.

### **a. Quarantine hotels**

On January 29, Prime Minister Justin Trudeau announced that travellers entering Canada would need to take a COVID test before boarding their flight, then take a second test upon arrival. They would then be required to quarantine at a government approved hotel until they receive the results. Travelers pay out of pocket for these hotels, which can cost over \$2,000 per traveler.<sup>3</sup>

Canadians have a Charter protected right to enter Canada, and imposing a sudden \$2,000 cost on re-entry is a limit on that freedom.<sup>4</sup> Canadians also have a fundamental right to liberty, and the requirement that they remain confined for three days or more in a government approved hotel is a violation of that right. This requirement could even be considered a violation of the right to be free from arbitrary detention. Just as troubling is the treatment of some of the travellers in these government contracted hotels. In some cases, this treatment could even rise to the level of cruel and unusual punishment. For example, one hotel removed the deadbolts from the room doors and a female traveller was subsequently sexually assaulted.<sup>5</sup> Other travellers, including at least one diabetic, have reported waiting nearly 24 hours for meals.<sup>6</sup>

Underscoring the absolute absurdity of the hotel quarantine requirement is the fact that individuals whose tests come back positive are simply sent home to quarantine. This begs the question, “what is the point?” If both positive and negative travellers are sent home to quarantine, why impose the hotel quarantine requirement?<sup>7</sup>

The government suggests that the hotel quarantine is necessary in the

event that a traveller's quarantine plan changes, or if they are flying into Canada and then need to take a second flight or transit to another city further away. But by its very nature, this would not be minimally impairing, since a less restrictive alternative is readily available and will achieve the same goal. If the government is concerned with positive travellers moving on to a second destination, the policy ought to have been narrowly tailored to address those specific scenarios rather than broadly imposed on all travellers.

The Canadian Constitution Foundation brought a challenge to the federal quarantine hotel policy, along with five individual applicants. The five applicants had all recently travelled or were imminently seeking to travel outside of Canada to attend to a loved one in need of medical care or at the end of his or her life.<sup>8</sup>

The federal quarantine policy allows for exemptions for travellers entering Canada who need to attend to a sick loved one or a funeral. But the policy does not create a specific corresponding exemption for travellers who need to leave Canada for these same reasons. The court has not yet ruled on this case.

## **b. Churches**

Churches across Canada have faced a range of fluctuating restrictions on in-person services, and these restrictions have been met in turn with a range of reactions, from legal challenges to full-out civil disobedience. In Canada, the Charter protects the right to freedom of religion,<sup>9</sup> and

this includes the right to worship as one sees fit. While many places of worship have shifted to online services, in-person fellowship is a tenet of many faiths and cannot be replaced by Zoom meetings.

For a long period of time in Ontario, places of worship were subject to hard caps of 10 people. The limits did not take into account the capacity of the building, so even churches with capacity for over 1,000 congregants were limited to just 10 people.<sup>10</sup> Capacity limits are more likely to pass constitutional scrutiny than hard caps, but they remain frustrating for many individuals who seek to exercise their constitutionally protected right to religious freedom. It is especially frustrating given that during the same time period that Ontario had hard caps on religious services, retail has a 25 per cent capacity and essential retail (for example, grocery stores) had a 50 per cent capacity.

A number of places of worship have sought to challenge the hard caps and capacity restrictions. Other churches, notably one in the Edmonton area, engaged in civil disobedience by running full services without health measures. In that case, the Pastor was held in pre-trial custody for over a month. He was eventually released, but when the church continued to run full services they were shut down by police.<sup>11</sup> The pastor faces charges and at the time of this writing is awaiting trial, and during that trial the constitutionality of the restrictions on places of worship will be challenged.

### **c. Business closures**

The Charter generally does not provide protection for economic interests, and Canada does not have constitutionally enshrined property rights. The right to freedom of association, assembly or liberty do not protect the right of business owners to remain open. Even during non-pandemic times, businesses are subject to extensive regulation.

However, certain Charter interests for consumers have been engaged when specific types of businesses have been ordered closed by the government.

Take, for instance, the case of gyms. Physical fitness can engage a variety of Charter protected rights, including liberty, security of person, and association. Many people use exercise to maintain their physical and mental health, and there is a strong argument that there is an associative element to fitness. Many people train better in groups than alone.

This argument is most starkly engaged for individuals with disabilities, many of whom use physical fitness to manage their disabilities. People with disabilities are often specifically prescribed physical fitness plans as a part of their disability management programs, and for many people with disabilities it is impossible to train alone at home because they require assistance or specialized equipment.

In Ontario, a gym in Kitchener Waterloo brought a legal challenge to the lockdown and stay at home orders that had forced gyms to close. This gym was a specialized gym accessed by the disability community, and part of the challenge was on the basis of the impact the closure had on people with disabilities.<sup>12</sup> The government responded to the challenge by essentially granting a portion of the relief being sought by the gym by amending the regulation. The lockdown order was amended to allow the opening of gyms for people who were prescribed a plan of physical fitness by their doctor as a part of a disability management program.<sup>13</sup>

The benefits of fitness as a health and associative activity for the broader community are also engaged, and the legal challenge on this basis is still underway.

#### **d. Public protests**

There have been protests across Canada throughout 2020 and 2021 related to a variety of causes, some related to COVID measures by the government and some wholly unrelated to the pandemic. For example, there have been large scale protests against lockdowns, protests in support of Black Lives Matter, and protests related to changes to farming policy in India.

Because most provinces have had various limits on large outdoor gatherings, these protests were often in violation of public gathering

restrictions. There appears to be unofficial policy in some municipalities not to issue tickets during protests, which has resulted in selective enforcement. This has created a perception, either real or perceived, that enforcement occurs on the basis of the purpose of the protest.

In British Columbia, the orders by chief medical officer Dr. Bonnie Henry prohibiting outdoor gatherings and events were challenged by activists and churches working with the Justice Centre for Constitutional Freedoms.<sup>14</sup> Alain Beaudoin is an activist in British Columbia who organized public protests against COVID restrictions imposed by the BC government. His protests took place in December of 2020, in violation of the restriction on outdoor gatherings, and Mr. Beaudoin received a ticket for one of those protests.

A few months following those protests, BC Chief Medical Officer Dr. Bonnie Henry issued another order prohibiting outdoor gatherings and events, but included in this order a preamble that stated in light of the *Charter*, she would not prohibit outdoor protests. While Mr. Beaudoin's *Charter* rights were still violated by the previous orders, the government conceded in argument that those orders which did not exempt protests were of no force and effect. The court accepted this concession, and concluded that orders prohibiting public protests are of no force and effect and unjustifiably infringe on the *Charter* right to assemble and associate.<sup>15</sup>

This is an important victory for the right to peacefully assemble and protest, and a victory for the rule of law. However, other provinces, notably Ontario, continued to prohibit outdoor gatherings, including

protests. In one incident in Kingston, a lone and masked protestor in front of city hall was ticketed for violating the stay at home order.<sup>16</sup> The Canadian Constitution Foundation is involved in this case and is assisting in the challenge to this ticket. The case is ongoing.

### **e. Stay at home order and curfews**

Ontario and Quebec have imposed restrictive versions of stay home orders that prohibit residents from leaving their homes unless it is for an essential purpose. There is a popular maxim in common law systems, “everything which is not forbidden is allowed.” The idea is that in liberal democracies we are inherently and naturally free to do anything, so long as it is not expressly prohibited by law.<sup>17</sup>

Curfews and stay home orders flip that maxim on its head. Under these types of restrictive policies, everything is forbidden unless it is permitted. They require every individual to remain in their place of residence, unless they fall into a lengthy list of exceptions.

Quebec has imposed curfews that prohibit people from leaving their homes during the evening, with the curfew fluctuating between 8:00 and 9:30 pm.<sup>18</sup> The Quebec curfew does have exemptions, for example, there are exemptions for essential jobs, medical appointments, visiting sick family members, to go to an airport for a flight, transporting essential goods, and walking a dog (within 1 km of your residence). Those who are permitted to travel during the curfew to attend work must ask their employer for a signed copy of a government form.<sup>19</sup>

One especially offensive part of the Quebec curfew was that it originally did not provide an exemption for individuals experiencing homelessness. The Quebec Premier argued that creating such an exemption might prompt individuals to try to skirt the curfew by pretending to be homeless. This policy was challenged by a clinic representing the homeless after a man was found dead in a portable toilet. The allegation was that the man had been hiding because he was afraid he would receive a curfew violation ticket, even though he had no fixed address.<sup>20</sup>

The Quebec Superior Court ordered an exemption for the homeless population, finding that the law imperiled the lives, safety and health of individuals with no fixed address. The clinic presented evidence that fines, which range from \$1,000 to \$6,000, had already been issued to homeless people for breaking curfew. The Quebec government has since amended the order to exempt individuals experiencing homelessness.<sup>21</sup>

The Ontario stay home order is arguably even broader, because it operates more like a blanket 24 hour curfew with various exemptions and carve-outs.

## **f. Police powers**

On April 16, Premier Ford in Ontario announced new, sweeping police powers to enforce the stay home order. Powers that in the view of many legal experts were plainly unconstitutional. In the face of swift

reaction from both advocacy groups and the public at large, Premier Ford repealed those powers within 24 hours.

The police power would have permitted officers to stop people on the street and pull over vehicles on no basis, other than to ask if they were complying with the stay at home order.

The Canadian Constitution Foundation and the Canadian Civil Liberties Association immediately announced that they had retained counsel to challenge this new power. The power was an unjustified violation of several *Charter* rights, including the right to liberty, the right to be free of arbitrary detention, the right to be free from arbitrary search, the right to equal protection under the law, and the right against self incrimination.<sup>22</sup>

Civil liberties organizations were not the only ones who opposed this law. In an unusual move, police departments across the province announced that they would not enforce the law. Of Ontario's 45 provincially mandated police forces, all but three posted statements against random and unwarranted stops using the new powers. Two services did not comment, and only the Ontario Provincial Police came out in favour.<sup>23</sup>

Within less than 24 hours, the government of Ontario reversed course and repealed these new police powers. But what is especially troubling is the revelation that Ontario's Attorney General warned Cabinet that the new powers were likely unconstitutional. Despite his warning, Cabinet proceeded to enact them. Their decision was in all likelihood

influenced by the fact that the powers were short term, and would expire before any legal challenge could be heard. The willingness of the government to enact a knowingly unconstitutional law is highly disturbing.

### **g. Movement between provinces**

Provincial governments in Atlantic Canada, and for a brief period Quebec, imposed restrictions on non-residents entering those provinces. These restrictions later evolved into the so-called “Atlantic Bubble”, which allowed travel within the Atlantic provinces without a requirement to self-isolate. British Columbia also imposed travel restrictions that prohibited people in the province from travelling within the three public health regions. During the third wave of the pandemic, Ontario also imposed restrictions on drivers entering the province from Manitoba and Quebec.

Among the Atlantic provinces, Newfoundland and Labrador imposed the most severe restrictions. For a period, non-residents of Newfoundland were prohibited from entering the province unless they were issued an exemption by public health officials.

This requirement was challenged by a Nova Scotian woman named Kim Taylor who sought to enter Newfoundland to attend her mother’s funeral. Ms. Taylor was initially denied an exemption, and brought a challenge to the travel restriction. Ms. Taylor did appeal the denial of the exemption, and an exemption was ultimately granted. But this did not stop the legal challenge already underway.

Ms. Taylor was joined in her challenge by the Canadian Civil Liberties Association. The challenge was on the basis that the travel restriction violated the fundamental right to mobility protected under section 6 of the Charter, and also on the basis that a provincial travel restriction is outside the scope of provincial powers.<sup>24</sup>

The Supreme Court of Newfoundland and Labrador ultimately upheld the travel restriction. The court found that the restriction was within the scope of provincial powers, and that while it violated Canadians' section 6 mobility rights, the restriction was justified by section 1 of the Charter.<sup>25</sup> At the time of this writing, the decision is being appealed.

## **h. Mandatory masking**

In the grand scheme of violations of the fundamental rights of Canadians, mandatory masking orders are a relatively minor infringement. These orders have been imposed by municipal bylaw, by public health order, and by provincial regulation.

These orders would most likely be upheld by courts as a reasonable limit on our right to liberty, given that they are imposed in the interest of protecting other fundamental Charter rights, the right to life and security of person. The intrusion of a mask is a minor inconvenience for most Canadians.

However, for some individuals, mandatory masking is more than a minor inconvenience. These include children who have autism and

who have sensory processing challenges that make masking practically impossible. It could also include survivors of sexual assault who experienced breathing restrictions during the course of their assault, and who have post-traumatic stress disorder triggered by masking. It can also include individuals with severely compromised breathing, for example recipients of lung transplants or who have very severe chronic obstructive pulmonary disease (COPD).

For such individuals, mandatory masking could actually compromise their security of person, and a blanket requirement to mask violates their right under section 15 to equal treatment under the law. Their disabilities need to be accommodated.

Early on when these mandatory mask orders were first being imposed, some municipalities and public health units did not make it explicit that individuals are entitled to medical exemptions from the masking orders. The Canadian Constitution Foundation advocated for these individuals through letter writing, and ultimately the Ontario and Toronto mandatory mask orders included medical exemptions that can be claimed at face value. Another public health unit that had not made medical exemptions explicit amended their order to clarify that medical exemptions are available.<sup>26</sup>

Masking can help stop the spread of COVID, which is a contagious respiratory virus. Masking is a reasonable limit, so long as individuals with disabilities are accommodated. The challenge with mask exemptions is that certain people may lie about having a disability in order to evade the mask requirement. It is unclear how widespread

this behaviour really is, beyond anecdotal stories. But just as some people will lie about having a disability in order to park in a disabled parking space, the existence of anti-social and selfish individuals does not change the government's obligation to accommodate those who have real disabilities.

## **2. What needs to change in the event of a future pandemic?**

The pandemic has demonstrated the willingness of government to impose limits on our most fundamental rights in the name of expediency. In a number of instances, the government has gone too far. And in some cases, like in the instance of the unconstitutional Ontario police powers, the government imposed unconstitutional laws knowing they were unconstitutional.

The struggle throughout the pandemic for civil liberties organization has been the pace of challenges. There was an extended period when courts were closed, and the speed of justice is achingly slow as a baseline.

But without organizations willing to stand up and push back against some of these unconstitutional measures, the victories that have been achieved to date would not have been possible. Courts need to be willing to hear cases about our fundamental freedoms on a more urgent basis in the future, and the public needs to continue to support civil liberties organizations that are funded through voluntary donations. These organizations are truly the last line of defence against illegal laws.

CHAPTER 7

# Circumventing our democratic institutions

*By: Jay Cameron, Justice Centre for Constitutional Freedoms*

The Canadian Constitution is most often thought of as the *Constitution Act, 1867*, and then subsequently the *Constitution Act, 1982*, (the “Constitution”) which includes *the Canadian Charter of Rights and Freedoms*.

There is a foundation of unwritten constitutional principles, however, that animate the whole of the Canadian Constitution, and are as essential to its potency and interpretation as the written text. These unwritten principles are democracy, constitutionalism, the separation of powers and the rule of law, federalism and respect for minorities.<sup>1</sup>

The Constitution acts as a safeguard and a check on government laws and actions by government officials. Section 52(1) of *the Constitution Act, 1982*, states that the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or

effect.<sup>2</sup> The principle of constitutional supremacy requires that laws or government actions that are inconsistent with the Constitution – with either its explicit textual provisions or the unwritten principles that inform the meaning of the text – are of no force or effect.

This is especially crucial in times of emergency or crisis when governments across Canada have displayed an increasingly voracious taste for executive power and the bypassing of the sometimes inconvenient and uncomfortable scrutiny and debate of the people’s elected representatives.

Constitutional supremacy means that the Constitution is not suspended by a pandemic crisis or any other public health emergency. It remains the supreme law of Canada at all times, during “normal” times and during emergency situations. Indeed, the Constitution and its historical and legal underpinnings exist as a check to rule by one individual over the lives of the citizenry especially during times of emergency when abuse of power and the disregard of individuals freedoms is most common. History bears witness to the abuses which flow from the arbitrary rule of one over many regardless of justification.

## **Democracy**

Democracy is based on elected representatives engaging in dialogue and ongoing debate to represent the people and create laws that reflect the people. Democratic representation is the opposite of a monarch in that the power over the people of the land is spread out by elected

representatives as opposed to an individual holding supreme power. Democracy, which is both a written and unwritten principle of the Constitution, requires that citizens be represented in an ongoing dialogue regarding the laws which govern them. Without democratic representation of this kind, Legislatures and Parliament lose legitimacy because they lose the consent of the governed.

Diverting legislative power away from the citizenries' elected representatives to a single minister, such as that done by the Alberta Government (which will be discussed later), violates the principles of democracy and violates all the reasons and safeguards inherent in the democratic representative model.

The Supreme Court of Canada has highlighted that the principle of democracy requires a continuous process of debate and discussion via democratically elected representatives, recognizing that “[t]he Constitution mandates government by democratic legislatures, and an executive accountable to them, ‘resting ultimately on public opinion reached by discussion and the interplay of ideas.’”<sup>3</sup> The Supreme Court went on to state:

No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.<sup>4</sup>

The circumvention of the peoples' representatives means that they have no voice in the laws which govern them. It is doubtless the case that Canadians have suffered terribly under the COVID health restrictions, some of which are clearly arbitrary and irrational. Canadians have lost jobs, businesses, retirement, domestic tranquility, the ability to send their children to school, the right to worship, the ability to access necessary and even emergency health care. When Canadians have exercised their democratic right to share their objections regarding some of the governments' response to COVID-19 with their Member of Legislative Assembly (MLA) or Member of Parliament (MP), they have too often been informed by their elected representatives "this is out of our hands, we can do nothing to help the populace because the health orders do not come from us." Across the country, when Canadians have assembled to peacefully express their concerns and criticism of COVID measures, they have all too often been informed by aggressive law enforcement and health officials that gathering to protest is illegal. Those brave enough to exercise their section 2(c) Charter freedoms have been punished with threats, fines and arrest.

An increasing number of these tickets have been withdrawn subsequently by prosecutors, as their issuance is a clear violation of section 2(c) of the *Charter*.

The principle of the "basic constitutional structure" which provides that legislative bodies derive their efficacy from the "free public discussion of affairs," was set out by the majority of the Supreme Court of Canada in 1987. The Supreme Court of Canada confirmed

that political “...institutions derive their efficacy from the free public discussion of affairs...” Speaking more generally, the Supreme Court found that “...neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure.”<sup>56</sup>

In its most detailed discussion of the democratic principle, the Supreme Court of Canada has stressed that “...a functioning democracy requires a continuous process of discussion.”<sup>7</sup>

## **Rule of law**

The second constitutional principle sidestepped by Canadian governments during the COVID-19 pandemic is the principle of the rule of law. At its most basic level, the rule of law awards the citizens and residents of a country a “stable, predictable and ordered society... [i]t provides a shield for individuals from arbitrary state action.” The rule of law provides that law-making power, the mechanistic arm of the rule of law in Canada’s constitutional monarchy, is vested exclusively with the duly elected federal Parliament and with the provincial legislatures.<sup>9</sup> Constitutional supremacy is also enshrined in the principle of rule of law.

Section 52(1) of the Constitution states that any law that is inconsistent with the provisions of the Constitution is of no force or effect. This is based directly off of the rule of law principle. The Supreme Court of Canada has confirmed that the Constitution is the “supreme law” of the

nation, “unalterable by the normal legislative process, and unsuffering of laws inconsistent with it.”<sup>10</sup>

With this clause, and with the Constitution more generally, the Supreme Court of Canada has proclaimed that “the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy.”<sup>11</sup> It is the will of the people as expressed in the Constitution to be governed democratically, not to have their democracy circumvented by the monarchs, autocrats or dictators who impose their individual will on the populace.

In the last provincial and federal elections, the people of Canada cast ballots to elect MLAs and MPs who would comprise the democratically-constituted provincial legislature and federal parliament for a set term. At no time have the citizens of Canada renounced their constitutional right to be governed democratically through laws debated, amended and duly passed by the provincial or federal legislation constituted by their elected representatives.

However, the various Ministerial Orders that have been enacted throughout the provinces in response to COVID-19 are not democratically enacted. Rather, they bypass the peoples’ representatives and impose severe measures on the representatives’ constituents. The impacts on the populace are the result of arbitrary and unilateral rule, not the democratic enactment of laws as required by the Constitution.

## **1. Examples of how these democratic safeguards have been circumvented across Canada**

In response to COVID-19, provincial governments and the federal government have put in place overbroad restrictions which have resulted in the prolonged circumvention of the democratic process' safeguards. Specific examples of this can be seen in Alberta, British Columbia, Manitoba, Ontario and at the federal level of government.

### **Alberta**

The Alberta Government has perpetrated some of the most egregious constitutional sidestepping of democratic imperatives in Canada by delegating primary legislative authority to a single minister. On April 2, 2020, *Bill 10: Public Health (Emergency Powers) Amendment Act, 2020* (Bill 10) came into force with only 22 out of 87 MLAs present for the vote.

As amended by Bill 10, the *Public Health Act* empowers the Minister of Health to unilaterally and “without consultation” or legislative oversight “specify or set out provisions which apply in addition to, or instead of, any provision on an enactment.” This power to make new law may be exercised when the Minister in question subjectively and personally determines that the action is required in the “public interest” as determined by that same Minister.

This Alberta legislation authorizes an unprecedented and unconstitutional transfer of plenary legislative authority from the Legislature of Alberta to the executive branch of government, empowering a single Minister with law-making power. While this power being given to a single Minister is egregious in itself, a similar and even more egregious bypassing of democracy is evidenced by the unilateral issuance of orders of broad and general application by Alberta's Chief Medical Officer of Health, Dr. Deena Hinshaw, who is an unelected bureaucrat and who is not required to account to the legislature with reporting regarding the basis for her health orders. The legislatures are not required to review reports, or debate or scrutinize them. Thus, Dr. Hinshaw, and her medical officer counterparts in BC and Saskatchewan, function essentially as autocrats, or health dictators.

## **British Columbia**

On March 17, 2020, Dr. Bonnie Henry, British Columbia's Provincial Health Officer, declared a state of emergency under the *Provincial Health Act*, SBC 2008, c 28, whereby she unlocked a range of emergency powers. Among other things, this empowered her to issue public health orders with immediate, and what has turned into a prolonged, effect. Under this newly given power, the Provincial Health Officer has been able to unilaterally rule over the residents of British Columbia without any type of legislative oversight. Upon either verbal or written declaration, the orders of Dr. Henry are binding as law despite an utter failure to comply with fundamental constitutional principles, namely those of democracy and rule of law.

## **Manitoba**

In Manitoba, the situation is similar to that in Alberta, although with ministerial approval of the enacted orders. After a state of emergency was declared, Manitoba's Chief Public Health Officer Dr. Brent Roussin, issued successive Public Health Orders which dramatically altered the lives of Manitobans, including broadly infringing their constitutional rights and freedoms to assemble and worship. The Minister of Health, Seniors and Active Living, Mr. Cameron Friesen (at that time), approved the Orders.

The Manitoba Legislature, comprised of the elected representatives of the people of Manitoba, had no oversight of the unilateral actions of Dr. Roussin and Mr. Friesen. Of great concern, this "new" form of government has no end date and Her Majesty's representative in the Province of Manitoba, the Lieutenant Governor, has not given Royal Assent to any of the Orders as required by the previously-mentioned constitutional principles.

## **Saskatchewan**

Beginning on March 17, 2020, Saskatchewan's Chief Medical Health Officer, Dr. Saqib Shahab, made over three dozen public health orders in response to COVID-19. Although the Chief Medical Health Officer has asserted that his public health orders are made with the authorization of the Minister of Health, there is no written public record of such authorizations. Even if Dr. Shahab's assertion is true,

serious constitutional issues still arise due to the utter lack of oversight and democratic process.

The provincial *Public Health Act*, 1994, SS 1994, c P-37.1 and the Emergency Planning Act SS 1989-90, c E-8.1 purportedly delegate the exclusive power of the Legislative Assembly to make laws of general and universal application. The sweeping scope of this unconstitutional delegation is reflected in the Public Health Orders, enacted by Dr. Shahab, which have been issued by the Chief Medical Health Officer without the democratic scrutiny of the required legislative process. These orders impose constantly shifting restrictions and outright prohibitions on broad facets of Saskatchewanians' lives, and have a devastating impact on health and well-being, impinging significantly on the free exercise of their constitutional rights in the process.

Saskatchewan's *Disease Control Regulations*, RRS c P-37.1 Reg 11 amount to a delegation by the Lieutenant Governor in Council of a power to make laws of general and universal application which it does not validly possess. Further, it continues to delegate such power by conferring binding legal force upon the guidelines set by the *Re-Open Saskatchewan Plan*, thereby rendering such guidelines laws of general and universal application.

In essence, the Saskatchewan Government has tried to connect the constitutional dots by using, and in certain cases drafting, legislation that permits constitutional safeguards to be sidestepped and utterly disregarded.

## **Ontario**

On March 17, 2020, the Ontario cabinet, by way of an Order in Council, declared a state of emergency under the provincial *Emergency Management and Civil Protection Act*, RSA 1990, C E9, giving the government increased powers to respond to COVID-19. Subsequent Orders in Council were made based off of this emergency declaration. In July 2020, when the state of emergency ended, the province of Ontario transferred its emergency powers into new legislation, called the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*. This new law permits the Ford Cabinet to circumvent the constitutional principles previously discussed by allowing cabinet to amend orders without any debate by the elected legislature even after the state of emergency has subsided.

## **Federal Government of Canada**

In early 2021, the Canadian Federal Government enacted two separate Orders of the Minister of Health giving the government power to forcibly quarantine asymptomatic healthy Canadians in possession of a negative Antigen COVID test and quarantine all international air travelers for a minimum of three days in federally approved quarantine facilities, respectively.

These Ministerial Orders, which were made in the form of an Order in Council, resulted in federal rule by the Trudeau Cabinet rather than by Parliament, as required. The Parliamentary safeguard was sidestepped

by a Ministerial Order which granted power to the very governmental hand which wrote the Order. The written and unwritten constitutional principles exist to prevent this very thing.

As legal philosopher Baron de Montesquieu observed, “When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty.”<sup>12</sup>

### **Summary on governments’ circumvention**

In the name of public safety, the above-mentioned governments have delegated authority which, in the existing context, is unconstitutional as it lacks safeguards. Practically speaking, that means that there is:

- a. No requirement for health officials to apprise their respective Minister of Health with a report on the latest science, guidance and impact of their orders on the populace;
- b. No requirement for the legislature or Parliament to review or debate such a report within a set period of time or at all; and
- c. No requirement for public consultation.

As a result, legislators (who are not themselves doctors) lack the context to govern, resulting in rule by executive dictatorship of health officials, and not democracy.

## **2. Ongoing challenges to push back against the unlawful delegation**

In response to the governments' actions discussed above, the Justice Centre for Constitutional Freedoms has filed court challenges in British Columbia, Alberta, Manitoba, Ontario and against the Federal Government of Canada. Litigation against Saskatchewan, along with further litigation in Ontario is also pending.

## **3. The faulty rebuttal**

In response to the legal challenges, the various governments claim that the measures taken are justified based on historical and dated cases which either predate the Charter or authorize limited power in drastically different situations.

In an early decision of the Privy Council and wartime decisions of the Supreme Court of Canada, a couple rulings came out that granted a delegation of legislative power in certain circumstances.<sup>13</sup> However, these judgments predate the emergence of a modern understanding of the Canadian Constitution heralded by the enactment of the *Constitution Act, 1982*, including the *Canadian Charter of Rights and Freedoms*, and the Supreme Court of Canada's subsequent charting of the architecture of the Constitution in a series of landmark rulings.<sup>14</sup> Further, these cases deal with regulating relatively trivial matters such as how late taverns could be open, how late people can play billiards

on a Saturday night<sup>15</sup> or the regulation of things like eggs and milk.<sup>16</sup>

In 1978, the Supreme Court of Canada upheld the validity of various Acts which were passed by the Parliament of Canada and the Legislative Assembly of Ontario for establishing a national agricultural marketing scheme regarding the interprovincial and export trade of eggs.<sup>17</sup> Based partly off of this decision, the Manitoba Government claims that if it is proper to regulate eggs and milk using a certain type of delegation, then they should be able to use the same type of delegation to restrict the constitutional rights of over 1.3 million Manitobans as they respond to COVID-19.

The governments also rely on the case of *Hodge* which is used to contend that the ability of provincial legislatures, to delegate for matters ancillary to legislation, has been settled for over 130 years. *Hodge* was decided by the Privy Council in the United Kingdom.

The Privy Council in *Hodge* dealt with an Ontario statute that had delegated limited and narrow power to the License Commissioners of Toronto to issue tavern licenses. *Hodge* deals with the issue of federalism and is known for its articulation of the ‘double aspect’ doctrine, allowing a degree of subject matter overlap between the federal and provincial legislatures”.<sup>18</sup>

However, *Hodge* has nothing to say in support of the contention that it can constitutionally delegate the potent powers of the democratically elected legislature to a lone Minister who then has the power to make laws for millions of people all by him or herself without oversight.

The power and control given to individual ministers and officers in response to COVID-19 is nothing like the ancillary and limited power granted to bureaucrats to grant tavern licenses. The delegation of authority in Hodge was ancillary, or subordinate, authority being delegated. The broad authority being delegated to the minister of health in response to COVID-19 is primary authority allowing the minister to amend any law, revise any law or suspend any law as long as that minister unilaterally believes that doing so is in the public interest. This is a critical distinction.

The governments also rely on the 1941 case of *Reference as to the Validity of the Regulations in Relation to Chemicals*,<sup>19</sup> a pre-Charter case dealing with the delegation of authority to a chemical controller to expropriate glycerine, a very specific matter. More specifically, the debate in this case was whether or not chemical controllers could order a different body to pay for the government's appropriate of glycerin. This matter was during the war effort and the cabinet was given the ability to create a chemical controller so that Canada has enough nitroglycerin in order to fight the war. This situation is drastically different to the issue at hand. For example, the worst thing that could happen in the *Chemical Reference* case is that a different government body pays for the glycerin that's already been expropriated by the government. Contrastingly, the delegation of authority occurring during the governments' response to COVID-19 gives the ability for ministers of health to rule as dictators.

Finally, the governments significantly, although incorrectly, rely on the 1918 case of *In Re Gray*.<sup>20</sup> In *In Re Gray*, the Supreme Court of Canada

upheld a form of Henry VIII clause contained within the *War Measures Act, 1914*, that authorized the Federal Cabinet to make orders and regulations “necessary or advisable for the security, defence, peace, order and welfare of Canada”.<sup>21</sup> The resultant measures of Cabinet resulted in the internment of Japanese Canadians during World War 2, something that the government later admitted was wrong.

As former Prime Minister of Great Britain, William Pitt the Younger, observed, “Necessity is the excuse for every infringement of human freedom; it is the argument of tyrants and it is the creed of slaves.”<sup>22</sup>

*In Re Gray* has been academically criticized as a “historical anachronism, a holding that was suitable for a young country in the context of the First World War but now out of step with the constitutional role of Parliament as seen through the contemporary approach to constitutional interpretation.”<sup>23</sup> Further, *In Re Gray* is grounded in Parliament’s authority under the extraordinary emergency powers branch of the peace, order and good governance (POGG) power. As noted by the Alberta Court of Appeal, *In Re Gray* has no application outside of the federal, war-time context.

## 4. Conclusion

The future of democracy faces its greatest threat when its circumvention seems most justified. This can be seen throughout Canada as governments have responded to COVID-19 in a manner that treats constitutional safeguards as bothersome inconveniences which they

are justified in ignoring for the greater good of “public safety”. For those who choose to listen to history’s stark warnings, it is understood that these constitutional principles are in fact of the greatest importance during times of emergency.

Canada’s democracy is founded on the principle that people are governed by elected representatives (democracy) and that there is no higher law than the constitution which equally binds those who govern (rule of law).

COVID-19 has presented an unprecedented threat to the freedom of Canadians which will only be defeated by Canadians pressuring their elected public servants to conduct themselves appropriately in accordance with the law, and by the Canadian judicial system holding the executive and legislative branches accountable.

# Conclusion

As we have demonstrated in this book, the challenges Canada faces in the years ahead will be daunting.

While everyday Canadians will soon (hopefully) have a chance to rip off their masks and once again enjoy the freedoms many of us took for granted, it will be important for our elected officials to get down to business and begin reforming many government programs and procedures.

Since the pandemic emerged, government debt has spiralled beyond previously unimaginable levels. Just as a higher debt load on your credit card results in higher monthly interest charges, governments now face billions in additional interest costs each year. That means more and more of the taxes you pay will go towards interest costs – not actual services.

As the Canadian Taxpayers Federation demonstrated in chapter two, there are plenty of ways governments could tackle their runaway spending by being much more cost-effective with the money we currently pay in taxes. Addressing such inefficiencies, along with

making some tough decisions, could help governments mitigate future tax increases and provide better services to Canadians.

In terms of government services that require immediate attention, health care should be at the top of the list. Patient suffering is at an all-time high in Canada. But we can't forget that even before COVID-19 emerged, waiting lists were well beyond what patients in other developed countries faced. It would be cruel for governments to not reform our health care system and continue to leave so many patients languishing on waiting lists.

In chapter three, MEI provided several ideas on how our health care system could be improved. These options should be considered instead of the tired and ineffective approach we've seen for decades – governments cutting a larger cheque to hospitals and health regions and hoping positive results eventually followed.

Fortunately, many forecasters expect our economy to grow quite well over the next year – that's very good news. However, we can't forget the economy contracted significantly (by over 5 per cent) in 2020. Our unemployment rate remains high as thousands of workers are out of work after their employers closed for good during the pandemic. While governments are set to embark upon a significant "stimulus" binge in an attempt to boost our economy, SecondStreet.org has shown that governments could actually drive economic growth by simply getting out of the way and making it easier for entrepreneurs to launch their ventures.

Cutting red tape, eliminating interprovincial trade barriers and making it easier for natural resource projects to proceed have all been discussed for years. Will governments finally embrace these ideas with enthusiasm?

While these issues are important to consider, it is crucial to examine how governments handled the pandemic – what went wrong, what went right?

In the event that a COVID variant emerges that is too strong for the vaccines being administered, do we really want to see governments repeat the same mistakes?

In this book, the Justice Centre for Constitutional Freedoms outlined a strong case for greater democratic oversight over emergency measures that were implemented during the pandemic. Some politicians may not want to follow proper democratic channels during challenging times, but the Constitution is clear that oversight is mandatory.

Similarly, the Canadian Constitution Foundation identified several cases whereby lockdown measures and other government restrictions infringed upon our civil liberties too freely. The lack of care in the crafting of so many of these restrictions should cause concern for all Canadians.

Finally, Anthony Furey raised many important points about the need to compare previous emergency plans with the decisions that were implemented. Independent reviews – sooner rather than later – could

help assess how well governments have handled the pandemic and what needs to change in the event of another emergency.

In the coming months, as we celebrate – hopefully – society returning to normal, it will important to monitor the actions of those running our governments. Do they spend their days celebrating the reopening of society and patting themselves on the back? Or do they roll up their sleeves and begin to tackle the important matters we have raised in this book?

For the sake of Canadians, we hope it is the latter.

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SecondStreet.org is a Canadian think tank that conducts original research, but also tells the stories behind the numbers. The organization's short online videos feature everyday Canadians explaining how government policies affect their lives. From health care to natural resource development, SecondStreet.org examines a wide array of government policies.

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The MEI is an independent public policy think tank with offices in Montreal and Calgary. Through its publications, media appearances, and advisory services to policy-makers, the MEI stimulates public policy debate and reforms based on sound economics and entrepreneurship.

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The Canadian Taxpayers Federation is a federally incorporated, not-for-profit citizen's group dedicated to lower taxes, less waste and accountable government. Any Canadian taxpayer committed to the CTF's mission is welcome to [join at no cost and receive issue and Action Updates](#). Financial supporters can additionally receive the CTF's flagship publication The Taxpayer magazine published three times a year.

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

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The Justice Centre for Constitutional Freedoms (JCCF) is a non-profit law firm dedicated to the education and defence of Canadians constitutional rights, particularly freedom of religion and conscience, freedom of speech and freedom of association. The JCCF provides legal representation free of charge, to protect the rights and freedoms of all Canadians.

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10. *Re Manitoba Language Rights*, [1985] 1 SCR 721, 1 RCS 721 at p. 745
11. *Secession Reference*, at para. 72
12. [http://oll.libertyfund.org/titles/montesquieu-complete-works-vol-1-the-spirit-of-laws#lfo171-01\\_label\\_786](http://oll.libertyfund.org/titles/montesquieu-complete-works-vol-1-the-spirit-of-laws#lfo171-01_label_786) When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

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13. *Hodge v. The Queen*, [1883] 9 A.C. 117 (P.C.), (“Hodge”); *In Re George Edwin Gray*, [1918] S.C.R. 150 (“Gray”); *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] S.C.R. 1. (“Chemicals”)
  14. *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (“Manitoba Referendum Reference”); *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 (“OPSEU”); *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“Judges Reference”); *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (“Secession Reference”); *Reference re Senate Reform*, [2014] 1 S.C.R. 704 (“Senate Reference”)
  15. *See Hodge*
  16. *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198, 19 NR 361
  17. *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198, 19 NR 361
  18. Lorne Neudorf, “Reassessing the Constitutional Foundation of Delegated Legislation in Canada” 41:2 Dal LJ 519 at p. 531, online (pdf): <<https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2108&context=dlj>>
  19. [1943] SCR 1 (“Chemical Reference”)
  20. [1918] 57 SCR 150, 42 DLR 1
  21. *In Re Gray*, [1918] 57 SCR 150, 42 DLR 1
  22. [https://en.wikipedia.org/wiki/William\\_Pitt\\_the\\_Younger#CITEREFHague2005](https://en.wikipedia.org/wiki/William_Pitt_the_Younger#CITEREFHague2005)
  23. Lorne Neudorf, “Reassessing the Constitutional Foundation of Delegated Legislation in Canada” 41:2 Dal LJ 519 at p. 523, online (pdf): <<https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2108&context=dlj>>
  24. See mention of “the residuary power conferred by s. 91 upon the Dominion Parliament” *Crédit foncier franco-canadien v Ross*, [1937] 3 DLR 365, 1937 CanLII 239 at p 369
  25. *Crédit foncier franco-canadien v Ross*, [1937] 3 DLR 365, 1937 CanLII 239 at p 369