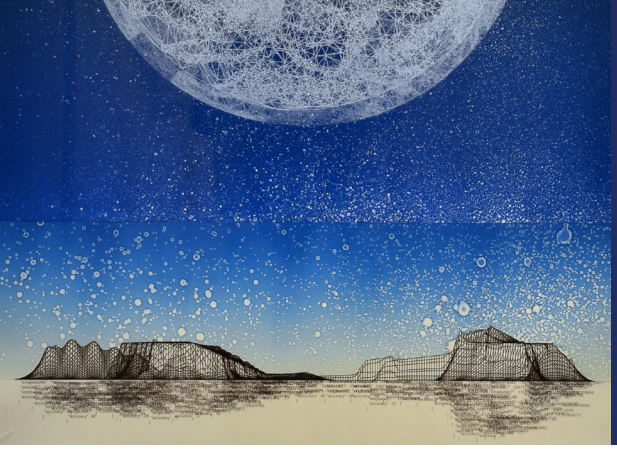

EXECUTIVE SUMMARY

Reconciling Civil Liberties and Public Health in the Response to COVID-19

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Reconciling Civil Liberties and Public Health in the Response to COVID-19

Executive Summary

The COVID-19 pandemic has highlighted the challenges governments face in balancing civil liberties against the exigencies of public health amid the chaos of a public health emergency. Current and emerging pandemic response strategies may engage diverse rights grounded in civil liberties, including mobility rights, freedom of assembly, freedom of religion, and the right to liberty and security of the person. As traditionally conceived, the discourses of civil rights and public health rest on opposite assumptions about the burden of proof. In the discourse of civil and political rights of the sort guaranteed under the Canadian Charter of Rights and Freedoms, the onus rests on government to show that any limitation on rights is justified. By contrast, public health discourse centers on the precautionary principle, which holds that intrusive measures may be taken—lockdowns, for example—even in the absence of complete evidence of the benefits of the intervention or of the nature of the risk. In this article, we argue that the two principles are not so oppositional in practice. In testing for proportionality, courts recognize the need to defer to governments on complex policy matters, especially where the interests of vulnerable populations are at stake. For their part, public health experts have incorporated ideas of proportionality in their evolving understanding of the precautionary principle. Synthesizing these perspectives, we emphasize the importance of policy agility in the COVID-19 response, ensuring that measures taken are continually supported by the best evidence and continually recalibrated to avoid unnecessary interference with civil liberties.

Analysis and Conclusions

First, the *Charter* rights analysis and the precautionary principle in public health have more in common than first meets the eye. Both require governmental decision-makers to adopt means of controlling outbreaks that are least rights-infringing, and to revisit their decisions as new evidence and responses emerge. This is very important, as it means governments and public health officials cannot be complacent. For example, if evidence emerges that COVID-19 can be controlled without restricting movement across provincial borders, or that outbreaks can be contained without strict lockdowns as infection rates fall, then governments must recalibrate their precautionary measures to both protect against the virus and be respectful of civil liberties. At the same time, governments are entitled to take public health objectives seriously. It is evident that the decision to rapidly restore civil liberties in other countries, most notably the US, has actually harmed rights *and* the fight against COVID-19 in the long run, since it has necessitated the re-

introduction of restrictive measures as cases re-emerge in even higher numbers than at the outset of the pandemic.

Second, public health officials need to understand that the burden of proof will be upon them in a *Charter* case to justify any rights infringement. They must be able to point to some evidence for their choices. This means staying on top of the evidence and being responsive.[1]

Third, notwithstanding debates about courts' effectiveness in an emergency, it is essential that courts remain capable of hearing challenges to executive and legislative overreach during the pandemic.[2] Majoritarian political processes are not particularly effective at ensuring that differential impacts of policies on vulnerable groups are considered and addressed. Courts play an important role in hearing these types of challenges—it is a core component of their mandate under the *Charter*.[3] While courts at all levels have done a remarkable job of adapting to the new environment—moving a largely paper-based justice system online in a matter of weeks in the midst of a pandemic—they need to continue to prioritize and expedite the hearing of challenges to executive overreach and the constitutionality of legislation while also making progress on cases that were stalled as a result of COVID-19.[4]

Fourth, in a more pragmatic vein, we should acknowledge that sound public health policy will be respectful as possible of civil liberties, not just because that is what the law requires but because that is the best way to get 'buy-in" from the public. By the same token, civil libertarians must be candid about the fact that right and freedoms have limits—the *Charter* does not commit us to "dying with our rights on" in the face of a deadly pandemic. We advocate for the continued effort of public health officials to strive for least restrictive measures, protecting public health while ensuring maximum freedom.

Fifth, and relatedly, any assessment of our COVID-19 response must attend to how these laws are enforced on the ground—and specifically, whether marginalized populations are disproportionately burdened, whether through discriminatory enforcement, or the sheer impossibility of complying with regulations that assume individuals can afford protective equipment, and have a home where they can safely shelter. It is unlikely that the courts will be an effective buttress against these concerns, given the cost and the difficulty of proving discriminatory enforcement, and so it will likely fall to civil society to track these issues and press for solutions. At the same time, it is important to recognize that marginalized populations have also been disproportionately affected by the pandemic, with substantially higher mortality rates amongst specific demographic groups. As such, those who argue that their rights are being infringed are creating risks for these vulnerable populations.

In conclusion, rights are not trumps against collective goal of public health; what rights demand of government, instead, is reasoned justification—evidence showing that interferences with civil liberties are proportionate to government aims. In this sense, the vigilant defense of civil liberties can encourage the timely revisiting of precautionary measures—something that has been a challenge in its application to public health. As such, a dynamic, evidence-based policy approach can achieve be fully respectful of both civil liberties and the goals of public health.

References

1 See generally Jula Hughes and Vanessa MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" (2013) 32:1 National Journal of Constitutional Law 23.
2 Mark Tushnet refers to courts as "weak reads in a crisis"; see Mark Tushnet, "The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation" (2007) 3:4 Intl J Law in Context 275 at 277 (internal quotation marks removed). But see Kent Roach, "Comparative Constitutional Law and the Challenges of Terrorism Law" in Rosalind Dixon & Tom Ginsburg, eds, Comparative Constitutional Law (Northampton, MA: Edward Elgar Publishing, 2011) 532.
3 Reference Re Secession of Quebec, [1998] 2 SCR 217; United States v Carolene Products Co, 304 US 144 (1938); Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Cambridge, MA: Harvard University Press, 2004), at 1-2.
4 Aedan Helmer, "'There is no Going Back': How COVID-19 Forced Courts into the Digital Age", Ottawa Citizen (16 May 2020), online: <https://ottawacitizen.com/news/local-news/there-is-no-going-back-how-covid-19-forced-courts-into-the-digital-age>; Paola Loriggio & Liam Casey, "COVID-19 Pandemic Forces Ontario Justice System 'Stuck in the 1970s' to Modernize", CP24 (29 April 2020), online: https://www.cp24.com/news/covid-19-pandemic-forces-ontario-justice-system-stuck-in-the-1970s-to-modernize-1.4917915; Ontario Superior Court of Justice, "Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings – Update" (2 April 2020), online: <https://www.ontariocourts.ca/scj/notice-to-the-profession-the-public-and-the-media-regarding-civil-and-family-proceedings-update>.