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IDEAS THAT LEAD

The Charter Won't Protect Us from the Pandemic Managerial State

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Prelude

For almost two years, lockdowns, masking requirements, vaccine mandates and other Covid-19-related rules have trashed Canadians' lives and shredded their civil liberties. According to governments and public health officials, these restrictions do not violate the *Canadian Charter of Rights and Freedoms*, or if they do, constitute "reasonable limits" that the Charter permits. So far, most courts have agreed. Canadians have been subject to some of the most sweeping restrictions in the history of their country, and the law has said "no problem."

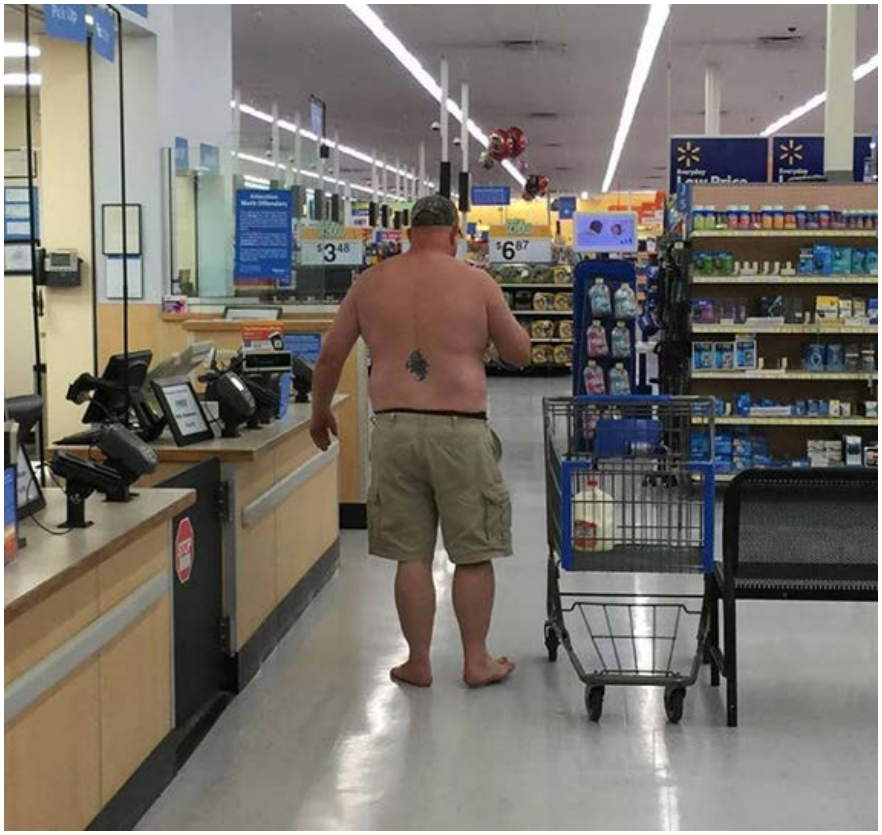
Before 1982 Canada had no entrenched roster of individual rights and freedoms, yet was among the freest nations on Earth. (The *Canadian Bill of Rights*, enacted in 1960, was merely a federal statute with limited applicability.) The common law was the backbone of the Canadian legal system and was largely built upon the notion of individual self-determination, including the right to bodily security. Common law rights

were no panacea, however, since legislatures could and occasionally did override or modify them in legislation. Before the Charter, with a few exceptions, legislatures were supreme. They could enact any law within their jurisdiction as they wished.

The Charter was drafted primarily as a roster of “negative” individual freedoms designed to limit the state’s ability to intrude. It did not negate legislative supremacy but placed specific limits upon it. The idea wasn’t so bad. But it hasn’t worked out well.

Processional: Why the Charter Doesn’t Work against Covid-19 Overreach

A man walks into a convenience store. It is a hot day in July, and he is wearing no shirt or shoes. The clerk points to the sign in the window that says, “No shirt, no shoes, no service,” and asks him to leave. Have the customer’s Charter rights been violated? The answer is no. The shop is a private business, and the Charter does not apply. Furthermore, the owner of the business has property rights over the premises and can determine requirements for entry. Both people are free – the proprietor to set her own rules for her own business and property, and the customer to accede to the request or to look for another that will accept his money while bare-chested and barefoot.



“No shirt, no shoes, no service”: This seemingly flippant example illustrates how the Charter is mainly composed of “negative” rights that protect individuals from government intrusion. While the Charter’s approach was in keeping with centuries-old legal traditions, it does not, paradoxically, protect individuals from feeling the force and suffering the effects of Covid-19 restrictions.

What about the customer's "human rights"? Provincial human rights codes make discrimination unlawful. They do not make *all* discrimination unlawful, however, but only those instances that are specifically enumerated (or analogous) in the relevant provisions of the human rights statute. Section 1 of the *Ontario Human Rights Code*, for example, says that every person has a right to equal treatment with respect to services, goods and facilities without discrimination "because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability." None of these will apply to the choice not to wear a shirt or shoes. The proprietor is allowed to bar the customer from her store unless he complies.

What if the rule requiring shirts and shoes comes not from the owner of the store, but from legislation or regulation? If there is a law that requires customers to wear shirts and shoes to enter retail establishments, then the law must comply with the Charter. Does the law violate the customer's Charter rights? The answer is probably no.

Section 15(1) of the Charter says that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law. Similar to section 1 of the *Ontario Human Rights Code*, section 15(1) prohibits discrimination "based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." None of these listed grounds, or grounds analogous to them, would apply in this case. Indeed, the government would say, with good cause, that the requirement to wear shirts and shoes applies equally to everyone. Equality rights under the Charter have not been breached. Note that both the Human Rights Code and a law requiring shirts and shoes curb the freedom of the proprietor, who is no longer able to decide who she will and will not serve.

Section 7 of the Charter provides that everyone has the right to life, liberty and security of the person "and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The customer's life does not appear to be in jeopardy. He might argue that because the rule requiring shirts and shoes applies to all retail establishments, as a person not wearing shirt and shoes his life has been put at risk because he cannot obtain the necessities of life. This argument is not likely to succeed. The potential deprivation of life is too remote, a court might say, since the state is not taking his life but creating a minor inconvenience. The burden of putting on a shirt and shoes is not equivalent to taking his life, and in any event, there are alternative ways not to starve, such as paying for delivery, asking a friend, or growing his own food.

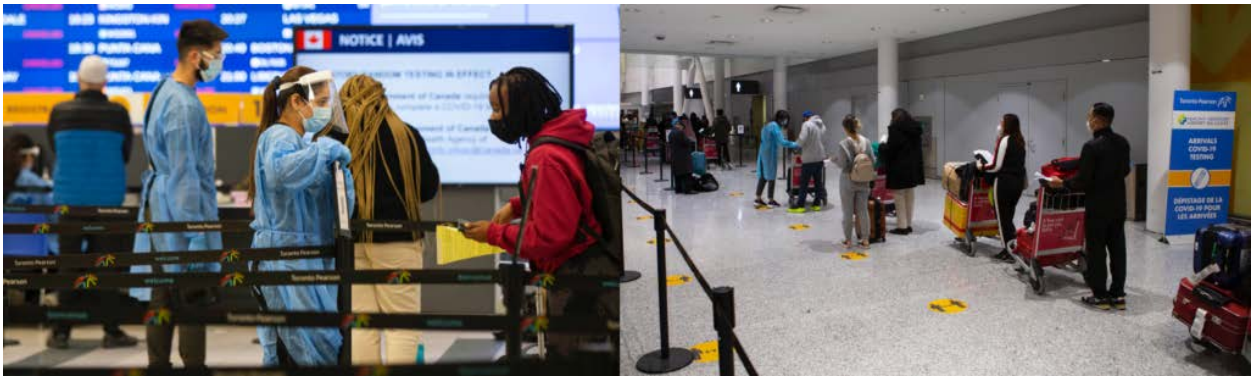
Core Charter rights, and especially those that can be described as true 'freedoms,' are negative rights that the state can observe simply by staying out of people's lives.

His right to liberty is not the right to go anywhere he wants. It does not give him the right to go onto the tarmac at the airport, to walk across the highway, to park in a no-stopping zone, or to go inside the stadium without a ticket. Instead, the right to liberty essentially

means the right not to be locked away without due process. Not being allowed in is different from not being allowed out.

Security of the person entitles him to control what happens to his body. It means that no one can touch him without his consent. No one can make him wear clothing against his will. But touching him without consent or forcing clothes upon him is different than establishing a requirement that he can choose to meet or not. If he retains the ability to say yes or no, his right to security of the person may not be at issue. The requirement for shirts and shoes is not unlawfully coercive unless our bare-chested friend is held down against his will, or the state imposes penalties such as fines or imprisonment for his failure to comply.

Clothes, or lack thereof, constitute a kind of self-expression. The customer has the right to freedom of expression under section 2(b) of the Charter. A rule dictating the kind of clothing that must be worn might breach that right. But even if it does, it is likely to constitute a "reasonable limit" under section 1 of the Charter. The rationale for shirts and shoes in retail establishments will be some combination of public decency and public health. Given the minor and temporary infringement of the right, and the lack of alternatives for achieving the objective of the rule, a court is likely to conclude that the rule is proportional to the objective, and therefore saved by section 1.



Simply rules, or real violations of rights? Legal challenges based on the Canadian Charter of Rights and Freedoms *to Covid-19 policies face a steep climb, since governments can argue that people still have choices. In all areas but one: mandatory vaccination, a policy which hasn't been imposed yet. (Source of photos: The Canadian Press)*

The above Charter rights are "negative" rights. They are rights to be left alone, free from government force. Governments have an unlimited capacity to comply with negative rights, since these rights merely require that governments not interfere. "Positive" rights, in contrast, are rights to be provided with resources, means, access or benefits. Constitutional rights to welfare or housing would be positive rights, as would rights to be provided with transportation or access to a venue. Positive rights can be found in the Charter, but they are the exceptions that prove the rule.

One is found in section 2(d). The Supreme Court of Canada has said that the right to freedom of association in section 2(d) includes a right to a legislative scheme that provides for collective bargaining in workplaces. Another is the right to vote in elections under section 3, which could be characterized as a positive right. Rights of due process, such the right in section 10(a) to be informed promptly of the reason for arrest or detention, or an accused's right under section 11(a) to be informed without reasonable delay of the specific offence he is charged with, are positive rights because they require the state to act. But core Charter rights, and especially those that can be described as true "freedoms," are negative rights that the state can observe simply by staying out of people's lives.

Banning barefoot customers might seem innocuous, but the law applies similarly to more serious issues, such as provincial and federal Covid-19 rules. Just as there is no easy Charter case against "no shirt, no shoes, no service," so too with vaccine passports and mandates, including the federal proof-of-vaccination requirement for air travel.

Mandatory vaccination, if it came to pass, would be ripe for Charter challenge. Unlike vaccination passports and employee mandates, a requirement that everyone be vaccinated or face fines or imprisonment would constitute unlawful coercion and infringe the right to security of the person.

To oppose the requirement, one might cite Charter rights to life, liberty and security of the person, equality, privacy, and mobility, but none of these may apply. The air travel policy does not deprive anyone of life. The right to liberty and the right to equal treatment are likely to be no more applicable than in the case of the customer at the convenience store. During an officially declared pandemic, the legitimacy of which the courts have so far been quick to acknowledge, the Charter's right to be free from "unreasonable search and seizure" is unlikely to translate into a privacy right not to be asked for proof of vaccination.

Security of the person includes the right to make one's own medical decisions, but the government argument from the beginning has been that, absent an actual vaccine mandate that requires all residents to be vaxxed upon penalty of fines or imprisonment, the choice whether to get vaccinated or not remains, just like the choice whether to wear a shirt and shoes.

Can’t fly? Just walk! Having access to air travel is considered a so-called “positive right” and is therefore not guaranteed by the Charter.

If travellers go to the clinic to get a vaccine because they cannot board the plan without one, the fact that they do not really want to be vaccinated does not vitiate the consent they give to the nurse. They could have declined and not travelled. Neither passports nor workplace mandates hold people down and jab them against their will or throw them in prison for refusing. Courts therefore may conclude that the Charter right to security of the person is not even engaged, let alone whether any violation was justifiable under section 1. The Charter does not give the right to be free from inconvenient choices.

Every citizen has the right to enter, remain in and leave the country – but mobility rights in section 6 are likely negative rights also. If so, the Charter does not require the government to provide the means of leaving and entering the country in the form of commercial flights. The feds are not preventing Canadians from walking across the United States border. That’s the U.S. government, to which the Charter does not apply. The right to move to and take up residence in any province, also provided in section 6, still exists even if you must walk or drive. Vaccine passports and mandates effectively prohibit unvaccinated people from social and economic life, yet it is doubtful whether Charter freedoms have been infringed.

Not all challenges to Covid-19 rules are bound to fail, since some restrictions infringe Charter rights directly. Bans or limits on gatherings, for instance, restrict freedom of assembly, and where the ban applies to places of worship, religious freedom as well. Under section 1, governments must justify their policies by showing that the infringement of the right was proportionate and justifiable given the compelling objective.

If, for example, governments cannot prove that the virus is apt to be transmitted between people outside, bans on outdoor gatherings will not pass that test. One would think that even courts inclined to defer to the judgment of public officials would find it difficult to find such restrictions constitutional. And yet so far they have.

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fines or imprisonment would constitute unlawful coercion and infringe the right to security of the person.

Even then, however, the “reasonable limits” exception in section 1 might be found to apply. Governments would at least have the onus of proving that vaccination was effective in preventing the spread of Covid, that the violation of personal security was proportional to the threat that the virus posed, and that no other practicable option existed. They have yet to be compelled to make that case.

Interlude: The Charter and the Supreme Court

According to the Supreme Court of Canada, the meaning of the Constitution is not fixed by its text. Instead, the Constitution is a “living tree” to be interpreted in accordance with changing social circumstances. Courts could, therefore, conceivably read the Charter expansively to prohibit Covid-19 lockdowns and vaccine mandates. That has not happened so far and does not seem likely.

The Supreme Court has read the Charter over its 40-year life largely through an ideologically “progressive” lens, slowly transforming what was drafted as a roster of autonomy rights into a mandate for collective values, group rights and the priorities of the expansive managerial state. The Supreme Court has not yet heard a Charter challenge to Covid-19 rules. But lower courts, rather than interpreting the Constitution expansively as when various progressive causes have been at stake, have steadfastly embraced public health policy and government sentiment in protecting Covid-19 orders from legal attack. Examples can be read here, here and here.

Creative misinterpretation: “The [1929] Privy Council [decision] was clearly not endorsing the principle that the meaning of the Constitution should change to reflect the values of modern society,” Toronto lawyer Asher Honickman (left) has written. Tell that to former Supreme Court Justice Rosalie Abella (right), who called herself and her colleagues “the final adjudicator of which contested values in a society should triumph.”

Fittingly, the living tree itself is a product of the Court's creative misinterpretation. The doctrine is said to derive from the "Persons Case" decided by the Privy Council in 1929 that found women to be eligible for appointment to the Senate under the *Constitution Act, 1867*. The decision itself, however, contains no endorsement of flexible or creative constitutional meaning. Instead, the court applied well-established principles of statutory interpretation. As Toronto lawyer Asher Honickman has written, "Whatever else may be said about the decision, the Privy Council was clearly not endorsing the principle that the meaning of the Constitution should change to reflect the values of modern society." The doctrine that allows for creative misinterpretation of the Constitution is the product of creative misinterpretation of the caselaw.

Nevertheless, the "living tree" doctrine prevails, having taken on a life of its own independent of the falsity of its origins. Stated bluntly, the Court decides social policy. As former Supreme Court Justice Rosalie Abella put it in a 2018 speech in Jerusalem, later published as a column in the *Globe and Mail*, the Supreme Court is "the final adjudicator of which contested values in a society should triumph." And adjudicate values it has.

Exhibit A – ***Trinity Western University (TWU) v Law Societies of British Columbia and Ontario***

TWU is a privately funded evangelical Christian university in Langley, British Columbia. Around 2012, TWU resolved to open a law school, and to that end applied to B.C.'s Minister of Advanced Education for approval to grant law degrees, to the Federation of Law Societies of Canada for approval of its program, and to the various provincial law societies to allow its graduates to be called to the bar to practice law. TWU received approval from all but the law societies of British Columbia, Ontario, and Nova Scotia. The law societies did not question the quality of the legal education to be delivered but objected to Trinity's community covenant, under which all students and faculty pledged to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman."

TWU challenged the law societies' decisions on the grounds that they violated TWU's freedom of religion. The Law Society of Nova Scotia relented when it lost its appeal of TWU's legal challenge at the Nova Scotia Court of Appeal. At the Supreme Court of Canada, however, the majority found that the law societies were entitled to violate Trinity's religious freedom in the name of "Charter values." Trinity's covenant, the majority said, imposed inequitable barriers on entry, especially for LGBTQ students, and held that the actions of the law societies reflected a "proportionate balancing" of the Charter protections in play.

But there were no competing Charter protections in play. Trinity's religious freedoms were not pitted against the equality rights of LGBTQ persons because no such rights existed. The Charter does not apply *against* anyone but the state. As a private religious institution, Trinity was not subject to the Charter or for that matter to the *B.C. Human*

Rights Code. Trinity was the only party with Charter rights, enforceable against the law societies as agencies of the state.

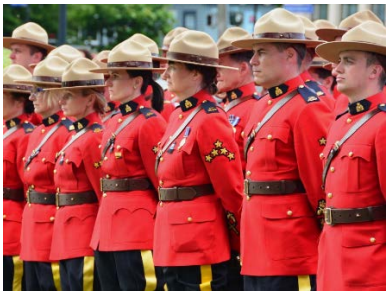
There was nothing to "balance." The "Charter values" cited by the majority were not found in the rights and freedoms that the Charter actually lists, such as religious freedom, but instead in the causes of critical theory and progressivism, mentioned nowhere in the text of the document: (substantive) equality, (social) justice, and (group) dignity. The Charter is a roster of freedoms, but according to the Court, those freedoms can be trumped by unwritten "values," the most important of which is equity.

Exhibit B – ***Fraser v Canada***

In 1997 the RCMP introduced a job-sharing program in which two or three RCMP members could elect to split the duties and responsibilities of one full-time position, which allowed each participant to work fewer hours than a full-time employee. Job-sharing was meant to be mutually beneficial for the RCMP and participating members. Participants were able to obtain a work schedule that better accommodated their individual circumstances. Most participants who chose to enrol were women with children, but the program was available to anyone.

Because the RCMP's job-sharing program was available equally to men and women, because more women than men voluntarily opted into the program, and because the pension rules provided benefits in proportion to hours of work, the Supreme Court held that the program perpetuated 'a long-standing source of economic disadvantage for women.'

RCMP members who worked at least 12 hours per week were required to enrol in and contribute to a statutory pension plan. The plan was a "contributory defined benefit pension plan," which meant that contribution rates were based on a percentage of a member's earnings. All members contributed to the pension fund at the same rate, set by the federal Treasury Board as a percentage of their salary. Both the individual member and the RCMP were required to contribute to the Plan. Upon retirement, members received a pension benefit that was proportional to their hours of work.



Equally open to all and well-liked by female officers, the RCMP's voluntary job-sharing program was nonetheless struck down by the Supreme Court of Canada because the associated pension plan was deemed conducive to "economic disadvantage for women."

At the Supreme Court, a majority struck down the program as a violation of section 15(1) of the Charter. Section 15 provides that every individual "is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on…sex."

Because the program was available equally to men and women, because more women than men voluntarily opted into the program, and because the pension rules provided benefits in proportion to hours of work, the Court held that the program perpetuated "a long-standing source of economic disadvantage for women." According to the Supreme Court, the equality guarantee in the Charter requires that rules apply unequally.

Recessional: The Charter has not made Canada a Free Country. A Different Charter might have

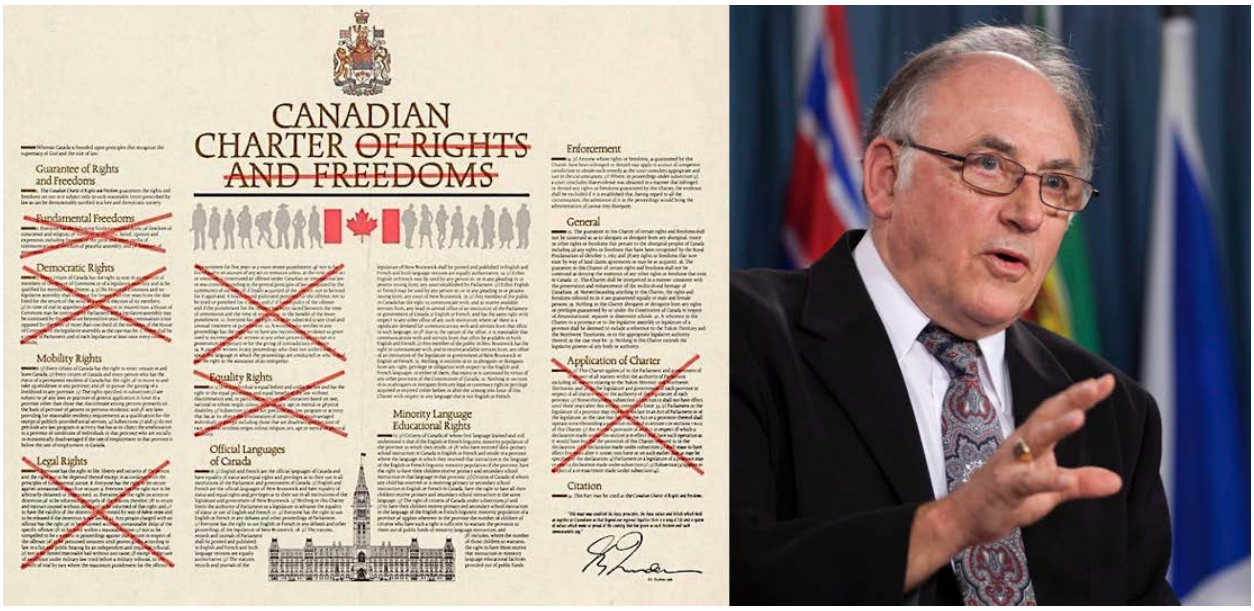
Peckford and his legal team will face a daunting challenge. The case will first be heard in Federal Court – the same court that last June concluded that quarantining air travellers in a hotel at their own expense (which had begun that February) did not violate the right to liberty because its deprivation was not contrary to principles of fundamental justice. If the air travel challenge eventually ends up in the Supreme Court, it seems unlikely the Court would use the Charter to strike down Covid-19 collectivism, the pinnacle achievement (so far) of the progressive managerial state.

Relying on the Charter to protect individual liberty is a mistake. The document is not equipped to hold back a dominant state integrated into every aspect of modern life or a judiciary inclined to endorse that dominance. In retrospect, the Charter seems almost naïve, written as though such a thing could not come to pass. In a different world, negative Charter rights and freedoms might have been enough. When government is small and leaves you alone, you are indeed free to seek a livelihood and bargain with others on their own terms. There is always someone to do business with. If the first convenience store won't serve you without shoes, you can always try the next one.

But when the state directs everything, including the conditions for participation in civil society – travelling, working, shopping, education, exercise and socializing – then negative constitutional rights do not do the job. Instead, government directives dictate the terms of social and economic interactions, all without directly running afoul of the Charter. By achieving indirectly what the Charter appears to prohibit when done directly, government can deny the non-compliant everything under the sun. If the law forbids service to the barefooted, there is no place to go but the black market.

The Covid-19 regime is just the tip of the iceberg. It is based upon an ideological premise: individual sovereignty must yield to the expertise, authority and discretion of officials acting in the name of public welfare and progressive causes.

There is no prospect for changing or repealing the Charter in the foreseeable future. If there were, it could be fixed. Even if such an attempt could be made, however, various rights-seeking groups would seek to add positive rights, which are not the answer. The Charter should not entrench rights to fly on planes, to have a job, to eat in restaurants, or to go university. Positive rights lead to bigger welfare states, higher taxes and more, not less, interference in the lives of private people. In any event, even without explicit positive rights in the Charter to things like welfare, housing, living standards, or other resources, the Supreme Court has said the Charter may one day be interpreted to include such entitlements.



In a society where government is involved in nearly everything, the Charter may no longer be equipped to protect individual freedoms. Some are trying anyway, such as former Newfoundland Premier Brian Peckford, the last living signatory of the Charter, who has mounted a legal challenge of Covid-19 travel restrictions. (Source of right photo: The Canadian Press)

What is needed is a different kind of Charter that sets out a different kind of limit: on the degree to which the state can manage society; on the extent to which it can interfere with markets; on when it can delegate authority to unelected officials and agencies; on its size as a proportion of economic activity; on its lack of responsibility to keep people safe from viruses and the vicissitudes of life; and other provisions that would actually restrict the role of government in people's lives.

Postlude

The Covid-19 regime is just the tip of the iceberg. It is based upon an ideological premise: individual sovereignty must yield to the expertise, authority and discretion of officials acting in the name of public welfare and progressive causes. Canada's constitutional law came to reflect that premise long before Covid-19 came along. It will

remain after Covid-19 rules collapse. The challenge will be to wipe that ideology away. In that enterprise, the Charter and the courts are obstacles, not solutions.

In the meantime, Godspeed to Peckford and his legal team, and to all those working to end vaccine passports, mandates and other Covid-19 incursions.

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