NATIONAL CITIZENS INQUIRY

Toronto, ON **Day 1**

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EVIDENCE

Witness 3: Dr. Bruce Pardy
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Shawn Buckley
So, our next witness coming to the stand is Bruce Pardy.

Mr. Pardy, I'll ask you if you can state your full name for the record, spelling your first and last name.

Dr. Bruce Pardy
My name is Bruce Richard Pardy. First name is spelled B-R-U-C-E. Pardy is spelled P-A-R-D-Y.

Shawn Buckley
Bruce, do you promise to tell the truth, the whole truth, and nothing but the truth?

Dr. Bruce Pardy
I do.

Shawn Buckley
Now, you had sent me earlier a copy of your CV, which we've kind of pre-entered as Exhibit T0-6. Would you confirm that the CV you sent me was correct and accurate?

Dr. Bruce Pardy
It is correct, thanks.

Shawn Buckley
Now, you are a professor of law at Queen's University.

Dr. Bruce Pardy
Correct.

Shawn Buckley
And you are the executive director of Rights Probe. And that's a law and governance think tank, and division of the Energy Probe Research Foundation?

Dr. Bruce Pardy
That's right.

Shawn Buckley
And then you're also currently a member of the Ontario Bar.

Dr. Bruce Pardy
Correct.

Shawn Buckley
Now, you've asked me to let the Commissioners know – and this would be a lawyer thing – that you are not opposed to questions being asked during your presentation, because you're going to cover different subjects. And the Commissioners might not be aware: judges interrupt lawyers all the time in court. So, it's kind of the common thing.

You've been called to explain how the legal system enabled governments and public health authorities to put COVID measures in place. And would you please share with us your thoughts on that?

Dr. Bruce Pardy
Yes, by all means. Thank you very much for having me. Is there a trick to starting the PowerPoint? Do I just click on?

Okay, very good.

Shawn Buckley
You have it.

Dr. Bruce Pardy
Great, great, great, okay.

So, I want to start with this thought, which is that the most powerful ideas are the ones you don't know you have. And one of those ideas is the problem here. I want to try to answer this question for us today.

During COVID, of course, people were told what to do and what not to do. They were told not to walk through the park. They were told to close their businesses. They were told their kids couldn't go to school. They were told that they couldn't go into the store without a mask. They were told they couldn't have a job without a vaccine. And so on.

And during this period, people thought the law would save them. This seemed like society unravelling. It seemed insane. And they thought, “the law will save us. The law is solid. The law is written down. The law will bring this back.” And it did not. Many people tried. They

found a lawyer; they brought an action; they brought a challenge to this rule or that. And those challenges, for the most part, were rejected. And the question is, why?

And there may be many answers to this question, but I would like to suggest two. The first one is that this is a reflection of the triumph of the administrative state. That system of governance is based upon an idea. And that's the idea that I want to talk to you about: this is the important idea that we don't know that we have.

And the second reason is that the Charter, that a lot of people put a lot of faith in, did nothing to push back against this idea. And in fact, in some ways – because of the way it is interpreted and applied now – the Charter, instead of opposing that premise, that idea, in some ways now facilitates it.

So, the premise: this idea that is the problem, let's start with this.

Our law is based upon ideas.

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Now it might seem that the law consists of books, of words. You go off to the shelf or onto the internet. And you open it up and you see what the words say. And that's the law. And that's true of course, to an extent. But the legal system is also based upon a certain number of ideas.

Here's one of the ideas. That the state is based upon three different branches: legislature; the administration or the executive branch, as it's sometimes called; and the courts. And one of the important ideas that we have had in our law for a long time is that these three branches of the state do different and distinct jobs. And one of the ways that we are protected from our state, from our own state, is that these three branches are distinct and they cannot do the job of the other. In other words, it prevents power from being concentrated in any one organ or person.

Legislatures legislate. They pass statutes that contain the rules. Courts take those rules and they apply them to particular cases. And the administration takes the rules that the legislature has passed and they enforce them, they enact them – they don't enact them, sorry – they carry them out. Now one way to understand which part of the state we're dealing with at any particular moment is to think about it this way. We know what a court is. And we know what a legislature is. A court has a judge and a room, and it involves a dispute and evidence and so on. And a legislature has elected people, and they pass statutes by vote. Everything else, everything else is a part of the administration: the cabinet, the ministries, the departments, the agencies, the tribunals, the commissions, the law enforcement, and so on and so forth.

Now, here's a basic idea. The administrative or executive part of the state is authorized to do nothing unless the legislature has passed a statute saying that it can. And that's a great rule. And that's a rule that the courts did enforce and still technically do enforce. But here's the problem. The ideas upon which our legal system is based are changing. They're evolving, if you like. But they're evolving in what I would consider to be a very dangerous way. Here is now what is happening – and it's been happening for quite a while, this is not just a COVID thing. But it reached its height during COVID.

Here's what's happening. Legislatures, instead of passing statutes that contain all the rules, are now passing statutes that delegate rulemaking authority to the administration. It

doesn't mean – I'm not suggesting that there aren't statutes with rules in them, that wouldn't be correct at all. But more and more, our statutes include sections that say, "and cabinet can make regulations about these things." Or, "the minister can decide this list of things." Or, "this public health official can do these things." Or, "this commission can do that." And the actual rules, the actual rules that apply to us day to day, more and more, are not in the statute. They are in the rules made by the administration.

Now you'd think, well, hold on, wait a minute. Surely the courts would prevent this from happening, because now you're concentrating power. Now the executive branch is doing the job of the legislature. But the courts have long said, "no, no, it's okay. Legislatures can delegate their rulemaking authority to the administration. And when they do so and when the administration makes these rules and does its stuff, what courts should do is to defer. We should give room to the administration,

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to the officials, to the public health officers, and so on, to do their thing. We shouldn't look too closely at it because after all, they are the ones with expertise and we in the court are not."

So, here's what we get. You get delegation from the legislative branch, and you get deference from the courts. And what you end up with is an administration that has the following mandate: It has the discretion to decide the public good. And that is the idea that has triumphed. And that is the idea that triumphed during COVID. On steroids. If you like, this is the holy trinity of the administrative state: delegation, deference, and discretion. The discretion to decide the public good is the premise of the administrative state.

And here's the implication: When we talk about data, when we talk about medicine, when we talk about whether masking works, talk about whether the vaccines are safe and effective, we are arguing about what is in the public good. That does not challenge the premise of the system that is in place. Here's what this premise means in a little bit longer detail: that individual autonomy must yield to the expertise and authority of officials acting in the name of public welfare and progressive causes.

So, just very briefly, here's what I mean by a premise. This is just a very short thing about deductive reasoning, right? You start with a proposition. Cats have tails. That's a premise. You plug in a bit of evidence; sometimes it's called a minor premise, but a piece of evidence. You're trying to connect two things: the premise with a piece of information. And you get a conclusion. Simple enough.

Here's the way the premise in this situation works. Here's the premise: officials have discretion to decide the public good. Here's the evidence: officials mandated a vaccine. Now, note the nature of this evidence. This evidence is not about the vaccine. It's not about its safety. It's not about its efficacy. It's not about whether it's in the public good. It's the evidence about what the officials with the authority did. If you put that premise together with that fact, what you get is the conclusion. The conclusion is: therefore, vaccine mandates are in the public good. That's what follows from the premise. And you cannot attack that conclusion without attacking the premise. And attacking that premise, for the most part, has not been done.

Why is that? Because the premise is very deep. We have lived with an administrative state for decades. People think that's what government is. If you went up to people on the street and you said, "we shouldn't have officials with the ability to decide the public good," they

would look at you like you were from a different place. Like, “what are you talking about? I don't understand what you mean. That's what government does.”

And I'm here to tell you, that is not necessarily what government does. It is what it does now. But it is not the only way to design your government. And the fact that we have designed our government in this way has led to this problem. And there is no way to avoid the problem again, the next time, unless the premise is challenged.

So, here's what I mean about all of the issues that so many people have been talking about.

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The masking. The lockdowns. Do lockdowns work? Did they work? Did they stop the spread? Did they cause more harm than good? Did social distancing have a rationale? Was six feet right, or should it have been five or seven? Was there any data? Was it ridiculous or not? Do masks work? What's the data? What are the studies on masks? Is it as ridiculous as it looks to be, or is there something to it? What about the vaccines? Were they tested properly? Do they cause these problems? Do they actually stop the spread? Do they actually stop the severity of symptoms? All of these questions. Now they're very important questions, to be sure. Very valuable to know about what the actual information is on all of these questions. But all of these questions are trying to debate what is in the public good. And to concentrate on that is to miss the problem.

The problem is not the last part of that statement; the problem is the first part. You must challenge the premise that our government officials have the expertise and authority to tell us what to do in the public good. Because that is the idea that is now running the show.

In other words, it would be a mistake to think of this COVID debacle as a matter of a collection of bad policies. Now they were, in my opinion, for sure. But that's not the real problem. The real problem is that the officials inside the state were able to produce a set of bad policies. If government officials have unchallenged authority to decide the public good and thereby to override individual autonomy, bad things inevitably follow. What they can do, they will do. And in a sense, what happened during COVID was the culmination of this trend, if you like, this evolution of the nature of the administrative state. If you like, it was the pinnacle achievement of this managerial state apparatus. It was a great opportunity for people who have authority to manage society, because that's what they think they're for.

Now as I say, COVID was not the first time. These things have been in development for decades. Decades. Over a long period of time, these things have come forward. But COVID may have been the most extreme example, certainly in living memory. So that's part one. That is the problem about the premise. That is the idea that's leading the charge, the idea that must be challenged.

And part two is, well, what happened to the Charter? I thought the Charter was there to protect my individual rights. It looks like it should. It's a roster of what appears to be individual freedoms: freedom of speech; freedom of religion; freedom of conscience; freedom of assembly; freedom of association; the right to equality; the right to life, liberty, and security of the person. What happened?

Well, the way our Charter reads combined with the way, over a long period of time, the courts have interpreted those words, means that the Charter does not now prevent the administrative state from overriding individual autonomy in the name of public good. Now, occasionally it will. In the law, of course, you can't make blanket statements about things

because cases go this way and that. But if you look at the trend over time, the Charter now is as much a legitimizer of the administrative state as it is an opposer of it. And note this: This administrative state I keep referring to, this managerial governance mechanism,

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or collection of agencies and departments and people who manage society, is explicitly provided for in the Constitution nowhere. Our Constitution does not say we shall have an administrative state. It doesn't prohibit it. It doesn't prevent it. But it doesn't prescribe it either. It has just grown up over time.

So, the Charter is not a foundation. Unlike what many people think, and understandably so, the Charter is not the foundation of our legal system. Instead, it is merely a gloss, if you like, on what the legislature and the executive branch can do.

Now it used to be – and some would argue still is, and that's a fair argument – it used to be that the foundation of our legal system was both the common law, that is, law developed on certain subjects by the courts over a long period of time, from case to case to case to case. The law of contract, the law of torts and negligence, the law of property are still largely common law subjects. In other words, you can't find the whole law by looking in the statutes.

And the other foundation is the separation of powers idea that I referred to at the beginning. The legislature does this, the administration does that, and the courts do this. And they should all be separate to protect us all from their domination. Today though, for the most part, I would contend that, even though those ideas are still around, they have been put aside in terms of their hierarchy in favour of this primary idea that I mentioned to you earlier, which is this holy trinity of the administrative state: delegation, deference, and discretion.

So, what about the Charter? Well, two things I want to say about the Charter. Number one, these COVID rules and the people who put them in place got around the Charter by going around to the back door. And b), I want to talk about the courts a little bit. But let's do the first one first: going around the back door.

What I mean is that some things are able to be done indirectly that are not able to be done directly. Here's an example. Let's say that a province had put in place a mandatory vaccine policy. I mean, actually mandatory. I don't mean a passport. I don't mean at your workplace. I don't mean for school. I mean actually mandatory in this sense: if you do not get a vaccine, the rule says, we will fine you or put you in prison. Okay. Well, now that is an actual mandatory vaccine. And we have Section 7 in the Charter. Section 7 says, “Everyone has the right to life, liberty, and security of the person.” Security of the person will include the notion of bodily autonomy. It's where in the Charter you will find the idea that you have the right not to give consent before medical treatment. A medical practitioner and the state need to get your voluntary informed consent before they can apply treatment. Okay.

If we had a mandatory vaccine, an actual mandatory vaccine: that – you'd like to think, I would think – would violate Section 7. That would be unconstitutional. But that's not what we had. We had something much more clever. We had a collection of policies put forward by, enacted by, directed by, promoted by the agencies of the administrative state that said, “Listen, you can do what you want. You don't have to get a vaccine. But by the way, if you don't get one, you might not be able to have a job. You won't be able to fly on a plane or a train. You maybe can't go to a restaurant. Maybe your kids can't go to school.

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But it's still your choice. We're not requiring you to get one. We're not coercing you." And they're right. In the strict legal sense, that is not unlawful coercion.

Why? Because they're not making you with the force of the state, with fines or imprisonment. It doesn't fit within the idea of unlawful coercion. So, the argument that they were making about this does fly. It fits within the gaps in the Charter. So those people who thought, "well, we have security of the person in Section 7, they can't make me take a vaccine." And those people are right. They can't make you take a vaccine. But they can set up consequences if you don't, and thereby avoid the Charter protection. Compulsory vaccines are likely a violation of Section 7. But vaccine passports probably are not. And that's what the courts have said. And this is just one example of going around the back door, of doing indirectly what cannot be done directly.

Let me give you a concrete example of how this works outside the COVID situation. And this is going to sound banal. But it's abstractly similar, so you can see it. Let's say a province creates a rule that applies to all retail establishments – stores and restaurants and so on – that says, "you cannot go into the establishment, a public commercial establishment, without shirt and shoes." Well, some people might say, "well, hold on, wait a minute, I have rights. I have Charter rights. I'm being made to wear something that's a violation of my person. My clothing or lack thereof is an expression that violates my freedom of expression." And so on and so forth. You can see the argument that, for someone who doesn't want to wear a shirt, this is actually a violation of their choice.

But of course, this is not going to work, because there are rationales for the rule. The rationales are public decency, public health. We don't want you walking around in a restaurant without a shirt on, just not going to look good and it might be unhealthy. There's going to be a social consensus and a legal rationale for having the rule. And therefore, you're not going to be able to reject it. The answer's going to be, look, you don't have to go to the restaurant if you don't want to wear a shirt. And that's exactly the kind of argument you heard with the vaccine passports. "You don't have to have one; just don't go. Now, the fact that you can't basically do anything without the vaccine is not our problem. Because it's a series of choices. And the Charter does not entitle you to be free of consequences," is the way that they would put it.

So here are the other kinds of rights in the Charter that have been tried as arguments against various COVID rules: freedom of assembly and speech, conscience and religion; mobility rights in Section 6, for the refusal to take the unvaccinated on planes and trains; freedom from arbitrary detention, the mandatory quarantine hotels that they ran for a while. For the most part, these didn't work. And of course, even if they had worked – and sometimes, they worked. Sometimes you had a rule that so plainly infringed one of these rights that the court had to say so. And then found another reason why it was still okay.

And this is the main reason: this is the famous Section 1 of our Charter. This is the reasonable limits exception. These rights and freedoms guaranteed in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Now, that's wide enough to drive a truck through, if you want to. And some courts used that exception to say that even though this rule—

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For example, there were rules prohibiting gathering for church services at the same time that some stores were open. Because gathering in stores is one thing that the state approves of and gathering in churches was another thing that they didn't want to happen. And those rules clearly infringed your right of assembly, perhaps your freedom of religion, and so on. And the court said, “well, they do, but it's a reasonable limit because of the situation that we are in.”

And for the most part, and I want to be clear that courts don't act as a monolith. No one sends a memo from on high to all the judges and all the courts saying, “here's the attitude you should take about this.” That's not the way it works. And I'm not suggesting that all the courts and all the judges are all thinking the same way. That wouldn't be correct. But if you look at the pattern, for the most part, I would argue that courts largely embraced not only the premise of the administrative state, but embraced the government COVID narrative. And you can see that if you take a wander through the various cases that have been tried over the past two or three years. You'll see that in their decisions, in black and white, they have said things that have suggested that they are totally on side with the danger that has been portrayed, that the virus poses, and the efficacy of the various rules that have been tried and put in place.

Here are just a couple of – I'll just take you through some examples. This is just to give you a flavour of the approach that many courts have taken.

Here's a case from Manitoba: “[T]he factual underpinnings for managing a pandemic are essentially scientific… [and] fall outside the institutional expertise of courts.” We don't know how to do this. And we don't want to do it: “it is not an abdication of the court's responsibility to afford the [public health officials] an appropriate measure of deference.” There's the deference I was speaking of. There’s the deference that makes the administrative state powerful. Courts don't want to deal with this. The judges don't have the expertise in these subject areas and the officials do. That's the rationale.

Here's another one. “[L]ike times of war… pandemics call for sacrifices.” This court is equating COVID with being at war. And during times of war, governments are entitled to expect sacrifice from their citizens. In other words, “you will do as you are told, because we're in a crisis here. And we are not going to tell the government not to do what it wants to do.”

That is a reflection of the premise of the administrative state. And note this: necessity. Necessity is so often the rationale for putting public welfare ahead of individual autonomy. You can find necessity pretty much anywhere you look if you want to find it.

“If some are unwilling to make such sacrifices … [the constitution] will not prevent the state from performing its essential function of protecting its citizens from that risk.” And note the end there. It is not a given that the job of government is to protect citizens from risk. That is the job of the administrative state. But it is not the job necessarily of any government organization, of any conception of what government's supposed to be.

There is the big idea that we don't know that we have. The idea that government has the job of protecting its citizens from risk. That is part of the premise that must be challenged. I would say, in my opinion,

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that the role of government is not to protect citizens from risk, and that that function is the citizens' job to do on their own. But if you accept that premise, then you get the COVID regime.

Another example. This is a case from Nova Scotia dealing with protests outside, against lockdowns. “[Protesters] are uninformed or willfully blind to the scientific and medical evidence that support those measures.” Now, of course, we have a pretty good idea now that actually that's not true. And in fact, it might be actually the reverse, that the protesters actually had it exactly right. But that was not acceptable then. Why? Because of the premise. Because officials had said, “we're going to have lockdowns.” And officials have the authority, expertise, and discretion to decide the public good. There's your logic. If the officials have said so, then that's the conclusion: therefore, the protesters must be wrong.

This is not based upon evidence from the court. Or, you know, induced in the court. I mean, there was evidence. As there is in any case, you'd hope to have conflicting evidence. It's the purpose of experts coming into a courtroom: I think this, I think that. Those two things conflict. The job of the court is to resolve that conflict and decide whose makes more sense. But in so many of these COVID cases, the court would be inclined to dismiss the evidence of those who were challenging the rules and to embrace those producing evidence on the part of the government. So, the protesters show “a callous and shameful disregard for the health and safety of their fellow citizens.”

Just two more. And then, I'm basically done. And if there are any questions, I'd be happy to take them.

I'm able to take judicial notice. Now, here's a very interesting thing: in a number of cases, especially family law cases, a number of courts took judicial notice. Judicial notice means a judicial conclusion of facts not based upon evidence. Judicial notice is a thing. It's designed to allow a court to assume certain facts as true even though there's no evidence, because those facts are so notorious that nobody would spend time debating them. The sky is blue. I mean, a court can take judicial notice of the fact that the sky is blue. Who would say otherwise?

But the efficacy and safety of the vaccine was, at least in part, the issue in the case. And yet in these cases – at least a handful of them – courts took judicial notice of the safety and efficacy of the vaccine precisely because they did not want to delve into the evidence.

And finally, here's a really neat one. This is from an Ontario court. “The [COVID] measures,” the COVID measures that are being challenged in this case; the COVID measures themselves, the ones that say, can't do this, can't do that, must do this. These “[COVID] measures protected the constitutional rights of those individuals to life and security of the person.”

You see now how the Charter is being exactly turned around. Instead of protecting you from the tyranny of the state, the Charter in this paragraph is now being used as a rationale and justification for why the state must come down and tell you what to do in order to protect your neighbours. So, maybe I'll stop there.

Shawn Buckley
Now, Professor Pardy, before I let the Commissioners ask you questions, I wanted to ask if you could also comment perhaps on the doctrine of mootness and how that has been applied to thwart some Charter cases?

Dr. Bruce Pardy
Sure, yeah. So, mootness is this idea. Courts are tasked with resolving live disputes. If you went into a court today and you said, "you know, I've always wondered about this question. What would happen if…?" If you did that, the court would throw you out because it's not a real dispute.

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It's theoretical, and therefore moot. It's a waste of judicial resources and time. It's got to be concrete; it's got to be a real thing. So, mootness comes along when a dispute that was real at the beginning becomes theoretical because something changed. The rule, for example, that was being challenged was repealed, taken away. So, the person with the problem doesn't have the problem anymore because the rule is gone. And on that basis, courts will dismiss suits that are moot if the rules are withdrawn.

However, the problem with doing that is that you essentially give a licence to the government to bring the rule back. If you do not resolve the legal question about whether the rule was constitutional to begin with, then it's still an open question. And a few months or a few years down the road, the government could say, "well, we didn't get into trouble the first time. Let's do it again." Or even more, in an even more sinister way, if you wanted to go this far, if you were the government, you could think, "well, you know what? If we just keep playing this mootness game, we can put on the rule for as long as it takes the case to get to court. Before we get to trial, we'll just take the thing away. It'll therefore be moot. The thing will be dismissed for mootness. And therefore, we can put the rule back on." Sort of a cat and mouse game. That's the kind of reason why courts have the discretion to hear a case which is technically moot. And they often do. But in this COVID era, some courts have declined to do that. For the reason, I would posit, that they don't want to. They don't want to be the ones to decide the COVID question. And understandably so.

Here's one of the mistakes that people who have opposed COVID rules have made, in terms of their thinking. They thought, this is crazy. Something strange has happened to society. I'm going to take this mess to the court to have them sort it out and put things back together again. You are essentially asking the courts to serve a political function. Courts don't want to do that. They don't like to get involved in politics to that extent. And predictably, the situations in which they've been tried to be given that mandate, they've backed away from it. And I quite understand that. But I think that's the story on the mootness.

Shawn Buckley
Thank you, Professor Pardy. I'll allow the Commissioners to ask you questions. But when you conclude, if you can give your thoughts of perhaps how this could be changed to prevent the administrative state. But we'll let the Commissioners ask you questions first.

Commissioner DiGregorio
Thank you, Mr. Pardy, for your testimony today. I wrote down a hundred questions but wanted to hear your presentation throughout before I tried to put them in some order that will help us to take this, what you've told us today, and develop it into some recommendations in our final report. And so that's kind of how I'm framing the way I'm going to ask these questions.

In trying to pinpoint where the problems are that we can address, or provide recommendations to address, I heard you talk about an issue with the role of delegation from the elected legislation to the unelected administrative regime, let's say. I heard an issue with the courts providing deference to the administrative state. I think I heard you talk about potentially the Charter being too weak to have protected rights robustly and that it could be overcome indirectly. And so, I'm just trying to think about, on each one of those levels, what we could recommend.

And if I start with the delegation problem: do you think that what's needed is a different standard, maybe legislative standards, as to when and how delegation can be given from the elected legislature to the unelected administrative state?

Dr. Bruce Pardy
The short answer is, yes. And thank you for the question. In a way, this is the question.

There is at least theoretically a doctrine, a non-delegation doctrine, which we don't have in this country. The Americans do have a form of a non-delegation doctrine in some places. It's not robust, but it does exist.

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In this country, we have essentially had the rule that a legislature can delegate its powers any way it likes, as long as it maintains the right to take them back.

A better rule, in my view, would be a non-delegation doctrine that said the following thing. This work, by the way, has been done by a fellow named James Johnson, a very thorough legal scholar and researcher. He's made this case in an article, amongst other places, in the *UBC Law Journal*. But he says this: "Legislatures should have the job of articulating the substance of the rule." In other words, our MPs and MPPs are elected to make policy decisions. That's legitimate. And as long as they make those judgment calls, that's fine. Those judgment calls between this and that, about where the line should be drawn; what the considerations are; what values or virtues are going to be reflected in the rule: that's a legitimate thing for elected officials to do. Because they're elected; they have democratic legitimacy. But the job of making that call, making that difficult political call about where to draw the line, the substance of the rule should be made in the legislature. So, if the people don't like it, number one, they can see it being made; and number two, they can kick the bums out next time if they don't like it.

What should not happen is that the statute should avoid having to make the hard call and send it off to some dark room in the back. Where you can't see the rule being made, sometimes you don't even know what the effective rule is. Right? That's the essence of the non-delegation doctrine. It should be sunlight; it should be democratic. It's not that the governments can't make policy choices; it's that they're not being made by the right body. And that's the essence of a non-delegation doctrine.

Commissioner DiGregorio
Thank you. So then, moving on to the issues we've seen with the courts throughout the pandemic, you identified – I think quite rightly – that there's been a lot of deference given by the courts to the decisions that have been made. And in terms of thinking about recommendations we could make to maybe strengthen the role of the courts, do we need statutes that set out perhaps better standards of evidence that are required before

deference is provided? Maybe rules around when judicial notice can be taken, do we need to strengthen that area?

Dr. Bruce Pardy
Yes and no. So certainly, rules of evidence are within the realm of the legislature to act upon. But there are some things about whether courts should get deference and the nature of judicial review and so on, that the courts are going to view as in their area and not the legislature's. In other words, we have – and quite rightly and good that we do – we have a tradition of judicial independence. And the courts as an institution, again quite rightly, are going to look askew a little bit at legislative attempts to curb what it is that they can do when they review the very legislation that they are asked to do.

In a sense, it's a constitutional dilemma. You want these three separate branches to do their job. And you want them to do it properly. We see a problem about how they're doing that job independently. And yet, when one branch comes along to try and tell the other branch to do their job properly, that's interference with that branch by the first branch. So, I don't have a simple answer to your question. It's a very good question. It's worth looking at the degrees to which legislatures could stipulate the legal rules about evidence to be applied in a court. On the other hand, the rule of judicial review, the constitutional standards for assessing when deference is going to be given and so on, is largely common law in the sense it's developed by courts. And we should probably be careful about treading on that territory.

Commissioner DiGregorio
Thank you. Lastly, I'd just like to ask you about your views on the Charter. And I think I heard you essentially say that a lot of the rules that were put in place did not violate the Charter. I think that could probably be argued both ways by many lawyers. But let's accept that, perhaps, that is the conclusion that the courts will reach.

[00:50:00]

Is it then your opinion that our Charter needs to be changed or revised?

Dr. Bruce Pardy
Oh, I think our Charter needs to be revised. Yes, definitely. I think it has proven to be inadequate to the task that people expect of it. I think the prospects for revising it are very, very poor. And I would even be reluctant to go down that road, because once you open it up, you are also subject to the forces that might want the Charter to be more what it's becoming instead of less. In other words, a Charter looks like a roster of individual rights and freedoms. Over time, it is probably less of that and more of a progressive blueprint for common interventions.

For example, the way that the Supreme Court over a period of decades has interpreted Section 15(1), which is the equality provision: from one that I read as providing, in Section 15(1), a requirement for equal treatment in the law, the Supreme Court has basically said that 15(1) and (2) together require substantive equality. Now. that is a real conflict in vision. If we opened up the Charter, I would be concerned that we would go further down that road instead of back to the one that I would like to see.

Commissioner DiGregorio
All right, thank you. I'm going to stop my questions there.

Commissioner Drysdale
Thank you for your testimony. Like my colleague, I have a hundred questions. And although we have the ability to ask those hundred questions, I don't think anybody would stay for them. But I have a few questions. And we've talked about – or you've talked about – the three branches of government, if that's the right term. You know, we often talk about another branch of government unofficially. And I ask this question because when I look around this room – and I looked around, I did this as well in our last hearing, and I will do it in every hearing – I only see a very thin representation from that other branch of government. And I'm talking about the press.

Dr. Bruce Pardy
Right.

Commissioner Drysdale
But in my mind, there's another component as well and that's the component of the people. And I start to look at the participation in our political system. And I start to look at the numbers of people that vote or don't vote and the number of people that get elected by acclamation in our country. And I also look at the incredible power of each of the leaders of the two or three political parties we have. In other words, the candidate doesn't even get to run unless they're vetted by that.

So, having said that giant mouthful, how do we re-engage the public? How do we re-engage the press in an honest and open way? Big question, but I think that – would you agree that that's kind of the fundamental of getting change? Because if you're not holding the big stick, they won't make the change. And you can only hold the big stick if you can engage the population. Is that a reasonable statement?

Dr. Bruce Pardy
Yes, absolutely it is. But it's also all tangled up, the problem that is, right? Because it's not just a case of electing the government that you will solve the problem. Because the idea is deep enough so that the particular stripe of party that's in power doesn't actually change the game. So, elections and democratic participation and so on is very important. But it's not the whole story either. I mean, I'm afraid I think it goes back to the set of ideas people carry around.

So, let's talk about the press for a minute. For some reason, we have come to the idea – a lot of people have, I think, in the here and now – that the job of the press, whether or not it's the legacy press or the new independent press or for that matter just people online, that their job, their responsibility, is to tell the truth. In fact, that if you are speaking, whether it's in a forum or online or as the case may be, that if you are not speaking the truth that you are not really exercising your free speech legitimately. And that's, in my opinion, completely wrong.

[00:55:00]

Free speech, upon which our press traditions are based, is not based upon truth. As soon

as you have the idea that people have to speak the truth to be allowed to speak, now you've got a real problem. Because now you have to define what the truth is. And the only party able to do that is the government. So now, you have free speech that's supervised by government approval of what you're saying. That's the opposite of free speech.

You're allowed to say what you think, not because it's true, but because it's what you think. And that's got to apply to the press too. And the job of a free citizen in a democratic country is to take all the things that they hear from everywhere and to understand that it might not be true and decide for themselves what is. And that's just one of the many ideas we have to get embedded into our people again.

Commissioner Drysdale
I have another one. And I very much enjoyed your talk, and I learned a lot from you. But my question to you is, would you consider what happened here, in your opinion, to be a significant breach of at least what Canadians' perception of their freedom is?

Dr. Bruce Pardy
I think it was a breach of their perception, yes. Part of what happened during this period, if I can put it this way, is a lot of Canadians discovered that their perception was wrong. And that's a hard lesson. We've been assuming that the system works in a certain way and that we have certain rights and freedoms. It says so in the document. Why wouldn't we believe in it? And then this thing comes along, and you find out that what you thought is not true at all. So, if there's any silver lining to this period, it might be that the curtain has been pulled back on the way the thing actually works and what it actually means. And having discovered that, now's the time; if we don't like what we see, got to fix it.

Commissioner Drysdale
Next question has to do with – this is going to sound odd – but why are you here telling me this? And the reason I say that in the way I'm doing it is because: if reasonable people consider what happened to be a fundamental challenge to what we understand our country to be, why is the head solicitor general of the country or the Supreme Court justice not sitting in that place to explain it to us as Canadians? Rather than, and not to be insulting, but, you know, a university professor or a lecturer? Why is a Supreme Court justice not sitting here telling me what it is?

Dr. Bruce Pardy
There are many ways to answer that question. Here's one of them: number one, because it would probably be out of line for them to do that. But also, because – and I don't want to speak to every single one of them – but a lot of them will believe in the premise that I discussed. They really do think that it is the job of government to protect us and to manage society. It is the job of public servants to fix social problems. That's part of the premise. And if you were to stand up in public and say, “no, no, no, no, no, no, no. Governments and their officials should not be primarily involved in bringing the power of the state to bear to fix social problems and keep people safe.” Okay? Now I'm talking heresy. Absolute heresy. Certainly, amongst that population of people who are, after all, involved in their careers in that enterprise. If you were to be a person with prominence in that area and stand up and say that, you will be undermining the whole machine.

Commissioner Drysdale
My last question is, what is the standard for the courts or the police when it comes to making a ruling like you talked about the ruling at Gateway Bible Baptist Church in Manitoba?

Dr. Bruce Pardy
Right.

Commissioner Drysdale
So, they make a ruling.

[01:00:00]

And then evidence becomes public shortly thereafter that proves that ruling incorrect. What is the process? Can the courts readdress that on their own? I'm wondering what the process is.

Dr. Bruce Pardy
Yes, it's very unusual to go back to a case. The general rule is that once a decision is done, it's done. In very narrow circumstances, in certain kinds of cases, if new evidence does come to light – for example, let's say somebody has been convicted of a crime and is in in prison and new evidence comes to light. There's a process for applying to reopen the situation. But in general, of course, that is not what's done. The new evidence becomes relevant to the next time around, if that issue should rise again. But for the most part, a case is a finished case.

Commissioner Drysdale
Thank you.

Shawn Buckley
I see we have another Commissioner.

Commissioner Massie
Just one question.

Shawn Buckley
And I do too. So, I'll let you go first, Professor Pardy, we clearly did not give you enough time.

Commissioner Massie
Thank you so much for your presentation. It really helps me to understand a lot of situations we're in. I just want to come back to your administrative state, which is probably prevalent in all of the Western society.

Dr. Bruce Pardy
Absolutely, yes.

Commissioner Massie
And to me, I've been living in the administrative state during my career. And one of the things I've always struggled with is that there seems to be a disconnection between authority and accountability. So, is there a way to reintroduce true accountability within the administrative state?

Dr. Bruce Pardy
That's a very good question as well. So, you would think, you would like to think that authority would come along with accountability. Those two things should really travel together. But they often don't. And part of the reason for that – and this is reflected in the law, the way the courts have developed it as well – is, if you are trying to sue the government for negligence, for example, you are able to sue them for operational failures.

So, let's say the government has adopted a policy of paving roads in a certain way, in a certain place, in a certain frequency. And they fail to do that properly. The road isn't well done; there's potholes; it's dangerous. And you have an accident on the road because of their failure to carry out the policy. You can do that. You can hold the government liable for its negligence as long as it's an operational failure. You generally cannot sue the government for its policy decisions. If the policy creates bad outcomes, there's no cause of action.

And that makes sense, in a way, for this reason. All policy decisions create some bad outcomes for somebody. That's the nature of a policy decision. It's a matter of weighing costs and benefits and drawing a line somewhere. And some people are going to be on one side of the line, and some people are going to be on the other. And so, it'd be very problematic for us to say, "you can sue them for policy decisions." That probably won't work, right? It's part of the democratic process to give the elected officials, as I said before, the power to make those kinds of policy decisions. And you would never be able to sue a legislature for the policy that it put inside a statute that was properly passed. That just wouldn't go.

Shawn Buckley
Because of time I'm going to defer on my question. We must take a lunch break. But Professor Pardy, I want to thank you on behalf of the National Citizens Inquiry for coming, for sharing your thoughts. I think I speak for the Commissioners and everyone present that you have made us think about things in a different way and we thank you for your contribution.

Dr. Bruce Pardy
Thanks for having me.

[01:04:18]