

# Canada's Justice System



Analysis from the NCI Final Report  
7.1.1. Canada's Justice System





# Analysis

Excerpts from the NCI Final Report | 7.1.1. Canada's Justice System

## Canada's Justice System

The Commission heard testimony regarding the role that Canada's justice system played in the pandemic response.

Based on the testimony, the Commission has serious concerns about the state of the rule of law in Canada, the real or perceived failure of Canadian courts to protect Canadians from government and administrative overreach, and the neutering of the Charter of Rights and Freedoms in the face of a government-declared emergency.

- **James Kitchen** (Saskatoon, SK; Vancouver, BC)
- **Leighton Grey** (Saskatoon, SK)
- **Bruce Pardy** (Toronto, ON)
- **Lt. Col. David Redman** (Red Deer, AB)
- **Myriam Bohémier** (Québec City, QC)
- **Luc Harvey** (Québec City, QC)
- **Maurice Gatién** (Ottawa, ON)

The preamble to the *Canadian Charter of Rights and Freedoms* (the Charter) affirms clearly that Canada itself is founded upon the principle of the rule of law:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law<sup>2</sup> . . . .

The rule of law is so fundamental to our nation that it is recognized as a pillar of the country in our Constitution.

The rule of law means that the law applies equally to all—including people and the government. It means that no person is above the law, regardless of wealth, race, or personal characteristics. It means that the government itself is bound by the law and cannot act with impunity. The rule of law rejects political influence and popularity, and ensures that each person is treated in the same way in the eyes of the law. The rule of law is of utmost importance to a functioning democracy and is a fundamental principle in the Canadian justice system.

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<sup>2</sup> *Canadian Charter of Rights and Freedoms*, preamble.

The NCI (National Citizens Inquiry) heard repeatedly about the rule of law during testimony. Sadly, the erosion of the rule of law during COVID was a recurring theme of the testimony from legal experts as well as lay witnesses.

The rule of law is not only important to ensure that a justice system functions correctly; the rule of law is equally important to maintaining the confidence of Canadians in their justice system. When the rule of law is subverted, Canadians perceive fundamental unfairness to themselves and their loved ones. This breeds resentment and mistrust and can undermine the very functioning of democracy.

In some ways, the justice system can be seen as a pressure valve on society. It is a place where people who feel wronged can bring their grievances to be heard and resolved. The actions of a court in: (1) hearing a grievance, (2) placing it into context with the other side, and (3) rendering a decision with careful reasons are of utmost importance. Even when the result is not the desired outcome, the mere fact that the process has been conducted fairly can provide relief and understanding to the participant.

However, when members of society lose trust in the justice system's ability to fairly resolve problems, the resulting frustration and grief can become problematic. When people lose faith in their ability to solve problems through the justice system, the risk that they may take matters of justice into their own hands increases significantly.

The NCI heard extensive evidence that Canadian courts have failed to uphold the rule of law, and failed to instil confidence in the system. The Canadian courts' response to the impact of COVID measures on Canadians has led to a breakdown in confidence and an erosion of trust in the Canadian legal system. One legal expert who represented many Canadians in lawsuits involving the pandemic measures described his experiences in Canadian courts as consistently being on the visiting team.<sup>3</sup>

A perception that the government has the advantage in court runs contrary to the rule of law - whether or not the perception is true. Sadly, the testimony heard led the Commissioners to conclude that the advantage was not only perceived; the advantage actually existed. Counsel repeatedly asked legal experts during their testimony if they were aware of any case in Canada where a person had success against the measures and mandates, and not one single lawyer could name such a case in the entire country.

Canadians have been left with the feeling that there is no person to protect them from government overreach. This is worrisome evidence of a breakdown of the rule of law.

### **The Legislative, Judicial and Executive Functions**

Canada's legal system is comprised of three branches: three branches: the legislative, judicial, and executive.

Most Canadians are familiar with the legislative and judicial branches. The legislative branch consists of parliament and each provincial legislature, where elected representatives enact laws.

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<sup>3</sup>Testimony of Leighton Grey, Saskatoon.

The judicial branch is the system of courts where Canadians go to resolve legal disputes (An extensive discussion of the courts and their role during the pandemic is below.).

What most Canadians are not aware of, however, is the power and reach of the executive branch within Canada and the important role that it played in Canada's pandemic response. During the pandemic, much of the rule-making power in Canada coalesced into the executive, which resulted in unelected public health officers across the country ruling as petty tyrants, without accountability or oversight.

### **The Administrative State**

Canadians relied on their institutions to serve them during the pandemic. Critical institutions failed, and public policy suffered.

The NCI heard testimony that this partly resulted from an overgrowth of the administrative state, whereby unelected bodies are delegated significant regulation-making and decision-making powers over Canadian citizens. The size of Canada's administrative state has been growing, and at the same time, Canadian courts have been paying more and more deference to the powers of unelected administrative bodies. This has resulted in a perfect storm, where unelected officials have powers over Canadians, which are largely unchallenged-able in court, and are not subject to oversight through an election.

In Canada, there are three distinct branches that make up the government and state: (1) the elected legislatures, (2) the courts, and (3) the administration. The separation of powers between the branches is intended to protect individuals by ensuring that excessive power does not become concentrated in any one branch.

The only branch that is elected, and thus accountable to the people, is the legislative branch, which, in Canada, is made up of the federal Parliament and the legislatures of each province. The second branch, the courts, is made up of judges who are chosen by the legislature and thereafter have tenure until retirement. Each of the legislatures and the courts are well-known institutions, with well-understood functions in Canadian society. The third branch, however, is not highly visible and is mostly not a consideration to Canadian citizens. However, its power over the lives of Canadians has been growing steadily, and this was revealed during the pandemic.

The purpose of legislatures is to create laws by passing statutes. However, the NCI heard that legislatures have been increasingly "passing the buck" by creating statutes that do not create new laws or rules, but instead delegate rule-making to various unelected administrative bodies. Once such power has been delegated, an unelected administrative body is then empowered to make rules and exercise decision-making powers that impact Canadians. These administrative bodies, however, lack accountability to citizens through civic elections.

The result is that the unelected administration of Canada makes rules that have a profound impact on Canadian citizens. This has become the case for a large number of rules that apply, on a day-to-day basis, to Canadians. It became particularly evident during the pandemic. One example was the health authorities of each province: The public health authority of each province in Canada was empowered to make profoundly restrictive rules limiting Canadians' freedom of movement, association, and expression. The officials making these rules were unelected and thus felt free to impose whatever measure made sense from the perspective of protecting everyone from one thing only— infection by COVID-19. The NCI was not made aware of a single health authority that took any oth-

er consideration into account. At the same time, the NCI heard considerable testimony (documented throughout this report) about the devastating harms that public health measures caused on Canadians and their society, as well as the fact that health authorities surely had early knowledge about the true risk profile of the COVID-19 virus on different parts of the population.

When rule-making and decision-making are delegated to the unelected administrative state, a gap in accountability is created. This gap has grown alongside the growth of the administration itself, as a result of Canadian courts' decisions that provide great deference to administrators who act within their area of expertise. (See the section below titled "The Standard of Review in Judicial Applications.")

During the pandemic, the unaccountable administrative state made far-reaching decisions in the name of the "public good." Individual rights that are purportedly guaranteed under the *Canadian Charter of Rights and Freedoms* became subverted to this purpose. Courts supported the decisions, often without requiring the administration to actually demonstrate the benefits of their actions, on the basis that protecting the public was the administrative state's area of expertise. This set a dangerous precedent.

While the most obvious example of this was the public health orders, the administrative state's power to subvert rights on the premise of "protecting the greater good" was evidenced across many areas of Canada, including the professional bodies that regulate various health professions.

The harms that arose from Canada's response to the pandemic demonstrated the dangers of allowing an administrative state to govern and make rules on the premise of protecting the public. The purpose of the *Canadian Charter of Rights and Freedoms* is to ensure that Canadian fundamental rights and freedoms are not subverted by the government, and yet the administrative state appears to have found a way around them, with less scrutiny by a court than would arguably arise if such infringements were inflicted by laws passed in a legislature.

The NCI heard testimony that this subversion could be addressed through creating legislation that enshrines a non-delegation doctrine, as some U.S. states have done. The NCI recommends that this be studied for potential application in Canada. Additionally, the NCI recommends legislated changes to the standard of deference paid by Canadian courts to decisions of the administrative state (which is set out in more detail under the section below titled "The Standard of Review in Judicial Applications").

### **Public Health Authorities**

The public health authorities in Canada and its provinces took on a regulatory role in an unprecedented manner.

The Commission heard that in Nova Scotia, the Minister of Health issued public health orders under the authority of the provincial health legislation. The first order was made on March 24, 2020, and it underwent 97 iterations, being renewed every two weeks until July 6, 2022. The final order remained in place at the date of the Truro, Nova Scotia hearings. Among the things that were ordered by the public health authority in Nova Scotia were protocols and directives mandating masks and vaccines in certain settings and for certain activities.<sup>4</sup>

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<sup>4</sup>Submission of Truro counsel on day 3—after Scott Spidle and before Jessica Blauvelt.

In Québec, the Commission heard that initially a 10-day public health emergency was declared. However, it was repeatedly renewed and changed. Different rules were enacted in each district, and the rules became so complex that even a legal practitioner who was specializing in the area could not keep up. Because the rules were not legislation, there was no central location for a person to learn what was being imposed at any particular time.<sup>5</sup>

In Alberta, the Premier effectively deputized the Public Minister officer, providing her with the power to make pandemic measures as public health orders.<sup>6</sup> By declaring an emergency under the *Public Health Act* instead of the *Emergencies Management Act*, the province of Alberta avoided having to implement the Emergency Preparedness Plan that it had spent decades creating and preparing. Instead, the public health authority made orders on the fly, without the benefit of the emergency planning that was well developed and ready to go.

Surprisingly, the Commission heard testimony that when the Alberta Public Health Officer was cross-examined in a court action, she admitted that the public health orders that she made were at the instruction of, and contained the will of, the Cabinet, and not her own. In this way, the government appeared to delegate the power to impose pandemic measures to a health expert, but in reality, the measures were political and made by politicians.

This stunning admission underscores the problems that can occur when matters are delegated by the government. The politicians were able to avoid public criticism for the measures they imposed by providing them under the guise of their medical expert. The courts, in turn, gave excessive deference to the public health authorities, believing them to be making orders based on their expertise.

That this happened in Alberta is a clear demonstration of why reform is needed in the area of judicial deference. The Commission recommends that legislation be implemented requiring that administrative bodies whose decisions are subject to the standard of reasonableness be required to demonstrate their expertise and how it was applied to reach the decision. Absent such demonstration, the decision cannot be reasonable.

### **Colleges of Physicians and Surgeons**

The Commission heard evidence that the governing bodies over doctors in each province created internal guidelines and directives in respect of doctors' ability to practise medicine during the pandemic.

- **Patrick Phillips** (Truro, NS)
- **Michael Alexander** (Toronto, ON)
- **James Kitchen** (Saskatoon, SK; Vancouver, BC)
- **Natasha Gonek** (Ottawa, ON)

<sup>5</sup> Myriam Bohémier, Québec City hearings.

<sup>6</sup> Lt. Col. David Redman, Red Deer hearings.

The Commission heard that colleges in Canada had taken these steps:

- Restricted doctors from making public statements that contradicted public health information concerning lockdowns, masks, and vaccines;
- Restricted doctors from prescribing certain drugs—notably ivermectin, zinc, and vitamin D—to patients in order to treat COVID-19;
- Restricted doctors from writing mask and vaccine exemptions for patients;
- Suspended a chiropractor from practising due to failure to mask;
- Disciplined a doctor who refused to get a COVID-19 vaccine due to religious beliefs.

Doctors who did not follow these instructions were subject to investigation and discipline by the College of Physicians and Surgeons of Ontario (CPSO).

There is legislation in each Canadian province establishing self-regulating bodies for doctors (each a college), which is an administrative body that regulates the practice of medicine. In Ontario, the legislation provides that the colleges have two aims: (1) to prevent patient harm, and (2) to establish standards of practice and competence for the profession. The college is required at all times to act in the public interest. But how is the public to know whether or not the college is, indeed, acting in the public interest?

The Commission heard evidence that the colleges governing health professions are private, not-for-profit entities formed for the purpose of being a self-governing body for professions under the applicable health legislation. They are funded by member fees, and their functions are to govern the regulated members in a manner that protects and serves the public interest. Main activities include providing direction and regulation of the practice of medicine and regulating members, establishing standards of practice, approving programs of study, and establishing, maintaining, and enforcing standards for registration and continuing competence.

The separation of the governing colleges from the government itself is intended to serve the public: independent and free from government influence. During the pandemic, however, such separation disappeared. The NCI heard testimony that regulatory bodies took up the government message and instead of independently considering their path, adopted and reinforced the government measures with zeal.

Lawyers across the country described case after case of professional discipline by professional colleges governing doctors, nurses, chiropractors, and others.<sup>7</sup>

One lawyer described defending doctors, and some nurses, who were prosecuted by their colleges for “spreading misinformation.” The charges were that the doctors harmed the public by spreading misinformation about COVID-19. Licences have been suspended and may be permanently revoked.<sup>8</sup> Another lawyer described a doctor who was disciplined for prescribing an

<sup>7</sup> James Kitchen, Saskatoon hearings. Michael Alexander, Toronto hearings.

<sup>8</sup> Michael Alexander, Toronto hearings.

off-label prescription drug (a practice that is explicitly allowed),<sup>9</sup> and another doctor who was disciplined for<sup>9</sup> failure to vaccinate (where the doctor's refusal was based on a religious belief).<sup>10</sup>

Freedom of expression among doctors was jettisoned, and colleges required that doctors not speak publicly against public health policies and recommendations. The Ontario college published this requirement on its website as a "statement." It was not passed as a resolution, it was not a policy established by the college, it was not in the legislation, nor was it a government directive. Nonetheless, the colleges prosecuted doctors for violating this statement, using their power to investigate and prosecute.

The NCI heard testimony that the prosecution of doctors by their colleges, highlighted faults in the system, revealed a lack of transparency in the governance process, and facilitated a chronic abuse of authority by the college system. During the pandemic, the medical colleges sought uniformity in medical messaging and treatment, while squashing dissent and questions among doctors.

Under the law, a college cannot prosecute a doctor without reasonable and probable grounds that the doctor has committed professional misconduct. During the pandemic, the colleges took the novel position that doctors were not permitted to publicly disagree with statements or guidelines from the college or public health authority. This was described as extraordinary. Doctors who violated this new rule were subject to not only investigation and prosecution but also search and seizure of their offices and medical records.

The following questions have yet to be answered:

- In whose interest did the colleges act when they directed members to convey ONLY the government and health authorities' messaging?
- How could colleges so freely interfere in the patient-practitioner relationship in directing the treatment of patients?
- Should regulators be allowed to censor their membership and prevent them from speaking publicly?
- Who oversees the regulators?

The Commission heard that the colleges engaged in fear based communication—threats of, and actual, discipline—as well as discouraging open discussion and research into best clinical practices.

In the end, the professional colleges simply adopted government messaging and imposed it on their members, when the government did not demonstrate that it was acting in the public interest.

The failure of professional colleges to act independently and ensure that their actions were indeed in the public interest reveals a serious governance issue. An independent, multidisciplinary inquiry into the governance of professional colleges, particularly in the medical field, is warranted.

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<sup>9</sup> The NCI heard testimony from multiple witnesses that once Health Canada approves a medication, any doctor can prescribe it on an off-label basis. The ability to prescribe off-label is allowed because approved medicines come with a side effect profile and doctors can assess the risks of prescribing it in an off-label manner. See for example, Michael Alexander, Toronto hearings.

<sup>10</sup> James Kitchen, Saskatoon hearings.





# Recommendations

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## Recommendations

Based on the witness testimony and the preceding discussion regarding Canada's justice system and its actions during the pandemic, here are 10 recommendations for improvements:

- A. Uphold the Rule of Law:** Reiterate and reinforce the importance of the rule of law in Canada's justice system, emphasizing that all individuals, including the government, are subject to the law
- B. Review and Rebuild Confidence in Courts:** Conduct a thorough review of the Canadian courts' handling of pandemic-related cases and their impact on the rule of law. Rebuild public confidence in the justice system by addressing concerns raised during the pandemic.
- C. Separation of Powers:** Reassert the separation of powers among the legislative, judicial, and executive branches, ensuring that each branch functions independently within its prescribed role.
- D. Limit Executive Authority:** Examine and reform the extent of executive authority during emergencies, ensuring proper checks and balances to prevent unelected officials from making far-reaching decisions without accountability or oversight.
- E. Non-Delegation Doctrine:** Study the implementation of a non-delegation doctrine in Canada, similar to some USA states, to ensure that legislative powers are not unduly delegated to unelected administrative bodies.
- F. Accountability of Administrative Bodies:** Enact legislation that requires administrative bodies to demonstrate their expertise and rationale for decisions, particularly when those decisions infringe on individual rights.
- G. Public Health Authorities Oversight:** Establish a clear framework for oversight of public health authorities' decision-making processes during emergencies to balance public health needs with individual rights and freedoms.
- H. Transparency in College Governance:** Conduct an independent, multidisciplinary inquiry into the governance of professional colleges, especially those governing medical professionals, to ensure transparency, independence, and accountability in their decision-making. The activities of the colleges must adhere to the Charter of Rights and Freedoms.
- I. Freedom of Expression for Healthcare Professionals:** Safeguard healthcare professionals' freedom of expression, while ensuring that they provide accurate and evidence-based information to the public.
- J. Protecting the Patient-Practitioner Relationship:** Review the ability of regulators to interfere in the patient-practitioner relationship, ensuring that professional judgment remains independent and guided by the best interests of the patient

These recommendations aim to address the concerns raised in the discussion and promote a more balanced, accountable, and transparent approach to governance and decision-making during public health emergencies in Canada.