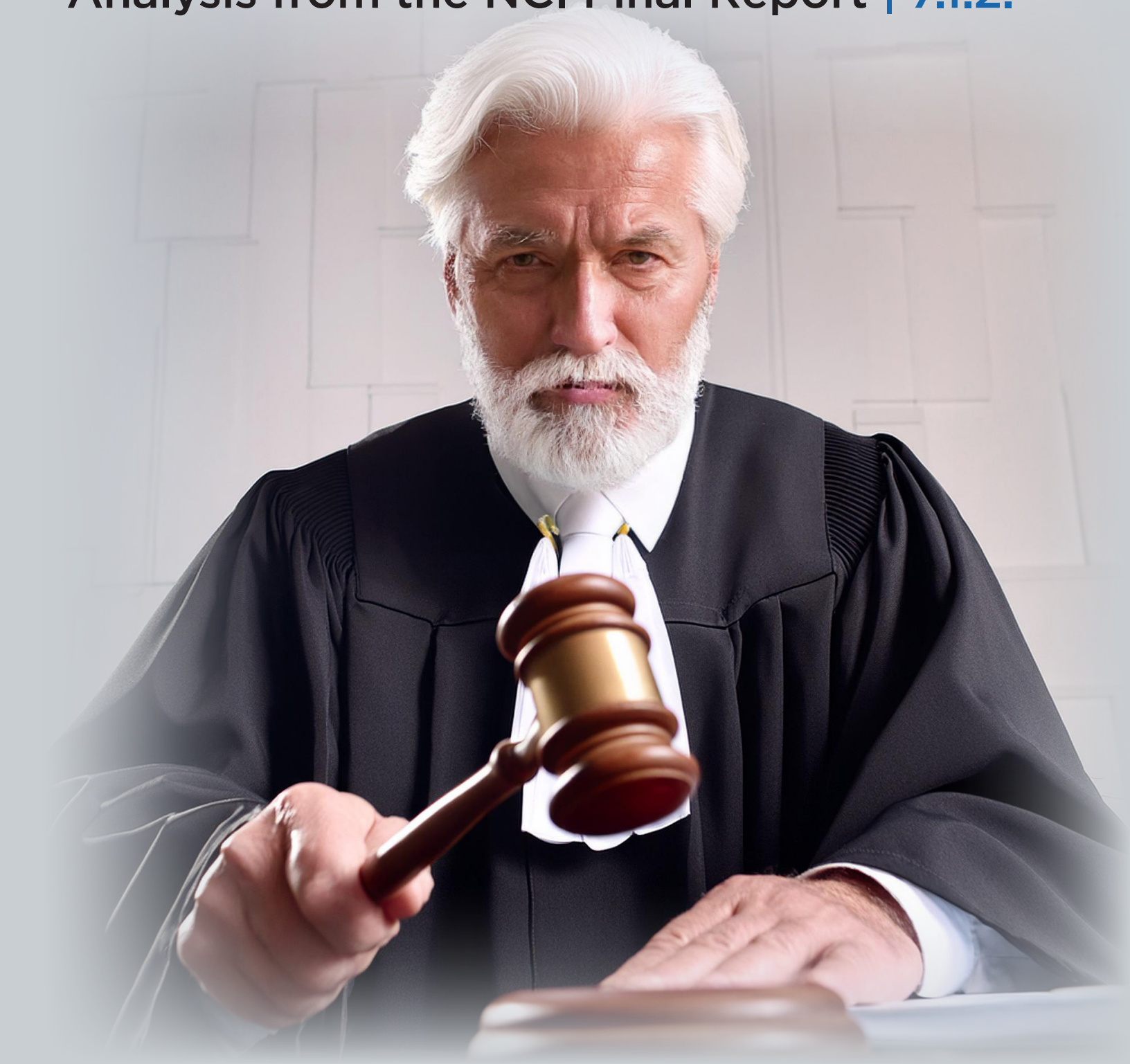
NATIONAL CITIZENS INQUIRY

The Response of Canadian Courts

Analysis from the NCI Final Report | 7.1.2.



7.1.2. The Response of Canadian Courts

Introduction

The Commission heard testimony regarding the role that Canada's court system played in the pandemic response.
Based on the testimony, the Commission has serious concerns about the impact of court pandemic measures and the excessive deference paid by the courts to administrative bodies such as public health authorities and professional colleges. The Commission recommends an independent inquiry be conducted into the court's response.

The Role of Canadian Courts

Canadian courts have an interesting dual role in that they must both: (1) enforce the laws created by the government; and (2) protect Canadians from unconstitutional laws created by the government. In practice, courts actually spend the vast majority of time enforcing and implementing laws. It is rare for courts to be called upon to consider whether laws are appropriate or constitutional in the first place. For this reason, one could wonder whether some courts forget, or are not comfortable with, their role as constitutional guardians who must stand up to the government in defence of citizens.

The imbalance of power between the government and its citizens, however, means that the courts' role in reining in legislative overreach and preventing rights violations by government bodies (and others) is critical. When the government enacts laws or takes actions that violate the constitutional rights of Canadians, there is no mechanism for protection other than the courts. This is particularly so when the government's actions are supported by (or, at least, not stopped by) the majority of Canadians.

In an elected democracy, the government can create laws that are popular with the voting majority, but which may harm individuals or minority groups. For this reason, one of the primary purposes of the Constitution, minority populations from the tyranny of the popular majority. The courts, through their tenure and independence, play a critical role in such protection. The courts are the only institution in the country that are empowered to stop government actions from harming the people. Despite this, the NCI heard compelling of evidence that Canadian courts did not hold up their expected role for Canadians.

The NCI heard significant criticisms from legal experts about the lack of protection from the courts in responding to pandemic measures that violated the rights of Canadians. The courts paid deference to the government in its action, which is inconsistent with the rule of law, and the requirement that the government be subject to the law in the same way as its citizens.

Among the many complaints heard by the NCI was that Canadian courts:
- participated in the prosecution of religious leaders whose alleged crimes are supposedly protected under the principle of freedom of religion and worship;
- gave unquestioned and unwarranted deference to the decisions of administrative bodies that censored medical providers;

- supported the medical system in denying life-saving care to a Canadian on the basis that she would not consent to a COVID injection, despite there being no medical reason for the requirement, and the fact that she could demonstrate evidence of strong natural immunity to COVID;
- supported the government and employers in denying Canadians the right to work and the right to receive Employment Insurance;
- avoided difficult decisions under the doctrine of mootness; and
- did not require governments to demonstrate the supporting proof of the benefits of their policies outweighing the risks, and even took judicial notice of public health positions as unquestioningly true.

These actions by the courts have eroded Canadians' trust in the judicial process, and have left many feeling hopeless.

Court Shutdowns and Delays

One of the first pandemic responses was to close Canadian courts. The NCI heard that virtually all Canadian courts completely shut down from April to June 2020 (except for emergency matters). Thus the Canadian justice system came to a standstill, delaying cases and creating backlogs. One is reminded of the old maxim: "Justice delayed is justice denied." The shutdown of courts caused Canadians to lose access to justice as an immediate result.

Upon reopening, many courts implemented the very public safety measures that were being challenged as unconstitutional. Virtual court hearings were required in many cases, which denied complainants their ability to be seen and heard by a judge in person. Mask requirements, and even vaccine passports, were imposed.

The fact that courts imposed the same measures as the rest of society without questioning their efficacy or justification was unbefitting of courts that are supposed to be independent and in control of their own process. Additionally, adopting government measures without question created an implicit bias against anyone who questioned or opposed those measures. For example, if a person wanted to dispute a ticket for refusal to wear a mask, they would be required to attend court in a mask and would be heard by a masked judge who insisted that everyone in his or her presence also wear a mask. It is difficult to see how a person coming to court in that situation could expect a fair and unbiased hearing about whether the masking ticket was reasonable or lawful.

For this reason, courts should not simply accept public health mandates, even in cases of public health emergencies. Canadian courts should have conducted an independent review of the impact of such measures on their own ability to provide justice. As part of this review, Canadian courts could have required the government to demonstrate how the benefits of the measures outweighed the harms. This review could be conducted now, and is recommended to be adopted as part of each court's process going forward in cases of public emergencies.

In Alberta, a small business applied to court for an injunction to stop business closures. Instead of recognizing the immediate harm that the business was asserting, the court allowed the government six months to prepare its evidence and delayed issuing a decision. At the time of the Saskatoon hearings (April 2023), the decision had still not been issued from the court despite the application being made in December 2020.

In these ways, Canadians experienced a lack of access to justice at a time when they felt they needed the courts.

The Courts Paid Undue Deference to the Government

A former judge who testified to the NCI described the Canadian courts' approach to pandemic cases as, "If the government makes a policy, then who are we to question it?"[11]

Judicial deference to government COVID policy was a consistent theme heard by the NCI across the country. Courts were reluctant to question public health messaging. Instead, the NCI heard that courts assisted in effectively creating a public health authority that could not be questioned, as public health recommendations were accepted by the courts without any verification or testing. This approach was inconsistent with the rule of law.

In Manitoba, when churches arranged for outdoor or car-based worship services, the police came and arrested the organizers and some attendees for violating the gathering restrictions.[12] The courts, instead of requiring the government to demonstrate the necessity of the gathering restrictions in those circumstances, especially in light of the extreme violation of Charter rights caused by such restrictions, paid deference to the government's actions. This left citizens with the perception that there was no point in going to court to defend themselves.[13]

In an Ontario family law case, a couple came to court with a dispute over whether to vaccinate a child.[14] The mother brought evidence from experts who discussed the risks versus benefits of vaccination, while the father pointed to the Ontario public health recommendation to vaccinate all children in that age group. The motions judge took significant time to review the evidence from both parents and concluded that the mother, who had sole custody of the child, could make the decision not to vaccinate.

The father appealed this decision to the Ontario Court of Appeal. The Appeal court overruled the decision and held that the lower court should have accepted the provincial health authority's recommendation.

The NCI heard that this approach caused the burden of proof to shift in cases involving the government. Thus, Canadian courts appeared to give the benefit of the doubt to the government and required ordinary citizens to disprove the government's conclusions, even where they negatively impact or infringe upon their protected rights. A dangerous precedent is being set. The Canadian approach could be compared with the U.S. courts, where pandemic measures were repeatedly struck down by the courts. The NCI heard evidence that U.S. courts have struck down a requirement that all air passengers wear face masks and have struck down several vaccine mandates.

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[11] Brian Giesbrecht, Winnipeg hearings.
[12] Tobias Tissen, Winnipeg hearings.
[13] Brian Giesbrecht opinion, Winnipeg hearings.
[14] J.N. v. C.G., Ontario Court of Appeal.

The courts' excessive deference and failure to question the governments' measures has led to a crisis of confidence in the judicial system. If courts simply take the government's position at face value, then what is the purpose of having a court at all? There is nobody else in the country that can require the government to justify imposing such draconian measures on its citizens. If the courts refuse to do this, then what is their purpose?

The Commission heard evidence that Canadians trust their institutions and have a general belief that institutions that exist to further the public good should not be questioned. This helps to explain why Canadian courts gave so much deference to public health authorities and administrative bodies such as medical colleges. The danger with holding such a belief, however, is that wellmeaning courts can actually participate in harm and the violation of rights by not holding institutions to a high standard.

In order to ensure that Canadian courts properly require the government to justify infringement of Canadian rights, judges need to be selected for, and have confidence in, their ability to hold the government to account and make principled decisions. This is especially so when the decisions are unpopular.

The Standard of Review in Judicial Review Applications

In Canada, government and administrative decisions can be reviewed by a court through the judicial review process. A person who wishes to challenge a government decision, therefore, may apply to court to have it struck or reversed. The judicial review process is a critical part of maintaining the rule of law in Canada, as it ensures that the government is not above the law in making decisions that affect its citizenry.

The NCI heard testimony that the standard of review applied by courts in the judicial review process is problematic, cumbersome, overly deferential, and applied inconsistently and incorrectly. During the pandemic times, the judicial review process was engaged by Canadians to review a wide array of decisions including:
• disciplinary decisions of Colleges of Physicians and Surgeons suspending doctors' licences,
• the decision of the Alberta Minister of Health to close businesses.

The Supreme Court of Canada has established two standards of review that can apply in the judicial review of a decision: (1) correctness, and (2) reasonableness.[15] In general, the standard of reasonableness is presumed to apply in all judicial reviews unless there is a question of law that requires the stricter standard of correctness. It is not always evident which standard of review is appropriate to review a particular decision.

The difference between the standards of review is critical, however, as the standard of review that is applied dictates the level of deference that will be given by the court to the decision-maker who issued the decision under review. Under the standard of correctness, there is virtually no deference given, and a court can feel free to substitute its own view about the correctness of the decision. By contrast, under the standard of reasonableness, a court must only review whether a decision was reasonable, meaning that a reasonable person could have reached the decision based on the facts before them.

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[15] Vavilov v. R., Supreme Court of Canada.

The standard of reasonableness comes from the Supreme Court of Canada case of Vavilov. This case requires courts to give deference to administrative bodies that are operating within their field of expertise. The Commission heard evidence that the result of this decision has been that no citizen has a chance of successfully overturning a decision or measure when this standard applies.

By way of example, Jeffrey Rath testified that the Alberta Chief Medical Officer Dr. Hinshaw, made statements that were negligent, delusional, and not based on facts. For example, Mr. Rath testified that Dr. Hinshaw stated that a person who had received an AstraZeneca vaccine as their first dose was fine to receive a Moderna or Pfizer vaccine as their second dose, despite the fact, according to Mr. Rath) that this was never studied, tested, or proven. Despite this, the reasonableness standard of review requires a court to give her the benefit of the doubt.

The standard of review also applies to court cases challenging the disciplinary decisions of Colleges against their doctors.[16] Each province has a college that regulates the medical profession and has the power to discipline doctors. This is similar for most medical professions. The disciplinary measures can involve reviewing allegations of professional misconduct, levying fines, and suspending or revoking licences to practise. Where a disciplinary decision is made to suspend a doctor‘s licence, this can be subject to a judicial review in court.

The NCI heard evidence in respect of a judicial review involving a doctor whose licence to practise medicine was suspended. The court essentially applied the wrong standard of review by allowing excessive deference to the administrative tribunal. Allowing deference to administrative bodies such as medical colleges is extremely concerning, particularly where decisions are made that affect a person‘s ability to work and earn a living. The Commissioners recommend that rules or legislation be enacted that would apply the standard of correctness to disciplinary decisions of professionals, thus ensuring that such persons are entitled to an independent review of disciplinary measures in a court of law.

Failure to provide for meaningful judicial review of disciplinary decisions encourages the application of poor standards by administrative tribunals. This is particularly problematic given the significant impact that such decisions have on the affected member.

The NCI further heard that there is no right to appeal in Ontario where the college‘s decision to suspend a doctor‘s licence is upheld upon judicial review. In effect, therefore, a doctor has to request permission from the Ontario Court of Appeal to have his or her appeal heard. This is extremely concerning because such a doctor is effectively prevented from earning a living. This type of deprivation should be entitled to review by a higher court. The Commissioners therefore recommend that rules or legislation be enacted expressly allowing for appeals to the Ontario Court of Appeal of a judicial review involving the suspension of a doctor‘s right to practise his or her profession.

Judicial Notice

The doctrine of judicial notice is a principle of common law where a court can take judicial notice of a fact without the need of supporting evidence. Taking judicial notice of a fact is supposed to be extraordinary.

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[16] Michael Alexander, Toronto hearings, day 2.

The Commission heard that in the past, courts would only take judicial notice of facts that involve no controversy whatsoever. However, in recent years, the upper courts of appeal in Canada have begun to expand the concept.

The problem with taking judicial notice of facts is that the practice throws the requirement for true evidence out and substitutes a court's own view of fact, regardless of the actual evidence presented in court. This practice undermines the principle of Canada's adversarial system, whereby each side of a lawsuit is entitled to present their evidence, and the judge adjudicates between them.

The Commission heard that in court cases involving pandemic measures, government lawyers would ask the court to take judicial notice of facts such as (1) the severity of the pandemic, and (2) the necessity of the government measures. The problem is that the cases before the court often challenged those exact facts. The practice of judicial notice, therefore, deprived Canadians of their ability to challenge the actions of their government.

Curiously, the one case in which a court refused to take judicial notice of the pandemic and the risks of COVID-19 was when inmates of a correctional facility applied to get out of jail. In that case, the court stated it could not take action to protect inmates from COVID without evidence and that judicial notice was not sufficient. Thus, the perception by members of Canada's legal community is that the practice of judicial notice was expanded in favour of government actions but never to support the rights of individuals.

Mootness

The doctrine of mootness is an old principle of common law that experienced resurgence in the courts during pandemic times. Essentially, mootness arises when a legal issue that is proceeding before the courts becomes moot, in that it is no longer a live issue. When an issue is moot, a ruling by the court is considered to be hypothetical only, and thus courts do not wish to waste valuable time and resources reaching a decision that will have no real impact.

It is only in rare and exceptional cases that a court will render a decision on an issue that has become moot. Typically, the issue must be of great importance and the principles to come out of the decision would be of great precedential value, regardless of the mootness in the particular circumstance.

The NCI heard that government lawyers defending cases of government violations of Charter rights consistently argued mootness as their first position in court. They were assisted in this by the slow movement of justice in Canada, which meant that by the time many cases reached a hearing in court, the particular measure or mandate had been suspended or removed. That meant it no longer applied and that any decision in favour or against it would technically be moot.

One might have expected that cases involving severe violations of Charter rights due to pandemic measures would be of such importance that courts would rule on it anyway. Instead, courts sheltered themselves from making difficult decisions by claiming mootness, even when restrictions were ever-changing or were suspended with the explicit threat of being re-invoked.[17]

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[17] See, for example, the case against the federal government's COVID vaccine mandate for air and rail travel.

Because mootness is a principle of common law, it can be modified or overturned by legislation. It would be appropriate to legislate parameters to the doctrine of mootness, including a prohibition on mootness when the case involves a violation of Charter rights.

Judicial Independence

Because Canadian courts make decisions that have power over citizens and government alike, it is imperative that members of the courts have independence and are not beholden to the government of the day. In principle, judicial independence is laudable and necessary. In practice, it is much more difficult to achieve.

Judges are human, they are citizens of Canada, and they are products of Canadian society. They are former lawyers who have practised law in a particular area, have their own lived experiences, and have formed views which have shaped their biases (conscious and unconscious). They are not untouchable paragons of virtue and fairness who have appeared out of nowhere to rule benignly over questions of law. Thus, perfection in our judicial selection is simply not possible.

In Canada, judges are not elected by the people but are instead appointed by the ruling political party. Once appointed, a judge has tenure essentially for life, meaning that his or her position cannot be threatened even upon issuance of an unpopular decision. Once appointed, judges are free to decide cases without fear of retribution.

In the event that a judge issues an incorrect or controversial decision, there are several levels of appeal through which more judges (often panels containing multiple judges) review the decision. The highest level of appeal is the Supreme Court of Canada. Judges at appellate levels in Canada have themselves been selected (or appointed) by the government, on the theory that they have demonstrated impartiality, competence, and expertise in making fair and reasoned judgments.

In theory, judges are free to make principled decisions that are unpopular and to strike down government actions that infringe constitutionally protected rights and freedoms. In practice, however, the NCI heard that judges were often fearful of COVID, held the same fear-driven views that were propagated daily in the news media, and were not open to or receptive of information that ran contrary to public health messaging.[18]

The NCI heard evidence that in Canada, judges are selected after being vetted by a judicial selection committee, which reviews the candidates to ensure their competence and quality. The ultimate selection and appointment to the bench, however, is made by the government.[19] Thus the judicial appointment process is inherently political.

The NCI heard evidence that judicial selection in Canada has been shifting "to the left," meaning that more judges are being appointed who favour government, and fewer are chosen that value individual rights. Over time, this has shifted judicial decision-making towards government deference and away from protecting citizens from their government. The effects of this shift became particularly apparent during COVID.[20]

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[18] James Kitchen, Saskatoon hearings.
[19] James Kitchen, Saskatoon hearings.
[20] James Kitchen, Saskatoon hearings.

There is a perception by some Canadian legal experts that the judicial appointment process in Canada is flawed. In this respect, there were two main criticisms: (1) any system with government appointments is inherently going to reflect political bias; and (2) in Canada, the federal government is responsible for appointing judges of each province's superior and appellate courts.

Judicial Appointments Versus Elections

One of the main criticisms of the judicial appointment process is that the judiciary will necessarily be made up of people who have been selected by politicians. There is a question, therefore, of whether appointees are selected because they align with, or may be disinclined to challenge, the views and positions of elected politicians. This may reduce the likelihood that courts will rule against the government to protect the citizenry as judges may have been selected for the very reason that they are pro-government.

Some may take comfort from the fact that in a democratic system, the government (at least in theory) changes fairly often, and thus, any bias in judicial appointments should balance out to some extent. What comfort can be taken, however, if one political party or, indeed, ideology dominates the Canadian landscape for a sustained period of time? And what comfort can be taken by citizens whose political interests are unpopular and are thus never reflected in the elected politicians of the country?

The NCI heard submissions from counsel that Canada's system of government selection and funding the judiciary could be perceived as inconsistent with the rule of law. Other jurisdictions have addressed this issue by providing for elections of judges by direct and popular vote of the citizenry, at least for some levels of court. While elections appear appealing as an antidote to the issues that can arise from a political appointment process, they also carry downsides. For example, we noted above that a court's role can be to protect minorities from the tyranny of the majority.

However, where a judge has been elected by a majority of the citizenry, he or she may align with the majority's oppressive actions or be disinclined to rule in protection of the unpopular minority. Whether or not judges should be elected at some levels in Canada, there are certain practices from the U.S. election system that could fit in with the Canadian appointment system and enhance its process. For example, an open debate with public hearings during the judicial appointment process would provide more transparency and might help to alleviate some of the political bias in appointments. This would be particularly appropriate when appointing judges to appellate levels.

It is clear that no system is perfect, and there are advantages and drawbacks to appointments versus elections. For this reason, the NCI believes that the judicial appointment process should itself be reviewed by a panel or inquiry—with the benefit of a wide range of experts, academics, and experienced practitioners—to determine if reform is needed to the system of judicial appointments.

Federal Appointments of Provincial Judges

In Canada, each province has its own set of courts, while Canada maintains a set of federal courts. Many Canadians would be surprised to learn (indeed, several of the NCI Commissioners were also surprised to learn) that the federal government appoints the judges of the superior and appellate courts of each province. When this is combined with the lifelong tenure of judges, it is not difficult to see that this practice can be perceived as providing a significant amount of control over the provinces by a centralized federal government.

It is common and expected in a large country like Canada that different regions have different priorities and ideas about the proper governance of the nation. The confederation of provinces and the separation of powers in the Constitution are intended to allow the provinces autonomy over their own affairs, while also providing for a centralized federal government to coordinate on certain national matters of importance to all.

The confederation is not intended to provide for a federal government that rules over the provinces, nor would that be appropriate, given the substantial separation of constitutional powers. Moreover, given the disproportionate distribution of population across the provinces, it has long been clear that the powers of the federal government tend to be dominated by the interests of the most populous provinces. This begs the question, then: why does the federal government have appointment power over judges that are making the most fundamental rights decisions in each province?

The NCI heard testimony from legal experts recommending that provinces be entitled to appoint their own judges, albeit with appropriate selection processes and corresponding judicial advisory committees. This suggestion makes sense to the Commissioners. However, given the fundamental importance of the judicial selection process, our recommendation is that this should form part of the overall justice system inquiry that should be conducted.

The Judiciary Cannot Act in Tandem with the Government Prosecution Service

The Government of Canada is responsible for law and order, as well as enforcing its laws and regulations. This means that in addition to selecting and funding the judiciary, the government also employs and funds the police and prosecution services in Canada. Government responsibility for all these functions can a perception of a conflict of interest (if not an actual conflict of interest).

The priority of the police and prosecution services is to enforce government laws against people. It is the government that directs them in carrying out their functions. While some may view the role of police and prosecution as achieving the "correct" result under the law, the NCI heard submissions that, in practice, the police and prosecution do not act as protectors of citizen rights. To the contrary, government lawyers appear in court to defend the position of the government. This was particularly so in cases involving pandemic measures.

In effect, the Department of Justice is Canada's largest law firm, with unlimited resources, prosecuting cases and lawsuits in favour of the government's laws and decisions. Individual Canadians who seek redress or protection from the courts face a significant imbalance of power and resources.

For this reason, the independence of the judiciary is of utmost importance. Citizens must not have the perception that the entire justice system is stacked in favour of the government, particularly when it comes to violations of their guaranteed rights and freedoms.

Moreover, Canadians should have access to resources when their cases involve violations of Charter rights and freedoms, particularly in a novel setting.

Societal Pressure on the Judiciary

There is no doubt that the uncertainty and fear that accompanied the introduction of the pandemic in 2020 impacted judges as well as everyone else. Members of the judiciary are members of society

and share in the same pool of information provided by the news media as the rest of the country. The societal pressure that was imposed on Canada at large was bound to be felt by some, if not the majority, of judges as well. Additionally, since most judges are older, it is perhaps understandable that some would have been fearful for their own personal safety from the virus.
The NCI heard from a former judge[21] who described how societal pressure in previous times has impacted judges in their decision-making. He noted that in the 1980s, there was a "satanic panic" that swept North America. Allegations of satanic ritual abuse against children were rampant. There was very strong societal pressure on police and judges to "believe all children," which resulted in the wrongful conviction of many people. In the aftermath of the panic, it was discovered that many children had been coached to make false abuse claims.

Similarly, spousal abuse got a lot of attention when society began to recognize that it was a real problem. The increased attention was appropriate, but the pendulum swung too far, and there was strong pressure on judges to "believe all women." Any judge who found in favour of an accused husband or who didn't accept all allegations of a wife was strongly criticized, sometimes by an Appellate court who oversaw the original judgment.

Judges are human and cannot help but be impacted by societal pressures of the day. The NCI cannot recommend that judges be replaced with unemotional robots who are immune to societal panics. Nor would that necessarily be positive, as it is important for judges to have a strong sense of sympathy and fairness that comes from being a human being. However, it is very important to select judges who demonstrate an ability to be impartial during times of strong pressure and who are similarly able to set aside their own personal views on controversial topics and remain openminded.

The political appointment process tends to undermine this, as each government would like to appoint judges who share their approach. For this reason, the NCI recommends that there be an independent selection process that involves members of each political party as well as lay citizens.

The Role of Chief Justices

Each court in Canada has a chief justice, whose function is to administer the court, in addition to being a judge. While the chief justice does not have power over any of the individual judges on a court, he or she does have the ability to select which judges on his or her court will hear which cases. Thus, the case-assignment process actually provides a chief justice with significant influence over the ultimate decisions of a court.

The NCI heard testimony that a large number of court cases were taken up directly by the chief justices of each court and that these tended to result in pro-government decisions. There is a perception that many of the older, more rights-focused judges may have been excluded (deliberately or coincidentally) from cases involving the infringement of Charter rights.[22]

Despite this perception, it is not recommended that governments legislate measures to direct chief justices in their duties, as this would encroach on judicial independence. It is recommended, however, that case-assignment practices of the courts be included as an item to be examined as part of an inquiry by the courts themselves.

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[21] Brian Giesbrecht, Manitoba hearings.
[22] James Kitchen, Saskatoon hearings.

Fear Felt by Legal Practitioners

The rule of law requires a functioning legal system in all ways. Just as important as an independent judiciary is the ability of Canadians to access legal advice and for lawyers to be able to provide such advice in a free and independent manner.

The legal profession was not immune from the fear felt by many other professionals in other disciplines across the country. One lawyer who gave advice to members of groups that protested government measures testified that he felt fear of reprisal and prosecution simply for providing his legal services.[23] Once the federal government enacted the Emergencies Act, he understood that any person who participated in providing assistance to any person who protested could have their property seized, have their bank account frozen, be fined, or be arrested. In response, he withdrew thousands of dollars in cash from his bank account. He also began to meet his clients clandestinely, in dark parkades and without cell phones.

These reactions may seem extreme, but considering the fact that people were, in fact, arrested and had their bank accounts frozen under the Emergencies Act, this was not an unreasonable response. As a legal representative of participants in the protests, he was fearful that he would be targeted. He further testified that although he had no evidence of the government intercepting his solicitor–client privileged communications, he considered it to be very possible.

Another lawyer testified that a complaint was filed against him at the Law Society[24] after he criticized the court for its pandemic measures. Such criticism, when done respectfully and academically, should be welcomed in a free society, not punished. The complaint resulted in an investigation by the governing body and was ultimately dismissed as having no basis. However, the mere act of reporting and investigating a lawyer in this circumstance will serve as a disincentive to other lawyers who may wish to speak out. When speaking up to protect freedoms puts your career on the line.

Canada should not be a country in which lawyers are fearful to criticize the court or to provide legal services to Canadian citizens who protest against their government. Lawyers being in fear of losing their licence to practise law when they speak up is an indication of a failure of a free democracy. Legal providers being in fear for their own safety in representing protesters is an indication that Canada is not governed by the rule of law. If the rule of law prevailed, lawyers would not be afraid of their government.

Lawyers should not have to fear for their careers or their safety when performing roles in the justice system. Without fundamental protections for lawyers, the rule of law cannot survive. Even if vindicated at the end of the day, the mere act of threatening the livelihood of lawyers has a chilling effect. Our society should welcome open discourse and should specifically protect those who criticize any branch of the government.

The ability to challenge the government during times of Charter violations and to obtain legal assistance in doing so is critical to maintaining our functioning democracy.

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23 Robert Ivan Holloway, Winnipeg hearings.
24 The Law Society of each province is the governing body for lawyers and is responsible for

Recommendations

licensing lawyers to practise law, as well as disciplining those who breach the code of practice. Following are recommendations to improve the situations described under each of the separate headings.

A. Protection of Constitutional Rights

- ***Judicial Review:*** Reinforce the role of Canadian courts as constitutional guardians by actively engaging in judicial review of government actions, especially those that may infringe upon Canadians' constitutional rights.
- ***Robust Assessment:*** Develop a rigorous and evidence-based assessment process for cases involving rights violations, ensuring that the burden of proof is not disproportionately placed on individuals. Courts should critically evaluate government actions.

B. Access to Justice and Court Shutdowns

- ***Timely Responses:*** Implement measures to ensure that court closures, especially during emergencies like the pandemic, do not result in undue delays in access to justice. Develop contingency plans for virtual proceedings, and prioritize cases with immediate consequences.
- ***Independent Assessment:*** Courts should independently assess the impact of public health measures on their ability to provide justice. Review the necessity and effectiveness of measures like mask requirements and vaccine mandates in a courtroom setting to ensure fair hearings.
- ***Public Engagement:*** Involve legal experts, practitioners, and the public in discussions about maintaining access to justice during crises.

C. Judicial Deference to the Government

- ***Balanced Review:*** Encourage a balanced and impartial review process for government policies and actions, rather than automatically deferring to the government's position. The burden of proof should not unfairly rest on individuals or groups challenging government decisions.
- ***Comparative Analysis:*** Consider international precedents, such as the approach taken by courts in the USA, where pandemic measures were subject to rigorous legal scrutiny. Analyze and learn from the experiences of other jurisdictions when addressing similar issues.
- ***Transparency and Accountability:*** Promote transparency in court decisions, ensuring they include clear reasoning and explanations for rulings, especially in cases that involve significant rights infringements. This helps build public trust and understanding.

D. Crisis of Confidence in the Judicial System

- ***Public Education:*** Launch educational initiatives to inform the public about the role of courts in safeguarding constitutional rights, especially during emergencies. Promote an understanding of the court's duty to question government actions and protect citizens.
- ***Judicial Independence:*** Emphasize the importance of judicial independence in preserving the rule of law and protecting individual rights. Judges should be selected and trained to have confidence in their role as independent arbiters of justice.
- ***Public Engagement:*** Create opportunities for the public to engage with the judicial system, such as public consultations or information campaigns. This can help demystify the legal process and foster public participation.

These recommendations aim to strengthen the Canadian judicial system's ability to protect citizens' rights, maintain access to justice, and enhance public trust during times of crisis. Implementing these measures would help ensure that courts fulfil their dual role of enforcing laws, while safeguarding constitutional rights effectively.

E. The Standard of Review in Judicial Review Applications

The Vavilov standard of review that pays excessive deference to the decisions of unelected administrative officials prevented Canadians from meaningful access to justice and review of their cases. This was particularly egregious where Canadians were fighting for their rights to bodily autonomy, to work, and to participate as free citizens in society.

The Commission recommends that:

- Legislation be enacted to amend the standard of review in cases where the rights of citizens have been affected. This could be implemented in the applicable Interpretation Acts and in the applicable Bills of Rights.
- The burden of proof should be placed on the administrative body to demonstrate reasonableness in cases where the rights of citizens are affected.
- Statutory protections should be removed for the decisions of health officers to the extent that they cause harm to persons.

F. Judicial Notice

- The Commission recommends that legislation be enacted to set strict parameters on the use of judicial notice by courts. Judicial notice should never be allowed in respect of evidence that is being challenged. The normal rules of evidence require a party who asserts a fact to prove that fact. This rule underlies the rule of law and should not be relaxed, even in times of emergency.

G. Mootness

- ***Legislate Parameters:*** Consider legislation to modify or limit the doctrine of mootness, especially when cases involve violations of Charter rights. This could include prohibiting mootness in such cases.
- ***Timely Hearings:*** Address the issue of slow-moving justice by implementing measures to expedite hearings, ensuring that cases are heard before measures or mandates are suspended or removed.

H. Judicial Independence

- ***Diverse Selection Committee:*** Ensure that the judicial selection committee includes members from various political parties and lay citizens, not just the government, to minimize political bias.
- ***Transparent Appointment Process:*** Implement a more transparent judicial appointment process, including public debates and hearings, especially for appellate judges, to reduce political bias and enhance fairness.

I. Judicial Appointments Versus Elections

- ***Independent Review Panel:*** Establish an independent panel or inquiry composed of experts, academics, and experienced practitioners to review the judicial appointment process. Evaluate whether reforms, such as introducing elections at certain levels, are necessary.
- ***Balancing Appointments:*** Ensure that appointments reflect a balance of judicial independence and government accountability.

J. Federal Appointments of Provincial Judges

- ***Provincial Appointment Authority:*** Consider devolving the appointment of provincial judges to the provinces, while maintaining appropriate selection processes and advisory committees to safeguard quality and independence.

K. The Judiciary Cannot Act in Tandem with the Government Prosecution Service

- ***Enhance Judicial Independence:*** Promote and protect the independence of the judiciary, particularly in cases involving government actions, to ensure that citizens have faith in the fairness of the justice system.
- ***Resource Allocation:*** Allocate resources to support citizens in cases involving violations of Charter rights and freedoms, ensuring they have access to legal representation.

L. Societal Pressure on the Judiciary

- ***Impartial Selection:*** Emphasize the importance of selecting judges who demonstrate the ability to remain impartial, open-minded, and fair during times of societal pressure.
- ***Non-Partisan Selection:*** Promote a non-partisan selection process aimed at minimizing political influence when appointing judges who possess strong principles to uphold laws as they are written, while also emphasizing fairness.

M. The Role of Chief Justices

- ***Review Case-Assignment Practices:*** Encourage courts to review their case-assignment practices to ensure fairness and balance in the decisions made, particularly regarding Charter rights.

N. Fear Felt by Legal Practitioners

- ***Support Legal Professionals:*** Ensure that legal professionals can perform their roles in the justice system without fear of career repercussions or threats to their safety.

These recommendations aim to uphold the principles of justice, fairness, and the rule of law, while addressing the specific challenges outlined in each section. Implementing them may require legislative changes, policy reforms, and a commitment to preserving judicial independence and protecting the legal profession‘s vital role in society.