Travel Restrictions in a Pandemic: What are your *Charter* Rights?

The COVID-19 pandemic has modern Canada facing unprecedented challenges. The severity of the crisis has led governments to restrict personal liberties in ways that were unthinkable only a few weeks ago. One of these restrictions is the decision to place limitations on travel. The mobility rights of all Canadians are protected by section 6 of the *Charter of Rights and Freedoms* .[1] Though it is an infrequently discussed section of the *Charter*, the protections afforded by section 6 figure prominently in this era of government-mandated travel restrictions.

Section 6: A Brief Overview

Sections 6(1) and 6(2) of the *Charter* state:

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right:

1. to move to and take up residence in any province; and
2. to pursue the gaining of a livelihood in any province.

As is clear from the wording, section 6(1) is concerned with international travel whereas section 6(2) is concerned with movement within Canada.

The right to international travel applies only to Canadian citizens.[2] Section 6(1) grants the right to enter, remain in, and leave Canada.[3] However, it is important to note that the right to enter, remain in, or leave Canada does not guarantee that this mobility can be achieved in practice. The section "does not grant the right to enter another country or the right to leave another country" since it "is the authorities of that other country who determine their own entry and exit conditions."[4] Thus, section 6(1) "does not impose any obligation on the Canadian government to guarantee entry to or exit from another country."[5] The section merely limits the Canadian government from hampering this mobility through its own action. Thus, "an adult Canadian citizen cannot be forced to stay in Canada and cannot be ordered to return to Canada" by the Canadian government, unless the government can provide a justification for its actions in a court of law, using section 1 of the *Charter*.[6]

Section 6(2)'s right to "move and take up residence in any province" implies that Canadian citizens have the right to travel freely throughout the country. Canadians have consistently had the right to inter-provincial travel since the adoption of the *Charter*. Government efforts to stop free travel in Canada are unprecedented and are a clear violation of this section. However, like other sections of the *Charter*, the government would have the ability to justify

its actions to a court, using section 1 of the *Charter*. It would likely argue that such an infringement was a necessary step to fight the spread of the COVID-19.

It is important to note that section 6 is not subject to section 33, the *Charter*'s notwithstanding clause. If invoked, the clause allows governments to ignore certain *Charter* rights. However, when the notwithstanding clause was drafted, mobility rights were determined to be of such fundamental importance that the *Charter* drafters decided that governments could not override those rights by invoking the clause. In effect, individual mobility rights were given an additional safeguard from government interference. This decision speaks to the significance of freedom of travel in a liberal democracy like Canada.

COVID-19 Related Restrictions on Mobility

The federal government and other levels of government in Canada have initiated various policies that have limited the freedom to travel since the pandemic was declared in early March. These include practical limits on leaving Canada, limits on returning to Canada, and restricting travel within the country.

Limits on leaving Canada

The Canadian government can only control access to its borders. This power allows Canada to limit the ability of citizens to leave the country. However, once people leave the country, it cannot control if they can enter the borders of another sovereign state. Some practical roadblocks to travel are out of the control of the Canadian government, such as the suspension of some commercial airline operations and the closing of international borders by other countries.

However, recent actions by the federal government are adding to Canadians' inability to leave the country. On March 16, 2020, Canada closed its borders to foreign travelers,[7] exacerbating paralysis of international travel routes to and from Canada. Further, a mutual decision between Canada and the United States to close its border to all but essential travel[8] clearly has the effect of limiting the ability of Canadian citizens to leave the country.

Limits on returning to Canada

There are also practical issues for citizens attempting to return to Canada. Despite Prime Minster Justin Trudeau's plea for Canadians abroad to "come home,"[9] closed borders and suspended flight routes have hampered the ability of Canadian citizens to do so.

At the time of writing (March 2020), despite the escalation of COVID-19 cases in the country and around the world, Canadian citizens can return to the country: while Canada has closed its borders to foreign nationals, they remain open to citizens and permanent residents.[10] Further, the federal government has begun to work with Canadian airlines to charter flights to repatriate Canadians stranded abroad.[11]

However, the Prime Minister has also conceded that the government is "unlikely to be able to bring everyone home."[12] In closing Canada's international borders, the Prime Minister also stated that "[anyone] who has [COVID-19] symptoms will not be able to come to Canada."[13] This policy choice will have the effect of stranding sick Canadians abroad, with no practical way to return to Canada. Thus, in practice, some Canadians will be not be able to exercise their right to exercise their section 6 right to return to the country.

Restricting Travel Within the Country

The ability for unfettered travel within the country has also been restricted. For example, Nova Scotia began restricting its border on March 23, 2020, where "anyone entering the province will be stopped, questioned and told to self-isolate for 14 days."[14] The Northwest Territories has closed its borders with only limited exceptions.[15] On March 28, the federal government barred anyone showing symptoms of COVID-19 from boarding domestic flights or intercity passenger trains.[16]Additionally, there has also been speculation that the federal government could invoke the *Emergencies Act*[17] to impose further inter-provincial travel restrictions throughout the country.[18]

Can the government justify its breach of *Charter* mobility rights? The Importance of Section 1

The restrictions on mobility rights by a government in Canada are unprecedented. All these government sanctioned efforts to restrict travel are likely clear breaches of section 6.[19] However, the government can attempt to justify its actions to a court using section 1 of the *Charter.* In order to justify its actions, any government travel restriction must be reasonable and demonstrably justified in a free and democratic society. If a court decides that the government has made its case for justifying its actions, the breaches will be deemed constitutional. If they do not, then the government would need to stop its travel restrictions because they would be unconstitutional. For this reason, Section 1's limitation clause is of great importance in ensuring that the government does not overstep when it breaches the section 6 rights of Canadian citizens, but also, allows the government to provide a rationale for a breach in specific circumstances.

In the context of a worldwide public health crisis, there are several arguments that Canadian governments can make to justify a section 6 breach. For example, since unfettered travel is a significant transmission source of COVID-19, the government could justify its breach as a necessary response to cut rates of transmission. This in turn could preserve valuable health care resources and limit the rates of fatality caused by COVID-19. Since the Canadian Constitution allows for the balancing of rights, some "liberties must [occasionally] make way in the pursuit of other legitimate societal objectives, like public health."[20] Therefore, restrictions on travel freedoms can look insignificant when balanced against a potentially substantial loss of life if they were not enacted. This current crisis speaks to the importance of section 1 of the *Charter* – in situations where the health and safety of Canadians is at stake, there may be a greater public good that requires the breaching of some individual rights.

Justifying a breach of Canadian's *Charter* rights is not an east job for the government. Government action must be pressing, substantial, and have proportionate effects. If the *Charter* breach is more detrimental than the goals of the policy being enacted, then it will not be upheld. A draconian government action would not to be upheld under section 1 if there was insignificant evidence that it helped to alleviate a pressing issue. For example, an indefinite quarantine order that is backed by no evidence showing that it would be beneficial to health and safety would likely be struck down by a court as unconstitutional.

University of Ottawa law professor Martha Jackman believes that the government's current approach to restricting travel is justified under section 1, since it is based on the best public health evidence available. She believes that if the restrictions arise because of public health concerns then it would be "quite likely [that they would] be found reasonable by the courts" and upheld.[21] The uncertainty and seriousness of the situation would likely give the government "significant leeway if any of [the travel restrictions] were challenged" in court.[22]

Conclusion

The restrictions on mobility that have been enacted or pondered by governments in Canada are unprecedented. It appears that, on their face, the restrictions breach the *Charter*'s right to free mobility guaranteed by section 6. Should the government's actions be challenged in court, section 1 of the *Charter* would be used to determine whether the breaches can be justified. However, given the extraordinary situation and the continually evolving public health risk posed by COVID-19, it is likely that governments would be given substantial leeway by the courts in restricting mobility rights to attempt to fight the virus, even if Canadians lose their travel related liberties in the short term.

[1] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

[2] *Canada (Minister of Employment and Immigration) v Chiarelli,* [1992] 1 SCR 711.

[3] *Divito v Canada (Public Safety and Emergency Preparedness),* 2013 SCC 47 at para 18.

[4] *Kamel v Canada (Attorney General),* 2009 FCA 21 at para 17.

[5] *Ibid.*

[6] *Droit de la famille – 13328*, 2013 QCCA 277 at para 40.

[7] Hannah Jackson and Emerald Bensadoun, "Trudeau closes Canadian borders to most foreign travellers amid coronavirus outbreak," *Global News* (16 March 2020), online: <globalnews.ca/news/6682040/coronavirus-trudeau-address-nation/> [Jackson and Bensadoun].

[8] Eric Stober, "Canada-US land border closes to all non-essential travel," *Global News* (20 March 2020), online: <globalnews.ca/news/6711194/canada-us-border-closes/>.

[9] "'If you're abroad, it's time for you to come home': Trudeau," *CBC News* (16 March 2020), online: <cbc.ca/player/play/1711921731695>.

[10] Jackson and Bensadoun *supra* note 7.

[11] Prime Minister's Office, "Prime Minister announces efforts to bring Canadians home from abroad" *Justin Trudeau, Prime Minister of Canada* (21 March 2020), online: <pm.gc.ca/en/news/news-releases/2020/03/21/prime-minister-announces-efforts-bring-canadians-home-abroad>.

[12] Kathleen Harris, "Trudeau says government will do all it can to help stranded Canadians, but concedes some will remain trapped," *CBC News* (21 March 2020), online: <cbc.ca/news/politics/trudeau-canadians-stranded-covid19-coronavirus-1.5505582>.

[13] Ryan Tumility, "Canada to close borders to most non-citizens, stop ill travellers from boarding inbound flights, PM announces," *National Post* (16 March 2020), online: <nationalpost.com/news/canada/trudeau-travel-restrictions-ban-coronavirus-covid19-canada>.

[14] "Nova Scotia border restricted as of 6am Monday," *The Chronicle Herald* (22 March 2020), online: <thechronicleherald.ca/news/provincial/nova-scotia-border-restricted-as-of-6-am-monday-428043/

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[15] Katie Toth, "NWT to close borders to all inbound travel by air, land and port – with limited exceptions," *CBC News* (20 March 2020), online: <cbc.ca/news/canada/north/nwt-travel-ban-covid19-1.5505505>.

[16] Hannah Jackson and David Lao, "Coronavirus: Canada to ban sick travellers from domestic flights, intercity trains," *Global News* (28 March 2020), online: <globalnews.ca/news/6745733/trudeau-coronavirus-update-march-28/>.

[17] RSC 1985, c 22 (4th Supp).

[18] Collen Flood and Bryan Thomas, "In the face of COVID-19, we must understand Canada's lockdown powers," *The Globe and Mail* (16 March 2020), online: <theglobeandmail.com/opinion/article-in-the-face-of-covid-19-we-must-understand-canadas-lockdown-powers/

>.

[19] Brian Hill, "Coronavirus: Could Canada impose strict travel bans? Experts say yes," *Global News* (13 March 2020), online: <globalnews.ca/news/6673743/coronavirus-travel-restrictions-canada/> [Hill]. Law Professor Martha Jackman believes that travel restrictions "absolutely raise mobility rights concerns."

[20] Joseph Arvay and David Wu, "As civil liberties erode, Canada must not allow COVD-19

outbreak to infect the rule of law," *CBC News* (26 March 2020), online: <cbc.ca/news/opinion/opinion-charter-rights-freedoms-covid-1.5508222?fbclid=IwAR2eADCfm_z9OFMIoSt9zBendyJa9W02i8DbqSMvKn7fyUcmAGVA5ybtQpw>.

[21] Hill *supra* note 19.

[22] *Ibid.*