The Freedoms We Cannot Afford to Ignore During COVID-19

One of Canada's forgotten constitutional freedoms has quickly become one of the most restricted in the era of COVID-19. In the nearly four decades since the *Charter of Rights and Freedoms* arrived, Canadian courts have paid almost no attention to section 2(c), which guarantees freedom of peaceful assembly.

On some level, this is no surprise. Governments are generally disinclined to limit this freedom because, intuitively, it is difficult to justify prohibitions on peaceful assemblies.[1] All of this changed seemingly overnight due to an unprecedented global health crisis. One of the cornerstones of the fight against COVID-19 has been, from day one, severe restrictions on in-person gatherings of nearly all shapes and sizes.

To date, the general consensus among lawyers and legal scholars has been that most of these drastic policies are constitutional. If a litigant were to argue that current bans on gatherings violate the *Charter*, our courts would likely conclude that these restrictions are a reasonable limit on freedom of peaceful assembly.[2] And according to opinion polls, a majority of Canadians have accepted that we must do what we can to protect vulnerable members of our society from infection, even if it means temporarily forgoing basic civil liberties.[3]

What's less certain, however, is how long governments will be justified in continuing to prohibit peaceful assemblies as we move into the next stage of our battle against COVID-19.[4] Provinces and territories have been easing some of the most restrictive measures in recent days, but we're still only beginning to understand what life is going to look like in the period between lockdown and whenever a viable treatment or vaccine is widely available.[5] If our pre-pandemic "normal" doesn't return until sometime next year, as many experts are projecting, we should expect an influx of litigation challenging workplace closures, border restrictions, bans on public events and long-term physical distancing measures as violations of the *Charter*.[6]

Religious gatherings are a clear example of the constitutional tightrope that governments are walking. Never before in modern Canadian history has the state shut down religious assemblies *en masse*. Though the situation varies from province to province, religious groups have until recently been largely absent from the public discourse as policymakers implement plans to reopen society, even though they are especially prone to the ongoing strain of these policies.

To their credit, a large number of churches, mosques, synagogues and other places of worship have successfully transitioned to live-streamed virtual services since the start of the pandemic.[7] But physical gatherings are how these communities attend to the collective

spiritual needs of their members. For certain faith traditions, physical presence is required in order to celebrate rites, sacraments, and ceremonies. In these cases, there is no substitute for being together in person.

Indeed, for religious groups, freedom of peaceful assembly is not the only *Charter* freedom that has felt the impact of COVID-19 restrictions. Freedom of religion is also at stake as a result. While religious freedom consists of far more than the act of communal worship, there is little doubt that worship itself – facilitated by peaceful assembly – is central to this constitutionally-guaranteed freedom. Necessary compromises during this pandemic have come at great personal cost to many people of faith as they live through significant limitations on two fundamental *Charter* freedoms.

In this regard, recent decisions by certain provinces permitting religious services to resume at limited capacities are encouraging. On June 12, for example, Ontario began allowing places of worship to have gatherings that don't exceed 30 per cent of a location's regular capacity.[8] In Alberta, "[t]here is no cap on capacity for places of worship, as long as there is a distance of at least 2 metres or appropriate barriers between members of different households … [or] cohort families", although congregational singing, as a high-risk activity, is discouraged.[9] Yet in Prince Edward Island, religious services are still limited to 15 people at a time, even though up to 50 people can gather in restaurants.[10] And it's far from certain when religious services will return to pre-pandemic "normal" – Nova Scotia's chief medical officer of health said recently that people should expect limitations of 50 to 100 people at services until a vaccine is found.[11]

The fact remains that, on the whole, policymakers have been slow to acknowledge the very real impact of the lockdown on religious communities.[12] While *Charter* claims are not simple matters of keeping score, many Canadians are still facing significant and simultaneous limits on their religious freedom and their freedom to peacefully assemble. This is a reality that we can't afford to ignore. Against this backdrop, as public health officials and politicians show an increasing willingness to tolerate larger public gatherings and demonstrations – a tolerance we have witnessed in the face of important protests against racial injustice – it will become difficult, if not impossible, to justify not extending similar allowances to religious groups.[13]

Many of these concerns likewise apply to other types of peaceful assemblies that have been affected by the pandemic. Activities which were staples of communal life mere months ago have now all but disappeared, and physical distancing is poised to persist as we enter the few months of warm weather for most of the country. It's looking more and more likely that we'll be asked to scale back – and in many cases completely sacrifice – much of what defines the summer season both socially and economically: outdoor exhibitions and cultural festivals, weddings and graduation ceremonies, and travel plans domestically and abroad.

Canada is in the middle of an unprecedented and unpredictable public health crisis, and certainty is a luxury we lack. There is no easy answer to how long we can or should expect our fellow citizens to accept restrictions on their fundamental freedoms. However, one thing is clear: while policymakers must carefully balance our responsibility to protect vulnerable

populations against the need to allow peaceful assemblies to safely resume, this balance has to be evenly and fairly struck throughout society and across the country. Otherwise, governments face a growing risk that these policies will lose credibility – in the eyes of Canadians and their Constitution alike.

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[1] Kristopher E.G. Kinsinger, "Positive Freedoms and Peaceful Assemblies: Reenvisioning Section 2(c) of the Charter" (2020) 98 SCLR (2d) (forthcoming).

[2] Josh Dehaas, "Are bans on religious gatherings constitutional?" (13 April 2020), online: *Canadian Constitution Foundation* <https://theccf.ca/are-bans-on-religious-gatherings-constitutional/>.

[3] Laura Osman, "Most Canadians comfortable with pace of easing restrictions: poll" (5 May 2020), online: *CBC News* <https://www.cbc.ca/news/politics/canadians-comfortable-pace-easing-restrictions-1.5556555>; Brian Bird, "COVID-19 and Common Humanity" (11 May 2020), online: *Convivium* <http://www.convivium.ca/articles/covid-19-and-common-humanity/>.

[4] Sujit Choudhry, "COVID-19 & the Canadian Constitution" (16 April 2020), online: *Medium* <https://medium.com/@SujitChoudhry/covid-19-the-canadian-constitution-52221ef31dc3>.

[5] Adam Radwanski and Ivan Semeniuk, "What will Canada's Pandexit strategy look like? How officials are deciding when to lift coronavirus lockdowns" (18 April 2020), online: *The Globe and Mail* <https://www.theglobeandmail.com/canada/article-what-will-canadas-pandexit-strategy-look-like-how-officials-are/>.

[6] Marieke Walsh and Ivan Semeniuk, "Trudeau warns of 'new normal' as Ottawa releases potential coronavirus scenarios" (9 April 2020), online: *The Globe and Mail* <https://www.theglobeandmail.com/politics/article-virus-modelling-estimates-11000-to-22000-canadian-deaths-if-physical/>; Tyler Dawson, "Legal groups eye suing government to roll back COVID-19 restrictions" (10 May 2020), online: *National Post* <https://nationalpost.com/news/canada/legal-groups-eye-suing-government-to-roll-back-covid-19-restrictions>.

[7] Garrett Barry, "Keeping the faithful: Technology has become pivotal for religious groups during COVID-19" (20 April 2020), online: *CBC News* <https://www.cbc.ca/news/canada/newfoundland-labrador/religious-services-online-mass-seder-service-1.5533069>.

[8] O Reg 276/20.

[9] Government of Alberta, "COVID-19 Information: Guidance for Places of Worship" (22 June 2020), online: *Government of Alberta* <https://open.alberta.ca/dataset/2be831dd-d83e-42da-b634-6bc6d5232d1a/resource/a6490934-bf3e-4e6d-9531-2822d6482f9f/download/covid-19-relaunch-guidance-places-of-worship-2020-0622.pdf>.

[10] Shane Ross, "Bishop wants more Islanders to be allowed in churches" (10 June 2020), online: *CBC News* <https://www.cbc.ca/news/canada/prince-edward-island/pei-bishop-covid19-church-limit-1.5606337>; Stu Neatby, "Why reopen restaurants but not churches? asks P.E.I. MLA" (9 June 2020), online: *The Chronicle Herald* <https://www.thechronicleherald.ca/news/canada/why-reopen-restaurants-but-not-churches-asks-pei-mla-460136/>.

[11] Mickey Conlon, "Top doctor says 'normal' church services could be a year or more away" (2 June 2020), online: *Grandin Media* <https://grandinmedia.ca/top-doctor-says-normal-church-services-could-be-a-year-or-more-away/>.

[12] Jonathan Pinto, "Hundreds of Ontario churches ask premier to let them reopen" (13 May 2020), online: *CBC News* <https://www.cbc.ca/news/canada/windsor/hundreds-ontario-churches-ask-reopen-1.5566955>.

[13] *Stephanie Levitz*, "'Balance of competing interests': Trudeau defends attending protest amid COVID-19" (8 June 2020), online: *Global News* <https://globalnews.ca/news/7039712/trudeau-george-floyd-protest-covid/>.