

Caging the Virus: Is Mandatory Isolation Constitutional?

Introduction

Recent news articles raise concerns about how government measures to contain COVID-19 may infringe the *Charter of Rights and Freedoms*.[\[1\]](#) One of the many measures raising concerns is mandatory isolation. While it is likely that the measures violate *Charter* rights, a court will likely find them constitutional. This article will explain why.

On March 17, 2020, the Government of Alberta declared a public health emergency due to pandemic COVID-19[\[2\]](#) and proceeded to implement emergency protections. These emergency protections include public health orders that restrict gatherings and services, and require mandatory isolation.

Details of the isolation requirements

The purpose of the public health orders is to stop the community spread of COVID-19 infections as there is “substantial” potential for individuals to transmit COVID-19 when they have the virus, and even before symptoms begin.[\[3\]](#) Other governments across the country have imposed similar emergency and public health orders.[\[4\]](#) In Alberta, a public health order[\[5\]](#) issued on March 25, 2020 requires residents to isolate for:

- 14 days if they recently returned from international travel or have been in close contact of someone with COVID-19, or
- 10 days if they have a COVID-19 symptom that is not related to a pre-existing illness or health condition.

The public health order includes financial penalties for people who do not isolate when required. Although these restrictions and penalties potentially violate *Charter* rights, they are still likely constitutionally valid.

Does the mandatory isolation order violate section 7 liberty rights?

What are section 7 rights?

The mandatory isolation order may be challenged under section 7 of the *Charter of Rights and Freedoms*, a provision that protects an individual’s autonomy and personal legal rights from Canadian governments. Section 7 of the *Charter* guarantees the right to life, liberty, and security of the person. A person cannot be deprived of these rights unless the deprivation follows the principles of fundamental justice. The section 7 “liberty” interest is engaged where the state interferes with a person’s ability to make “basic choices going to the core of what it means to enjoy individual dignity and independence”.[\[6\]](#) Liberty protects the right to “make inherently private choices free from state interference.” [\[7\]](#)

There is a breach of section 7 when a law violates the liberty interest in a manner that is not in keeping with the [principles of fundamental justice](#), meaning it imposes an arbitrary, overbroad, or grossly disproportionate impact.[\[8\]](#) Courts determine arbitrariness by whether the law's effects meet the law's objective. [\[9\]](#) They evaluate overbreadth by examining if the law surpasses what is required to achieve the law's objective. Finally, a court's evaluation of gross disproportionality examines if the law's negative effect is too extreme as a response to its objective. The courts do not look to how well the law achieves its object, how much of the population the law benefits, nor the percentage of the population that the law negatively affects.[\[10\]](#)

Analysis: the mandatory isolation order potentially violates section 7

Mandatory isolation interferes with an individual's ability to leave their home and take part in their chosen activities such as attending church services or shopping in a store. These individuals lose their independence by being required to rely on others for medicine, food, and other supplies. Therefore, there are multiple circumstances in which the mandatory isolation order may violate a person's liberty interests. The court will look at who is bringing the challenge and how the law has infringed their right. It is likely that a court will find the order infringes personal liberty rights under a broad range of circumstances.

If a court finds that there is a violation of a person's liberty interest, then its next step is to examine if this infringement violates the principles of fundamental justice: arbitrariness, overbreadth, and gross disproportionality. Based on the current evidence, it is possible that a court will find the order is overbroad because there will be people who do not have or who will not be infected with COVID-19, who are forced to isolate. For example, the order captures international travelers who are arriving to Canada from a place where risk of exposure to COVID-19 is low. Therefore, there may be no good reason for these people to be isolated.

The order is not likely to be found arbitrary because the goal of stopping the virus' spread across the community connects to isolating individuals who are vulnerable or who are already ill.[\[11\]](#) Isolating those who may be ill connects to the goal of preventing community spread of the disease. The order is probably not grossly disproportionate in its effects because the deprivation of liberty is not "totally out of sync"[\[12\]](#) with the goal of preventing widespread COVID-19 infections. There is evidence that COVID-19 may be transmitted 2.5 days before an individual shows symptoms or tests positive for the disease.[\[13\]](#) The order limits the number of days of mandatory isolation based on the likelihood of transmitting the disease to others. It is limited to capturing those at greatest risk of transmitting COVID-19, including people who have COVID-19, people who have been in close contact with them, and people who have been travelling internationally.

Mandatory isolation interferes with an individual's ability to take part in the day-to-day activities of their choosing. Although isolating those who may be ill connects to the goal of preventing community spread of the disease, the mandatory isolation order is likely overbroad as it captures people who have a low risk at contracting COVID-19. For this reason, the mandatory isolation orders could violate the right to liberty that is protected in

the *Charter*.

Does the mandatory isolation order violate section 1?

What is section 1?

When a government action is found to violate a *Charter* right, the government will try to convince a court that its actions are justifiable in the circumstances using section 1, the [balancing section](#) of the *Charter*. The court will determine whether it finds the government's order reasonable and justifiable in the circumstances. What is reasonable government action in one context may be unreasonable in another, so the courts' *Charter* analysis takes the uniqueness of the situation into account. This flexibility to determine reasonableness in different circumstances is what allows judges to come to different conclusions given the specific facts of each case, and without disregarding earlier decisions.[\[14\]](#)

To justify the mandatory isolation order, the government must show that its public interest goals are important enough to override the negative effects – that is, the impact resulting from the violation of the right to liberty. A court will look at a situation where someone having to isolate upon returning from a trip will cause great hardship. For example, the effect on a person in mandatory isolation who cannot visit a family member who is critically ill or dying.[\[15\]](#) The solution adopted must be proportionate to the harm caused by being:

- Rationally connected to the government's goals,
- Minimally impairing on the right, and
- Must have a benefit that outweighs the harm of the human rights violation.

These criteria align with the principles of fundamental justice in the section 7 test, so the analysis is similar. Because their tests are so similar, laws which violate section 7 are normally not justifiable. However, in “exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like”,[\[16\]](#) courts will sometimes find the government's actions to be reasonable and justifiable.

Analysis: the mandatory isolation order is potentially justifiable

The balancing exercise that a court engages in rests on whether the government's action is reasonable in the circumstances. In this case, as the purpose of the mandatory isolation order is to stop the community spread of COVID-19, a court is likely to find that the purpose of the public health order is pressing and substantial.

It is likely that a court will find that the order is proportionate to the harm of the community spread of COVID-19. As stated in the above section 7 analysis, the mandatory order will capture some individuals who do not have or who will not develop symptoms of COVID-19. However, isolation will lower pre-symptomatic and asymptomatic transmission of the disease, and the time limits on the order are based on scientific data. The order is limited to individuals who carry a high-risk of contracting COVID-19. For these reasons it is expected

that a court will find that the order is rationally connected to the government's goals and impairs the right as little as possible. A court will probably find that the benefit for Canadians generally, outweighs the harm to the individual. In this case, a court is likely to find that public health in the form of controlling disease and preventing deaths outweighs limiting personal liberty for a short amount of time.

Conclusion

In situations of emergency, such as the COVID-19 pandemic, it is probable that the courts will give weight to the purpose of a government's public health orders, such as the need for mandatory isolation. A court may find that the mandatory isolation violates the section 7 right to liberty. However, the government could probably convince a court that the measures are reasonable for the circumstances. The Supreme Court has delineated "exceptional circumstances" in which the violation of a section 7 Charter right can be justified. The COVID-19 pandemic seems to be just the sort of exceptional circumstance the Court envisioned. In most cases, a law violating a person's right to liberty will not be reasonable. But in times of pandemic, the courts are likely more inclined to find the government's actions are justified.

[1] Sean Fine, "How measures to contain COVID-19 may clash with Canadians' Charter rights" (17 March 2020) *Globe and Mail*, online: <<https://www.theglobeandmail.com/canada/article-how-measures-to-contain-covid-19-may-clash-with-canadians-charter/>>; Bernise Carolino, "Alberta protestor arrested for breaking social distancing order: Charter breach?" (11 June 2020) *Canadian Lawyer*, online: <<https://www.canadianlawyermag.com/practice-areas/criminal/alberta-protestor-arrested-for-breaking-social-distancing-order-charter-breach/330464>>.

[2] OIC 080/2020, (2020), online: <https://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2020/2020_080.pdf>

[3] X He et al, "Temporal dynamics in viral shedding and transmissibility of COVID-19" (2020) 26 *Nature Medicine* 672, online: <<https://doi.org/10.1038/s41591-020-0869-5>>.

[4] See e.g. *Declaration of a State of Emergency Throughout the Province of Saskatchewan to Address the COVID-19 Public Health Emergency (President of the Executive Council)*, OC 102/2020, online: <<https://publications.saskatchewan.ca/#/products/104478>>. See also OIC 148/2020 (2020) *M Gaz* 149 at no 26, online: <https://gazette.gov.mb.ca/index.html?d=issue&pub_id=1&issue_id=1560&heading_id=540#notice3044>.

[5] Ministerial Order 612/2020, (2020), online: <<https://open.alberta.ca/dataset/115a8c1c-354e-4511-923640cee5681544/resource/fc2406d6-2151-4da3-bbb5-ed5ce7c709af/download/health-mo-612-2020-mandatory-self-isolation.pdf>>.

[6] *Godbout v Longueuil (City)*, 1997 CanLii 335 (SCC), [1997] 3 SCR 844 at para 66.

[7] *Ibid.*

[8] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 123 .

[9] *Ibid* at para 125.

[10] *Ibid.*

[11] Government of Alberta, “COVID-19 orders and legislation” (2020), online: <<https://www.alberta.ca/isolation.aspx>>.

[12] *Bedford*, *supra* note 7 at para 120.

[13] Alberta Health Services, COVID-19 Scientific Advisory Group, “COVID-19 Scientific Advisory Group Rapid Response Report” (13 April 2020).

[14] Brandon L Garrett, “Constitutional Reasonableness” (2017) 102 Minn L Rev 61 at 62.

[15] *Ibid* at para 125.

[16] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 85.