

Walking for “Freedom”: The Charter and “Rights Talk” amidst Canada’s COVID-19 culture war

Marcher pour la « liberté » : La Charte et le « discours des droits » au milieu de la
guerre culturelle COVID-19 du Canada

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Abstract

The COVID-19 pandemic has sparked a culture war in Canada, as a determined segment of citizenry – the “anti-lockdown” movement – has furiously opposed public health measures. Chief among the many arguments advanced by anti-lockdowners is the assertion that public health measures constitute an unacceptable violation of Canadians’ Charter rights. The frequent invocation of Charter rights by the anti-lockdown movement cannot be understood in isolation, but rather as part of a wider pattern within Canadian political discourses. Since the adoption of the Charter in 1982, Canadian political discourses have been influenced by “rights talk,” a hyperindividualistic and uncompromisingly absolutist conception of Charter rights. The anti-lockdown movement is a manifestation of the deep permeation of rights talk into Canadian political life; through a case study of anti-lockdown discourses, this paper demonstrates how the hyperindividualism and absolutism of rights talk are at the core of anti-lockdowners’ understanding of the Charter. Rights talk is fundamentally at odds with our collective policy needs during a pandemic, leading to an extremely difficult pandemic political environment in Canada. Moreover, the damage anti-lockdowners have done to our public health discourses foreshadows the damage that unchecked rights talk can do to Canadian democracy; there is an urgent need to repair our collective understandings and discourses about the Charter and the fundamental rights protected therein.

La pandémie de COVID-19 a déclenché une guerre culturelle au Canada, car un segment déterminé de la population — le mouvement « anti-confinement » — s’est furieusement opposé aux mesures de santé publique. Parmi les nombreux arguments avancés par les militants anti-confinement, le principal est l’affirmation selon laquelle les mesures de santé publique constituent une violation inacceptable des droits des Canadiens en vertu de la *Charte*. L’invocation fréquente des droits garantis par la *Charte*

de la part du mouvement anti-confinement ne peut être comprise isolément, mais plutôt comme faisant partie d'un modèle plus large dans les discours politiques canadiens. Depuis l'adoption de la *Charte* en 1982, les discours politiques canadiens ont été influencés par le « discours des droits », une conception hyperindividualiste et absolutiste sans compromis des droits de la *Charte*. Le mouvement anti-confinement est une manifestation de l'imprégnation profonde du discours sur les droits dans la vie politique canadienne; à travers une étude de cas des discours anti-confinement, cet article démontre comment l'hyperindividualisme et l'absolutisme du discours sur les droits sont au cœur de la compréhension de la *Charte* par les militants anti-confinement. Le discours sur les droits est fondamentalement en désaccord avec nos besoins politiques collectifs pendant une pandémie, ce qui conduit à un environnement politique extrêmement difficile en cas de pandémie au Canada. De plus, les dommages que les militants anti-confinement ont causés à nos discours sur la santé publique laissent présager les dommages qu'un discours sur les droits non contrôlé peut causer à la démocratie canadienne; il y a un besoin urgent de réparer nos compréhensions et nos discours collectifs sur la *Charte* et les droits fondamentaux qui y sont protégés.

The COVID-19 pandemic has sparked a fierce culture war in Canada that has placed the Charter of Rights and Freedoms at its centre. Throughout the pandemic, there has been a fierce backlash against public health measures – such as social distancing and mandatory masking – by individuals and groups we will refer to as the “anti-lockdown” movement or “anti-lockdowners”.¹ The anti-lockdowners’ reasonings are diverse; some have argued that public health measures are ineffective at stopping the spread of the virus while others believe COVID-19 not to be a crisis at all (Franklin and Bruch 2020). One of the central arguments of the anti-lockdown movement, however, is that public health restrictions constitute an unacceptable violation of Charter rights. This is exemplified by the court battles of Pastor James Coates and GraceLife Church in Alberta over the church’s defiance of public health measures. Coates’ case was premised on the idea that the provincial government had violated Coates’ Charter rights to worship, peaceful assembly, and free expression by limiting the legal capacity of church services (Wakefield 2021). To understand the anti-lockdown movement and its frequent use of rights discourses, we should not view it as an isolated phenomenon. Since the adoption of the Charter in 1982, Canada has seen the rise of an absolutist, hyperindividualistic rights

¹ The terms “anti-lockdown movement” or “anti-lockdowners” are used for simplicity’s sake, but it is acknowledged that these terms do not fully capture the movements, beliefs, and ideologies they refer to.

discourse known as “rights talk”; this simplistic conception of rights dominates the anti-lockdown movement, demonstrating that rights talk discourse has permeated deep into Canadian political life. While the Charter itself does not reflect the features of rights talk, there is nonetheless a clear weakness in Canadian political discourses about rights; the damage anti-lockdowners have done to public health efforts and discourses indicates that simplistic rights talk is eroding the foundations of Canadian democracy.

American law professor Mary Ann Glendon (1991) first articulated the idea of “rights talk” in *Rights Talk: The Impoverishment of American Political Discourse*. Glendon argues that contemporary American political life has become dominated by simplistic “rights talk,” based on a hyperindividualistic and uncompromisingly absolutist conception of rights (14-15). There is no compromise or room for common ground under rights talk; there is only the assertion of a right, which demands that all other considerations and discussions yield to it (Glendon 1991, xi). Emmett Macfarlane (2008) describes this uncompromising absolutism, noting “to stake a claim to a specific right is to presuppose that claim overrides other considerations, values or policy initiatives” (304). Importantly, this absolutism applies near-exclusively to a hyperindividualistic conception of rights. Glendon (1991) notes that, within rights talk, there is an “image of the rights-bearer as a self-determining, unencumbered individual, a being connected to others only by choice” (48). The hyperindividualistic rights-bearer does not need to consider others when exercising their rights; rights talk believes every individual bears the consequences of their decisions alone (45). Rights talk does not consider the societal effects of an individual recklessly asserting a right, or of our collective responsibility to one another (45-46). Glendon sharply criticizes the effects of rights talk, arguing that, “our simplistic rights talk regularly promotes the short-run over the long-term, sporadic crisis intervention over systemic preventive measures, and particular interests over the common good” (15).² Such concerns foreshadow our analysis of the anti-lockdown movement.

² Glendon also uses her analysis to forcefully advance an anti-abortion argument, a fact that should be acknowledged, although it is not directly relevant to this paper’s analysis.

Glendon (1991) believes rights talk to be a uniquely American phenomenon (xi). She even cites the “reasonable limits” clause in the Charter – which specifies that Charter rights are subject to limits that are demonstrably justifiable in a free and democratic society – as an example of how a society avoids “rights talk,” particularly within the judiciary (39). Nonetheless, Canadian scholars have utilized the rights talk concept. Rather than focus on Canada’s judiciary, however, scholars have used rights talk to analyze developments in Canadian political discourses since the adoption of the Charter in 1982 (Macfarlane 2008, 306–7). In this view, the advent of a permanent human rights document like the Charter is criticized for bringing about an “Americanization” of Canadian political discourse by popularizing a similarly reckless, absolutist rights talk (Macfarlane 2008, 306–7; Simpson 1994, 54). Rainer Knopff (1998) summarizes this analysis of Canadian political discourse well by arguing that the “courtroom debate about constitutional rights... implies permanent winners and losers, painting one side as angelic and the other as satanic... [it] threatens to dissolve the middle ground of representative institutions” (705). Disregarding their broader criticism of the Charter and its effects on Canadian political life, these scholars make it clear that hyperindividualistic, absolutist rights talk is present and influential within Canadian political discourse. Moreover, Macfarlane (2008) offers convincing empirical proof of this assertion through an analysis of how Canadian newspapers discuss Charter decisions (324-25).

With this in mind, we can return to the COVID-19 culture war and the anti-lockdown movement. As we noted earlier, we paint “anti-lockdown” with a broad brush, studying a variety of backlashes against public health measures – many of which are linked to other groups and movements, particularly on the far-right (Taylor 2021). The motivations and reasonings behind the groups and individuals that make up the anti-lockdown movement are not singular, but there is a noticeable rhetorical pattern in their invocation of Charter rights (Choudhry 2020; Franklin and Bruch 2020).

The language of “rights” and “freedoms” underpins the anti-lockdown movement. For example, one of the largest anti-lockdown events in Canada was titled “Walk For Freedom,” which held rallies that drew crowds of hundreds in defiance of public health measures; their signs and banners featured slogans such as “Protecting OUR Civil Liberties” and “Your Freedom Matters” (Franklin and Bruch 2020). The courts and most

legal experts agreed that the argument that public health measures are unconstitutional holds little water (Choudhry 2020; Johnson 2020). In the case of James Coates and GraceLife Church, for example, Judge Robert Shaigec wrote “[r]eligious freedoms are subject to the rule of law” (Wakefield 2021). However, it is the persistent focus on the Charter and rights by anti-lockdowners – despite their losses in court – that is most noticeable. To demonstrate how these rights discourses are rights talk, we will use a more detailed case study of discourses within the anti-lockdown movement.

The “Justice Centre for Constitutional Freedoms” (JCCF) is a Canadian right-wing, socially conservative legal advocacy organization that has taken on a strong anti-lockdown stance during the pandemic. The JCCF has launched multiple Charter-based challenges against public health measures and a JCCF-affiliated lawyer represented James Coates and his Charter-based argument in court (Griwkowsky 2020; Wakefield 2021). Studying such an organization so deeply connected with the anti-lockdown movement gives us more detailed versions of their rights-based discourses while being representative of the movement as a whole.

A JCCF opinion piece by Calgary lawyer John Carpay (2021) titled “Kenney-Notley covidism follows in the footsteps of other collectivist ideologies” is an excellent example of both the uncompromising absolutism and the hyperindividualism that follows the anti-lockdown movement.³ Carpay rails against the imposition of public health measures by the Kenney government, arguing it constitutes an unreasonable violation of Albertans’ Charter rights (para. 4). It is indisputable that, over the course of the pandemic, certain Charter rights have been restricted or violated to implement public health measures. As we noted earlier, however, the courts and most legal experts have overwhelmingly agreed that such violations, in the context of a public health emergency, fall well within Section 1’s “reasonable limits” (Choudhry 2020; Johnson 2020). Carpay (2021), of course, disagrees with this assessment, citing questionable scientific reasoning (para. 13). However, even if one were to take Carpay’s unreasonableness argument at face value, his approach to the issue is marked with the uncompromising absolutism of rights talk. For Carpay, an unreasonable violation of rights during a public health emergency is not a

³ The piece is also hosted on the website of the far-right alternative news outlet *Western Standard*.

policy misstep to be adjusted; it is a totalitarian imposition comparable to curfews imposed by the Nazis during the Second World War (para. 2). Carpay's hyperbolic comparison of public health measures to totalitarian regimes brings to mind Knopff's (1998) description of how rights talk divides the different sides of an issue into the "angelic" and the "satanic." The absolutism of anti-lockdowners' rights talk leaves little room for compromise on the issue; how could one find a middle ground if any restrictions on Charter rights are immediately equated with the most odious regimes in history?

Hyperindividualism also permeates Carpay's (2021) piece. He argues that the Albertan government has been taken over by "covidism," something Carpay describes as being a "collectivist" ideology that "has little regard for the rights, freedoms, and basic human needs of each individual person" (para. 9). Carpay argues that, under "covidism," "[t]he basic human right (and need) to associate freely, in person, with friends and extended family, must give way to the ideological cause of stopping the virus at all costs" (para. 9). As absurd as this argument might be, it reveals the hyperindividualism at the core of anti-lockdown rights talk. Carpay focuses on the fact that individual rights have been violated in the name of the collective good; in his mind, such an effort is reviled as "collectivism" comparable to communism (para. 5). Carpay is an excellent example of how the anti-lockdown movement is fixated solely on the inability of the individual rights-bearer to make certain choices during the pandemic; there is no consideration of collective responsibility or of the effects that individuals exercising their rights may have on others around them. Thus, it is clear that rights talk is at the core of the anti-lockdown movement's beliefs. What implications does this have for the Charter itself?

Given the direct link between the adoption of the Charter and the rise of rights talk in Canada, many scholars use the concept to criticize the legacy of the document wholesale – particularly in comparison with parliamentary sovereignty. Jeffrey Simpson (1994) writes, for example, that he is "sceptical... that in contributing to smashing the old political order, the Charter and the "rights talk" it has spawned produced anything cohesive with which to replace the old order, which, whatever its sins and deficiencies, was based on a recognition of compromise and accommodation and balance..." (59).

I am more reluctant to criticize the Charter itself so harshly. Firstly, to overly criticize the Charter is to attack landmark advances in rights in Canada since 1982; this is particularly true concerning the Charter's protection of collective rights (Magnet 1986). More directly, the Charter itself does not feature the uncompromising absolutism and hyperindividualism of rights talk. The "reasonable limits" clause in Section 1 directly refutes rights talk by stating that rights are not absolute and that individual rights must yield to reasonable restraints in the name of the public good (Gibson 1985, 27-28). While rights talk may have arisen because of the Charter, it is clearly not a necessary consequence of the document.

Rather, I argue that the COVID-19 culture war and the anti-lockdown movement have exposed a weakness in our political discourses about the Charter – not the document itself. The strength of the anti-lockdown movement – particularly within right-wing discourses in Canada – is a product of the deep permeation of rights talk discourses into Canadian political life. COVID-19 has merely been a demonstration of how damaging rights talk can be to democracy, particularly during a crisis.

Addressing a pandemic requires individual sacrifice for the collective good and the protection of the most vulnerable; this is fundamentally at odds with an absolutist, hyperindividualistic conception of human rights. The consequences of this have been very real; the anti-lockdown movement has contributed to the spread of the virus and helped promote the far-right in Canada (Taylor 2021). A less conspicuous consequence of the anti-lockdown movement, however, is its poisoning of public health discourses. There are uncertainties in the science of public health that deserve measured discussion; however, our discourses are currently dominated by anti-lockdown, anti-mask, and anti-vaccine absurdities (or efforts to counter these narratives). This lack of subtlety, compromise, and common ground within our public health discourses foreshadows the wider danger that unrestrained rights talk poses to our democratic life; as Glendon (1991) warns, rights talk "needlessly multipl[ies] occasions for civil discord. We make it difficult for persons and groups with conflicting interests and views to build coalitions and achieve compromise..." (15). Rights talk has the potential to hinder our ability to have democratic discourses, just as it has hindered our measured discussions about public health.

As we look to exit the pandemic, we have not yet exited the era of hyperindividualistic, absolutist rights discourses. The assertion of rights is not a bad thing; in fact, it is a cherished part of Canadian democracy. However, the anti-lockdown movement has shown that parts of our rights discourses are “overgrown,” fixated solely on an uncompromising view of the individual rights-bearer and ignoring collective responsibilities or societal consequences. It is clear that this has left considerable damage on Canadian democracy and impoverished our political discourse. There is much work to be done in repairing Canada’s political discourse so that, in the future, we might all meaningfully discuss the Charter and our rights again.

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