

**Digital Identification (ID) and the *Canadian Charter of Rights and Freedoms*. Does the luxury of a better user experience justify the risks involved in centralizing access to government services and the potential violation of charter rights?**

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*“If you look for truth, you may find comfort in the end; if you look for comfort you will not get either comfort or truth only soft soap and wishful thinking to begin, and in the end, despair.” -C.S. Lewis*

According to the *Office of the Chief Information Officer*, Digital ID describes a “tool for Canadians to access government services in a seamless and secure way.”<sup>1</sup> In theory, digital ID is supposed to expand on the notion of *identification*, for which “birth certificates [remain] the gold standard of legal identity which empowers the holder to access rights.”<sup>2</sup> However, unlike birth certificates, which are often printed on paper, digital ID will rely on digital technology tools that can validate the identity of a user and grant them access to online government services and portals as permitted.

In theory, the practical benefits of digital ID cannot be overstated, particularly when the digital framework of the Canadian government makes accessing some of its portals a challenging and time-consuming process. In fact, the concept of digital ID in Canada is not new and has been utilized by Ontario universities and colleges to various extents. If you survey any group of post-secondary students, you will find that most appreciate the easiness by which they can access multiple digital resources simply by entering the university identification keys. Similarly, Interac Corp, which acquired an exclusive right to the Canadian *SecureKey Digital ID Service* in 2021,<sup>3</sup> believes that digital ID can provide three main benefits: faster government bureaucratic processing ex. when issuing a driver’s license, “seamless” interaction with various government portals and finally, the centralization of health care files for enhanced access and updated medical records.<sup>4</sup>

*Prima facie* digital ID would benefit users and consumers at a time of digital centralization. However, concerns about the potential abuse of power and information dissemination are grounded in real-world examples of government surveillance and power abuse. Just recently, the Canadian Public Health Agency admitted to tracking 33 million mobile devices during covid-19 lockdowns without the prior consent of users and in a process that lacks transparency about the data collection, use and destruction.<sup>5</sup> **Thus, the purpose of this paper is to examine the risks from the perspective of the *Canadian Charter of Rights and Freedoms (CCRF)* through its application to two cautionary tales: First, the mandated use of the ArriveCan app at the Canadian border. Second, the freezing of bank accounts of the ‘trucker convoy’ protesters in February 2022.** Additionally, as the CCRF governs the relationship between the state and the citizen, the implications of digital ID for private business practices (usually between two or more citizens) will be omitted.

## ArriveCan

The Canadian government launched the ArriveCan in April 2020 as an **optional** “communication and screening tool to ensure travellers arriving in Canada complied with pandemic border

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<sup>1</sup> <https://www.canada.ca/en/government/system/digital-government/living-digital/digital-id.html>

<sup>2</sup> <https://www.biometricupdate.com/202111/un-explores-digital-identity-sector-to-inform-legal-identity-progress>

<sup>3</sup> <https://www.interac.ca/en/content/news/interac-corp-acquires-exclusive-rights-to-securekey-digital-id-services-for-canada/>

<sup>4</sup> <https://www.interac.ca/en/content/ideas/how-will-digital-identity-will-shape-the-future-of-canada/>

<sup>5</sup> <https://nationalpost.com/news/canada/canadas-public-health-agency-admits-it-tracked-33-million-mobile-devices-during-lockdown>

measures.”<sup>6</sup> Travellers were mandated to upload their contact information, travel information and quarantine plans, and obey any random testing requirements prescribed by the app. The app was made mandatory in November 2020 and has since been used to deny entry or exist to Canadians who refuse to comply with the entry requirements, particularly covid-19 vaccine mandates.

### *CCRF*

Mandating the use of the ArriveCan app and consequently denying or allowing entry of Canadian citizens appear to, *prima facie*, violate the rights under s.6(1) *Mobility Rights* guarantee every citizen of Canada the “right to enter, remain in and leave Canada.” The mobility rights are considered so fundamental that they cannot be suspended even through invoking s.33, the notwithstanding clause. Historically, s. one has been interpreted to prevent exile and banishment<sup>7</sup> as well as the operational aspects of entering and leaving Canada. In *R v. Nikal*, the Supreme Court of Canada stated in *obiter* that the requirement to present a passport is not an infringement of the right to enter Canada unless the requirement was met with great difficulty or expense.<sup>8</sup> This can be expanded on to cover the expenses and barriers to having access to the ArriveCan, where a traveller’s device does not meet the minimum operating system requirements and is not presented with alternative options from the government. In essence, mandating the use of the ArriveCan not only gives the government power to allow or restrict an individual’s movement in and out of Canada but also mandates the possession of electronic devices, which are luxury products.<sup>9</sup>

### *Setting Precedents & Considerations*

The key point to be made here is that the Canadian government has set two important precedents through its implementation of the ArriveCan app. First, what was initially introduced as an “optional” tool that would make crossing the border a more seamless operation for users who freely chose to use the app, was made mandatory. Second, the Canadian government demonstrated how digital tools could be launched, (and potentially repurposed) to ensure wide-scale compliance with government regulations. In this case, the compliance was regarding covid-19 health measurements that the government deemed necessary even at times when the rules were questionable. For example, for a brief period in 2022, Ukrainian refugees were exempt from meeting the covid-19 border vaccination requirements per the *Canada-Ukraine Authorization for Emergency Travel*. Meanwhile, Canadian citizens with active passports were still unable to exercise their rights under s.6(1).<sup>10</sup> Had the border requirements been significant enough to justify the suspension of s.6(1) rights of 17% of the population<sup>11</sup>, Ukrainian refugees would have been either required or provided with the resources to get vaccinated as soon as they arrived on Canadian lands. On the contrary, if the requirement for travel can be waived on ‘emergency’ grounds for Ukrainians, then one ought to ask whether the suspension of the rights

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<sup>6</sup> <https://www.cbc.ca/news/politics/arrivecan-app-optional-mandatory-prescreening-customs-1.6593709>

<sup>7</sup> *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469

<sup>8</sup> *R v. Nikal*, [1996] 1 S.C.R. 1013, paragraph 96

<sup>9</sup> <https://financesonline.com/number-of-smartphone-users-worldwide/>

<sup>10</sup> [https://www.rebelnews.com/ukrainians\\_arrive\\_unvaccinated\\_while\\_canadians\\_banned\\_from\\_travel](https://www.rebelnews.com/ukrainians_arrive_unvaccinated_while_canadians_banned_from_travel)

<sup>11</sup> <https://health-infobase.canada.ca/covid-19/vaccination-coverage/>

and freedoms of a Canadian citizen is not a sufficient emergency and grave concern for a nation in which the first document of the constitution is the *Canadian Charter of Rights and Freedoms*.

One crucial counter argument to the above is that the requirement to have access to ArriveCan on the web or a smartphone is no different from requiring individuals to present a passport. Unfortunately, this is not true because the arriveCan app puts the onus on the citizen instead of the government to meet the requirements. Aside from paying the cost of a passport, possessing a passport requires the government to make the process accessible and available in a timely fashion. On the other hand, the government website stated that “travellers who refuse to use ArriveCAN won't be denied entry but may face delays due to additional questioning and potentially ‘be subject to enforcement action.’”<sup>12</sup> Apparently, the government also suggested asking “a friend or a family member who does have a compatible device to fill out the information for you and email you the receipt,”<sup>13</sup> which could very easily have risked the privacy of citizens.

### *Takeaways*

The key takeaway from the ArriveCan case analysis is that governments may choose to implement a digital ID program as optional first and then, due to a perceived ‘emergency,’ make it mandatory for exercising rights and freedoms. The second is that the Canadian government cannot be given the benefit of the doubt that it would not abuse the digital ID tools to ensure or demand compliance from citizens. This was observed in the case of tracking the phones of 33 million people in Canada and again in the case of the Trucker Convoy discussed below. The latter is especially true when our *Canadian Charter of Rights and Freedoms* is meaningless in protecting the rights and freedoms of the citizens when it truly matters.

### **Trucker Convoy**

The second cautionary tale about the potential risks of digital ID can be briefly observed during the *Trucker Convoy* protest in Ottawa in February of 2022. For almost a month, trucks and other protestors gathered on Parliament Hill and the surrounding area to protest Justin Trudeau’s vaccine mandate for truck drivers and covid-19 restrictions in general. In response, the federal government invoked the *Emergencies Act*, granting itself power and other financial institutions the power to cease providing financial services to anyone suspected (not proven) of aiding the continuation of the protest in Ottawa.<sup>14</sup> Luckily, the *Emergencies Act (EA)* is subject to the CCRF<sup>15</sup>, and the actions taken by the Canadian government would demonstrate how centralized access to government portals could be fatal to the protection of certain rights and Freedoms.

### *Chinese Social Credit Score*

The discussion in this section and henceforth will be loosely related to the Trucker Convoy and focus on the general implications of digital ID on protecting certain rights and freedoms not previously discussed. More specifically, the invocation of the EA sets the precedent that the

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<sup>12</sup> <https://www.ctvnews.ca/canada/how-to-use-the-arrivecan-app-if-you-don-t-have-a-smartphone-1.5480882>

<sup>13</sup> *ibid*

<sup>14</sup> <https://www.cbc.ca/news/politics/trudeau-premiers-cabinet-1.6350734>

<sup>15</sup> [https://www.justice.gc.ca/eng/csj-sjc/ea\\_infog-lu\\_infog.html](https://www.justice.gc.ca/eng/csj-sjc/ea_infog-lu_infog.html)

government may suspend the bank accounts of those it disagreed with based solely on unfounded suspicions, as well as the fact that government can use the digital ID to ensure compliance.

With the first precedent, a centralized government identification platform may make it easier for the government to track citizens' behaviour and opinions and suspend their access to services per the government's exercise of power. In practical terms, this can be observed through the *Social Credit System* of China,<sup>16</sup> which is similar to the idea of a credit score but based on the behaviour of individuals at all times. The system incorporates behaviours ranging from smoking on trains, jaywalking and buying too many video games.<sup>17</sup> In one instance, the system barred millions of people from access to travel based on their social credit score.<sup>18</sup> The cautionary tale here is as follows: while regulating public behaviour may seem a noble idea – for the “common good,” governments can easily use such a system to demand, not ensure, compliance. When social justice is at stake, for example, when there is active persecution of a minority group<sup>19</sup>, it can be especially challenging for citizens to hold the government accountable for its actions. In this sense, a system that aims to regulate the behaviour of the citizens can create the very thing it may, *prima facie*, seek to fight: bad behaviour. If a government can police behaviour and ensure it is good, it can change the definition of good to match its agendas and prevent citizens from doing what is good when it is not aligned with the agenda of a government.

Of course, Canada is not China, so people may be tempted to believe that notion is far-fetched and grounded in an irrational distrust of the government. Unfortunately, this argument fails when the historical actions of the Canadian government in the treatment of Indigenous communities and Japanese during World War II (WWII) and systematic racism against black people and minorities are considered. The painful truth is that Canada has no moral superiority to China or any other country regarding human rights, and we are not immune to the systematic mistreatment of minority groups in Canada spearheaded by the government. This does not mean that every government and every individual in the government is always guilty of an atrocious crime – but it does mean that the benefit of the doubt cannot be handed over to an institution with a shameful track record of committing atrocities. To believe it would never happen again is to make the suffering of minority groups go in vain.

### CCRF

So, what rights could be at stake if a digital ID is implemented? The short answer is all of them. Before the discussion continues, it is essential to acknowledge that the notion of *human rights* was based on the idea that there are certain freedoms that individuals possess as a virtue of being born a human. The human rights describe are ones that individuals *own* and not owns that the state grants them. In other words, these rights aren't given by the state and thus cannot be made conditional. This means that a digital ID system aims to monitor one's behaviour and suspend certain rights in accordance, which makes these rights conditional by nature, which is against the

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<sup>16</sup> <https://www.youtube.com/watch?v=N4Gr-HLM7Qk>

<sup>17</sup> *ibid*

<sup>18</sup> <https://www.cbc.ca/radio/thecurrent/the-current-for-march-7-2019-1.5046443/how-china-s-social-credit-system-blocked-millions-of-people-from-travelling-1.5046445>

<sup>19</sup> <https://www.bbc.com/news/world-asia-china-22278037>

principles that originated the CCRF. More specifically, and as described in the analysis of the ArriveCan app, the right to mobility under s. 6 could be at stake. Additionally, and a pressing consideration is a right to security (s.7), freedom from unreasonable search (s.8) and arbitrary detention (s.9). All three rights are generally concerned with the administration of justice<sup>20</sup> and in conjunction: where detention (s.9) can affect the right to the [physical] liberty of the person (s.7)<sup>21</sup>, and detention (physical or psychological) can impact security (s.7).<sup>22</sup>

### *Takeaways*

The key takeaway from the analysis of the trucker convoy and the implications of a digital ID on the behaviour regulation of individuals is that the gravity of the issue at hand lies in the fact that the *CCRF* allows the suspension of rights and freedoms in accordance with a “free and democratic society.” Thus, the existence of a digital ID framework can make it possible for governments to have the power to limit rights with little short-term accountability and protection for the individual.

### **Concluding Remarks**

Implementing a digital ID program may benefit the overall user experience and interaction with government systems but prove fatal to the protection of rights and freedoms in a manner inconsistent with the principles of fundamental justice or a free democratic society. The central issue is not the notion of a digital ID system – as it already exists in universities, but rather its management and operational capabilities in broader society. Canadians should not be fooled into thinking that an optional or temporary measure cannot be made permanent or mandatory nor that a government with a shameful track record of crime can be trusted with remaining accountable to itself. No matter how noble or ethical a government is, Canadians should continue to demand the government’s answers to complex questions. The latter is significant when the *Canadian Charter of Rights and Freedoms*, the very document that is supposed to protect citizens from having their rights infringed, is both ineffective and easily hijackable. As long as the CCRF continues to have Section 33, the *non-withstanding clause*, the rights and freedoms of Canadians are neither guaranteed nor entrenched in the constitution. Canadians would do themselves and future generations a favour by continuing to support decentralized governance and access to services as long as the judicial system continues to be inaccessible to the public and offers no readily available remedies or measures to prevent tampering with the rights of citizens. Another consideration that Canadians can make is assessing whether an improved interaction with the digital infrastructure of the government services is necessary. Living in a “first world country,” Canadians already possess enough luxuries that people in other countries can only dream of. In the long term, users can be expected to be better at navigating the existing systems due to increased technological literacy in the younger population.

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<sup>20</sup> <https://justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/check/art7.html>

<sup>21</sup> *ibid*

<sup>22</sup> <https://justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/check/art9.html>

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