

Bill 1: Criminalizing Protests and Encroaching on Aboriginal and Treaty Rights

By: Alexandra Heine and Kelly Twa

Bill Commented On: [Bill 1, the *Critical Infrastructure Defence Act*](#), 2nd Sess, 30th Leg, Alberta, 2020

This is the second part of a two-part series on [Bill 1, the *Critical Infrastructure Defence Act*](#), 2nd Sess, 30th Leg, Alberta, 2020. Professors Jennifer Koshan, Lisa Silver, and Jonnette Watson Hamilton authored the first post, [Protests Matter: A Charter Critique of Alberta's Bill 1](#), which explores Bill 1's lack of compliance with sections 2(b), 2(c), 2(d), 7, and 15 of the [Canadian Charter of Rights and Freedoms](#). The first post also offers an overview of Bill 1 and importantly, it offers examples of the type of activities that appear to contravene Bill 1:

- A vigil for Regis Korchinski-Paquet is held in Olympic Plaza—a square in downtown Calgary—in conjunction with Black Lives Matters protests across the country. The vigil spills onto Stephen Avenue Mall, where bicycles are permitted.
- Indigenous persons and their allies hold a protest against construction of a pipeline on-site in northern Alberta.
- Workers rally in a parking lot outside a meat packing plant to bring attention to the gendered and racialized impact of the Alberta government's response to COVID-19.
- Persons with disabilities and their allies protest cuts to AISH on the sidewalk adjacent to the High Level Bridge in Edmonton.
- LGBTQ2S+ groups hold a sit-in under a flagpole on the grounds of the Alberta Legislature after the Pride flag is taken down only one day into Pride month.

As noted in the first post, these peaceful protesters could be subject to immediate arrest by the police, increasing the potential for further conflict between law enforcement and the public. This second post examines how Bill 1 treads on the federal government's criminal law powers under section 91(27) of [The Constitution Act, 1867](#) and provides commentary on how the Bill threatens Aboriginal rights under section 35 of [The Constitution Act, 1982](#).

The Constitution Act, 1867 and its Application to Bill 1

By way of background, sections 91 and 92 of *The Constitution Act, 1867* distribute legislative authority between the federal and provincial government, respectively. When the federal or provincial government enacts legislation that falls outside the ambit of any of the heads of power attributed to that government under sections 91 or 92, a person or group can challenge that

legislation. If the challenge is successful, the legislation can be declared *ultra vires* or constitutionally invalid, thereby rendering it of no force or effect.

Bill 1 engages various heads of power under sections 91 and 92, raising the issue of whether the Province of Alberta passed legislation aimed at matters outside its jurisdiction. It engages:

- Section 91(27), which gives the federal government the exclusive power to legislate all matters coming within the criminal law;
- Section 92(13), which gives provincial governments the exclusive power to legislate matters of property and civil rights;
- Section 92(15), which gives provincial governments the exclusive power to enact laws imposing punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter under section 92; and
- Section 92(16), which gives provincial governments the exclusive power to make laws in relation to all matters of a merely local or private nature in the province.

Before delving into whether Bill 1 is outside the powers of (or *ultra vires*) the Province of Alberta, it is important to understand how the legislative scheme created by Bill 1 operates.

Section 2 of Bill 1 lists the following prohibitions:

2(1) No person shall, without lawful right, justification or excuse, wilfully enter on any essential infrastructure.

(2) No person shall, without lawful right, justification or excuse, wilfully damage or destroy any essential infrastructure.

(3) No person shall, without lawful right, justification or excuse, wilfully obstruct, interrupt or interfere with the construction, maintenance, use or operation of any essential infrastructure in a manner that renders the essential infrastructure dangerous, useless, inoperative or ineffective.

(4) No person shall aid, counsel or direct another person to commit an offence under subsection (1), (2) or (3), whether or not the other person actually commits the offence.

(5) A person who enters on any essential infrastructure, having obtained by false pretences permission to enter on the essential infrastructure from the owner or an authorized representative of the owner, is deemed to have contravened subsection (1) unless the person had a lawful right, justification or excuse to enter on the essential infrastructure.

The term "essential infrastructure" is defined in section 1 of Bill 1 and it captures a broad range of infrastructure including pipelines, railways, public utilities, and agricultural operations. It also includes a "highway" as defined in the [Traffic Safety Act, RSA 2000, c T-6 \(TSA\)](#). Bill 1 does not copy the full definition from the TSA, but the definition of "highway" in subsection 1(1)(p) of the TSA is vast. It includes streets, thoroughfares, parkways, driveways, and alleys, "whether publicly or privately owned, that the public is ordinarily entitled or permitted to use for the passage or parking of vehicles." It also includes sidewalks, ditches, and land between fences and

highways. Section 5 allows the provincial Cabinet to expand the already lengthy list of “essential infrastructure” through additional regulation.

Section 3 of Bill 1 states that anyone who contravenes section 2 is guilty of an offence and liable, in the case of a first offence, to a minimum fine of \$1,000 and a maximum fine of \$10,000, to imprisonment for a term not exceeding 6 months, or both. In the case of a second or subsequent offence, an individual is liable to a minimum fine of \$1,000 and a maximum fine of \$25,000, to imprisonment for a term not exceeding 6 months, or both. The Bill also sets significantly higher fines for a corporation that commits an offence.

Section 4 gives peace officers the power to arrest without a warrant any person who contravenes subsection 2(1), (2), or (3).

While only five sections long, this Bill manages to prohibit a wide range of conduct, grant extraordinary powers to police and other peace officers, and impose significant sanctions on those who contravene the legislation. This post argues that the enactment of this legislative scheme is outside the Province of Alberta’s jurisdiction to legislate and falls within the federal government’s power to legislate criminal law, pursuant to section 91(27).

Section 91(27)

When legislation is being challenged as unconstitutional on the basis of the division of powers in sections 91 and 92, the burden is on the challenging party to show that the legislation at issue does not fall within the legislative authority of the enacting government (*Northern Telecom v Communication Workers*, [1983 CanLII 25 \(SCC\)](#), [1983] 1 SCR 733 at 779). A constitutional challenge based on the division of powers proceeds in two steps.

The first step is to characterize the legislation to determine its pith and substance (*Canadian Western Bank v Alberta*, [2007 SCC 22 \(CanLII\)](#) at para 25 (CWB)). The second step is to classify that pith and substance by reference to the heads of power under sections 91 and 92 to determine whether the legislation comes within the jurisdiction of the enacting government (*Reference re Pan-Canadian Securities Regulation*, [2018 SCC 48 \(CanLII\)](#) at para 86; *Reference re Firearms Act (Can)*, [2000 SCC 31 \(CanLII\)](#) at para 15).

Characterization: Pith and Substance

A law's pith and substance can be identified by looking at both its purpose and its legal and practical effects. A law's purpose can be ascertained through both intrinsic evidence (i.e. the legislation itself) and extrinsic evidence (e.g. legislative debates and government publications) (*R v Morgentaler*, [1993 CanLII 74 \(SCC\)](#), [1993] 3 SCR 463 at 483-484).

Looking at the intrinsic evidence, Bill 1 does not contain any provisions that explicitly or implicitly state a purpose. On its face, the Bill's legislative scheme appears to set out the broad purpose of protecting that which is defined as essential infrastructure from unlawful activity.

As to the extrinsic evidence, the legislative debates on the purpose of the Bill are brief. The previous post described the debates as “contradictory and vague,” and noted that the fact that

provincial and federal legislation already exists for many of the purported “purposes” expressed by Members of the Legislature only blurs the purpose of the Bill further.

Alberta’s Premier Jason Kenney introduced the Bill at first reading and stated that it is aimed at strengthening penalties against those who would lawlessly trespass or jeopardize public safety by blocking critical infrastructure, reinforcing public safety, and increasing the dissuasive effect of law ([Alberta Hansard, February 25, 2020](#) at 4).

On second reading, Alberta’s Minister of Infrastructure stated that the Bill was aimed at protecting Alberta’s vital economic infrastructure and the economic interests of Albertans by enforcing the rule of law ([Alberta Hansard, February 26, 2020](#) at 15).

On third reading, Alberta’s Minister of Justice stated that the goal was upholding the rule of law, providing police with the tools they need, and sending the following message to the people that would try to jeopardize the future of Alberta’s economy: “not now, not ever in the province of Alberta” ([Alberta Hansard May 28, 2020](#) at 861).

These comments by the Premier and Ministers of Infrastructure and Justice during the legislative debates suggest that the Bill’s purpose could encompass the protection of property, of public safety, of Alberta’s economic interests, and perhaps of the rule of law. The all-encompassing definition of “essential infrastructure,” however, raises questions as to whether the purpose of the Bill is truly the protection of “property.” Section 5 also gives the provincial Cabinet the power to make regulations prescribing buildings, structures, devices or other “things” as “essential infrastructure.” As noted by a Member of the Opposition, “there are absolutely no brackets or collars around how [this] discretion can be exercised” ([Alberta Hansard March 2, 2020](#) at 96).

With such a broad definition of essential infrastructure, the purpose of Bill 1 might properly be framed as prohibiting any conduct that the Province determines is unwanted in relation to property. Restated, the focus is not on the property, but on the prohibition of conduct.

To further this point, Bill 1 was initially tabled in February 2020 during the blockades of rail lines [in support of Wet’suwet’en hereditary chiefs](#). In all three readings, the legislative debate centers on the role of protestors who were repeatedly described by some Members of the Legislature as holding the Albertan and Canadian economies “hostage.”

In discussing the genesis of the Bill, the Minister of Infrastructure stated:

Our railways have been illegally blockaded by thugs who have appropriated the noble goal of reconciliation with Canada’s native peoples and used that as an excuse to hold the country hostage... It’s not a stretch to say that railways built Canada [sic], and a small group of environmental radicals should not be able to shut down the foundational infrastructure, if you will, of the country. But, sadly, that has been the case, and that’s why we have been forced, we have been compelled to put forward this bill as Bill 1, because our province’s critical infrastructure is too important. ([Alberta Hansard February 26, 2020](#) at 15, emphasis added)

In response to comments from Members of the Opposition on the breadth of section 5, the Minister of Infrastructure stated:

We'll observe if these protestors behave responsibly and exercise their democratic right to protest peacefully. But if we see any more disturbances or any more, you know, harm to Albertans, then as Minister of Infrastructure I won't hesitate to recommend to the Minister of Justice to amend this Bill 1, to update it as required. ([Alberta Hansard February 26, 2020](#) at 15)

Another Member of the Alberta legislature referred to protestors as “thugs,” “green zealots,” and “eco-radical thugs” and stated:

We need to do everything that we can and use every possible option to discourage the illegal protesters, who are scaring away investors, shutting down a large part of our economy, and potentially jeopardizing the public safety of the workers on rail lines and critical infrastructure projects. ([Alberta Hansard February 26, 2020](#) at 12)

On a full reading of the debates, the Bill's true purpose might properly be characterized as an attempt to prohibit the conduct of protesters, by making protests illegal no matter the place they occur.

The legal and practical effects of the Bill are ascertained by contemplating how the legislation will affect the people it applies to (*Reference re Firearms* at para 18). The legal effects are determined from the legislation itself and refer to how the legislation affects the rights and liabilities of those subject to it (*Morgentaler* at 482). The practical effects consist of the actual or predicted results of the legislation's operation (*Morgentaler* at 486).

The legal effects of Bill 1 are clear from the legislative scheme, which effectively prohibits persons from doing anything that may affect essential infrastructure, gives peace officers broad powers to enforce the prohibition through warrantless arrests, and enforces the prohibitions with financial penalties and imprisonment.

As noted in *Morgentaler*, once the legal effects of provincial legislation are ascertained, they can be compared with any relevant federal legislation. When provincial legislation uses language that is duplicative of the *Criminal Code*, [RSC 1985, c C-6](#), a strong inference can be drawn that the province has transcended its powers and crossed the boundary into section 91(27) criminal law powers (*Nova Scotia Board of Censors v McNeil*, [1978 CanLII 6 \(SCC\)](#), [1978] 2 SCR 662 at 698-9). This inference can be negated if the provisions are duplicative yet done in pursuit of a provincial head of power.

Bill 1 overlaps with sections 72(1), 430, and 495 of the *Criminal Code* as follows:

BILL 1	CRIMINAL CODE
Section 2(1) of Bill 1	Section 72(1) of the <i>Criminal Code</i> A person commits forcible entry when that person enters real property that is in the actual and peaceable possession of another in a

<p>No person shall, without lawful right, justification or excuse, wilfully enter on any essential infrastructure.</p>	<p>manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace.</p>
<p>Section 2(2) of Bill 1</p> <p>No person shall, without lawful right, justification or excuse, wilfully damage or destroy any essential infrastructure.</p>	<p>Section 430(1)(a) of the <i>Criminal Code</i></p> <p>Every one commits mischief who wilfully destroys or damages property.</p>
<p>Section 2(3) of Bill 1</p> <p>No person shall, without lawful right, justification or excuse, wilfully obstruct, interrupt or interfere with the construction, maintenance, use or operation of any essential infrastructure in a manner that renders the essential infrastructure dangerous, useless, inoperative or ineffective.</p>	<p>Section 430(1)(b)-(d)</p> <p>Every one commits mischief who wilfully obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.</p>
<p>Section 4 of Bill 1</p> <p>A peace officer may arrest, without warrant, any person the peace officer finds contravening section 2(1), (2) or (3).</p>	<p>Section 495 of the <i>Criminal Code</i></p> <p>495 (1) A peace officer may arrest without warrant</p> <ul style="list-style-type: none"> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence; (b) a person whom he finds committing a criminal offence; or (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found. <p>(2) A peace officer shall not arrest a person without warrant for</p> <ul style="list-style-type: none"> (a) an indictable offence mentioned in section 553,

	<p>(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or</p> <p>(c) an offence punishable on summary conviction,</p> <p>in any case where</p> <p>(d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to</p> <ul style="list-style-type: none"> (i) establish the identity of the person, (ii) secure or preserve evidence of or relating to the offence, or (iii) prevent the continuation or repetition of the offence or the commission of another offence, <p>may be satisfied without so arresting the person, and</p> <p>(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.</p> <p>(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of</p> <ul style="list-style-type: none"> (a) any proceedings under this or any other Act of Parliament; and (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).
--	---

Sections 2(1)-(3) are largely duplicative, in substance, of sections 72(1) and 430 of the *Criminal Code*, which prevent forcible entry and mischief or damage to property. Further, sections 2(1)-(3) are arguably an attempt to “stiffen” the *Criminal Code* provisions by extending the offence to protect not just “property,” but any “thing” prescribed by the regulations as “essential infrastructure.” As noted in *Morgentaler*, provinces are not authorized to “invade the criminal field by attempting to stiffen, supplement or replace the criminal law” (at 498).

There is one notable distinction between the language of Bill 1's section 2 and sections 72(1) and 430 of the *Criminal Code*, which is that section 2 explicitly provides an individual with the defences of "lawful right, justification or excuse." During the debates, the government emphasized that the goal of this Bill is not to deter "peaceful protests," which purportedly are still allowed. Despite this, given the sweeping prohibitions set out in the Bill, it is difficult to contemplate the legal effects of these defences, as the Bill provides no definition for "lawful right, justification or excuse." A "justification or excuse" has a specific legal meaning and attaches to common law defences, such as the defence of property, self-defence, duress, and necessity. A "lawful right" is open to interpretation and could include a property right to be on certain lands, as well as an Aboriginal right pursuant to section 35 of *The Constitution Act 1982*. In any event, given the power to arrest without a warrant, these defences only meaningfully arise once an individual is charged and is thus required to defend themselves before a court.

The arrest power given to police by section 4 is also problematic when contrasted with section 495 of the *Criminal Code*, which was recently re-interpreted in Alberta in *R v Veen*, [2020 ABQB 99 \(CanLII\)](#). In *Veen*, Justice Sullivan stated that, contrary to previous interpretations, section 495(2) imposes a duty on peace officers **not to arrest in certain circumstances**, including when it is not in the public interest to arrest, when identity is not in question, or when there is no need to secure or preserve evidence (at para 60, emphasis added). If an arrest does take place, it must be shown that there were reasonable grounds to believe that it was necessary in the public interest or that the failure to arrest would result in a failure to attend court (at para 60). Otherwise, the arrest can be found unlawful.

Justice Sullivan found that section 495(3), which "deems" police officers to be acting lawfully, is in fact a shield to protect peace officers from personal criminal or civil liability in secondary or ancillary proceedings commenced against them (at para 61). As he noted, this interpretation reflects the legislature's goal to reduce unnecessary arrests and detentions and to provide clear arrest guidelines for peace officers (at para 62).

The *Provincial Offences Procedures Act*, [RSA 2000, c P-34 \(POPA\)](#) states that all provisions of the *Criminal Code* that are applicable in any manner to summary convictions and related proceedings apply in respect of every matter to which the *POPA* applies (s 3). As Bill 1 is an enactment that sets out an offence including imprisonment, *POPA* will apply to the Bill once it is in force (s 2). In addition, courts have held that the warrantless arrest power in section 495 applies to any offence to which *POPA* applies (*R v Sevigny*, [2019 ABCA 245 \(CanLII\)](#) at para 9; *R v Sandy*, [2007 ABPC 173 \(CanLII\)](#) at para 59).

Here, Bill 1 gives peace officers unrestricted powers to arrest without a warrant. This is contrary to section 495 of the *Criminal Code*, which contains limitations on the powers to conduct warrantless arrests and which *POPA* and the cases above state should apply.

In fairness, there are valid provincial enactments that provide officers with the ability to conduct warrantless arrests. For example, the *TSA* allows a peace officer to arrest an individual without a warrant where they have committed an offence created by the *TSA* (s 169(1)(a)). This power, however, is limited by the requirement that the peace officer must believe, on reasonable and probable grounds, that the person will continue to repeat that offence if not arrested, or if the person has provided the peace officer with inadequate identification information (s 169(1)(b)).

Even if Bill 1 was found to be *intra vires*, that is, properly within the power of the province to enact, a court would likely read down or limit the power in section 4. In *R v Akpalialuk*, [2013 NUCJ 12 \(CanLII\)](#), the Court was unwilling to infer that a warrantless arrest provision in the *Liquor Act*, [RSNWT \(Nu\) 1988, c L-9](#) demonstrated a legislative intention to do away with section 495's legal safeguard of individual liberties. The Court stated that section 495(2) is profoundly important to the protection of individual liberties in the criminal process and to the protection against arbitrary arrest (at para 44).

Although the legal effects can be identified, it is more difficult to delineate the scope of Bill 1's practical effects on the rights and liabilities of those subject to it, because its application is broad and its limits unknown. Without a "lawful right, justification or excuse," it prohibits everything from a homeless person sleeping on a sidewalk deemed a "highway" under the *TSA*; to a group of Indigenous persons peacefully protesting on or in any building, structure, installation or equipment deemed a "facility" under the *Oil and Gas Conservation Act*, [RSA 2000, c O-6](#); to a group of peoples marching down the streets in Calgary as part of a peaceful protest for the Black Lives Matter movement, since 17th Avenue could be deemed a "transportation facility" under the *Highways Development and Protection Act*, [SA 2004, c H-8.5](#). Any of these people or groups can be arrested without a warrant, charged, and subject to serious fines or imprisonment.

The fact that Bill 1 could, when implemented through regulations, apply to any thing or place, illustrates that it is not truly tied to property or the protection thereof, but rather to an undefined scope of conduct that the government seeks to ban.

All in all, we contend that Bill 1's true purpose and its effects show that the Bill's pith and substance is prohibiting and punishing conduct the government has calculated as interfering with essential infrastructure (specifically, protests) and at eliminating a "number of evils or mischiefs" for public order and safety (*Reference re Firearms* at para 21).

Classification

The next step in the division of powers framework is to determine whether the Bill's pith and substance can be assigned to one or more heads of power under sections 91 and 92. As noted in *R v Keshane*, [2012 ABCA 330 \(CanLII\)](#), "the fundamental question becomes whether the challenged provision should be classified under the federal criminal power or under the provincial power over property and civil rights or local matters" (at para 34).

The federal criminal law power is "broad and plenary" (*RJR-MacDonald Inc v Canada (Attorney General)*, [1995 CanLII 64 \(SCC\)](#), [1995] 3 SCR 199 at para 28). Criminal legislation must have (1) a valid criminal law purpose, (2) backed by a prohibition, and (3) a penalty (*Reference re Firearms* at para 27). Valid criminal purposes include public peace, order, security, health, and morality (*Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1948 CanLII 2 \(SCC\)](#), [1949] SCR 1 at 50).

As we argued above, Bill 1's true purpose appears to be the prohibition of conduct that may affect public order, peace, and safety, all of which are criminal law purposes (*Ouimet v Bazin*, [1912 CanLII 628 \(SCC\)](#), 46 SCR 502 at 594-95). Bill 1 also has the colour of morality legislation. As illustrated by the legislative debates, Bill 1 appears to take a moral stance on the

individuals described by some Members of the Legislature as “thugs” and “radicals”. These Members also stated that Bill 1 is needed to prevent lawlessness and to prevent the economy from being held “hostage”. While morality is not determinative of a law’s classification, it weighs towards a finding that the Bill has a criminal law purpose (*Smith v St. Albert (City)*, [2014 ABCA 76 \(CanLII\) at para 44](#)).

The first post on Bill 1 noted that there are two Alberta statutes, the *Petty Trespass Act*, [RSA 2000, c P-11](#) and the *Trespass to Premises Act*, [RSA 2000, c T-7](#), which taken together make it a regulatory offence to enter on to private or Crown land without a lawful right. In addition, the *Crown Property Regulation*, [Alta Reg 125/1998](#), prohibits congregating with other persons “in a disorderly manner” on Crown property. The fact that these offences already exist suggest that Bill 1 was enacted to go further than these provincial Acts and offences contained therein, as well as the *Criminal Code* offences discussed above.

The Supreme Court of Canada has, in the past, allowed provinces to enact laws that come near to criminal legislation. In *Bedard v Dawson*, [1923 CanLII 43 \(SCC\)](#), [1923] SCR 681, the Court upheld a Quebec law authorizing the closure of disorderly houses in the province. However, this was allowed because it was aimed at “suppressing conditions calculated to favour the development of crime rather than at the punishment of crime” (at 407). In contrast, Bill 1 almost exclusively operates to punish conduct it has classified as an offence.

The prohibitions backed by penalties under sections 2 and 3 militates towards finding that Bill 1 has a criminal law purpose. Although prohibitions backed by penalties are not necessarily determinative in classifying Bill 1, since section 92(15) of the *Constitution Act 1867* authorizes provinces to impose punishment to enforce provincial law, the prohibitions and penalties are an attempt to stiffen sections 72(1) and 430 of the *Criminal Code* by capturing a much wider range of conduct. Further, Bill 1’s section 4 actually hinders the operation and purpose of section 495 of the *Criminal Code* by permitting warrantless arrests without the section 495(2) limits and prescribed duties aimed at reducing unnecessary arrests and detentions.

In summary, Bill 1 has many criminal law aspects, including the promotion of public order, peace, safety and morality; the outright prohibitions; the overlap and stiffening of *Criminal Code* offences; and the imposition of penal consequences such as imprisonment for offences.

Having concluded that Bill 1 is properly characterized as criminal law and thus, falls within federal powers under section 91(27), the next question is whether it is also anchored in a provincial head of power. Provinces have the power to enact legislation that concerns property and civil rights (s 92(13)), punishments to enforce provincial law (s 92(15)), as well as all matters of local nature (s 92(16)).

Bill 1 could be described as an assertion of protection over property and civil rights and thus, falling within section 92(13). However, as discussed above, this protection of property is asserted through an unbridled prohibition on impugned conduct, and the Bill therefore loses its anchor in the regulation of property itself.

As to section 92(15), although the Province has broad powers to enforce provincial and local laws, the Bill’s provisions are not part of a larger valid provincial regulatory scheme. Rather, the

Bill's five provisions make up the entire scheme and merely prohibit conduct already captured by other laws. The tension between Bill 1 and the *Criminal Code* provisions is not unlike the tension in *R v Raclette*, [1988 CanLII 5335 \(SK CA\)](#), 48 DLR (4th) 412, where the Court found that a provincial driving law repeated an offence section in force under a federal statute and was therefore *ultra vires*. The Court noted that:

I am of the view that the true purpose of this legislation is indeed to enter into the field of criminal law. Indeed, if re-enactment of federal driving offences with respect to liquor can be justified there is no reason that, to use the analogy adopted by Laskin, C.J.C., some incursion might not be attempted into drug related laws or other matters under a colourable guise of this nature [...]. (at para 33)

Similarly, here, if re-enactment of federal criminal offences can be found valid under a provincial head of power, there is no reason that the Province of Alberta will not attempt to intrude on other matters already directly captured by federal law.

As to section 92(16), it could be argued that Bill 1 is an attempt to legislate in relation to matters “of a merely local or private nature in the province.” We concede that certain essential infrastructures, such as hydro developments and public utilities, may be considered local in nature. However, the true focus of the Bill is on conduct rather than property, and the Bill takes aim at protestors who typically raise issues that transcend provincial borders, including the environment and Aboriginal rights. The Province should not be able to legislate, for example, in a manner requiring individuals to move to the streets of another province in order to hold a Black Lives Matter gathering without fear of arrest.

To support an argument that Bill 1 is valid provincial law, the Province could raise the double aspect doctrine, which applies where the federal and provincial aspects of the law are of roughly equal importance and where the federal and provincial laws regulate different aspects of the same activity (*Multiple Access* at 181-182; *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988 CanLII 81 \(SCC\)](#), [1988] 1 SCR 749 at 765-766).

The double aspect doctrine, however, may not save Bill 1. The Bill's provincial aspects are arguably a colourable guise for its criminal law aspects, which fall outside provincial jurisdiction. Further, it is difficult to see the real need under provincial legislation for repetition of valid offences under the *Criminal Code* which also exist to protect property. As such, it should be concluded that the dominant aspect of Bill 1 is the usurpation of criminal law, which falls within exclusive federal jurisdiction.

The foregoing analysis demonstrates that Bill 1, if challenged after it becomes law, may be struck down as *ultra vires* the provincial powers granted by section 92 of the *Constitution Act 1867*. The Bill's provisions invade the exclusive federal jurisdiction to enact criminal law, pursuant to section 91(27).

Section 35 of *The Constitution Act, 1982* and its Application to Bill 1

In addition to the argument that Bill 1 engages various *Charter* rights, as identified in the [first post](#), and that it falls beyond the scope of provincial powers, Bill 1 also raises serious questions

as to whether it was passed contrary to Aboriginal and Treaty rights, which are recognized and affirmed by section 35 of *The Constitution Act 1982*. Section 35 states:

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The operation of Bill 1, once in force, will engage section 35 Aboriginal and Treaty rights. For example, certain “essential infrastructure” runs through reserve and Treaty lands. In a hypothetical situation, an Indigenous group hosting a ceremony or an Indigenous person exercising a Treaty right to hunt may be arrested without a warrant for entering onto essential infrastructure. The fact that this Bill may criminalize conduct that is constitutionally protected by section 35, leaving the assertion of Aboriginal rights as merely a “lawful right” defence to such conduct, is a disappointing step backwards for the state of Aboriginal law in Alberta.

In addition, Bill 1 will disproportionately impact Indigenous persons who have long used acts of civil disobedience. Where acts of civil disobedience take the form of a blockade or a protest, Superior Courts have the inherent jurisdiction to grant injunctive relief restraining such conduct or requiring parties, such as major project developers or governments, to proceed to trial to determine whether Aboriginal rights are infringed by the development that is being protested. The three part legal test for injunctive relief as set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994 CanLII 117 \(SCC\)](#), [1994] 1 SCR 311 requires the court to conduct a balancing of interests to determine whether granting an injunction would be a fair and just result.

For example, the BC Supreme Court recently dismissed Taseko Mines Limited’s application for an injunction to restrict members of the Tsilhqot’in Nation from blockading its access to an exploratory drilling program area. The Court held that Taseko’s application was moot given that it was granting the Tsilhqot’in Nation’s cross application for an injunction, restricting Taseko from carrying out the exploratory drilling program until the determination at trial of whether section 35 rights were infringed. While the Court did not condone the Tsilhqot’in Nation’s use of a blockade to advance their interests, it held that the ability of First Nations to pursue actions that will give rise to a section 35 challenge “is such that the balance of convenience is in the Tsilhqot’in’s favour” (*Taseko Mines Limited v Tsilhqot’in National Government*, [2019 BCSC 1507 \(CanLII\)](#) at para 131, leave to appeal refused, [2019 BCCA 479 \(CanLII\)](#)).

In contrast, the BC Supreme Court granted an injunction restraining members of the Iskut First Nation and Secwepemc First Nation from blockading two access roads to the site of the Red Chris Mine in northwestern BC. Following its three-part analysis, the Court concluded:

In this case there is a public interest in upholding the rule of law and enjoining illegal behaviour, protecting gainful employment of members of the public, allowing the project to proceed to benefit the public, and protection of the right of the public to access on Crown roads. Accordingly, it would run contrary to the public interest to allow the defendants to persist in their blockade of the plaintiff. (*Red Chris Development Company v Quock*, [2014 BCSC 2399 \(CanLII\)](#) at para 77)

An injunction is an extraordinary remedy that is not granted lightly, and it provides relief in the exact circumstances targeted by Bill 1. However, with Bill 1's sweeping powers of arrest, protestors may be apprehended without the need for an interested party in essential infrastructure to appear before the court and make arguments on the competing interests at play. As a result, Bill 1 will effectively prohibit Indigenous peoples from using these acts of civil disobedience to advance assertions of Aboriginal rights and title.

Beyond these arguments, this post does not offer a more detailed analysis of how a court may find that Bill 1 violates section 35, because matters involving Aboriginal rights and title are highly factually driven, enormously complex, and sensitive (*R v Van der Peet*, [1996 CanLII 216 \(SCC\)](#), [1996] 2 SCR 507 at para 262; see also *Delgamuukw v British Columbia*, [1997 CanLII 302 \(SCC\)](#), [1997] 3 SCR 10 at para 108). Rather, we argue that this Bill may have been enacted contrary to the honour of the Crown and the accompanying binding and enforceable duty on the Crown to consult, both of which are facets of section 35.

The honour of the Crown guides the reconciliation of prior Aboriginal occupation of lands in Canada with the Crown assertion of sovereignty and informs the purposive interpretation of section 35 (*Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73 \(CanLII\)](#) at para 16). The honour of the Crown is always at stake in Crown dealings with the Aboriginal peoples of Canada and it gives rise to certain binding and enforceable duties, such as the duty to consult (*Haida Nation* at para 32; see also *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, [2014 FC 1244](#) at para 39). The Supreme Court of Canada has repeatedly affirmed the duty to consult as a key tool for advancing reconciliation (*R v Sparrow*, [1990 CanLII 104 \(SCC\)](#), 1 SCR 1075 at 1119-20; *Haida Nation* at para 25).

Thus far, jurisprudence has recognized two instances in which the duty to consult exists. In *Sparrow*, the Supreme Court of Canada held that when legislation infringes an existing Aboriginal right, the burden is on the Indigenous person or group to prove infringement. Once this *prima facie* infringement is proven, the burden shifts to the government to prove that the infringement is justified. One of the factors that determine whether that infringement is justified is consultation (*Sparrow* at 1119). The *Sparrow* approach is meant to encourage early and adequate consultation to avoid infringement; however, it does not capture every possible infringement and is largely backward-looking (see Nigel Bankes' 2016 post, [The Duty to Consult and the Legislative Process: But What About Reconciliation?](#)”).

The Court in *Haida Nation* developed a second approach that identifies the duty to consult as free-standing (see also *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018 SCC 40 \(CanLII\)](#) at para 67). The Court stated that the duty arises when the Crown “has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and

contemplates conduct that might adversely affect it” (*Haida Nation* at para 35; *Mikisew Cree* at paras 67-69). The wording of the *Haida Nation* test states that the duty applies to Crown executive action and more generally, the test stands for the idea that reconciliation is not a “distant legalistic goal, devoid of a “meaningful content” mandated by the “solemn commitment” made by the Crown (*Mikisew Cree* at para 33).

Bill 1 also raises an important question of whether the duty to consult can (or should) arise in a third instance: the law-making process. This question was recently explored by the Supreme Court of Canada in *Mikisew Cree*. By way of background, the Mikisew Cree First Nation brought an application to the Federal Court seeking various forms of relief. Primarily, they sought a declaration that the Crown had a duty to consult with the Mikisew regarding the development and introduction of the federal environmental laws contained in two Omnibus Bills. The Federal Court’s decision was appealed to the Supreme Court of Canada, which held that the Federal Court did not have jurisdiction to consider the Mikisew Cree First Nation’s application for judicial review. Due to the procedural finding that the Federal Court was not properly seized, the *Mikisew Cree* judgment is not binding on the issue of whether the duty to consult applies to law-making. On this issue, a majority of the Court (in separate reasons delivered by Justice Karakatsanis, Justice Rowe, and Justice Brown) noted that the Crown does not have a duty to consult during the legislative process. These reasons appear to be the state of the law as it stands; however, because these reasons are not binding, the Supreme Court of Canada left open many questions and room for argument on this question.

For example, Justice Karakatsanis stated that although a duty to consult does not arise in the law-making process, declaratory relief may be appropriate in a case where legislation is enacted that is not consistent with the Crown’s duty of honourable dealing toward Aboriginal peoples (*Mikisew Cree* at para 47). While it is unclear what the legal effect of such a declaration would be, Bill 1 may present a court with the right framework for exploring such relief.

From the legislative debates and other information available on the enactment of Bill 1, it is unclear whether or not the Government of Alberta engaged in meaningful consultation with affected or potentially affected Indigenous peoples, and if so, whether those consultations would militate in favour of a court finding that the government satisfied its burden to prove it fulfilled its duty to consult. In the second reading of the Bill a Member of the Opposition stated:

We would want to know on this side of the House: what consultations took place with indigenous communities across this province? There are 48 First Nations. Have they raised any concerns? Were there any First Nations who were for this piece of legislation? These are all important questions that, if the government would address them, will help us understand this piece of legislation better. ([Alberta Hansard February 26, 2020](#) at 14)

Unfortunately, no direct response was offered in the debates and the conclusion on whether consultation took place remains unclear.

Further, recent media commentary from Indigenous peoples on Bill 1’s enactment suggests that consultation was either not conducted or was not adequate. Chief Arthur Noskey, the Grand Chief of the Treaty 8 First Nations of Alberta, has called Bill 1 a violation of his community’s

Treaty rights. And in addition, according to Chief Noskey, Bill 1 “further strains the relationship between police and Indigenous Peoples, mirroring an international narrative that’s dominating headlines” (Brandi Morin, [“Alberta’s Bill 1 Is ‘Racially Targeted’: First Nations Leaders”](#), [Huffpost \(11 June 2020\)](#)).

Given that the Bill was drafted as a direct response to protests led by Indigenous groups, it is difficult to contemplate why the duty to consult would *not* arise in the process of drafting Bill 1. If the duty to consult is a free-standing and ever-present duty, as noted in *Haida Nation*, it would seem that this is a case where the provincial government had real or constructive knowledge of the potential existence of an Aboriginal right or title and contemplated conduct that might adversely affect it. Not only was this conduct contemplated, but a Bill that criminalizes the ability of Indigenous peoples to protest was enacted and is one step short of becoming law in Alberta.

Any court confronted with a challenge to Bill 1 based on section 35 will likely be asked to give meaning to the honour of the Crown and the duty to consult as a key tool for advancing reconciliation. As noted by the Supreme Court of Canada in *Mikisew Cree*, quoting *Ross River Dena Council v Yukon*, [2012 YKCA 14 \(CanLII\)](#), “[s]tatutory regimes that do not allow for consultation and fail to provide any other equally effective means to... accommodate Aboriginal claims are defective and cannot be allowed to subsist” (at para 130).

To conclude, Bill 1 certainly engages section 35 in many respects and it could potentially lead to a Court reconsidering whether the duty to consult arises at the law-making stage. In any event, whether Bill 1 is challenged because it infringes an existing Aboriginal or Treaty right, or represents a failure of the Crown’s duty of honourable dealing towards Aboriginal people, it is troubling that all of these avenues for recourse are backwards-facing and arise after an infringement of section 35 will have already occurred.

The views and opinions expressed in this blog represent those of the authors and not their employers.

This post may be cited as: Alexandra Heine and Kelly Twa, “Bill 1: Criminalizing Protests and Encroaching on Aboriginal Rights” (June 17, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/06/Blog_AH_KT_Bill1.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](#)

