

## Protests Matter: A *Charter* Critique of Alberta's Bill 1

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The last few weeks have emphasized the crucial role of public protests. The [Alberta Energy Minister's statement](#) about the COVID-19 pandemic being a great time to build pipelines without protestors went viral (and not in a good way), and demonstrations in the [United States](#) and [Canada](#) are stark reminders that direct and systemic racism and colonialism are present in Canadian society today. In the midst of these events, the [Alberta government passed Bill 1](#), the *Critical Infrastructure Defence Act*. Bill 1 was initially tabled in February 2020 during the blockades of rail lines [in support of Wet'suwet'en hereditary chiefs](#). Only five sections long, it contains a number of prohibitions and offences relating to activities involving “essential infrastructure.” This post reviews Bill 1's compliance with the [Canadian Charter of Rights and Freedoms](#), concluding that it is an unjustifiable violation of at least five different fundamental rights and freedoms. A second post will examine how Bill 1 also treads on the federal government's criminal law powers under [The Constitution Act, 1867](#) and Aboriginal rights under [section 35](#) of *The Constitution Act, 1982*.

### Bill 1 in a Nutshell and in Context

[Kim Siever News](#) has an excellent summary of Bill 1 – in particular, setting out the various types of “essential infrastructure” that are protected, with links to the relevant statutes – so we will keep our summary brief:

- Section 1(1)(a) defines “essential infrastructure” to include a vast array of infrastructure including everything from pipelines to processing plants to highways (which are defined as “any thoroughfare, street, road, trail, avenue, parkway, driveway, viaduct, lane, alley, square, bridge, causeway, trestleway or other place or any part of any of them, whether publicly or privately owned, that the public is ordinarily entitled or permitted to use for the passage or parking of vehicles” and include sidewalks, boulevards and adjacent ditches – see the *Traffic Safety Act*, [RSA 2000, c T-6](#), s 1(1)(p)). Vehicles are also defined broadly and could include bicycles and scooters (s 1(1)(ww)).
- Section 1(2) deems the land that the essential infrastructure is located on, and any land used in connection with it, to be part of the essential infrastructure.
- Sections 2(1), (2) and (3) prohibit the following activities related to essential infrastructure when those activities are done without lawful right, justification or excuse (and note that lawful right, justification or excuse is not defined):
  - wilfully entering any essential infrastructure;

- wilfully damaging or destroying any essential infrastructure; and
- wilfully obstructing, interrupting or interfering with the construction, maintenance, use or operation of any essential infrastructure in ways that make it dangerous, useless, inoperative or ineffective.
- Section 2(4) prohibits aiding, counselling or directing another person to do any of the things in sections 2(1) to (3), whether or not the other person actually does so.
- Section 2(5) states that where permission to enter is granted based on false pretences, a person who has entered on essential infrastructure is deemed to have contravened s 2(1).
- Section 3(1) and (2) make violations of section 2 offences punishable as follows:
  - for individuals with first offences, fines between \$1,000 and \$10,000 or imprisonment for up to 6 months, or both;
  - for individuals with second or subsequent offences on the same premises, fines between \$1,000 and \$25,000, or imprisonment for up to 6 months, or both;
  - for corporations, fines between \$10,000 and \$200,000; and
  - for any officer, director or agent of a corporation who directed, authorized, assented to, acquiesced in or participated in the offence, the same penalties as for individuals.
- Section 3(3) provides that each day that a contravention continues will be considered a separate offence liable to the penalties in section 3(1) and 3(2).
- Section 4 allows peace officers to arrest, without warrant, any person they find contravening the prohibitions in sections 2(1), (2) and (3).
- Section 5 allows the provincial Cabinet to make regulations prescribing other buildings, structures, devices and any other things to be “essential infrastructure.”

The following examples illustrate the types of activity that appear to contravene Bill 1:

- Holding a vigil for [Regis Korchinski-Paquet](#) in Olympic Plaza – a square in downtown Calgary – in conjunction with Black Lives Matters protests across the country, and the vigil spills onto Stephen Avenue Mall, where bicycles are permitted.
- Indigenous persons and their allies protesting against construction of a pipeline on-site in Alberta.
- Workers rallying 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 protesting cuts to AISH on the sidewalk adjacent to the High Level Bridge in Edmonton.
- LGBTQ2S+ groups holding 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.

These are all examples of protests against government or corporate interests, primarily by marginalized “others” without access to legislative or corporate halls of power. Under Bill 1, these peaceful protesters could be subject to immediate arrest by the police, increasing the potential for further conflict between law enforcement and members of the public. These are the kinds of protests that concern us in this post. We have not included, for example, anti-abortion protests, because they are covered by [other legislation](#) which protects the rights of those seeking or providing abortion services to privacy, security of the person, and equality. None of the

examples we provide above interfere with other rights or freedoms, except perhaps property and commercial rights, which are not protected under the *Charter*.

In these examples, most of the groups are likely to have, at the very least, “wilfully entered” “essential infrastructure” under section 2(1), which is the broadest of the prohibitions in Bill 1. While the Legislature is not yet included in the definition of this term, [it could be added by regulation](#). (The possibility that regulations could greatly expand the scope of Bill 1 is a concern that we will address below.) The grounds of the Legislature in Edmonton – which are expansive and on which bicycles and scooters can be ridden – could fall within the definition of “essential infrastructure.” Depending on the facts, the groups might also be wilfully obstructing, interrupting or interfering with the construction or operation of essential infrastructure so as to make it inoperative or ineffective. And it is not just protests that could be captured by Bill 1 (although that is our focus). A person sleeping rough on a city sidewalk has also entered onto essential infrastructure and is perhaps even obstructing its use. The key issue in all of these examples is whether the persons or groups are acting “without lawful right, justification or excuse.” We will address this issue when we discuss section 7 of the *Charter* (the right to life, liberty and security of the person).

The purpose of a law is a necessary element of *Charter* analysis, which we will discuss below. However, the purpose of Bill 1 is difficult to make out for two reasons. One is the absence of an expression of its purpose in the Bill itself, coupled with the contradictory and vague justifications made in the brief legislative debates on its substance. The second is the existing provincial and federal legislation which already does the work that Bill 1 purports to do.

One method for establishing the government’s purpose is to look at legislative history, such as the remarks of the Minister responsible for the bill and debates on the floor of the legislature. In the case of Bill 1, the legislative history is scant and much of the debate is only a description of the circumstances giving rise to the legislation. We see this in the remarks made by Premier Jason Kenney when he introduced Bill 1 on its first reading in February, before he sets out three goals for the Bill:

In recent weeks we have seen lawlessness jeopardize the Canadian economy, leading to the loss of tens of thousands of jobs here in Alberta and across the Dominion. Mr. Speaker, this is making a mockery of the principle of the rule of law, one of the foundational principles of our democratic life together. Therefore, the government tables this legislation *to strengthen penalties* against those who would lawlessly trespass or jeopardize public safety by seeking to block critical public infrastructure, including roadways, railways, and other important infrastructure. This *reinforces public safety*. It *increases the dissuasive effect of law* against those who would seek to hold us all jeopardy [sic] to their radical demands. ([Alberta Hansard February 25, 2020](#) at 4, emphasis added)

On the second reading of the Bill, the Minister of Infrastructure Prasad Panda focused on the goal of protecting economic interests, stating: “We will protect our vital economic infrastructure. We will enforce the rule of law, and we’ll protect jobs. We’ll defend the vital economic interests of Albertans” ([Alberta Hansard, February 26, 2020](#) at 15).

On the third reading of the Bill, Minister of Justice Doug Schweitzer spoke very briefly about upholding the rule of law, providing police and law enforcement with the tools they need to do their job, and sending “a clear signal to those 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).

The second reason the government’s purpose in enacting Bill 1 is obscure is because the offences it creates are already offences in other legislation. Two Alberta statutes – the *Petty Trespass Act*, [RSA 2000, c P-11](#) (*PTA*) and the *Trespass to Premises Act*, [RSA 2000, c T-7](#) (*TPA*) – 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 (s 4). The federal *Criminal Code*, RSC, 1985, c C-46 already makes it a criminal offence to wilfully damage or destroy property of all types or to obstruct or interfere in its use (s 430, mischief). The offence of forcible entry under [section 72\(1\)](#) of the *Criminal Code* also already criminalizes entry onto property that is likely to cause a breach of the peace.

Recall that the Premier told the legislature that one of the purposes of Bill 1 was “to strengthen penalties against those who would lawlessly trespass.” However, Bill 1’s penalties for trespassing in section 3(1)(a) are very similar to the penalties for trespassing in the *PTA* (s 2(1.3)(a)) and the *TPA* (s 3) as of amendments made in December 2019. The *Trespass Statutes (Protecting Law-Abiding Property Owners) Amendment Act*, 2019, [SA 2019, c 23](#) was the government’s response to an animal welfare protest at the Jumbo Valley Hutterite Colony in September 2019 (Amanda Stephenson, “[Alberta hikes trespassing fines to ward off 'anti-farming' animal activists](#)”, *Calgary Herald* (3 October 2019)). These other statutes might also violate the *Charter*, but that is outside the scope of this post.

There are also some significant differences between the trespassing laws and Bill 1:

- The most consequential difference is that entering *unmarked* property is an offence under Bill 1 (s 2(1)). For entry on Crown lands to be an offence under the *TPA*, a person must have oral or written notice to stay off, or there must be a “No Trespassing” type of sign posted on the entrance to or corners of the property (s 2). Entry onto private property with the same type of notice and without an owner’s or occupier’s permission is prohibited by the *PTA*, but it also prohibits entry without notice on to agricultural land, lawns, gardens and land enclosed by a fence or in some other way that indicates the owner’s or occupier’s intention to keep people out or animals in.
- The category of properties which cannot be entered onto is more explicit in Bill 1 than in the trespass statutes. Bill 1 contains a very long list of what is considered to be “essential infrastructure,” whereas the trespass statutes depend on notice to prohibit entry onto any land or structures. The list of “essential infrastructure” in Bill 1 can be expanded by the provincial Cabinet under section 5.
- Bill 1 makes each day that an offence continues a separate offence (s 3(3)).
- Bill 1 adds minimum fines: a minimum fine of \$1,000 for entry (trespass) and damage or obstruction (mischief) (s 3((1)(a)) and a minimum fine of at least \$10,000 for a corporation.

With this context for Bill 1 in place, we now turn to its compliance with the *Charter*.

## **The *Charter* and its Application to Bill 1**

The burden is on the person or group challenging Bill 1 to prove that either its purpose or effect violated a *Charter* right or freedom. The relevant provisions here are freedom of expression (s 2(b)), freedom of peaceful assembly (s 2(c)), freedom of association (s 2(d)), the right to liberty (s 7) and the right to equality (s 15). The reverse onus provision in section 2(5) of Bill 1 may also violate section 11(d) of the *Charter*, the right to be presumed innocent of an offence until proven guilty, but we will not elaborate on that argument here.

### ***Section 2(b): Freedom of Expression***

Freedom of thought, belief, opinion and expression protects any activity that conveys meaning. It also protects all forms of expression except those that are violent or otherwise infringe the values underlying section 2(b), which are seeking and attaining the truth, participation in social and political decision-making, and diversity in individual self-fulfillment and human flourishing (*Irwin Toy Ltd v Quebec (Attorney General)*, [1989 CanLII 87 \(SCC\)](#), [1989] 1 SCR 927). Government actions, including laws, will violate section 2(b) when they restrict the content of the expression (the message being conveyed), or where they interfere with the form or location of expression in ways that undermine those values.

The kinds of protests we enumerated above would likely fall within the protected scope of freedom of expression. The protests convey meaning and are non-violent, so they would at first blush engage section 2(b). The government might argue that not all locations of expression are protected, and if it did the issue would be whether the protests were consistent with the functions of the places in question and promoted the values underlying freedom of expression (see *Montréal (City) v 2952-1366 Québec Inc.*, [2005 SCC 62 \(CanLII\)](#)). Many of the locations noted above – roads, bridges, town squares and areas outside government buildings – are places where expression has historically taken place, and to deny expression there would interfere with expression-related values. While pipeline sites may not be a location where expression has traditionally occurred, [this has been changing](#), and new sites for expression can be recognized under section 2(b) (*Montréal (City)* at para 80). As long as the protests are not interfering with the actual function of the place in question, they should be recognized as protected places of expression.

Bill 1, by prohibiting the entry onto “essential infrastructure,” does not just limit forms of engaging with these places that obstruct or interfere with the functions of the sites. It prohibits simply being there and participating in peaceful protests that have no such impact (see section 2(1)). Although Bill 1 does not restrict the content of expression, one of its stated purposes is to dissuade protests and the impact they have on economic interests and public safety through tougher penalties. There is a good argument, therefore, that the very purpose of Bill 1 is to restrict expression. But even if the purpose of Bill 1 is not aimed at curtailing expression, the effect of Bill 1 is surely to do so. On the other hand, sections 2(2) and (3) of Bill 1 may not engage section 2(b) of the *Charter*, because those sections prohibit activities that, while they may convey meaning, do obstruct or even damage the places where the expression is occurring.

Section 2(4) of Bill 1, which prohibits aiding, counselling or directing another person to do any of the things in sections 2(1) to (3), is also a restriction on expression. Unlike section 2(1), we can view this prohibition as a content-based restriction on expression. Kim Siever raises the example of creating a Facebook event for a protest in a parking lot about a recent government action. In our example above, let's assume a worker organized the rally outside the meat packing plant via Facebook and was charged under section 2(4) of Bill 1. It would be the content of their expression that was being attacked – i.e. the extent to which they aided, counselled or directed entry onto essential infrastructure, even if they did not attend or participate in the protest. This would likely amount to a violation of section 2(b) of the *Charter*, as governments cannot restrict the content of expression without reasonable justification under section 1.

### ***Section 2(c): Freedom of Peaceful Assembly***

Freedom of peaceful assembly has not been subject to sustained discussion by the Supreme Court of Canada, and is often eclipsed by arguments relating to freedom of expression and freedom of association. While freedom of peaceful assembly may be the least developed of the four freedoms protected by section 2 of the *Charter*, its role as an independent freedom can and should be developed as a crucial part of the law on public demonstrations. This is the argument persuasively made by Basil Alexander in “Exploring a More Independent Freedom of Peaceful Assembly in Canada” (2018) [8:1 UWO J Leg Stud 4](#) (Alexander), where he sets out a doctrinal analysis of what a stand-alone freedom of assembly argument would include. Alexander's article also helpfully includes references to his earlier work and to work by other Canadian legal scholars on this neglected freedom, including: Basil Alexander, “Demonstrations and the Law: Patterns of Law's Negative Effects on the Ground and the Practical Implications” (2016) 49:3 UBC L Rev 869 ([online: SSRN](#)); Nathalie Des Rosiers, “Conclusion: The Future of Protests in Canada” in Margaret Beare, Nathalie Des Rosiers & Abigail Dushman, eds, *Putting the State on Trial: The Policing of Protest during the G20 Summit* (UBC Press: Vancouver, 2015) at 319; and Graham Mayeda, “Has Public Protest Gone to the Dogs? A Social Rights Approach to Social Protest Law in Canada”, in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) ([online: SSRN](#)).

Section 2(c), as currently understood and applied by the courts, adds little to the freedom of expression analysis when applied to Bill 1. Depending on what happens during a protest, freedom of peaceful assembly may even offer less protection. It is only the offences of entry onto essential infrastructure and aiding, counselling or directing entry that are open to challenge under 2(c), because the freedom is expressly qualified by a modifier: “peaceful assembly.” However, all of the examples we are using involve only entry and would be considered peaceful.

Alexander argues that freedom of peaceful assembly is more analogous to freedom of association than to freedom of expression, because assembly is a collective, as well as expressive, activity (as noted in the next section). However, it is unique and requires its own analysis because “assembly is a collective action that requires physical space in order to be effectively carried out” (Alexander at 7). The physical space requirements of assembly are often controlled or regulated by the state. And because peaceful demonstrations often include disruptions in order to

draw the attention that is necessary for them to be effective, interaction with the police is common.

What can be said about the scope of section 2(c) is that the issue for the state is how to ensure that peaceful assemblies can occur and not be prevented (Alexander at 7). Like all protected freedoms, the focus should be on limiting state coercion and constraints. Exactly what type of state action amounts to infringement of the freedom of peaceful assembly depends on how its scope is defined. Alexander argues that “substantial interference” with the protected freedom, should be the test (at 14). In other words, does the purpose or the impact of the law undermine the key activity?

Defining the scope of section 2(c) has been neglected to date and the development of similar freedoms has taken decades of concrete examples in the courts. Peaceful assembly has become an ongoing and too often high-risk activity with the potential for significant gains and losses. As we have seen far too often recently, peaceful protests can quickly devolve into conflict between the police and those assembled, and that conflict can escalate with deadly consequences. It is crucial that section 2(c) be developed, and Bill 1 will likely offer many opportunities to do so.

### ***Section 2(d): Freedom of Association***

Freedom of association is typically applied in the labour rights context, where it protects the rights to join a union, to engage in collective bargaining, and to strike. However, it protects associational activities more broadly. In *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015 SCC 1 \(CanLII\)](#), the Supreme Court defined the scope of section 2(d) to include: “(1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities” (at para 66). The key question for assessing a violation of section 2(d) is whether the state has “precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals” (*Dunmore v Ontario (Attorney General)*, [2001 SCC 94 \(CanLII\)](#) at para 6, [2001] 3 SCR 1016).

Like freedom of peaceful assembly, freedom of association case law is underdeveloped in the context of protest activities. An argument can be made, however, that protests are inherently a collective activity – certainly the examples we provide above are all illustrative of the collective nature of public protests, and are examples of people joining with others “to meet on more equal terms the power and strength of other groups or entities.” The courts have recognized the connection between freedom of expression and freedom of association in the context of labour picketing, which also supports the idea that collective protests should be included within the protected scope of section 2(d) (see e.g. *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, [2013 SCC 62 \(CanLII\)](#) at para 30).

To the extent that Bill 1 is aimed at dissuading such protests through arrest and/or punishment, it could be seen as precluding activity because of its associational nature, which would violate section 2(d). However, Bill 1 might also capture individuals who have entered onto essential infrastructure by themselves, as we note with our example of an individual sleeping rough on a city sidewalk. The better argument may be that while the purpose of Bill 1 is not necessarily

aimed at collective activities, it has that effect. This impact would still amount to a violation of section 2(d).

### ***Section 7: The Right to Life, Liberty and Security of the Person***

The liberty interest under section 7 is engaged when someone faces the possibility of jail when convicted of an offence (*Re BC Motor Vehicle Act*, [1985 CanLII 81 \(SCC\)](#), [1985] 2 SCR 486). Bill 1 interferes with this liberty interest by using jail as a possible sanction to enforce its prohibitions.

Liberty also protects a broader freedom of movement and attendance in places where the public is “free to roam” (*R v Heywood*, [1994 CanLII 34 \(SCC\)](#), [1994] 3 SCR 761 at 789). This freedom is connected to the full and free expression of one’s social alliances; who people associate with and where people gather are important features of our humanity. As people have experienced in the COVID-19 context, restrictions of movement by the state can be a significant impact on an individual’s self-autonomy, dignity and independence. Bill 1’s broad definition of “essential” infrastructures includes squares, city streets, and other gathering places “essential” to social interaction. The Bill, by defining these protected structures as “essential,” is actually recognizing the constitutional character of these places and the liberty interests at risk in restricting public access to them.

A person’s liberty interest may also be violated where the state has “prevented an individual from making fundamental personal choices” (*Blencoe v British Columbia (Human Rights Commission)*, [2000 SCC 44 \(CanLII\)](#) at para 54). These do not include mere “lifestyle” choices (*R v Malmo-Levine; R v Caine*, [2003 SCC 74 \(CanLII\)](#) at para 86), but rather “quintessentially private decisions” (*Godbout v Longueuil (City)*, [1997 CanLII 335 \(SCC\)](#) at para 66) that “go to the very heart” of an individual’s self-autonomy and dignity (*Carter v Canada (Attorney General)*, [2015 SCC 5 \(CanLII\)](#) at para 65). While this is still a developing area of law, Bill 1 arguably interferes with these sorts of decisions by preventing involvement in collective expressions of opinion and thought such as participating in a rally outside a meat packing plant against government treatment of vulnerable and marginalized workers in that plant. To have these choices minimized or curtailed through the fear of penal sanction would violate section 7 in a profoundly personal way.

As noted above, our focus in this post is on public protests. We have raised the possibility that Bill 1 is broad enough to capture persons sleeping on city streets, which might also engage security of the person under section 7 (see e.g. *Victoria (City) v Adams*, [2009 BCCA 563 \(CanLII\)](#); *Abbotsford (City) v Shantz*, [2015 BCSC 1909 \(CanLII\)](#)). We will leave it for others to develop that argument.

An infringement of section 7 requires a state interference with liberty that is contrary to the principles of fundamental justice. There are a number of principles of fundamental justice recognized by the courts. Many of these principles are found in specific sections of the *Charter* such as the presumption of innocence under section 11(d). Other principles are not so specifically identified but are considered core societal values. One such principle particularly relevant to Bill 1 requires that citizens receive fair notice of what kinds of behaviour are subject

to state sanction. This principle also limits state enforcement and investigatory discretion. It holds our lawmakers to a discernible standard in crafting the laws that society lives by. Fair notice requires laws to be visible, transparent, and not arbitrary, overbroad, grossly disproportionate or overly vague (*R v Nova Scotia Pharmaceutical Society*, [1992 CanLII 72 \(SCC\)](#), [1992] 2 SCR 606; *Canada (Attorney General) v Bedford*, [2013 SCC 72 \(CanLII\)](#)). These principles ensure that the legislative purpose of the law frames the law as written and implemented. When laws are written purposively, proportionately and rationally, they are consistent with societal values and principles. The law is contrary to those principles when the stated purpose of the law is out of sync with the means used to achieve that objective.

Bill 1 is disturbingly out of sync with these principles of fundamental justice. To focus on one specific principle, Bill 1 is overbroad in the sense that it goes further than its legislative objectives require (and recall the point above that the objectives are mostly already accomplished by existing statutes).

According to the legislative debates noted above, the purpose of the Bill is to protect certain property, deemed as essential infrastructure, from malicious damage or obstruction. Sections 2(2) and (3) of the legislation reflect that objective. Section 2(1), creating an offence where a person “wilfully enter(s)” an essential infrastructure, does not. That section bars people from mere entry, including peaceful protesters holding a vigil for a victim of racial abuse in Olympic Plaza that spills onto Stephen Avenue. It prohibits entry whether the person or group intends to damage the property or not. Section 2(1) therefore violates the principle that laws should not be overbroad, as it goes further than required to meet Bill 1’s objectives.

Section 2(1) does provide an exception for those individuals who have a “lawful right, justification or excuse” to enter the structure or the connecting land, but that concession fails to fix the constitutional concern. A “justification or excuse” has a specific legal meaning, and attaches to specific common law defences such as defence of property, duress and necessity.

“Lawful right” is open to interpretation. It might refer to “a right or authority conferred by law to be on that land” as required under the *PTA* or “a fair and reasonable supposition that the trespasser had a right to do the act complained of” pursuant to the *TPA*. Both of these definitions specifically connect “lawful right” to the protection of property rights, which are not *Charter* protected (except in the case of Indigenous land rights, which will be addressed in a future post). If the meaning of “lawful right” is indeed property-related, then there is no need for this new legislation considering trespass is already well covered in these other statutes. In comparison, the trespass statutes are less vague and more confined than Bill 1, requiring notice to warn individuals to stay off certain property before an offence is committed. Bill 1 does not include this prior notice requirement, making it illegal for anyone to wilfully enter the property, whether they know the structure is essential or not.

“Lawful right” can also flow from a right authorized by law, which could include police officers investigating or bailiffs distraining goods. None of these definitions include the group of concerned and socially aware citizens who are conducting a peaceful vigil in a city square and street.

Bill 1 “defends” certain kinds of public and private property from its own citizens. It shuts out the public and serves to silence those whose voices need to be heard across all land, owned and unowned and through all structures be they truly essential or not. Section 2(1) is simply a mechanism for the exclusion of law-abiding citizens, without giving them full and fair notice as to what property is deemed off limits, the way the trespass statutes do. This clarity is needed because ignorance of the law is no excuse. The government is responsible to ensure the laws are accessible and easily understood by the public before punishing them. The section fails to provide clear enforcement guidance to the police. Instead of protecting the public, it creates the potential for adversity and conflict.

Moreover, the term “essential infrastructure” is overly broad. It includes everything from pipelines (s 1(1)(i)) to farms (s 1(1)(vi)) to “device[s] or other thing[s] prescribed by the regulations” (s 1(1)(xvi)). It includes the land on which the structure or “thing” is located “and any land used in connection” with it (s 1(2)). The fact that the provincial Cabinet can prescribe other “things” to be “essential infrastructure” adds to the overbreadth problem (and may also offend the regulation-making powers of government, which we will not get into here). This reference to land lacks specificity; it gives no direction as to how much of the land the legislation applies to, and could include “[any part of the earth’s surface not covered by water.](#)”

### ***Section 15: Equality Rights***

Restrictions on expression, assembly, association or liberty that are targeted at or disproportionately affect particular groups may also violate the equality rights protection in section 15 of the *Charter* (*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000 SCC 69 \(CanLII\)](#)). A violation of section 15 requires finding that (1) the law treats people differently either in its purpose or effects, based on protected grounds (including sex, race, national or ethnic origin, disability, and sexual orientation) and (2) the differential treatment results in discrimination, defined as the perpetuation of historical disadvantage against the group(s) in question (see *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17 \(CanLII\)](#); *Centrale des syndicats du Québec v Quebec (Attorney General)*, [2018 SCC 18 \(CanLII\)](#)).

There is little doubt that the prohibitions in Bill 1 will have an adverse impact on marginalized individuals and groups – those who are racialized, Indigenous, LGBTQ2S+, disabled, gendered, poor. While Bill 1 is neutral on its face and does not draw any distinctions based on these grounds, members of these groups will likely face arrest and prosecution disproportionately under Bill 1. As we noted at the outset, it is often marginalized “others” without access to legislative or corporate halls of power who demonstrate against government or corporate interests. This disproportionate impact should be sufficient to find that Bill 1 effectively treats people differently on the basis of protected grounds, satisfying step 1 of the section 15 test.

Step 2 requires proof of discrimination. The argument here would be that Bill 1 perpetuates historical disadvantage by prohibiting the very means that marginalized groups have to assert their interests, including mere entry onto essential infrastructure under section 2(1). Marginalization is itself the result of state suppression and exclusion, with the power to exclude being the essence of property, backed by trespass laws and now Bill 1. Moreover, marginalized

individuals and groups are often labelled and controlled by being associated with violence – as exemplified by the US President’s [references to looting](#). This is a form of stereotyping, which also constitutes discrimination.

While these arguments may appear persuasive, adverse effects discrimination is infrequently recognized by the courts. There is currently a case before the Supreme Court of Canada that will require the Court to revisit this area of law (see [here](#)), but the last time the Court found in favour of adverse effects discrimination was in the 1990s (see *Eldridge v British Columbia (Attorney General)*, [1997 CanLII 327 \(SCC\)](#), [1997] 3 SCR 624 and *Vriend v Alberta*, [1998 CanLII 816 \(SCC\)](#), [1998] 1 SCR 493).

It is also important to consider the other *Charter* rights and freedoms mentioned here in their full context, which means interpreting section 2 and section 7 protections through an equality rights lens. One of the goals of equality is to facilitate full participation in society by all (see e.g. *Gosselin v Québec (Attorney General)*, [2002 SCC 84 \(CanLII\)](#) at para 22). Everyone in Canada is guaranteed freedom of expression, peaceful assembly, association, and liberty. They are also guaranteed equality based on protected grounds. Therefore, restrictions on protests by disadvantaged groups that express dissatisfaction with social conditions – like those in Bill 1 – violate all of these rights in an intersecting way.

### ***Section 1***

The government would have the burden of proving that Bill 1 is justifiable under section 1 of the *Charter*, based on the *Oakes* test (*R v Oakes*, [1986 CanLII 46 \(SCC\)](#), [1986] 1 SCR 103). *Oakes* requires proof that (1) the Bill has a pressing and substantial objective, and (2) the Bill’s means of achieving that objective are reasonable and demonstrably justified, including scrutiny of its rational connection, whether it minimally impairs the rights and freedoms in question, and the balance between its positive and negative effects.

It should be noted at the outset that violations of section 7 are difficult to justify under section 1, because laws that violate the principles of fundamental justice are rarely seen as reasonable and demonstrably justified. That said, in *Bedford* the Supreme Court found that any balancing of the infringed rights and freedoms with the “ancillary benefits to the general population” that the law is seeking to protect should not be done under section 7, but under section 1 (at para 123; see also paras 125-129).

We have set out the possible purposes of Bill 1 above: protection of public safety, economic interests, and the rule of law. Courts rarely strike down laws at this stage of the analysis, so we will assume that these objectives would be found pressing and substantial. That said, we recognize that the rule of law objective is questionable, particularly for Indigenous peoples who are protesting government and commercial interference with their Aboriginal rights and title and the inherent right to self-determination. Economic justifications for a violation of *Charter* rights are also rarely accepted (see *Newfoundland (Treasury Board) v N.A.P.E.*, [2004 SCC 66 \(CanLII\)](#)). And, if the true purpose of Bill 1 is found to be to dissuade protests, that would not be a pressing and substantial objective. Laws that have an unconstitutional purpose cannot be upheld (see *R v Big M Drug Mart Ltd*, [1985 CanLII 69 \(SCC\)](#), [1985] 1 SCR 295).

The next question is whether the means used by Bill 1 to achieve these purposes are rationally connected to those objectives. Here, we might say that Bill 1 is not really necessary, given the existing prohibitions that are quite similar under the *PTA*, *TPA*, *Crown Property Regulation*, and *Criminal Code*. However, Bill 1 does go further than the *PTA* and *TPA* in prohibiting protests without giving prior notice in regard to the structures and lands in question; it goes further than the *Crown Property Regulation* in banning protests on Crown land that are not disorderly; and it goes further than the *Criminal Code* in prohibiting mere (rather than forcible) entry on to essential infrastructure, in addition to damaging and obstructing it. Moreover, necessity is not the test for rational connection – rather, the law must be logically connected to the ends it seeks to achieve. By creating prohibitions for activities that might harm public safety, economic interests, and the rule of law, we might expect that the law will deter some of these activities and protect those goals.

However, the ways in which Bill 1 goes further than the *PTA*, *TPA*, *Crown Property Regulation*, and *Criminal Code* lead to the argument that it is overbroad, as discussed above in relation to section 7. A law that is overbroad will not be minimally impairing because it goes further than it needs to in order to achieve its objectives (see *Bedford*, cited above). Section 2(1) of Bill 1 prohibits simply entering onto essential infrastructure such as Olympic Plaza and a meat-packing plant parking lot, and it is difficult to see how it furthers Bill 1’s stated objectives in the context of peaceful protests in those locations. This prohibition also infringes upon expression, peaceful assembly, liberty, and equality in ways that outweigh any beneficial impact on these objectives that Bill 1 might have (i.e. it would also fail the last step of the second part of the *Oakes* test).

Therefore, there is a strong argument to be made that section 2(1) of Bill 1 in particular will not survive constitutional scrutiny.

## Conclusion

The purposes of social protest demonstrations are to make the public aware of group or social interests, to call for deliberate action, and to insist on the recognition of marginalized interests and rights. In a democracy, those engaged in peaceful protests must be free to demonstrate in places of safety – places where they are not subject to arrest and punishment simply for being present in a public space. Too often, where the police are under pressure to enforce the letter of the law, the spirit of the law is undermined. In those instances, the police enforce “petty” laws that escalate into violence, abuse and fear.

What we see in Bill 1 is an attempt by the government of Alberta to penalize all protests that are group activities, and perhaps individual entry onto essential infrastructure too. Bill 1 does not even pretend to facilitate and channel social protest demonstrations into locations that are acceptable and safe for both protesters and other members of the public. While Bill 1 may dissuade some from what are lawful protests based on their *Charter* rights, there will always be those like Martin Luther King for whom oppressive laws are not a deterrent to civil disobedience and protest (see [Letter from a Birmingham Jail](#)). Mass arrests and charges are foreseeable, but the cost of challenging even some of these arrests will be prohibitive for most.

Bill 1 does not include a specific coming into force date, so it will come into force on assent, i.e., at an as yet unspecified date. Social protest demonstrations and their reception have intensified in ways that could not have been anticipated when Bill 1 was introduced four months ago. *Charter* rights, on the other hand, have remained a constant. The government still has an opportunity to recognize that Bill 1 violates the *Charter* and should not receive assent. We urge it to do so.

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