# Report of the Public Inquiry into the 2022 Public Order Emergency

## Volume 5: Policy Papers

The Honourable Paul S. Rouleau, Commissioner

February 2023

PUBLIC ORDER EMERGENCY COMMISSION

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PUBLIC ORDER EMERGENCY COMMISSION | COMMISSION SUR L'ÉTAT D'URGENCE

# Volume 5: Policy Papers

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Report of the Public Inquiry into the 2022 Public Order Emergency.
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Cette publication est également disponible en français :
*Rapport de l'Enquête publique sur l'état d'urgence déclaré en 2022. Volume 5 : Documents d'orientation.*

Vol. 5 - CP32-167/5-2022E-PDF
ISBN 978-0-660-46659-0

(Set) CP32-167/2022E-PDF
ISBN 978-0-660-46654-5

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# Donation-Based Crowdfunding: Legal Framework for Crowdfunding and Governance of Online Platforms

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# 1. Mandate

My mandate is to provide an independent critical review of the relevant literature, which includes an analysis of the legislation, case law and doctrine regarding the legal framework of donation-based crowdfunding and the governance of online crowdfunding platforms.

I will also examine the jurisdictional and transnational aspects of crowdfunding, while considering international legal models where applicable.

Beyond the legal framework, my mandate includes documenting the dominance and influence of certain platforms, along with their associated challenges or problems.

# 2. Short Answer

Donation-based crowdfunding creates a legal relationship between the project owner, the donors and the beneficiaries of the campaign. The project owner is the person or group that launches the crowdfunding campaign. There are two types of intermediaries that also play a role: first, the crowdfunding platform that hosts the campaign on a dedicated page of its website and, second, the payment intermediary. The payment intermediary is a financial institution or money services business that the crowdfunding platform entrusts with processing donations and transferring them to the designated individuals.

The legal framework applicable to donation-based crowdfunding is poorly defined and somewhat inadequate, both in provincial private law and in federal public law.

In Quebec law, applying the deed of gift to crowdfunding is unsatisfactory, whether one views the project owner or the beneficiary as the donee of the funds collected.

Under Canadian common law, the application of the trust better reflects the role of the project owner, who holds the funds as a trustee. Further challenges arise, however, if the trust is invalid due to uncertainty of objects, if the funds could not be used to achieve the purpose of the campaign, or if there are surplus funds.

The Uniform Law Conference of Canada developed a uniform donation-based crowdfunding act that addresses these challenges. Adopting this act across Canada would provide greater protection for donors and recipients, while limiting the power of

the crowdfunding platform when it is involved in administering and distributing the funds. Since crowdfunding often crosses jurisdictional boundaries, adopting a uniform legal framework would reduce uncertainty caused by a conflict of law or forum.

Looking at federal public law, there are several offences in the *Criminal Code* that cover the worst abuses of crowdfunding, such as fraud, false pretence and breach of trust. Clarifying the applicable private law would facilitate the enforcement of these offences, as it would specify who may hold the funds and in what capacity. The provisions on the financing of terrorism appear to cover the risks of crowdfunding in this respect. The freezing of funds, authorized by the *Criminal Code*, was an effective measure during the 2022 “Freedom Convoy.”

Following up on the financial measures of the *Emergencies Act,* the federal government amended the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* in April 2022 to include donation-based crowdfunding. The usefulness of these measures should be reviewed, since platforms typically outsource payment processing to intermediaries already subject to these regulations. Additionally, some organizations that engage in crowdfunding without the use of a platform may be excluded.

Essentially, crowdfunding platforms collecting and using personal data raises the same issues as with social media. Reforming private sector privacy legislation should address these concerns.

Some crowdfunding campaigns have attracted attention due to their political nature. People are seeing how effective these campaigns are when it comes to mobilizing and funding citizen-led movements, and in some cases, civil unrest challenging the state. We should not exaggerate this risk by applying an overly strict framework to crowdfunding, as it remains above all a tool for mutual aid and support in community-oriented projects. Still, it is important to ensure that crowdfunding does not serve as a means of circumventing electoral law.

The same tax rules that require thorough, transparent management on the part of registered charities do not apply to most crowdfunding organizations, let alone informal groups. It is fair to assume that crowdfunding platforms often do not verify the identity of project owners or donors. However, many private law relationships are formed without public disclosure or identity checks, and this does not seem to be a cause for concern.

Ultimately, it seems essential that private law be clarified across Canada in order to achieve a better framework for donation-based crowdfunding while making it easier to implement public law that applies to this practice.

# 3. Background

During the "Freedom Convoy" that took place in Ottawa in January and February 2022 (hereinafter referred to as the "Convoy"), the organizers launched crowdfunding campaigns via two U.S.-based platforms: GoFundMe (GFM) and GiveSendGo (GSG). These campaigns raised over $10 million to provide financial support for the truckers taking part in the Convoy.

The way in which these two crowdfunding campaigns were carried out raises several questions regarding the legal framework for crowdfunding and the governance of online platforms. It is useful to briefly outline how these two campaigns developed, as well as the control measures imposed on them. For context, here is a short timeline of the events that took place until emergency measures were lifted on February 23.

## 3.1 Timeline of Events

- January 13: "2022 Freedom Convoy" is announced on social media
- January 14: crowdfunding campaign is launched on GFM platform
- January 22: first convoys depart
- January 27: GFM pays Tamara Lich $1 million on top of the $6.7 million already raised
- January 28: convoys arrive in Ottawa and protestors reportedly engage in threats, racist remarks and harassment, particularly towards journalists
- January 29: first full day of protests in Ottawa
- Over the next few days, an increasing number of incidents disturb the peace; some protestors wave Nazi and far-right flags and symbols; downtown residents are disturbed by the honking sounds and truck exhaust; some residents are afraid to go outside; many businesses close following a recommendation by Ottawa police
- January 30: the NPO "Freedom 2022 Human Rights and Freedoms" is incorporated under the *Canada Not-for-profit Corporations Act*
- February 2: after a meeting with Ottawa police, GFM announces that the crowdfunding campaign is under review to determine if it complies with its terms of use
- Over the next few days, more and more people are arrested or given tickets

- February 4: Ottawa residents file a class-action lawsuit against the Convoy's organizers, supporters and participants (*Li v. Barber*); on the same day, GFM shuts down the crowdfunding campaign, which has already raised $10 million; Tamara Lich announces a new crowdfunding campaign through the GSG platform
- February 5: GFM announces it will automatically refund all donors
- February 6: the City of Ottawa declares a state of emergency
- February 7: as part of the Ottawa residents' class-action lawsuit, Ontario Superior Court Justice McLean orders the truckers in the Convoy to stop honking their horns
- February 10: at the request of the Ontario Attorney General, Chief Justice McWatt of the Ontario Superior Court of Justice grants an *ex parte* restraint order against the funds held by GSG pursuant to s. 490.8 of the *Criminal Code*
- February 11: Ontario declares a state of emergency
- February 14: the federal government invokes the *Emergencies Act*
- February 15: the Governor in Council makes the *Emergency Measures Regulations* and the *Emergency Economic Measures Order*; Ottawa police chief resigns
- February 17: Tamara Lich and Chris Barber are arrested; as part of the Ottawa residents' class-action lawsuit, Ontario Superior Court Justice MacLeod grants an *ex parte* interlocutory injunction to freeze the financial assets of the Convoy's organizers, supporters and participants
- February 20 (approximately): the financial entities specified in the *Emergency Economic Measures Order* freeze several accounts belonging to the Convoy's organizers or participants
- February 23: the federal government revokes the *Emergencies Act*

## 3.2 Convoy-Related Crowdfunding Campaigns

On both the GFM and GSG platforms, each crowdfunding campaign has its own dedicated page containing the following key information: 1) the name of the campaign; 2) the name of the project owner; and 3) the campaign details, i.e., the reasons why the project owner is asking for donations and how that person intends to use them. The campaign's launch date does not always appear on the dedicated page, and this page disappears after the campaign has ended, making it sometimes difficult to find this information afterward.

### 3.2.1 Campaign Launched Through GoFundMe Platform

**Name of campaign**: Freedom Convoy

**Launch date**: January 14, 2022

**Project owners**: Tamara Lich and Benjamin Dichter. Keith Wilson, the lawyer representing Tamara Lich, told the Globe & Mail that Benjamin Dichter was never involved and that he never had control over the funds.[1]

**Campaign details**: the dedicated page no longer exists, but media sources report that the funds were to be used to pay for fuel, food and lodging for the truckers participating in the Convoy.[2]

**Follow-up actions from the GFM platform:** the campaign was closely monitored by GFM.[3] On January 25, GFM announced that it was freezing the money until Ms. Lich provided a plan on how it would be spent.[4] GFM paid her $1 million on January 27.

GFM suspended the "Freedom Convoy" crowdfunding campaign on February 2 and terminated it on February 4.[5] The platform explained that law enforcement had communicated the fact that the protest had turned violent and protestors were

[1] Colin Freeze, "MPs call on GoFundMe staff to testify about efforts to screen out hate campaigns," *Globe & Mail* (February 3, 2022), online: <theglobeandmail.com/canada/article-gofundme-mps-screen-hate-campaigns-trucker-convoy/>, accessed September 26, 2022.
[2] Christopher Reynolds, "GoFundMe gèle 4 millions destinés aux camionneurs contestataires", *Presse Canadienne* (January 25, 2022), online: lapresse.ca/covid-19/2022-01-25/vaccination-obligatoire/gofundme-gele-4-millions-destines-aux-camionneurs-contestataires.php>, accessed September 26, 2022. The article quotes the following excerpt from the GFM crowdfunding campaign's dedicated page: "Our current government is implementing rules and obligations that are destroying the foundations of our businesses, industries and livelihoods. We are a peaceful country that has helped protect nations across the globe from tyrannical governments who oppressed their people, and now it seems it is happening here."
[3] The day after the campaign was launched, GFM began actively monitoring it "based on significant fundraiser activity": Testimony of Juan Benitez, President of GFM. House of Commons, Standing Committee on Public Safety and National Security, Evidence, 44-1, no. 12 (March 3, 2022), online: <ourcommons.ca/DocumentViewer/en/44-1/SECU/meeting-12/evidence>.
[4] In an email, GFM spokesperson Rachel Hollis told the Canadian Press: "We require that fundraisers be transparent about the flow of funds and have a clear plan for how those funds will be spent. In this case, we are in touch with the organizer to verify that information. Funds will be safely held until the organizer is able to provide the documentation to our team about how funds will be properly distributed." *Canadian Press*, *supra* note 2.
[5] Testimony of Juan Benitez, *supra* note 3.

committing criminal acts, which violates the platform's terms of use that prohibit, among other things, the promotion of violence and harassment.[6]

The crowdfunding campaign raised over $10 million before GFM decided to terminate it.

GFM initially promised to refund the donors who requested it, as well as to donate surplus funds to charities chosen by the project owners.[7] The next day, GFM announced that all donors would be automatically refunded.[8]

### 3.2.2 Campaign Launched Through GiveSendGo Platform

The dedicated page no longer exists, but it has been preserved in a blog post by Mark Blumberg.[9]

**Name of campaign**: "Freedom Convoy 2022"

**Launch date**: February 4 or 5, 2022

[6] Nick Boisvert, "GoFundMe ends payments to convoy protest, citing reports of violence and harassment," *CBC* (February 4), online: <cbc.ca/news/politics/gofundme-stops-payments-1.6340526>. GFM announces on its website: "We now have evidence from law enforcement that the previously peaceful demonstration has become an occupation, with police reports of violence and other unlawful activity."
GFM justified the payment it made because "organizers were able to prove that money would be used for participants involved in peaceful protest."

[7] GFM then "offered donors the chance to request a refund or, in accordance with the statements made by the campaign organizer, to have their donations allocated to recognized and credible charities, chosen by the campaign organizer and verified by GoFundMe." *Ibid*.

[8] GoFundMe, "UPDATE: GoFundMe to refund all Freedom Convoy 2022 donations" (February 4, 2022), online: *Medium* <medium.com/gofundme-stories/update-gofundme-statement-on-the-freedom-convoy-2022-fundraiser-4ca7e9714e82>.

[9] Mark Blumberg, "New Canadian Federal non-profit 'Freedom 2022 Human Rights and Freedoms'" (February 6, 2022), online (blog): *Canadian Charity Law* <canadiancharitylaw.ca/blog/new-non-profit-freedom-2022-human-rights-and-freedoms/>.

**Project owner**: Freedom 2022 Human Rights and Freedoms, an NPO incorporated on January 30, 2022, under the *Canada Not-for-profit Corporations Act*. Tamara Lich and Benjamin Dichter are among its directors.[10]

**Campaign details**: according to the dedicated page, the funds were to be used to pay for fuel, food and lodging for the truckers, without specifying whether this applied only to Ottawa participants, or to other truckers involved in protests across Canada. The page also indicated that the funds would be paid directly to a fuel supplier and that any surplus funds would be donated to a "credible Veterans organization which will be chosen by the donors."

In a statement, GSG stated that the organizers had pledged to use the funds to provide the Convoy's truckers with humanitarian assistance and legal support.[11]

According to GSG co-founder and representative Jacob Wells, the funds raised in this campaign were eventually refunded to the donors. In one of the judgments in *Li v. Barber,* the judge stated that, "I am advised by Mr. Groot and by Mr. Wells that the defendant Freedom 2022 Human Rights and Freedoms was to have been a recipient of funds raised on the GiveSendGo platform, but it did not open a bank account to receive the funds prior to the granting of the injunction. As a consequence, the funds were never transferred. Mr. Wells advises that GiveSendGo is now returning those funds to the donors."[12]

The crowdfunding campaign raised over $12 million.

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[10] See information available on Corporations Canada website. Corporations Canada, "Federal Corporation Information – 1372685-1", online: <ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpDtls.html?corpId=13726851&V_TOKEN=null&crpNm=Freedom 2022 Human Rights and Freedoms&crpNmbr=&bsNmbr=>, last updated September 14, 2022.

[11] Sarah Turnbull, "Freedom Convoy raises millions on new crowdfunding platform," *CTV News* (February 8, 2022), online: <ctvnews.ca/politics/freedom-convoy-raises-millions-on-new-crowdfunding-platform-1.5772985>, accessed September 26, 2022.

[12] *Li v. Barber*, 2022 ONSC 1543, subsec. 18. This judgment, rendered in the Ottawa residents' class-action lawsuit, pertains to the renewal of the *ex parte* interlocutory injunction to freeze the defendants' assets. The judge stated that the GSG platform was not subject to the injunction and that the funds that it did not distribute to project owners or campaign beneficiaries were not subject to the freezing of assets (subsec. 17–24).

### 3.2.3 Other Campaigns Launched Through GiveSendGo Platform

As of September 26, 2022, at least seven other campaigns related to the Convoy are still active. For example, a campaign named "Freedom Convoy 2022 Worldwide Fund God Bless" launched by "Envision LBV" has raised over $1 million towards a goal of $2 million.[13]

A second campaign, "Unacceptable Documentary Freedom Convoy," is collecting donations to produce a feature documentary about the Convoy. This campaign has raised $45,000 towards its $90,000 goal.[14]

A third campaign launched by "Canadian Friends" to provide financial support for Tamara Lich has raised $70,000. The page mentions that the campaign has been approved by Tamara Lich's lawyer, Keith Wilson, QC.[15]

As these examples show, there can be several campaigns for a single event, and it can be difficult to know whether these campaigns are backed or approved by the beneficiaries or main organizers of a cause or movement. This was the case with the Humboldt bus tragedy in Saskatchewan. The main crowdfunding campaign launched through GFM raised $15 million to help victims and their families. When that campaign ended, some people were frustrated that they were not able to contribute, and other project owners launched a series of new campaigns. The Broncos team president made a public statement informing potential contributors that these other campaigns were not endorsed by the team.[16]

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[13] GiveSendGo, "Freedom Convoy 2022 Worldwide Fund God Bless," online: *GiveSendGo* <givesendgo.com/FreedomConvoy2022Worldwide>, accessed September 26, 2022.

[14] GiveSendGo, "Unacceptable Documentary Freedom Convoy," online: *GiveSendGo,* <givesendgo.com/unacceptabledoc>, accessed September 26, 2022.

[15] GiveSendGo, "Supporting Tamara Lich," online: *GiveSendGo* <givesendgo.com/Tamaralich>, accessed September 26, 2022.

[16] It seems that Ms. Kellington, the person who launched the main crowdfunding campaign, gave up leadership rather quickly to Broncos executives and GFM, who created a foundation and petitioned Saskatchewan's superior court to authorize a plan to distribute the funds. See: *Re Humboldt Broncos Memorial Fund Inc*, 2018 SKQB 341. See also the orders made in this case: Q.B.G. No. 1038 of 2018 (April 6, 2018), online: <cdn2.mltaikins.com/wp-content/uploads/2018/07/Filed-Order-Initial-Order-under-the-IPAA.pdf> and (November 28, 2018), online: <cdn2.mltaikins.com/wp-content/uploads/2018/11/Final-Order.pdf>, accessed September 26, 2022.

### 3.2.4 "Ottawa Fund" Crowdfunding Campaign

Another crowdfunding campaign was launched in support of the Ottawa residents' class-action lawsuit. This campaign can be found through a page, apparently created by the law firm representing the plaintiffs, which provides information about the class-action lawsuit.[17] According to the donation page, the money raised will be used to pay the plaintiffs' legal fees and other expenses related to the class-action lawsuit, while surplus funds will be refunded to donors who request it once litigation has concluded.[18]

The donation page was created using software tools provided by NationBuilder and Progressive Nation, a web designer that integrates NationBuilder's tools. The software developed by these companies allows users to design websites for an organization, a cause, a movement or a campaign with a wide range of content and features, including donation pages.[19] The personal information of donors and others who follow or engage with the campaign can then be collected in an integrated way. Developed by NationBuilder, a California-based company launched in 2011, this product was originally designed to facilitate election campaigns. Many political parties and politicians in the U.S. and around the world have used NationBuilder's tools, and the company is now expanding its operations into other areas.[20]

The above-mentioned examples demonstrate how difficult it can be to identify the individuals or organizations behind crowdfunding campaigns, as these initiatives are sometimes created by informal groups. In some cases, donation-based crowdfunding campaigns are associated with political movements, and it becomes difficult to separate the two. In addition, crowdfunding campaigns do not always go through a platform such as GFM or GSG; they may be integrated into the official website of an oftentimes short-lived organization or movement.

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[17] See: "Ottawa Convoy Class Action," online: *Class Action* <ottawaconvoyclassaction.ca/>, accessed September 26, 2022.

[18] See: "Friends of the Ottawa Convoy Class Action Fight," online: *The Ottawa Fund* <ottawafund.ca/>, accessed September 26, 2022.

[19] See: "Digital Organizing Tools for Campaigns, Causes & Organizations," online: *Progressive Nation* <progressivenation.ca/services> and "NationBuilder About," online: *Nation Builder* <nationbuilder.com/about>, accessed September 26, 2022.

[20] See: "NationBuilder" (February 20, 2022), online: Wikipedia, French: <fr.wikipedia.org/wiki/NationBuilder>, accessed September 26, 2022. English: <en.wikipedia.org/wiki/NationBuilder>.

## 3.3 Control Measures for Funds Raised

Funds raised through the GFM and GSG platforms were subject to a number of control measures aiming at freezing both accounts and funds.

### 3.3.1 Restraint Order Pursuant to s. 490.8 of the Criminal Code

On February 10, 2022, Chief Justice McWatt of the Ontario Superior Court of Justice granted an *ex parte* restraint order on the funds held by GSG, pursuant to s. 490.8 of the *Criminal Code*, ruling that the funds were likely to be used in the commission of a serious criminal offence.[21] The order would be enforceable under Canada-U.S. financial crime cooperation agreements.[22] On March 3, 2022, GSG reportedly stated that these funds were being held in a U.S. bank account and that the company wanted to ensure they were transferred to the beneficiaries or, if that was not possible, refunded to the donors.[23]

### 3.3.2 Class-Action Lawsuit and Freezing of Financial Assets

On February 4, 2022, Ottawa resident Ms. Li filed a class-action lawsuit against the organizers, supporters and participants of the Convoy in *Li v. Barber.*[24] The plaintiffs represented by Ms. Li are the residents, business owners and workers of the area of

[21] This ruling does not appear to be published. The information cited is from *Li v. Barber*, 2022 ONSC 1176, subsec. 31.

[22] House of Commons, Standing Committee on Finance, Evidence, 44-1, no. 21 (February 22, 2022), online: <ourcommons.ca/DocumentViewer/en/44-1/FINA/meeting-21/evidence#Int-11540238>; House of Commons, Standing Committee on Finance, "Invocation of the *Emergencies Act* and Related Measures: Report of the Standing Committee on Finance (June 2022) (Chair: Peter Fonseca), p. 20.

[23] See testimony of Jacob Wells: House of Commons, Standing Committee on Finance, Evidence, 44-1, no. 12 (March 3, 2022), online: <ourcommons.ca/DocumentViewer/en/44-1/SECU/meeting-12/evidence#Int-11556653>; *Ibid*, p. 21.

[24] *Li v. Barber*, 2022 ONSC 1176 (statement of claim), online: <ottawaconvoyclassaction.ca/claim-amended.pdf>.

the city affected by the Convoy. The class action is based on the tort of nuisance, seeking over $300 million in compensatory and punitive damages.[25]

On February 17, Ms. Li brought an *ex parte* application before Ontario Superior Court Justice MacLeod for an interlocutory injunction to freeze the defendants' financial assets before they could be dissipated (Mareva Injunction). The injunction applied specifically to the funds raised through the GSG crowdfunding campaign. The judge granted the application, and the reasons for his decision were released on February 22.[26]

The judge granted the injunction to freeze all financial assets, including cryptocurrency wallets, held by the defendants (many of whom referred to as "John Doe," as they were not yet identified) to ensure these assets would be available to compensate class action plaintiffs, if appropriate. The injunction targeted the project owners of the crowdfunding campaigns, in particular NPO "Freedom 2022 Human Rights and Freedoms."

With respect to the crowdfunding platforms, the effects of the order are less clear. In the order, GFM and GSG are identified and referred to as intermediaries potentially holding funds for the defendants.[27] In his reasons, however, the judge adds that the funds not yet released by the crowdfunding platform to the organizers or beneficiaries are not subject to the injunction.[28] However, based on the evidence presented by the plaintiff, the judge considers that the funds raised through the GSG platform are already held by the defendants and that GSG does not have control over these funds,

[25] *Ibid*. The plaintiffs in this case obtained an order from Superior Court Justice McLean requiring the Convoy participants to stop honking their horns. See: *Li v. Barber*, 2022 ONSC 1037 (court records from February 5 and 7); Irina Ceric and Jasminka Kalajdzic, "Policing Protest via the Civil Law: Class Actions, Injunctions, and the 'Freedom Convoy'" [2022] 70 Crim L Q 247. According to the authors, the injunction was hardly respected (260). It was the responsibility of the Ottawa police to ensure compliance.

[26] *Li v. Barber*, 2022 ONSC 1176.

[27] *Li et al v. Barber et al*, 2022 ONSC (order), online: <ottawaconvoyclassaction.ca/order-mareva.pdf>.

[28] *Li v. Barber, supra* note 26, subsec. 15: "Suffice to say that a crowdsourcing fund held by a fundraising platform is probably not the property of the intended beneficiaries until the funds are released. It would be difficult to argue that such a fund would fall within the ambit of a Mareva Injunction."

nor the ability to refund the donors,[29] which, as we will see in a moment, is not the case.

On February 28, the injunction was renewed, and then postponed, to allow certain defendants or intermediaries to deposit the financial assets being held, allowing thus the injunction against them to be lifted. Records show funds possibly derived from GFM's payment of $1 million to Tamara Lich, held in a TD Bank account, along with other proceeds from crowdfunding campaigns paid to a Mr. Garrah.[30]

With respect to GSG, the judge stated:

> [18] I am advised by Mr. Groot and by Mr. Wells that the defendant Freedom 2022 Human Rights and Freedoms was to have been a recipient of funds raised on the GiveSendGo platform, but it did not open a bank account to receive the funds prior to the granting of the injunction. As a consequence, the funds were never transferred. Mr. Wells advises that GiveSendGo is now returning those funds to the donors.
>
> [19] Ms. Jilesen takes the position that GiveSendGo is in breach of the injunction by taking this step. Ms. Adams also takes the position that GiveSendGo is in breach of the restraint order.
>
> [20] The question of a breach of the restraint order is not before the court today.
>
> [21] As set out in my original reasons, the funds which the Mareva Injunction intended to preserve were funds that were, at the time, in the possession or control of the Mareva Defendants and therefore potentially exigible property if the plaintiffs are successful in this proceeding. I indicated that I did not view

[29] The judge states: "I am satisfied by the evidence that the funds, whether they are in the form of currency or cryptocurrency, are now legally in the possession, power and control of the defendants who are the target of the motion (referred to in the motion material as the "Mareva Defendants"). I am also satisfied that the organizers of the protest and the Mareva Defendants have purposely arranged the control of the funds in this manner to avoid another scenario such as the GoFundMe situation. The funds have been purposely placed outside of the control of any fundraising platform. Moreover, the Mareva Defendants have been promoting the use of cryptocurrency such as bitcoin under the mistaken belief that it is untraceable and cannot be seized by a court or other legal authority." (*ibid,* subsec. 19–20)
[30] *Li v. Barber*, 2022 ONSC 1543, subsec. 8 and 15.

> property that was held by a fund-raising platform and had not been distributed as falling within that class.
>
> [22] Ms. Jilesen asked that I not rule definitively on that question today without the benefit of further affidavit material and a formal motion. In her submission, funds that were to have been distributed to Freedom 2022 as soon as it opened a bank account are its property and should fall into the class of assets to which the injunction attached. She argued that the question of whether GiveSendGo is in breach of the Mareva Injunction or whether Freedom 2022 is in breach by not taking the steps necessary to receive the funds should be questions for another day. I agree.
>
> [23] There is no motion for contempt before the court and no motion to expand the scope of the injunction. If the plaintiffs wish to bring such motions for relief against either GiveSendGo or Freedom 2022, they may do so.
>
> [24] For the moment, although Mr. Wells was present and is aware of the position of counsel for the plaintiffs (and counsel for the Attorney General) there is nothing for his company to formally respond to.

Therefore, since the GSG platform never released the funds to the project owner or beneficiaries of the crowdfunding campaign, these funds were apparently exempted from the injunction.

### 3.3.3 Financial Measures Based on the Emergencies Act

The *Emergency Economic Measures Order*[31] applies not only to Canadian banks and foreign banks authorized to operate in Canada, but also to collaborative and virtual currency platforms that solicit donations.[32] These entities are required to determine on a continuing basis whether they are in possession or control of property owned by a designated person and to cease dealings with that property.[33] A designated person is anyone who is engaged, directly or indirectly, in an activity prohibited by sections 2 to 5 of the *Emergency Measures Regulations.*[34] Prohibited activities include participating in a public assembly that leads to a breach of the peace by interfering with trade, the movement of persons or property, or the functioning of critical

[31] SOR/2022-22. The order was issued on February 15, 2022.
[32] *Ibid*, s. 3 a) and k).
[33] *Ibid*, s. 2 and 3.
[34] *Ibid*, s. 1 “designated person” and *Emergency Measures Regulations*, SOR/2022-21.

infrastructure, or by supporting the use of violence, or to "use, collect, provide, make available or invite a person to provide property" to facilitate such an assembly.[35]

The order authorizes any Government of Canada institution to disclose information that identifies a designated person to any financial entity (s. 6). Under the order, at least 250 accounts were frozen by financial institutions, according to the Royal Canadian Mounted Police.[36]

These measures ended as soon as the state of emergency was lifted. The only accounts that remained frozen after emergency measures were lifted were those subject to court orders.

## 4. Key Challenges

Taking into account the mandate I have been assigned, the background information provided in the previous sections highlights several challenges regarding the legal framework for donation-based crowdfunding and the governance of online crowdfunding platforms. Here is an overview of these challenges:

- ***Ownership of funds raised through a crowdfunding campaign***. Who owns these funds? The platform, the project owners, the Convoy organizers, or the participants benefiting from the campaign? This is a question raised in the interlocutory injunction granted by Justice MacLeod. The judge seems to believe that once the funds were handed over to the project owners or Convoy organizers, that money could then be used to compensate the class-action lawsuit plaintiffs.

- ***Crowdfunding platform's power over distribution of funds.*** What is the basis and scope of this power? GFM and GSG had significant control over the funds donated in support of the Convoy truckers. These platforms appear to view their position as having the discretion to terminate the campaign, to refund or refuse to refund donors, to determine which project owner receives the funds, to impose conditions, to withhold the funds and to donate surplus funds to a third-party organization.

- ***Identity and power of project owners and others involved in managing the funds.*** To whom must a crowdfunding platform pay the funds raised as part of a

[35] *Emergency Measures Regulations*, *ibid*, s. 5.
[36] Standing Committee on Finance, *supra* note 22, p. 9.

campaign? Can someone other than the person whose name appears on the campaign's dedicated page be in charge of managing the funds? What are the rights, powers and duties of those who receive the funds? In some cases, crowdfunding campaigns appear to be launched by an individual, while in other cases they are launched by a legal entity, or even by or on behalf of an informal group. Sooner or later, the funds are given to an individual or legal entity. It is important to know what their title is.

- ***Rights and legal recourse of campaign donors and beneficiaries.*** In the event that the funds are improperly managed by the platform or fund administrators, or if there are surplus funds, what legal recourse is available to donors and prospective beneficiaries?

- ***Compliance with the terms of the campaign.*** To what extent must the terms of a campaign be respected? During a campaign, can platforms, project owners or other fund administrators make changes or add clarifications to its terms? Changes appear to have been made to those of the GSG campaign. Initially, the purpose was to pay for fuel, food and lodging, and then it was about paying the protestors' legal fees—a cause not mentioned when the campaign was launched. It was also unclear who the campaign's beneficiaries would be; was it just for Convoy participants, or was it for people involved in other Canadian protests and blockades?

- ***Illegality of the campaign or of its use of donations; platform's powers and duties.*** If the campaign pursues an illegal objective or if the funds are used to finance an illegal activity, what are the legal consequences, and how should the funds be managed? Does the crowdfunding platform have the power, or even the duty, to terminate a campaign if it is illegal? In such a case, are donors to be refunded? GFM and GSG do not appear to have the same threshold for intervention. Some people praised GFM's decision to terminate the campaign, while others criticized it as "political."

- ***Illegality of the campaign or of its use of donations; Attorney General's or supervisory authority's power to intervene.*** What power does the federal or provincial government have with regard to terminating a crowdfunding campaign that is illegal or whose funds are being used to finance criminal activity? Is this power adequate?

- ***Governance of crowdfunding platforms***. Under current law, what are the regulations governing these platforms and how they operate? Are they adequate?

Crowdfunding platforms have been presented as neutral intermediaries, but this is clearly not the case. They give themselves a significant amount of authority in their terms of use. The discretion of these platforms is not clearly defined, and there is a risk of arbitrary decision-making.

- ***Challenges related to the international nature of crowdfunding.*** The major platforms are based in the United States, while donations come from different provinces, territories and countries. Since beneficiaries may be located outside the country, it can be a complex process to determine which law applies to the legal relationship between the platforms, project owners and other fund administrators, donors and beneficiaries. The international aspect of crowdfunding also makes it more difficult for Canadian supervisory authorities to intervene.

- ***Politicization of crowdfunding and protection of personal information.*** There is often a fine line between political movements and crowdfunding, which raises questions as to whether political party financing laws are respected. Also, the use of social media to promote crowdfunding campaigns, all while collecting personal information, raises important privacy issues.

## 5. Different Types of Crowdfunding

There are several types of crowdfunding, depending on the type of reward offered to contributors:

- In donation-based crowdfunding, contributors receive nothing in return.
- In donation-based crowdfunding with a reward, contributors receive a token of appreciation such as a thank you or an object of symbolic value.
- In rewards-based crowdfunding, contributors make a donation in exchange for goods or services, such as one of the products developed thanks to the donated funds. This often involves what is referred to as “prepurchase” or “presale.”
- In lending-based crowdfunding, contributors receive their money back, with or without interest.
- In equity-based crowdfunding, contributors receive equity ownership and become shareholders or members of the corporation or group. Sometimes, they are offered bonds or preferred shares instead.

Based on these different types of crowdfunding, contributors can have a range of motivations, from the more charitable intent of donation-based crowdfunding to seeking a return on investment with equity-based crowdfunding.

Of the different categories, donation-based crowdfunding is the least regulated. Rewards-based crowdfunding is governed by sales or service contract regulations, and most likely by consumer law.[37] Lending-based or equity-based crowdfunding is governed by securities law.[38]

This report focuses exclusively on donation-based crowdfunding.

# 6. Major Donation-Based Crowdfunding Platforms in Canada

The most established platform is GFM, a joint-stock company incorporated in 2010 under Delaware law, specializing in donation-based crowdfunding. According to its president, Juan Benitez, the company has raised over $17 billion in over 19 countries since its inception. In Canada, $200 million are donated each year through the platform. GFM has over 400 employees.[39]

GFM is a well-organized leader in the field of crowdfunding. The company has taken an interest in legislative reform proposals that seek to regulate the practice of donation-based crowdfunding and has offered valuable insight on the subject. For example, GFM served as a consultant to the United States Uniform Law Commission working group in drafting a uniform act on donation-based crowdfunding. The company also worked with the Uniform Law Conference of Canada working group as it developed a similar project in Canada. I will discuss this in further detail below.

The GSG platform, which calls itself "the # 1 Free Christian Fundraising Site,"[40] is a joint-stock company incorporated in 2014 under Delaware law. Jacob Wells, one of the company's founders, serves most often as its representative. Prior to the "Freedom Convoy" crowdfunding campaigns, GSG had a limited presence in Canada.[41] In the United States, the platform has been the focus of several

[37] See Michelle Cumyn, "Le sociofinancement" in Charlaine Bouchard, Ed., *Droit des PME*, 2nd ed., Cowansville, Yvon Blais, 2021, 337 at pp 359 and following.
[38] See RLRQ c V-1.1, r 21, *Regulation 45-110 respecting Start-up Crowdfunding Registration and Prospectus Exemptions* adopted June 23, 2021, by the Canadian Securities Administrators; Cumyn, *ibid* pp 345 and following.
[39] See testimony of Juan Benitez, President of GFM in: Standing Committee on Public Safety and National Security, *supra* note 23, online: <ourcommons.ca/DocumentViewer/en/44-1/SECU/meeting-12/evidence>.
[40] See GiveSendGo website, online: <givesendgo.com/>.
[41] See Standing Committee on Public Safety and National Security, *supra* note 23.

controversies, including security flaws. On February 11, 2022, a group of hackers successfully attacked the site and retrieved the list of donors for the "Freedom Convoy 2022" campaign.[42]

The Canadian company FundRazr is a donation-based crowdfunding platform that offers perks to donors, but without presales.[43] Yoyomolo is another Canadian crowdfunding platform.[44]

Also in Canada, the platform CanadaHelps specializes in donation-based crowdfunding for charity organizations, essentially by helping Canadian charities organize fundraisers through its platform. CanadaHelps is itself a registered charity that aims to distinguish itself from other platforms that have little or no regulation.[45]

While the above-mentioned platforms focus on donation-based crowdfunding, others such as the Quebec-based platform La Ruche, along with the U.S.-based Indiegogo, host a wide range of projects. Sometimes, a single campaign can be both donation-based and rewards-based, i.e., in exchange for goods or services.[46]

Facebook and Instagram have also become major players in the world of donation-based crowdfunding since they created their own fundraising tools in 2015.[47]

Data on the subject is vague, but the crowdfunding craze is showing no signs of slowing down.[48] It is estimated that there are between 600 and 1,500 donation-based crowdfunding platforms throughout the world.[49] This does not include NPOs,

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[42] See "GiveSendGo" online: *Wikipedia* <en.wikipedia.org/wiki/GiveSendGo>, last updated September 28, 2022.

[43] "Crowdfunding Perks and Wishlists," online: *FundRazr* <fundrazr.com/pages/perks-wishlist-crowdfunding>.

[44] "About Yoyomolo," online: *Yoyomolo* <yoyomolo.com/pages/about-yoyomolo.aspx>.

[45] Marina Glogovac, "Fundraising, Crowdfunding, and the Emergency Measures Act" (February 17, 2022), online: *CanadaHelps* <canadahelps.org/en/giving-life/marina-on-giving/fundraising-crowdfunding-and-the-emergency-measures-act/>.

[46] See, for example, some of the projects presented on the La Ruche platform, online: <laruchequebec.com/>.

[47] See: Naomi Gleit, "People Raise Over $2 Billion for Causes on Facebook" (September 19, 2019), online: *Meta* <about.fb.com/news/2019/09/2-billion-for-causes/>, accessed September 26, 2022.

[48] For a comprehensive overview of the available data: Lloyd Hitoshi Mayer, "Regulating Charitable Crowdfunding" (2022) 97:4 Ind LJ 1375, p. 1377–99.

[49] Mayer, *ibid*, p. 1381 and cited sources.

individuals or groups, which, as previously mentioned, can add donation pages to their own websites.[50]

## 7. Politicization of Crowdfunding

The use of crowdfunding for political purposes seems to be a growing phenomenon. Crowdfunding provides support for political or judicial activism,[51] both of which are detailed in a fascinating paper on the important role of crowdfunding in the 2019 Hong Kong protests.[52] The author outlines the many advantages of crowdfunding: the fact that it is simple, spontaneous, informal, engaging and international, as well as its ability to outwit the authorities. One can draw parallels with how crowdfunding was used during the Convoy.

Another telling example is the "We Fund the Wall" campaign, which raised over $25 million through the GFM platform. This project was aimed at helping fund part of the wall that President Donald Trump had promised to build along the U.S.-Mexico border.[53]

Several politically-charged crowdfunding campaigns have led to scandals, prompting some platforms to distance themselves from certain projects and others to welcome them. This may lead to platforms becoming polarized to some degree, or rather, specialized, perhaps. Here are a few examples related to judicial activism.

GFM discontinued a campaign to help a bakery owner pay her legal fees when she was sued for refusing to bake a wedding cake for a same-sex couple. The funds already raised before the campaign's removal were handed over to the project owner,

[50] See above, section 3.2.4.

[51] See Joe Tomlinson, *Justice in the Digital State: Assessing the Next Revolution in Administrative Justice*, Bristol (UK), Policy Press, 2019, c 2 "Crowdfunding and the changing dynamics of public interest judicial review."

[52] Julius Yam, "Political Crowdfunding of Rights" (2020) 50:2 Hong Kong LJ 395.

[53] After the campaign was launched (and presumably at GFM's request), the project owner formed an NPO to collect donations. This did not stop several individuals, including Steve Bannon, from diverting some of the funds to themselves. They are facing criminal charges for fraud. For a summary, see: "We Build the Wall," online: *Wikipedia* <en.wikipedia.org/wiki/We_Build_the_Wall>, last updated September 28, 2022.

and a new campaign was launched through another platform.[54] GFM then changed its eligibility policy to exclude this type of campaign. Campaigns that are deemed discriminatory and that provide legal support to a person accused of a violent or financial crime are banned.[55]

A similar case occurred in France, involving a crowdfunding campaign to help file a lawsuit against a National Front candidate who had made homophobic remarks. The campaign was rejected by the Ulule platform, but the association behind the project was able to move forward using a NationBuilder site.[56]

The Goteo platform allowed a citizen collective to raise money for a fraud and money laundering lawsuit against former Spanish politician Rodrigo Rato, who served as the managing director of the International Monetary Fund and as the president of Bankia. The collective also created secure websites for citizens to anonymously submit documents in support of the lawsuit. Rodrigo Rato ended up receiving a four-and-a-half-year prison sentence.

To some extent, the class-action lawsuit by Ottawa residents follows the same trend. Faced with police inaction, citizens took it upon themselves to enforce the law, acting as a "private attorney general," as aptly described by Ceric and Kalajdzic.[57]

While some more high-profile campaigns tend to be very political, it is important to remember that the vast majority of crowdfunding campaigns are founded on mutual aid and the desire to carry out community projects.

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[54] See: Valerie Richardson, "Sweet Cakes by Melissa crowdfunder breaks record with $352K," *The Washington Times* (July 14, 2015), online: <washingtontimes.com/news/2015/jul/14/sweet-cakes-melissa-crowdfunder-breaks-record-352k/>, accessed September 26, 2022.

[55] See "Terms of use," under "Prohibited Conduct," no. 8 and 9, online: *GoFundMe* <gofundme.com/en-ca/c/terms>, accessed September 26, 2022.

[56] Aude Lorriaux, "Le crowdfunding de plainte en justice a-t-il un avenir?," *Slate* (September 17, 2015), online: <slate.fr/story/106919/crowdfunding-plaintes-en-justice>, accessed September 26, 2022.

[57] *Supra* note 25, 247; see also above, sections 3.2.4 and 3.3.2.

# 8. General Law Applicable to Crowdfunding

There is little or no case law on donation-based crowdfunding in Canada, and very little doctrine on the subject. The following section is therefore exploratory in nature and should be interpreted with caution.

## 8.1 General Law Applicable in Québec

Donation-based crowdfunding involves a gift, a contract named by the *Civil Code of Québec* in sections 1806 and the following. This definition also applies when a low-value reward is promised to the donor.[58]

The three essential components of a gift are:

> 1) the donor's intention to benefit the donee (donative intent or *animus donandi*)[59]
>
> 2) the donee's acceptance of the gift[60]
>
> 3) the immediate transfer from donor to donee or, at least, the immediate creation of an obligation to pay[61]

In theory, a gift must be in notarial form, but if the object of the gift is movable property, the gift is valid on the condition that the donee receives the property immediately; this

[58] See *Messier v. Béique* [1929] RCS 19; *Martin v. Dupont*, 2016 QCCA 475, subsec. 56.
[59] *Tétrault v. Gagnon* [1962] RCS 766; *Deschênes v. Gagné*, 2007 QCCA 123, subsec. 70; *Trépanier* v. *Murray*, 2008 QCCS 4311, subsec. 21; *Lacroix (Syndic de)*, 2014 QCCA 1994, subsec. 34; *Martin v. Dupont*, *ibid*, subsec. 46 and 53. Donative intent is not presumed and must, if necessary, be proven. See Pierre Ciotola, *De la donation*, 2nd ed., Montréal, Wilson & Lafleur, 2006, p 1.
[60] S. 1386 CcQ. S. 755 of the *Civil Code of Lower Canada* expressly mentioned this requirement in the rules for donation. It is not repeated in full in the chapter on donation in the *Civil Code of Québec*, but it is still applicable, as a donation is a contract. See: Québec, *Commentaires du ministre de la Justice. Code civil du Québec*, Québec, Les Publications du Québec, 1993, t I, p. 1131; Jean-Louis Baudouin, Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th ed., Cowansville, Yvon Blais, 2013, subsec. 54.
[61] S. 1806–1807 CcQ; *Hennebury v. Hennebury*, [1981] CA 136; *Family Law – 504*, [1990] RJQ 302 (CA). See also *GL v. AG*, 2006 QCCS 1314, subsec. 42 and following.

is referred to as a manual gift.[62] The promise to give a gift is not legally binding under Québec law.[63]

In the context of crowdfunding, the difficult question that arises is knowing who qualifies as the donee. Is it the project owner, or is it the campaign's beneficiary?

If the project owner is considered the donee, this person can use the funds as they wish, without having to comply with the terms of the campaign.[64] In fact, donors have very limited recourse for nullity or revocation of the donation.[65] This also means that that funds could be seized by the project owner's creditors.

If one considers instead that the crowdfunding campaign's beneficiary is the donee, this raises the issue of whether the donations are valid, since the gift must be accepted by the donee. This acceptance is considered valid if the campaign is launched on behalf of and with the knowledge of a specific beneficiary, because the existence of an agency relationship can be inferred. If the project owner receives the donations as an agent for the beneficiary, the donations are valid.

If there is no agency relationship and if the project owner is not considered the donee, donations are void because they are not validly accepted.[66] However, it often happens that a campaign is launched without the knowledge of the beneficiaries.[67] In other cases, the beneficiaries are undetermined. Some projects have too broad a scope to even discuss beneficiaries, such as in the case of a campaign to protect a wetland and preserve its biodiversity.

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[62] S. 1824 CcQ; *Spina v. Sauro*, [1990] RL 232 (CA); *Therriault v. Clément*, [1992] nºAZ-92031262 (CQ); *Québec (Deputy Minister of Revenue) v. Vidal*, [1992] nº AZ-92038111 (CQ); *Family Law — 2760*, [1997] no. AZ-97021739 (CS). The transfer of funds from one account to another meets this requirement: *Spina v. Sauro, ibid*.

[63] According to s. 1812 CcQ, the beneficiary who has relied on the promise may, however, claim damages.

[64] It may be tempting to invoke the stipulation for another or the gift with a charge to compel the project owner seen as donee to use the funds in the way promised. However, the beneficiary of a stipulation for another must be determinate or determinable (s. 1445 CcQ), which is often not the case. As for the charge in a gift with a charge, it cannot be the entire consideration for the donation. In either case, in order for the project owner to be a donee, there must be an intention to benefit the project owner personally.

[65] See s. 1400–1401 and 1836 and following, CcQ

[66] It should be remembered that in Québec law, a gift must be made by notarial act, except in the case of a manual gift (*supra* note 62). The manual gift implies that the donee gains immediate possession of the donated property.

[67] Mayer, *supra* note 48, p. 1393–94.

In other words, treating the project owner as the donee would not satisfy donors who expect the funds to be used as specified in the terms of the campaign. On the other hand, if one finds the beneficiary to be the donee, the validity of donations could be challenged in the case of many crowdfunding campaigns.

I have not found any decision in Québec case law relating to donation-based crowdfunding that would confirm this analysis.

## 8.2 General Law applicable in Common Law Provinces and Territories

As with the province of Québec, I have not found any decisions in the common law provinces and territories that addresses the legal characterization of donation-based crowdfunding.

There have been at least two decisions in Canadian case law, however, regarding the characterization of public appeals for donations (or public subscription fundraising). In accordance with British case law,[68] Canadian judgments use the term "trust" to refer to funds resulting from public donation.[69] Canadian doctrine follows the same approach,[70] which is also enshrined in Saskatchewan law.[71]

Public appeals can be considered the precursor to crowdfunding, prior to the rise of online platforms and social media. It is therefore likely that under Canadian common law, the "trust" characterization would apply to donation-based crowdfunding, in keeping with previous doctrine on public appeals.

This solution can be easily applied since there is no formal requirement in common law for creating a trust. A trust may be established out of a unilateral act by which a person declares to hold property for another person or to solicit gifts for another person (declaration of trust). It may also be implied.

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[68] See, for example: *Re the Trusts of the Abbott Fund*, [1900] 2 Ch 326; *Re Gillingham Bus Disaster Fund*, [1958] 1 All ER 37, affd [1959] Ch. 62 (CA).

[69] *In re YMCA Extension Campaign Fund* [1934] 3 WWR 49; *Halifax School for the Blind v AG* [1935] 2 DLR 347.

[70] Canada, Law Reform Commission of British Columbia, *Report on Informal Public Appeal Funds*, LRC 129, January 1993, p. 4, online: <bcli.org/publication/129-informal-public-appeal-funds/>; Richard Thompson, "'Public' Charitable Trusts Which Fail: An Appeal for Judicial Consistency" (1971) 36 Sask L Rev 110; L Sheridan, "Cy-Près in the Sixties: Judicial Activity" (1968) 6 Alberta L Rev 16, 24.

[71] *Informal Public Appeals Act*, SS, c I-9.0001, s. 4.

Perhaps surprisingly, the same characterization of a trust does not seem to apply in U.S. law. Instead, it would be a gift to the project owner or to the beneficiary of the donations.[72] This solution is surely linked to the structure adopted by GFM for donation payments, wherein project owners have the choice of receiving the funds themselves, or having them sent directly to the beneficiary. This seems to be what determines who owns the funds.

Returning to the subject of Canadian law, it must be noted that if project owners solicit donations for themselves, there is no trust. A trust applies only if project owners are soliciting donations for one or more beneficiaries, or for a project that benefits persons other than the project owners themselves. In the case of charities and NPOs soliciting donations as part of their mission, these organizations are generally seen as soliciting donations for themselves. This solution seems to apply even if these organizations name a specific victim or cause as the beneficiary of the funds.[73]

In any case where the crowdfunding campaign qualifies as a trust, it is necessary to determine who the trustees are. These are the people who have control over how the funds are managed and used. Usually, these people are the project owners and others who have or who obtain that control. If the crowdfunding platform becomes involved in the administration and disposition of the funds, this platform should be considered a trustee. On the other hand, a platform that does not interfere, or a financial intermediary that holds funds for the sole purpose of transferring them to the recipient, is not considered a trustee.

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[72] See: Jamie Drennen, "An Analysis and Prediction of Federal Taxation as it Pertains to Crowdfunding" (2017) Duquesne Bus L J 144, p. 152, 154–155; Mayer, *supra* note 48, p. 1394–95: "Some crowdfunding efforts start out as efforts to raise funds for a cause […] As a practical matter, such efforts become a campaign to raise funds for a particular organization that supports the cause at issue or a number of campaigns to raise funds for individuals in need, or a combination of the two, since an abstract cause cannot actually receive any funds. […] Donative campaigns focused on specific causes therefore collapse into the other two categories because someone has to actually receive the funds raised."

[73] See *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23:

> **31.** A corporation owns any property of any kind that is transferred to or otherwise vested in the corporation and does not hold any property in trust unless that property was transferred to the corporation expressly in trust for a specific purpose or purposes.

The Act also states:

> **33.** Subject to the limitations accompanying any gift and the articles or by-laws, a corporation may invest its funds as its directors think fit.

Trustees must avoid commingling their own funds with the funds they administer. Funds held in trust cannot be seized by the trustee's creditors. Trustees have strict duties to manage funds in accordance with the purpose of the trust. In that sense, the trust model provides significant protection to a crowdfunding campaign's donors and beneficiaries.

There are, however, challenges with respect to creating a non-charitable purpose trust without determinate or determinable beneficiaries. Such a trust may fail because it does not comply with the rules regarding certainty of object. Except in jurisdictions where the law permits, such a trust cannot apply the cy-près doctrine, which would validate the trust by specifying its purpose.[74]

Sometimes, a trust created through a public appeal or crowdfunding campaign starts out as valid, but the funds cannot be used in their entirety for their intended purpose. This can occur for a number of reasons: the funds are not sufficient to complete the project; there are surplus funds after the project has been completed; or it has become impossible, for one reason or another, to complete the project. Again, the rules are complex and can be difficult to apply, depending on whether the purpose of the trust is considered charitable or not. Broadly speaking, there are three options: reimburse the donors (resulting trust), allocate the funds to another purpose as closely related to the original purpose as possible (cy-près doctrine), or declare the funds "bona vacantia," which means that they are returned to the Crown. Some of these solutions may be impractical, such as reimbursing the donors, while others may not be desirable, such as returning funds to the Crown. A number of public appeal cases illustrate the inadequacy of these rules.[75]

The injunction granted by Justice MacLeod raises the question of who owns the funds raised through a crowdfunding campaign. He states:

> [15] A more difficult question is whether the plaintiffs have a claim against the funds they are attempting to freeze. Just because a fund was created to support the protest does not necessarily mean that a judgment against an individual defendant would attach to that fund. Fundraising law is complex. People who start a fundraiser may have a duty to the donors. Funds raised

[74] See Lyn L Stevens, "Certainty and Charity. Recent Developments in the Law of Trusts" (1974) 52 Can Bar Rev 372; Johanna C.C. Caithness, "Legal Issues Associated with Informal Public Appeals and Crowdfunding" (2020) 39 Estates, Trusts & Pensions J. 271.
[75] See: *Re Gillingham Bus Disaster Fund*, supra note 68; *In re YMCA Extension Campaign Fund*, *supra* note 69; Caithness, *ibid*.

> from the public may be impressed with a trust or in some cases may fall under the jurisdiction of the Public Guardian and Trustee. Suffice to say that a crowdsourcing fund held by a fundraising platform is probably not the property of the intended beneficiaries until the funds are released. It would be difficult to argue that such a fund would fall within the ambit of a Mareva Injunction.
>
> [16] The pertinent question for this motion is whether the funds the plaintiff seeks to enjoin are now owned or controlled by the defendants who are the target of the injunction and not whether the fundraisers owe obligations to donors or others. It is fundamental to the granting of a Mareva Injunction that the defendants are attempting to dissipate funds to which a judgment might attach.
>
> [17] A fundraising platform which controls the funds and acts like a granting agency might have the power to grant or withhold funds in its own discretion. An example of this occurred earlier in February. The protestors had originally raised a considerable sum of money through a GoFundMe campaign. At a certain point GoFundMe concluded that, in its view, the original peaceful protest had mutated into something more sinister and unlawful which was a violation of its terms service. It froze the funds and returned them to the donors. Evidently, in that case, the ownership of the asset had not passed to the defendants.
>
> [18] The situation is different if the funds are in the hands of the defendants and no longer controlled by either the original donors or the fundraising platform. In that case the gift has vested [reference omitted].

This passage demonstrates just how vague the current law is when it comes to characterizing donation-based crowdfunding, as well as identifying who has control over the funds and the nature of their rights with respect to these funds.

## 8.3 Uniform Crowdfunding Acts Proposed by the Uniform Law Conference of Canada

In response to the shortcomings of the law as it applies to public appeals, the Uniform Law Conference of Canada (ULCC) adopted two uniform acts: one for the common

law provinces and territories in 2011, and the other for Québec in 2012.[76] Only Saskatchewan has enacted the uniform act.[77]

The ULCC recently revised and replaced its uniform act with one better suited to the current crowdfunding landscape. There are two specific versions of the uniform crowdfunding act:

- The *Uniform Benevolent and Community Crowdfunding Act* (UBCCA), proposed for adoption in all Canadian provinces and territories except Québec.[78] This act was adopted by the Conference in 2020 and has not yet been enacted by any province or territory.

- The *Loi uniforme sur le sociofinancement à titre gratuit** (LUSTG), proposed for adoption in Québec. This act was adopted by the Conference in 2022 and will be made public in the near future. [*Translator's note: uniform act for socio-financial fundraising when no consideration is involved]

The uniform acts amend and complete the law applicable to donation-based crowdfunding for the benefit of third parties. These acts affirm (in the case of Québec) or confirm (in the case of the common law provinces and territories) that funds raised through a crowdfunding campaign are held in trust (UBCCA, s. 3(1); LUSTG, s. 4).

These acts specify who qualifies as a trustee; this is generally the project owner and any other person who is performing the role of a trustee, which may include the crowdfunding platform if it is involved in the administration and disposition of funds (UBCCA, s. 4; LUSTG, s. 7 and 8). The acts provide a framework for the administration of funds and specify the rights and remedies of donors and beneficiaries.

In Québec, the uniform act would validate donations since they would be accepted by the project owner, who would be acting as a trustee, and they would be added to the trust estate.[79] The Civil Code recognizes three categories of trusts, each applicable to

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[76] Uniform Law Conference of Canada, *Uniform Informal Public Appeals Act*, Winnipeg, August 2011; Whitehorse, August 2012, online: <ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Informal-Public-Appeals-Act>.

[77] *Informal Public Appeals Act*, *supra* note 71.

[78] Uniform Law Conference of Canada, *Uniform Benevolent and Community Crowdfunding Act*, August 2020, online: <ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Benevolent-and-Community-Crowdfunding-(1)>.

[79] See s. 1283, CcQ.

different circumstances: 1) a personal trust, if the crowdfunding campaign is launched on behalf of one or more determinate or determinable beneficiaries (s. 1267 of the Civil Code); 2) a private trust, if the purpose of the crowdfunding campaign is to raise funds for a specific use, either for the benefit of potential beneficiaries or for another private purpose (s. 1268 of the Civil Code); 3) a social trust, if the crowdfunding campaign has a "purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose" (s. 1270 of the Civil Code).

In the other provinces and territories, a crowdfunding campaign described as a non-charitable purpose trust would be considered valid (UBCCA, s. 3(2)).

The uniform acts clarify the issue of ownership in relation to donations. Those who administer these donations are considered trustees. When the funds are transferred to the beneficiaries, the beneficiaries gain full ownership of those funds.

The purpose of the trust is determined by the terms of the crowdfunding campaign. It follows that the funds must be used in accordance with that purpose. Under certain conditions, the terms of a crowdfunding campaign can be modified, but any changes must reflect the purpose of the campaign (UBCCA, s. 6; LUSTG, s. 21).

The uniform acts allow any person who does not wish to have a crowdfunding campaign launched for their benefit or on their behalf to terminate or be excluded from the campaign. The crowdfunding platform is then required to honour this request (UBCCA, s. 25; LUSTG, s. 22).

The uniform acts provide a scheme for distributing surplus funds. The preferred solutions are to return the surplus to the beneficiary or to an organization whose purpose is similar to that of the campaign (UBCCA, s. 9–12; LUSTG, s. 27–34).

The uniform acts allow any interested person, such as a donor, trustee or beneficiary to seek remedy with the court in the event of difficulty. The court has broad powers of action (UBCCA, s. 10; LUSTG, s. 34).

The Québec version of the uniform act provides that in the event of a breach of the law or public order, any interested person may ask the court to terminate the crowdfunding campaign. Donors must then be reimbursed, unless a court orders otherwise (LUSTG, s. 23). It is understood that the crowdfunding platform has the right to terminate the campaign under the same conditions.

It is interesting to note that the Uniform Law Commission (ULC) in the United States initiated a uniform donation-based crowdfunding act, modelled on the Canadian version. However, the ULC moved away from the trust model that initially served as

the basis for the project. A preliminary draft circulated by the Commission in 2020 nevertheless imposes certain fiduciary duties on the project owner and anyone else in charge of administering the funds. The ULC's draft has been put on hold.[80]

It would be beneficial for the provinces and territories of Canada to enact the ULCC's uniform acts as soon as possible to foster greater legal certainty in this area.

## 8.4 Governance of Crowdfunding Platforms Under Private Law

The purpose of uniform acts is not to regulate crowdfunding platforms. However, the acts would indirectly impose certain restrictions on the platforms. A crowdfunding platform that acts as a trustee by becoming involved in the administration and disposition of funds would be subject to the strict duties that apply to trustees.

The platform could not impose or authorize the funds to be used in a way that does not respect the project owner's powers or duties and the terms of the campaign. For the distribution of surplus funds, the scheme provided for in the uniform acts would apply. In short, these acts would limit the discretion of crowdfunding platforms.

This would allow donation-based crowdfunding to be carried out in a more predictable legal environment that is better suited to the reality of this type of fundraising.

## 8.5 Rules of Private International Law

Crowdfunding campaigns often extend beyond the boundaries of a single jurisdiction.

In the event of a dispute between the donors, the project owner and the beneficiaries, or a combination thereof, it would be necessary to enforce the rules of private international law applicable to the province or territory of the forum. It is unlikely that these parties would consider choosing the law applicable to their legal relationship. The connecting factors recognized by the private international law of the forum would therefore be determinative.

If a donor, project owner or beneficiary is in a dispute with the crowdfunding platform, the platform's terms of use generally stipulate that the dispute must be submitted to

[80] See: Uniform Law Commission, *Fundraising Through Public Appeals Act* (Draft), March 10, 2020 (unpublished). An earlier version dated June 6, 2019, can be found online: <uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1ce51aeb-a39b-d755-2114-5a192e67606e>.

arbitration and that class actions are excluded.[81] If it is not prohibited or neutralized by law, such a clause could be deemed unjust.[82]

Adopting a uniform legal framework across Canada would reduce uncertainty caused by a conflict of law or forum.

# 9. Public Law Applicable to Crowdfunding

Given the issues mentioned above, public law may have a role to play in regulating donation-based crowdfunding. Without specific sources on the subject, it is difficult for me to comment on how this law would be applied, especially since it is not part of my expertise, which is more in the area of private law. For that reason, I will approach the subject with caution, focusing on federal law.

## 9.1 The *Criminal Code*

Crowdfunding can be used to commit a variety of criminal acts.

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[81] See, for example, the terms of use under "Disputes", online: *GoFundMe* <gofundme.com/en-ca/c/terms>, accessed September 26, 2022: "**Arbitration; Class Action Waiver**: YOU AGREE THAT ALL DISPUTES BETWEEN YOU AND US OR ANY OF OUR OFFICERS, DIRECTORS OR EMPLOYEES ACTING IN THEIR CAPACITY AS SUCH (WHETHER OR NOT SUCH DISPUTE INVOLVES A THIRD PARTY) WITH REGARD TO YOUR RELATIONSHIP WITH US, INCLUDING WITHOUT LIMITATION DISPUTES RELATED TO THESE, YOUR USE OF THE SERVICES, AND/OR RIGHTS OF PRIVACY AND/OR PUBLICITY, WILL BE RESOLVED BY BINDING, INDIVIDUAL ARBITRATION AND YOU AND WE HEREBY EXPRESSLY WAIVE TRIAL BY JURY. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION. YOU UNDERSTAND AND AGREE THAT, BY ENTERING INTO THESE TERMS, YOU AND WE ARE EACH WAIVING OUR RIGHT TO A TRIAL BY JURY OR TO PARTICIPATE IN A CLASS ACTION."

[82] *Uber Technologies Inc. v. Heller*, 2020 SCC 16. Section 3117 of the *Civil Code of Québec* precludes a clause that has the effect of, "depriving the consumer of the protection afforded to him by the mandatory rules of the law of the State where he has his residence." Moreover, section 3149 of the *Civil Code of Québec* could invalidate a choice of forum clause that would have the effect of ousting the jurisdiction of the courts of Québec, the platform user's place of residence. See *Douez* v. *Facebook Inc*, 2017 SCC 33, [2017] 1 R.C.S. 751, the solution of which was repeated in *Demers v. Yahoo! Inc*, 2017 QCCS 4154.

The most common offences are most likely fraud (s. 380(1) CCC), false pretence (s. 362(1) CCC), theft (s. 330(1) CCC) or breach of trust (s. 336 CCC), usually on the part of the project owner. How these offences are enforced depends in part on private law, which defines who owns the funds and in what capacity, as well as how these funds are to be disposed of.[83]

Crowdfunding is not usually seen as a way to launder money or proceeds of crime, since donations most often consist of small amounts (s. 462.31(1) CCC).[84] However, this offence was reportedly applied in connection with the Hong Kong protests, as well as in Florida for the misappropriation of funds raised through the "We Fund the Wall" campaign.[85]

There is also a risk of crowdfunding campaigns being used to provide financial support for criminal activities. It is not always immediately obvious that such an offence is taking place. For example, in 2015, the GFM platform terminated a campaign that had raised over $580,000 to free "Yazidi and Christian sex slaves who had been captured by the Islamic State terrorist group." GFM was heavily criticized for its decision, which was seen as, allegedly, political. This was however a justified decision, as the project owner intended to use the funds to ransom the captive women from the terrorist organization.[86]

In the more serious cases, the *Criminal Code*'s provisions on the financing of terrorism could be applied. Terrorist activity is broadly defined and includes several types of

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[83] For the impact of crowdfunding fraud, see Mayer, *supra* note 48, p. 1395–99. It is important to distinguish false pretence from breach of trust. In the case of breach of trust, the property is obtained legally, but its misuse is what characterizes the offence. In the case of fraud, the property is obtained in a fraudulent manner.

[84] See Michelle Gallant, "Using an Anti-Money Laundering Terrorist Finance Approach to Harness a Convoy" [2022] 70 Crim L Q 292, 304–305.

[85] Brian Schwartz, "Former Trump advisor Steve Bannon pleads not guilty in alleged border wall fundraising scheme", *CNBC* (August 20, 2020), online: <cnbc.com/2020/08/20/former-trump-advisor-steve-bannon-arrested-on-charges-of-defrauding-donors-in-fundraising-scheme.html>, accessed September 26, 2022.

[86] See: Caroline Piquet, "Steve Maman, l'homme d'affaires qui rachète les esclaves sexuelles de Daech," *Le Figaro International* (August 20, 2015), online: <www.lefigaro.fr/international/2015/08/20/01003-20150820ARTFIG00033-steve-maman-l-homme-d-affaires-qui-rachete-les-esclaves-sexuels-de-daech.php>, accessed September 26, 2022; Jean-François Bégin, "Libération d'esclaves sexuelles détenues par l'EI : une campagne illégale ?" *La Presse* + (August 31, 2015), online: <plus.lapresse.ca/screens/f56547ac-e675-44c5-b390-e178e907f5c7__7C__zul-Npg_caCb.html>.

attacks on persons, property, or public or private systems, as long as these acts are committed:

- for a political, religious or ideological purpose
- or "in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada" (s. 83.01(b) CCC).

Any project owner who raises funds for the purpose of financing a terrorist activity as defined above could be found guilty of financing of terrorism (s. 83.02 CCC). This section could even apply to donors, provided they know that the funds are intended to be used, in whole or in part, to finance a terrorist activity. As for the crowdfunding platform, it can be targeted if it makes available "any financial or other related services," intending that they be used or even "knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity" (s. 83.03 CCC).

It should be noted that a restraint order can be issued, pursuant to s. 490.8 of the *Criminal Code,* if it appears that the funds will be used in the commission of a serious criminal offence—a measure that was applied during the Convoy (see section 3.3.1 above).

A key step in enforcing the criminal law would be to clarify the private law as it applies to donation-based crowdfunding, by specifying who holds the funds and in what capacity.

## 9.2 Proceeds of *Crime (Money Laundering) and Terrorist Financing Act*

The main purpose of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* is to combat terrorist activities and organized crime by facilitating the detection of such activities and by simplifying investigations.[87] For example, this law requires financial services providers to report certain transactions deemed risky and to establish record keeping and client identification requirements. It was for this

[87] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act,* S.C. 2000, c 17, s. 3. See Gallant, *supra* note **Error! Bookmark not defined.**.

purpose that the act established the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC).

FINTRAC is "Canada's financial intelligence unit and anti-money laundering and anti-terrorist financing regulator."[88] The Centre's main purpose is to ensure the compliance of businesses subject to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and its related regulations. It does this by collecting information from these businesses and disclosing it to the appropriate department for investigation. The businesses subject to the act are mainly Canadian financial institutions and money services businesses, or foreign-controlled enterprises operating in Canada.

On April 5, 2022, Canada adopted regulations to include crowdfunding platforms in the above-mentioned framework. These changes can be seen as a continuation of the financial measures outlined in the *Emergency Economic Measures Order.*[89] Crowdfunding platforms are now "covered as money services businesses (MSBs) or foreign money services businesses (FMSBs)."[90] As a result, they are under new obligations with FINTRAC:

- "register with FINTRAC
- develop and maintain a compliance program
- carry out know-your-client requirements, including verifying the identity of persons and entities for certain activities and transactions
- keep certain records, including records related to transactions and client information
- report certain transactions to FINTRAC."[91]

There are two definitions crucial to determining which new businesses are subject to these obligations. A crowdfunding platform is defined as a website, application or other software "that is used to raise funds or virtual currency through donations."[92] Crowdfunding platform services are defined as "the provision and maintenance of a

[88] Government of Canada, "Mandate of the Financial Transactions and Reports Analysis of Canada," online: <fintrac-canafe.canada.ca/fintrac-canafe/1-eng>.
[89] See above, section 3.3.3.
[90] *Regulations Amending the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations and the Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations*, TR SOR/2022-76, (2022), Gaz C II, v 156, no. 9.
[91] Government of Canada, "Crowdfunding platforms and certain payment service providers must register with FINTRAC and the definition of 'EFT' has been amended," online: <fintrac-canafe.gc.ca/notices-avis/2022-04-27-eng?wbdisable=true>; SOR/2022-184, art 29.1.
[92] Regulations, *Ibid,* s. 1(2).

crowdfunding platform for use by other persons or entities to raise funds or virtual currency for themselves or for persons or entities specified by them." These obligations apply to any business providing crowdfunding platform services.

Crowdfunding platforms that allow both donations and presales would likely be targeted. But, what about donation pages embedded on websites belonging to organizations or movements, such as that of the above-mentioned Ottawa Fund?[93] In this case, the site owner is not maintaining the site to allow someone else to raise funds. Therefore, this site does not appear to be subject to the obligations. However, the company providing the donation collection application or software could be targeted, but it would be difficult to enforce the new provision as the company itself does not administer the site.

The Canada Gazette's Regulatory Impact Analysis, published at the end of the regulations text, states that the amendments tend to impact small businesses.[94] It was deemed necessary to include these, or else there would be a high risk that "criminal and terrorist financing would be diverted to these businesses." The impact analysis also states that FINTRAC will adjust its monitoring regime based on the size of the organization and on the risk assessment.

The National Crowdfunding and Fintech Association, which represents several crowdfunding platforms operating in Canada, has criticized these new measures, stating that the impact analysis was not conducted in a rigorous manner. The association denounced the costliness of the new regulations for the impacted platforms and the fact that these measures were applied so quickly. It also points out that crowdfunding platforms do not hold the funds directly, but deal with money services businesses or financial institutions that are already subject to the regulations.[95]

Indeed, one may wonder whether direct control of payment intermediaries does not remain the most effective approach after all.

## 9.3 Personal Information Protection

Much of the information that crowdfunding platforms are likely to collect is personal information protected under the *Personal Information Protection and Electronic*

[93] See above, section 3.2.4.

[94] *Supra* note 90.

[95] "NCFA Response to FINTRAC's 'Knee Jerk' Regulations Requiring Donation Crowdfunding Platforms to Register and Comply with AML/ATF Legislation," *NCFA* (June 10, 2022), online: <ncfacanada.org/?s=DONATION+CROWDFUNDING>.

*Documents Act* (PIPEDA) or, in the case of Alberta, British Columbia and Québec, under provincial legislation deemed equivalent.

Crowdfunding platforms do not retain financial data if they contract with another company to process payments.[96] However, platforms are likely to collect information regarding donation amounts and other personal information from donors, project owners and beneficiaries.

It seems quite clear that crowdfunding platforms collect, use or disclose this personal information to engage in commercial activities, even if this data is collected during a donation. The platforms would therefore be subject to the act (s. 4(1)(a).[97]

The success of a crowdfunding campaign depends largely on its social media outreach; the two activities are closely integrated. We can therefore reasonably assume that these platforms face the same issues as a company such as Facebook. I have not reviewed Federal Bill C-27, *Digital Charter Implementation Act, 2022*, but one can only hope it will fill the gaps in the current law by providing better protection of personal information collected through social media and online platforms.

Section 7(3)(*c*) of PIPEDA authorizes organizations subject to the act to disclose personal information without the knowledge or consent of the individual if the disclosure is "required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information."

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[96] See the terms of use, under "Payment processor," online: *GoFundMe* <gofundme.com/en-ca/c/terms>, accessed September 26, 2022: "GoFundMe is not a payment processor and does not hold any funds. Instead, GoFundMe uses third-party payment processing partners to process Donations for a Fundraiser ("Payment Processor"). You acknowledge and agree that the use of Payment Processors is integral to the Services and that we exchange information with Payment Processors in order to facilitate the provision of the Services."

[97] At least that would likely be the view of the Office of the Privacy Commissioner of Canada, which has always considered Facebook to be subject to the act, see "Report of Findings into the Complaint Filed by the Canadian Internet Policy and Public Interest Clinic (CIPPIC) against Facebook Inc. Under the *Personal Information Protection and Electronic Documents Act*" by Elizabeth Denham, July 16, 2009, online: <priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2009/pipeda-2009-008/>; see also: *Privacy Commissioner of Canada v. SWIFT*, Report of Findings, online: https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2007/swift_rep_070402/>.

This means it is possible for a public authority to obtain such information in this manner.

## 9.4 Electoral Laws

Due to time constraints, I will not undertake a review of the electoral laws that govern political advertising, partisan activities and party financing. However, it would be worthwhile to examine whether these laws provide an adequate framework for political crowdfunding campaigns, where necessary (see above, section 7).

## 9.5 Tax Laws

For the same reasons, I will not review tax laws, which require registered charities to be managed in a thorough and transparent manner. However, most organizations that engage in crowdfunding are not charities. Sometimes, these are merely short-lived, informal organizations.

It seems plausible that crowdfunding platforms do not verify the identity of project owners or donors. As we have seen, project owners may use a name that does not correspond to any legally existing organization. Also, some donors may ask to remain anonymous, so the platform may or may not collect information on these individuals. However, these individuals will need to identify themselves in order to send or receive a payment.

Considering that many private law relationships are formed without public disclosure or identity checks, this situation does not seem to be a cause for concern.

# 10. International Models

I have not found any law, in any other country, that regulates donation-based crowdfunding specifically. Most countries with crowdfunding regulations focus instead on equity-based crowdfunding and sometimes on presales, without addressing donations.[98]

[98] For international models, see Caroline Kleiner, Ed., *Legal Aspects of Crowdfunding*, IUS Comparatum – Global Studies in Comparative Law, vol 55, Springer Cham, 2021. See also Mayer, *supra* note 48.

As of 2014, however, the French *Code monétaire et financier* (hereinafter "CMF") has regulated crowdfunding platforms in general.[99] Although the CMF applies mainly to investment- or lending-based crowdfunding,[100] the amending order of 2014 has had a significant impact on the supervision of donation-based crowdfunding platforms by including these platforms in the definition of "intermediation in participatory financing."[101] This statute gives rise to several obligations, listed in the CMF's sections L548-1 and following, which state that platforms must register (s. L548-3), comply with rules of good conduct (s. L548-6) and conform to the rules regarding the prevention of money laundering and the financing of terrorism, as stipulated under Title VI of the CMF.[102] This is a special scheme that applies, in addition to the provisions of the penal code, to many financial institutions.[103]

Finland is said to have passed a law in 2016 that requires crowdfunding platforms to obtain a licence.[104] I was not able to review this law.

A comprehensive study would require an investigation into whether other countries have laws that regulate donation-based crowdfunding in an incidental manner. Unfortunately, this thorough research would require more time than I have at this moment.

[99] Order no. 2014-559 of May 30, 2014, on participatory financing, JO, May 31, 2014, no. 0125. See also s. L548-1 and s. CMF.

[100] François Barrière, "Le Crowdfunding, ou l'Adaptation du Droit au Service des Investissements en France" in Caroline Kleiner, Ed., *Legal Aspects of Crowdfunding*, IUS Comparatum – Global Studies in Comparative Law, vol 55, Springer Cham, 2021, 303, p. 306.

[101] S. L548-1 CMF.

[102] S. L561-2(4) CMF.

[103] S. L561-2 to L561-4 CMF.

[104] Aki Kallio, "Crowdfunding Act Accelerating the Growth of the Crowdfunding Market in Finland" in Kleiner, *supra* note 98, 291, p. 295.

# Cryptocurrency: Challenges to Conventional Governance of Financial Transactions

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# I. Introduction

This expert report surveys the current state of cryptocurrency regulatory governance in Canada. It summarizes investor and consumer protection, market integrity, financial system stability, criminal enterprise, and other governance concerns in the Canadian and global cryptocurrency ecosystem. Further, it draws comparative insights from the United States (US), United Kingdom (UK), European Union (EU), and other international regulatory frameworks and proposals, and points to potential pathways for legal evolution and regulatory reform in diverse areas of Canadian cryptocurrency governance.

The report proceeds in Section II by first defining "cryptocurrency" and providing a taxonomy for its diverse forms, utility and use cases. Section III then surveys wide-ranging cryptocurrency regulatory governance frameworks that have been enacted to date in Canada, including securities regulation, money transmission laws, anti-money laundering and terrorism finance controls, payments-related regulation, taxation, estate planning, and environmental parameters for cryptocurrency mining operations. Section IV provides a broad overview of current cryptocurrency governance concerns and challenges, including regulatory uncertainties and gaps, the issues these pose, and how such concerns might be addressed. Section V offers concluding thoughts and regulatory considerations for further analysis.

# II. What are Cryptocurrencies?

The terms "crypto," "crypto coin," "cryptocurrency," "virtual currency," "token" or more commonly "crypto-asset," generally describe a digital asset that is created using distributed ledger technology (blockchain).[2] The value of a blockchain is where "trust" (or the services of a trusted intermediary) is expensive.[3] Blockchains also operate using an encrypted, secured ledger without a central authority (since trust and

[2] See Joshua A.T. Fairfield, "Bitproperty," (2015) 88 *Southern California Law Review* 805; Kevin Werbach and Nicolas Cornell, "Contracts Ex Machina," (2017) 67 *Duke Law Journal* 313; Jeremy M. Sklaroff, "Smart Contracts and the Cost of Inflexibility," (2017) 166 *University of Pennsylvania Law Review* 263; Kevin Werbach, "Trust, But Verify: Why the Blockchain Needs the Law," (2018) 33 *Berkeley Law Journal* 487.

[3] Caroline Crenshaw, "DeFi Risks, Regulations, and Opportunities," (2021) 1 *The International Journal of Blockchain Law* 4 at 4.

transactional certainty is ensured through cryptography), thereby providing transparency, and "user controlled" networks.[4] Transactions are verified and recorded on a blockchain, without a central authority, using a "consensus mechanism" - the nature of which varies depending on the blockchain, ranging from energy-intensive "proof-of-work" (used by the Bitcoin network), to more environmentally-friendly consensus mechanisms such as "proof-of-stake" and other emerging forms.[5]

Throughout this report, the term "cryptocurrency" will be used as a general descriptor for the cumulative forms of crypto-assets that are created using blockchain technology. As this section will highlight, there are significant contextual differences in diverse forms, functions and intended uses of cryptocurrencies, including transferring value, or performing a payment, utility, or governance function. They can also be used in conjunction with digital identifiers of ownership, or rights to diverse assets (both within and outside of a blockchain ecosystem).[6] Distinguishing forms and functions is critical for effective policy formation, and the regulatory overview, and governance concerns sections below will seek precision in cryptocurrency taxonomy in its analysis. Also, distinct cryptocurrency sub-types give rise to unique risks, nuances, and characteristics, including distinctions in fungibility and non-fungibility, that require definitional precision when undertaking policy analysis.

## A. Decentralized Payment Tokens and Altcoins

The first major, and widely-used, implementation of blockchain technology was *Bitcoin* - a decentralized "peer-to-peer version of electronic cash" or "cryptocurrency" - conceived in 2008 by the anonymous "Satoshi Nakamoto" (whose identify still remains unknown).[7] Bitcoin allows for stores of digital value (payments) to be transferred between parties, without "double spending," or requiring the assistance of a bank, government, or other trusted intermediary, through the use of a decentralized

[4] Ryan Clements, 'Regulating Fintech in Canada and the United States: Comparison, Challenges and Opportunities' in K. Thomas Liaw (ed), *The Routledge Handbook of Fintech* (Routledge, 2021), at 426.

[5] See Parma Bains, "Blockchain Consensus Mechanisms: A Primer for Supervisors," *Fintech Notes, International Monetary Fund* (January 2022), online (pdf): https://www.imf.org/-/media/Files/Publications/FTN063/2022/English/FTNEA2022003.ashx.

[6] Juliet M. Moringiello and Christopher K. Odinet, "The Property Law of Tokens," (forthcoming, 2022) *Florida Law Review*, manuscript, at 1, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3928901.

[7] Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System," (2008), online (pdf): https://bitcoin.org/bitcoin.pdf.

distributed ledger (database), cryptography, and a "proof of work" consensus mechanism.[8]

Despite their purported use value as a payment mechanism, decentralized payment tokens like Bitcoin have not been widely used as a medium of exchange, consumer payment device or money substitute for employment, consumption, trade or debt repayment purposes due to their high volatility, but rather have been purchased and held by investors for speculative trading and the potential for price appreciation.[9] There are many cryptocurrencies that theoretically could perform a similar function to Bitcoin as a medium of exchange, but are also currently being held and traded for investment and speculative purposes. These are commonly called "alternative coins" or "altcoins,"[10] although as noted in the next several subsections, there are sub-taxonomies within alternative coins that capture diverse cryptocurrency forms including utility and governance tokens, security tokens, and stablecoins.

## B. Utility and Governance Tokens

Despite its novel disintermediating utility when transferring value online, the Bitcoin blockchain has limitations - notably its limited programmability.[11] The development of the *Ethereum* network represented a significant moment in the evolution of the cryptocurrency ecosystem because it was the first major blockchain to allow programmable "smart contracts" - where transactions or transfers could be "made contingent on meeting certain pre-specified conditions."[12] This spawned a host of new blockchain-based decentralized financial applications (called Dapps) including

[8] *Ibid.*

[9] See Christian Catalini and Jai Massari, "Stablecoins and the Future of Money," (10 August 2021), online: *Harvard Business Review,* <https://hbr.org/2021/08/stablecoins-and-the-future-of-money>; Dirk G. Baur and Thomas Dimpfl, "The Volatility of Bitcoin and its Role as a Medium of Exchange and a Store of Value," (2021) 61 *Empirical Economics* 2663 (2021); Dirk G. Baur et al., "Bitcoin: Medium of Exchange or Speculative Assets?" (2018) 54 *Journal of International Financial Markets, Institutions & Month* 177.

[10] See Eric Rosenberg, "What are Altcoins?" (30 March 2022), online: *The Balance,* https://www.thebalance.com/altcoins-a-basic-guide-391206.

[11] See Scott Jeffries, "Ethereum vs. Bitcoin: Which Crypto is Better?" (16 May 2022), online: *Nasdaq,* https://www.nasdaq.com/articles/ethereum-vs.-bitcoin%3A-which-crypto-is-better; Ryan Clements, "Assessing the Evolution of Cryptocurrency: Demand Factors, Latent Value, and Regulatory Developments," (2018) 8 *Michigan Business & Entrepreneurial Law Review* 73.

[12] Frederic Boissay, Giulio Cornelli, Sebastian Doerr and Jon Frost, "Blockchain scalability and the fragmentation of crypto," (7 June 2022), *BIS Bulletin, No 56*, at 3, online (pdf): https://www.bis.org/publ/bisbull56.pdf.

cryptocurrency trading, borrowing, investing, and lending applications, without requiring a centrally-controlled intermediary, in what is now colloquially known as "DeFi."[13] Ethereum, and other programmable blockchains, also utilize a platform native cryptocurrency, commonly called a "utility token," to incentivize the decentralized consensus mechanism on the blockchain, which also can be used as a transactional digital currency to pay for goods or services on the network.[14]

Utility tokens are distributed in an "initial coin offering" (ICO) which, depending on the nature and characteristics of the token may constitute an offering of securities in Canada.[15] The emergence of programmable blockchains such as Ethereum also allow for the creation of "decentralized autonomous organizations" (DAOs) which use a decentralized governance mechanism through the distribution of a certain type of utility token called a "governance token."[16] Dapps also use governance tokens - for example, the "UNI" token on the popular decentralized cryptocurrency trading protocol *Uniswap.*[17] A DAO or Dapp facilitates a diffuse governance structure through the distribution and holding of governance tokens; although recent research by the *Bank for International Settlements* (BIS) has revealed they also tend to result in centralized control over time.[18]

Governance parameters are highly specific to the decentralized application or organization in question (which vary in design from "single purpose" entities to more complex organizations with pooled assets and ongoing concerns); and as noted below, give rise to numerous legal uncertainties including the nature of fiduciary

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[13] *Ibid.*

[14] See Scott W. Maughan, "Utility Token Offerings: Can a Security Transform into a Non-Security?" (2019) *B.Y.U. Law Review* 1113.

[15] See Canadian Securities Administrators, *CSA Staff Notice 46-307, Cryptocurrency Offerings* (24 August 2017) online (pdf): https://www.securities-administrators.ca/uploadedFiles/Industry_Resources/2017aout24-46-307-avis-acvm-en.pdf ("CSA Staff Notice 46-307"); Canadian Securities Administrators, *CSA Staff Notice 46-308, Securities Law Implications for Offerings of Tokens* (11 June 2018), online (pdf): https://www.securities-administrators.ca/uploadedFiles/Industry_Resources/2018juin11-46-308-avis-acvm-en.pdf ("CSA Staff Notice 46-308").

[16] See Benedict George, "What is a Governance Token?" *CoinDesk,* https://www.coindesk.com/learn/what-is-a-governance-token/ (last accessed 8 August 2022).

[17] Uniswap Protocol, https://uniswap.org/ (last accessed 8 August 2022).

[18] Sirio Aramonte, Wenqian Huang and Andreas Schrimpf, "DeFi risks and the decentralization illusion," (December 2021), *BIS Quarterly Review,* online: https://www.bis.org/publ/qtrpdf/r_qt2112b.htm.

duties, legal and contractual status, voting participation, operational dynamics, design considerations, dispute resolutions mechanisms, and cybersecurity controls.[19]

## C. Security and Asset Tokenization

Not all cryptocurrencies are decentralized. Traditional assets or securities can also be "tokenized" and represented on a blockchain. These are often described colloquially as "asset tokens" or "security tokens." Security tokens can take multiple forms including the "digital representation" of a security on a blockchain, or the primary issuance of a security in a tokenized form.[20] A security token provides its holder, via a blockchain-based digital asset, "a bundle of rights to govern the corporation, along with residual claims on its assets proportional to the number of shares they own."[21]

The *Canadian Securities Administrators* (CSA) have facilitated securities tokenization through regulatory accommodation in the CSA fintech regulatory sandbox.[22] In October 2019, the *Ontario Securities Commission* (OSC) provided time-limited exemptive relief to *TokenGX Inc.* to test a trading platform where private companies could issue blockchain-based tokenized securities, using the offering memorandum prospectus exemption, under contextualized regulatory parameters, to certain qualified investors.[23] In November 2020, several CSA jurisdictions provided time-limited exemptive relief to *Finhaven Capital Inc.* as an exempt market dealer facilitating primary distribution and secondary trading of tokenized securities.[24]

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[19] See *infra* Section IV(f); Kevin Schwartz and David Adlerstein, "Decentralized Governance and the Lessons of Corporate Governance," (4 June 2022), online: *Harvard Law School Forum on Corporate Governance,* https://corpgov.law.harvard.edu/2022/06/04/decentralized-governance-and-the-lessons-of-corporate-governance/.

[20] See Organisation for Economic Co-operation and Development (OECD), "The Tokenization of Assets and Potential Implications for Financial Markets," (17 January 2020), online: https://www.oecd.org/finance/The-Tokenisation-of-Assets-and-Potential-Implications-for-Financial-Markets.htm.

[21] Shaanan Cohney, David A. Hoffman, Jeremy Sklaroff and David Wishnick. "Coin-Operated Capitalism," (2019) 119 *Columbia Law Review* 591 at 599.

[22] Canadian Securities Administrators, "CSA Regulatory Sandbox," https://www.securities-administrators.ca/resources/regulatory-sandbox/decisions/ (last accessed 26 August 2022).

[23] Ontario Securities Commission, *In the Matter of the Securities Legislation of Ontario and in the Matter of TokenGX Inc., Decision,* (22 October 2019), online (pdf): https://www.osc.gov.on.ca/documents/en/ord_20191023_tokengx.pdf.

[24] Re Finhaven Capital Inc., 2020 ABASC 194 (2 November 2020), online: https://www.asc.ca/-/media/ASC-Documents-part-1/Notices-Decisions-Orders-Rulings/Registrants/2020/12/Finhaven-Capital-Inc-Decdoc.ashx.

## D. Non-Fungible Tokens

A non-fungible token (NFT) is a blockchain-based crypto-asset that contains a unique identification code and metadata.[25] This makes them non-interchangeable (non-fungible).[26] It is helpful to contrast NFTs with fungible or "interchangeable" cryptocurrencies (like Bitcoin or Ether) which can be substituted without losing their value – thus making them the same in type.[27] NFTs, however, cannot be substituted for another identical NFT, thereby making them unique in type.[28]

An NFT is not a "content file," but rather is a digital token that contains a "unique cryptographic key" that both establishes a record of ownership for the holder of creative works (allowing it to be transferred without fraud), and "verifies a corresponding content file as genuine."[29] NFTs have been used by musicians to sell proportional rights to streaming royalties without transferring ownership.[30] They have also been used to convey ownership of digital gaming artifacts, or ownership rights to non-digital assets (like fractional ownership in real estate).[31] They may also have use value in regulatory technology such as "disclosure NFTs" to incentivize interaction by readers and provide an "application layer" for regulatory compliance.[32]

[25] Iris H-Y Chiu and Jason G. Allen, "Exploring the Assetization and Financialization of Non-fungible Tokens: Opportunities and Regulatory Implications," (2022) 37 BFLR 401 at 402 ("NFTs are usually created based on the ERC-721 template that allows for unique identification and metadata coding, producing digital tokens that are distinct and non-interchangeable.")

[26] Samir Patel, "If NFTs Rules The World: A New Wave of Ownership," (2022) 2 *The International Journal of Blockchain Law* 19.

[27] *Ibid.* at 19.

[28] *Ibid*.

[29] *Ibid.*

[30] *Ibid.*

[31] Chiu and Allen, *supra* note 25 at 403.

[32] Chris Brummer, "Introducing Disclosure NFTs, Disclosure DAOs, and Disclosure DIDs," (24 March 2022), online: *Medium,* https://chrisbrummer.medium.com/introducing-disclosure-nfts-disclosure-daos-and-disclosure-dids-9579e0e739fe.

## E. Stablecoins

Stablecoins have emerged as a less volatile form of cryptocurrency.[33] This makes them potentially useful in a variety of payments applications,[34] including global remittance, consumer payments, crypto lending and collateral, and executing crypto-asset trading and income-earning strategies on DeFi applications and protocols.[35] Stablecoins play a critical role in the DeFi ecosystem,[36] allowing for trade execution, collateral, leverage, and stable value transfers.[37] They also operate within the technological ecosystem of a blockchain, and thereby convey potential advantages to users such as on-chain transparency, programmable money, cryptographic security, nearly instant settlement, and disintermediation for value stores and transfers.[38] Stablecoins attempt to mitigate volatility by "pegging" their value to a reference asset such as the US dollar.[39]

[33] This is largely due to the fact that decentralized payment tokens like Bitcoin have proven to be poor money substitutes due to their high volatility and fees, see Catalini and Massari, *supra* note 9.

[34] See MARK CARNEY, VALUES: BUILDING A BETTER WORLD FOR ALL (2021, Penguin Random House Canada) at 115-117.

[35] See Ryan Clements, "Built to Fail: The Inherent Fragility of Algorithmic Stablecoins," (2021) 11 *Wake Forest Law Review Online* 131, online: http://www.wakeforestlawreview.com/2021/10/built-to-fail-the-inherent-fragility-of-algorithmic-stablecoins/; Ryan Clements, "Defining the Regulatory Perimeter for Stablecoins in Canada," (*forthcoming,* 2022) *Canadian Business Law Journal*, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4134010.

[36] Drik G Baur & Lai T Hoang, "How stable are stablecoins?" (08 July 2021) *The European Journal of Finance* at 2.

[37] Paul Vigna, "DeFi is Helping to Fuel the Crypto Market Book--and Its Recent Volatility" (3 June 2021), online: *The Wall Street Journal,* https://www.wsj.com/articles/defi-is-helping-to-fuel-the-crypto-market-boomand-its-recent-volatility-11622712602.

[38] Clements, Defining the Regulatory Perimeter for Stablecoins, *supra* note 35; see**,** "A Round Table Discussion on Stablecoins: Taking the World By Storm or Storming the World?" (2022) 3 *The International Journal of Blockchain Law* 4 at 9.

[39] See David Gogel et al., "DeFi Beyond the Hype: The Emerging World of Decentralized Finance," *Wharton Blockchain & Digit. Asset Project, The Wharton School, Univ. of Pennsylvania,* (2021), at 9–10, online (pdf): https://wifpr.wharton.upenn.edu/wp-content/uploads/2021/05/DeFi-Beyond-the-Hype.pdf.

Stablecoins, take many different forms,[40] including centrally issued, off-chain fully collateralized, and decentralized on-chain "over-collateralized" forms, which operate through smart contracts on a programmable blockchain and are collateralized with other cryptocurrencies.[41] The most popular stablecoins by market capitalization are known as "fiat-backed," and they peg their value by holding sufficient assets as collateral on reserve such as US dollars, other US denominated short-term, low-risk, liquid assets like treasury bills, commercial paper, or short-term corporate bonds, and then agreeing to create or redeem the stablecoins with select (and authorized) market participants at pre-determined rates (generally one stablecoin for $1).[42]

Other decentralized "algorithmic" stablecoin forms do not hold collateral at all but use reserve token supply modifications, arbitrage opportunities (usually with a second or "dual" coin structure), automated price feeds, smart contracts and economic incentives to attempt to achieve a stable peg.[43] The algorithmic form of stablecoin is the most volatile and fragile, and several iterations have failed to date,[44] including the catastrophic implosion of the Terra algorithmic stablecoin (UST) in May 2022.[45]

## F. Central Bank Digital Currencies

Central bank digital currencies (CBDCs), in many ways, represent a governmental response (or pre-emption) to the potential adverse network effects, and de-monetizing impact, of a widely held, privately-issued, stablecoin that is used frequently as a money substitute for consumer purchases.[46] The Bank of Canada (BoC) has begun exploring iterations, core features, foundational principles, and design models for

[40] There is no "universal" definition for a stablecoin, see The Board of the International Organization of Securities Commission, "Global Stablecoin Initiatives," (March 2020), at 3, online (pdf): *IOSCO* https://www.iosco.org/library/pubdocs/pdf/IOSCOPD650.pdf.
[41] Clements, Built to Fail, *supra* note 35 at 134-137.
[42] Clements, Defining the Regulatory Perimeter for Stablecoins, *supra* note 35 at 2 (noting that stablecoin issuers may also hold other reserves including precious metals, securities, derivatives, commodities, real assets, or other crypto assets on reserve)**;** see G7 Working Group on Stablecoins, "Investing the impact of global stablecoins," *Bank for International Settlements, Committee on Payments and Market Infrastructures,* (October 2019), at 1,3, online (pdf): https://www.bis.org/cpmi/publ/d187.pdf. ("G7 Working Group Report").
[43] Clements, Built to Fail, *supra* note 35 at 134-137.
[44] *Ibid.* at 137-141.
[45] Gian M. Volpicelli, "Terra's Crypto Meltdown Was Inevitable," (12 May 2022) online: *Wired,* https://www.wired.co.uk/article/terra-luna-collapse.
[46] See Bank of Canada, "Contingency Planning for a Central Bank Digital Currency," (25 February 2020), online: https://www.bankofcanada.ca/2020/02/contingency-planning-central-bank-digital-currency/.

CBDCs,[47] driven by the potential decline of physical fiat acceptance by vendors (accelerated by the COVID-19 pandemic[48]), and in response to the potential widespread take-up of a fiat-backed stablecoin as a dominant private currency.[49] Concerns around CBDCs focus on privacy, design, operational and cyber-security considerations, and the level of surveillance or "control" they provide to the government.[50]

## III. Survey of Existing Canadian Cryptocurrency Regulatory Governance

There is not a comprehensive or overarching regulatory framework that applies to cryptocurrencies in Canada. Governance measures have, however, been established by numerous federal and provincial regulators across a wide range of cryptocurrency industry segments, use cases, forms, activities, and intermediaries. Despite their conceptual use as a payment mechanism, cryptocurrencies, including stablecoins, are not considered legal tender in Canada.[51] However, as this Section will show, the distribution of, and numerous business and trading activities in relation to, cryptocurrencies are currently subject to diverse regulatory frameworks in Canada. The most comprehensive requirements are in the domain of securities regulation, which is provincial jurisdiction with statutory authority under provincial securities acts and harmonized rules through the umbrella organization of the CSA.[52]

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[47] See Bank of Canada, "The Positive Case for a CBDC," (20 July 2021), *Staff Discussion Paper 2021-11*; Bank for International Settlements, "Central bank digital currencies: foundational principles and core features," (9 October 2020) online: https://www.bis.org/publ/othp33.htm.

[48] See Bank of Canada, "Payments Innovation Beyond the Pandemic, Remarks by Timothy Lane, Deputy Governor," Institute for Data Valorization (10 February 2021), online (pdf): https://www.bankofcanada.ca/wp-content/uploads/2021/02/remarks-2021-02-10.pdf.

[49] See Bank of Canada, "Contingency Planning" *supra* note 46; Bank of Canada, "Money and Payments in the Digital Age, Remarks by Timothy Lane, Deputy Governor, CFA Montreal Fintech RDV2020," (February 2020), online (pdf): https://www.bankofcanada.ca/wp-content/uploads/2020/02/remarks-250220.pdf.

[50] "A Round Table Discussion on Stablecoins: *supra* note 38 at 9.

[51] See *Currency Act,* R.S.C., 1985, c. C-52, at ss. 7-8; Clements, *supra* note 4 at 428.

[52] See Canadian Securities Administrators, online: https://www.securities-administrators.ca/ (last accessed 15 August 2022).

There are also significant anti-money laundering (AML) and counter-terrorism finance (CTF) safeguards around cryptocurrencies, and the individuals and businesses who deal in cryptocurrencies, as administered by the *Financial Transactions and Reports Analysis Centre of Canada* (FINTRAC).[53] Other provincial or federal statutory rules and regulations, requirements, tax considerations, and regulatory parameters may also be applicable to cryptocurrencies, or businesses dealing in cryptocurrencies, depending on the nature of the business activity. Further, there are emerging regulatory frameworks in Canada around payments activities, particularly the recently enacted *Retail Payments Activities Act* (RPAA),[54] which has significant implications for cryptocurrencies, but governing regulations are still evolving.[55] Nevertheless, regulatory gaps, uncertainties, and governance issues persist across the Canadian cryptocurrency ecosystem as detailed in Section IV.

## A. Securities Regulation

The most comprehensive regulatory and governance standards for cryptocurrencies in Canada is currently found within the securities regulatory perimeter. Securities law in Canada is comprised of the rules and regulations of thirteen different provincial and territorial securities regulatory authorities, who work together through the umbrella organization of the CSA to foster national policy formation, improve, and coordinate rule harmonization, and facilitate national transaction efficiency.[56] Securities regulation looks to protect investors from unfair, improper, or fraudulent practices, foster fair and efficient capital markets, instill market confidence, and ensure financial system stability, by regulating the distribution and trading of securities and derivatives.[57]

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[53] See Financial Transactions and Reports Analysis Centre of Canada, online: https://www.fintrac-canafe.gc.ca/intro-eng (last accessed 15 August 2022).
[54] *Retail Payments Activities Act,* S.C. 2021, c. 23, s. 177 ("RPAA").
[55] See Jack Franklin, Zain Rizvi and Gillian R. Stacey, "Filling the Gap: Scope of Canadian Anti-Money Laundering Laws Expanded," (7 June 2022) online: *Davies Bulletin,* https://www.dwpv.com/en/Insights#/article/Publications/2022/Scope-of-Canadian-Anti-Money-Laundering-Laws.
[56] See Canadian Securities Administrators, *supra* note 52; See Multilateral Instrument 11-102, *Passport System*; National Policy 11-202, *Process for Prospectus Review in Multiple Jurisdictions*; National Policy 11-203, *Process for Exemptive Relief Applications in Multiple Jurisdictions*; National Policy 11-204, *Process for Registration in Multiple Jurisdictions.*
[57] See Securities Act, R.S.O. 1990, c. S.5, s. 1.1 ("OSA").

Securities regulation accomplishes this goal by utilizing a variety of tools and compliance mechanisms including (among others) marketplace and exchange rules,[58] investment dealer, fund manager and adviser initial registration and ongoing compliance obligations,[59] and initial and ongoing disclosure requirements for issuers of securities.[60]

There are jurisdictional limits, however, to the imposition of securities regulation over cryptocurrencies in Canada - namely there must be a "security" or a "derivative."[61] If a cryptocurrency is a "security," and the trade of that security is a "distribution,"[62] then a receipt for a prospectus must be issued by the requisite regulator before this cryptocurrency may be distributed to the public,[63] unless there is an available exemption from the prospectus requirement.[64] Securities that are distributed via prospectus exemptions are generally subject to re-sale restrictions.[65] Determining whether a particular cryptocurrency is a "security" or a "derivative," or whether a cryptocurrency trading platform, or cryptocurrency business, distributes or otherwise is in the business of trading a cryptocurrency that is a security or a derivative through their activities, is a contextual analysis that can be very difficult.[66]

The CSA has, however, established helpful guidance (as will be discussed below[67]); yet uncertainties remain in certain areas, particularly in emerging DeFi protocols and applications on decentralized, globally distributed, public blockchain networks.[68]

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[58] See National Instrument 21-101, *Marketplace Operation*; National Instrument 23-101, *Trading Rules*; National Instrument 23-103, *Electronic Trading and Direct Electronic Access to Marketplaces.*

[59] See National Instrument 31-103, *Registration Requirements, Exemptions and Ongoing Registrant Obligations.*

[60] See National Instrument 41-101, *General Prospectus Requirements;* National Instrument 51-102, *Continuous Disclosure Obligations.*

[61] Ryan Clements, "Emerging Canadian Crypto-Asset Jurisdictional Uncertainties and Regulatory Gaps," (2021) 37(1) *Banking and Finance Law Review* 25 at 27.

[62] OSA, *supra* note 57 at s.1(1)("distribution"); *Securities Act*, RSA 2000, c S-4 ("ASA"), at s.1(p); *Securities Act,* RSBC 1996 c. 418 ("BCSA") at Part I ("distribution").

[63] OSA, *supra* note 57 at s.53; ASA, *supra* note 62 at s.110; BCSA, *supra* note 62 at s.61;

[64] Examples include OSA, *supra* note 57 at Part XVII; National Instrument 45-106*, Prospectus Exemptions;* National Instrument 45-110*, Start-Up Crowdfunding Registration and Prospectus Exemptions;* ASC Rule 45-517*, Prospectus Exemptions for Start-Up Businesses.*

[65] National Instrument 45-102, *Resale Rules.*

[66] See CSA Staff Notice 46-307, *supra* note 15; CSA Staff Notice 46-308, *supra* note 15.

[67] See *infra* Section III(a)(1).

[68] See Clements, Emerging Canadian, *supra* note 61; Section IV, *infra.*

Given its decentralized nature, Bitcoin is widely considered to be a commodity, not a security, and this is supported by US regulatory pronouncements,[69] and federal court decisions.[70] However, beyond Bitcoin, the question of whether a particular cryptocurrency is a security or a derivative becomes less clear, especially given the motivations of "hoping for a return" when investors purchase cryptocurrencies, rather than using them as a payment mechanism.[71] *Ether* (the utility token on the *Ethereum* blockchain network) is also widely considered not to be a security,[72] but some skeptics allege that it is still centrally controlled, especially in light of its initial distribution in the context of a capital raise,[73] and the infamous DAO hack and resulting hard fork which created Ethereum and *Ethereum Classic*.[74]

## 1. Cryptocurrencies Distributed in Initial Coin Offerings (ICOs)

As noted, the critical *ex ante* jurisdictional determination for the application of securities regulation to cryptocurrencies is whether a particular cryptocurrency is a security or a derivative on its own, or whether the business activities of an intermediary create a security or derivative (a material factor in the regulatory jurisdiction over cryptocurrency trading platforms (CTPs), as noted below[75]). Some cryptocurrencies (securities tokens as described above in Section II[76]) are clearly distributions of securities, and as such, the issuer of a security token must comply with the prospectus rules or qualify for a suitable exemption.[77] Some initial distributions of

[69] See U.S. Commodity Futures Trading Commission, "CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets," (4 January 2018), online (pdf): https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder_virtualcurrency01.pdf.

[70] U.S. Commodity Futures Trading Commission, Press Release, "Federal Court Finds that Virtual Currencies Are Commodities," (3 October 2018), online: https://www.cftc.gov/PressRoom/PressReleases/7820-18.

[71] André Beganski, "SEC Chair Gensler Again Says Bitcoin is Not a Security, What About Ethereum," (27 June 2022), online: *Decrypt,* https://decrypt.co/103926/sec-chair-gensler-bitcoin-not-security-what-about-ethereum.

[72] See William Hinman, "Digital Asset Transactions: When Howey Met Gary (Plastic)," (14 June 2018), online: *Remarks at the Yahoo Finance All Markets Summit: Crypto,* https://www.sec.gov/news/speech/speech-hinman-061418.

[73] Beganski, *supra* note 71.

[74] See U.S. Securities and Exchange Commission, "Reporting of Investigation Pursuant to 21(a) of the Securities Exchange Act of 1934," (25 July 2017), online (pdf): https://www.sec.gov/litigation/investreport/34-81207.pdf.

[75] *Infra* Section III(a)(2).

[76] *Infra* Section II(c).

[77] See CSA Staff Notice 46-307, *supra* note 15; CSA Staff Notice 46-308, *supra* note 15.

cryptocurrencies (colloquially known as “initial coin offerings” or “ICOs”) may purport in marketing materials or online white papers to be offerings of non-securities (similar to decentralized tokens like Bitcoin), but may in substance have properties that resemble a traditional securities offering such as an investment contract.[78]

There are several open-ended sub-prongs of the definition of “security” in analogous provincial securities acts which allow for a wide potential application of securities regulation to collective investment schemes or arrangements where the economic realities of the arrangement suggest investment intent.[79] The leading Canadian Supreme Court decision which interpreted the definitional sub-prong of “investment contract” (often considered a catch-all category) resisted being confined to strict judicially established tests, and instead took a purposive, remedial, substance over form, approach to the interpretation of “investment contract” as a security, where there is investment intent.[80] This is in alignment with the policy objectives and purpose of securities law, which focuses on investor protection and full and fair disclosure.[81]

It is not always clear, however, if securities laws apply to cryptocurrency, as some cryptocurrencies (like Bitcoin) are not controlled by any one issuer, and other cryptocurrencies (like Ether) perform a utility function (like as a payment mechanism to acquire goods and services) on a public blockchain beyond the expectation of profit.[82] To assist in whether securities rules apply to the distribution of a given cryptocurrency in an ICO, the CSA issued successive guidance notices in 2017 and 2018, which provide numerous contextual factors that the securities regulator will

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[78] *Ibid.*

[79] See OSA, *supra* note 57 at s.1(a)(“security”); ASA, *supra* note 62 at s.1(“security”)(ggg); BCSA, *supra* note 62 at s.1(1)(“security”); see *In the Matter of Universal Settlements International Inc.* (2006), 29 O.S.C.B. 7880; *Re Shelter Corporation of Canada Ltd.,* 1977 O.S.C.B. 6; *Pia Williamson,* (1993), 16 O.S.C.B. 2689; *Jenson v. Continental Financial Corporation,* 404 F. Supp. 792 (D.C. Minn. 1975); *Re O.S.C. Brigadoon Scotch Distributors (Can.) Ltd.,* [1970] 3 O.R. 714 (Ont. H.C.J.); See *R. v. Stevenson,* 2017 ABCA 420; *Ontario Securities Commission v. Tiffin*, 2020 ONCA 217.

[80] *Pacific Coast Coin Exchange v Ontario Securities Commission* [1978] 2 SCR 112, at127–129 (“It is clearly legislative policy to replace the harshness of caveat emptor in security related transactions and Courts should seek to attain that goal even if tests carefully formulated in prior cases prove ineffective and must continually be broadened in scope. It is the policy and not the subsequently formulated judicial test that is decisive.”); Such policy objectives would include, among others, investor protection, ensuring full and fair disclosure and fair and efficient capital markets, and maintaining financial system stability.

[81] *Ibid.*

[82] See CSA Staff Notice 46-307, *supra* note 15; CSA Staff Notice 46-308, *supra* note 15.

consider in their determination.[83] Canadian and U.S. regulators have been active in monitoring illegal distributions of cryptocurrencies, which have the properties of a security, but do not comply with the prospectus and other regulatory parameters.[84]

The CSA has also noted that many utility token offerings in ICOs will require a prospectus, or an allowable exemption from the prospectus rules, despite performing a utility function because they have characteristics analogous to securities such as investment contracts.[85] A person or company who engages in the business of trading, advising or managing an investment fund of cryptocurrency that is a security must also register in an appropriate category (or obtain a suitable exemption) and comply with numerous ongoing obligations.[86] Also, offerings of utility tokens may present unique risks for investors. A US study of the largest ICOs in 2017, identified a computer-coding "disconnect" between the promises in token offering "white papers" and marketing materials (such as token-vesting conditions, token-supply limits, and code-modification rights) and the actual execution of smart-contract code.[87]

## 2. Cryptocurrency Trading Platforms (Crypto Exchanges)

Canadian securities regulators recently enacted a novel, internationally idiosyncratic, but positive (and needed) approach to regulating CTPs.[88] The formation of regulatory

[83] See CSA Staff Notice 46-307, *supra* note 15; CSA Staff Notice 46-308, *supra* note 15 (The CSA noted that no one consideration is determinative, and they will take a contextual, holistic approach to the circumstances of each case. Factors that are used in the determination by the CSA include, among others, whether the platform that will utilize the utility token has been fully developed or is in a development phase; whether the token will trade on secondary exchanges; whether the token is immediately delivered to the purchaser; whether the purpose of the distribution is a capital raise to support the developers key business; the nature of benefits that the token holder receives including rights to future profits; whether management or early investors retain a significant portion of the tokens; whether the tokens have a fixed supply; and the nature of promotional activity surrounding the tokens).

[84] See U.S. Securities and Exchange Commission. 2017. "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO," Securities Act Release No. 81207, (25 July 2017); Ontario Securities Commission, "OSC Charges Stephan Katmarian with Securities Act Offences," (1 April 2021), online: https://www.osc.ca/en/news-events/news/osc-charges-stephan-katmarian-securities-act-offences.

[85] See CSA Staff Notice 46-307, *supra* note 15; CSA Staff Notice 46-308, *supra* note 15.

[86] National Instrument 31-103, *supra* note 59.

[87] Cohney, Hoffman, Sklaroff and Wishnick, *supra* note 21.

[88] Clements, Emerging Canadian, *supra* note 61 at 27-29 ("this jurisdictional assertion is a

parameters in Canada around CTPs was largely catalyzed by the catastrophic failure, and fraudulent activities of its founder Gerald Cotton, on the Ontario-based *QuadrigaCX* platform in late 2018, which resulted in the loss of over $169 million in customer assets.[89] QuadrigaCX's failure catalyzed a 2019 public consultation by the CSA and the *Investment Industry Regulatory Organization of Canada* (IIROC)[90] into the securities regulatory jurisdiction, and potential rules application, for CTPs.[91]

In January 2020, the CSA and IIROC issued joint guidance (Staff Notice 21-327) on how securities regulatory frameworks would be applied to CTPs that facilitate the trading of cryptocurrencies in Canada.[92] The joint guidance noted that the securities regulator would assert jurisdiction over the trading of cryptocurrencies that were securities (on their own), and would also assert regulatory jurisdiction over the trading of cryptocurrencies that were commodities (like Bitcoin), and not securities on their own, if the CTP took custody of the commodity cryptocurrency and then provided the user with a "contractual right" to the delayed, rather than immediate, delivery of the cryptocurrency.[93] The justification for the latter jurisdictional assertion, for non-security cryptocurrencies, was that the contractual right to delayed delivery of a custodied cryptocurrency created a security or a derivative (the former based on one of the open-ended sub-prongs of the definition of security such as "investment contract.")[94] The Staff Notice, however, carved out an exception for certain cryptocurrency intermediaries and dealers by noting that the regulatory perimeter for the application

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positive development in the evolution of crypto asset regulation. It brings certainty, stability and credibility to a historically vulnerable operating segment of an industry surging in investor interest.")

[89] Ontario Securities Commission, "QuadrigaCX: A Review by Staff of the Ontario Securities Commission" (14 April 2020), online: https://www.osc.ca/quadrigacxreport/.

[90] The Investment Industry Regulatory Organization of Canada is the pan-Canadian self-regulatory organization that oversees all investment dealers and trading activity on Canadian debt and equity marketplaces, *see* IIROC, "About IIROC," online: https://www.iiroc.ca/about-iiroc (last accessed 19 August 2022).

[91] Canadian Securities Administrators, *Joint Canadian Securities Administrators/Investment Industry Regulatory Organization of Canada, Consultation Paper 21–402, Proposed Framework For Crypto-Asset Trading Platforms*, (14 March 2019) online (pdf): https://www.securities-administrators.ca/uploadedFiles/Industry_Resources/2019mars14-21-402-doc-cons-en.pdf.

[92] Canadian Securities Administrators, *CSA Staff Notice 21–327, Guidance on the Application of Securities Legislation to Entities Facilitating the Trading of Crypto Assets*, (16 January 2020), at 1-2, online: https://www.asc.ca/securities-law-and-policy/regulatory-instruments/21-327 ("CSA Staff Notice 21-327").

[93] *Ibid.,* at 2.

[94] *Ibid.,* at 1-2.

of securities rules would not extend to businesses who provided "immediate delivery" of a cryptocurrency.[95]

CSA Staff Notice 21-327 was followed by CSA / IIROC Staff Notice 21-329 which established a contextual path to compliance, based on the operations of the CTP, using either a "restricted dealer" category as an interim two-year transitional solution to a full investment dealer registration, the application of marketplace rules, or a hybrid application of investment dealer and marketplace rules for certain CTPs that perform dual functions.[96] Staff Notice 21-329 identified several risks for investors who utilize the services of Canadian CTPs including custody, safeguarding cryptocurrencies (private key management), providing fair and transparent access criteria and operations, ensuring integrity and resiliency in system and security controls, avoiding conflicts of interest, and complying with typical investment dealer and marketplace concerns such as ensuring market integrity, efficient price discovery, know-your-client (KYC), and know-your-product (KYP) standards.[97]

Staff Notice 21-329 did not introduce new rules for CTPs; rather, it provided guidance on how existing requirements of securities legislation might be "tailored" using terms and conditions on the registration or recognition of CTPs, and with discretionary exemptive relief under appropriate conditions.[98] This also allows CTPs to operate with

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[95] *Ibid.* at 2-3 (CSA Staff Notice 21-327 notes that the notion of "immediate delivery" is a fact-specific, contextual determination having consideration of the intention of the parties, the "economic realities" and substance of the transaction, and would generally occur if "ownership, possession and control" of the particular cryptocurrency was transferred to a purchaser and the transferor retained no further legal right, security interest or involvement in the cryptocurrency).

[96] Joint Canadian Securities Administrators / Investment Industry Regulatory Organization of Canada, CSA Staff Notice 21-329, *Guidance for Crypto-Asset Trading Platforms: Compliance with Regulatory Requirements*, (29 March 2021), online: https://www.asc.ca/securities-law-and-policy/regulatory-instruments/21-327 ("CSA Staff Notice 21-329"). Dealer platforms that transact in Quebec may also be required to register as derivatives dealers pursuant to the Quebec *Derivatives Act,* CQLR c 1-14.01.

[97] CSA Staff Notice 21-329*, supra* note 96.

[98] *Ibid.* at 1 ("The overall goal of the approach outlined in this Notice is to ensure there is a balance between needing to be flexible in order to foster innovation in the Canadian capital markets and meeting our regulatory mandate of promoting investor protection and fair and efficient capital markets."); see also at 11 ("IIROC recognizes the need to be flexible and foster innovation and has therefore established a path to membership for businesses or entities with novel business models, including Marketplace or Dealer Platforms that do not necessarily fit in the existing IIROC membership structure."); see Clements, Emerging Canadian, *supra* note 61 at 32-35.

regulatory compliance using tailored standards to accommodate novel business models. Exemptive relief decisions to date have applied dealer member rules; universal market integrity rules (UMIR); standardized terms and conditions, including investor limits, insurance (both third-party and self-insurance), custody rules, KYC, KYP, and account "appropriateness" as a form of suitability, with limits for investors with less risk tolerance.[99]

Also, CTPs must self-certify that none of the cryptocurrencies that are traded on their platform are "securities" on their own,[100] and must adhere to requirements relating to advertising, marketing and social media promotion.[101] The OSC has been active in enforcement actions against non-compliant CTPs,[102] and CTPs who have engaged in market manipulation.[103] In August 2022, the CSA also established a requirement that CTPs must provide a "pre-registration undertaking to their principal provincial regulator" that they will comply with terms and conditions to protect investors, similar to the requirements imposed on registered CTPs, while they are undergoing the IIROC registration process and their applications are under review.[104]

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[99] See Ontario Securities Commission, "Registered Crypto Asset Trading Platforms," https://www.osc.ca/en/industry/registration-and-compliance/registered-crypto-asset-trading-platforms (last accessed 3 September 2022).

[100] *Ibid.*

[101] See Joint Canadian Securities Administrators, Investment Industry Regulatory Organization of Canada, Staff Notice 21-330 – *Guidance for Crypto-Trading Platforms: Requirements relating to Advertising, Marketing and Social Media Use,* (23 September 2021), online: https://www.asc.ca/securities-law-and-policy/regulatory-instruments/21-330.

[102] See Ontario Securities Commission, "OSC Holds Global Crypto Asset Trading Platforms Accountable," (22 June 2022), online: https://www.osc.ca/en/news-events/news/osc-holds-global-crypto-asset-trading-platforms-accountable; see Ontario Securities Commission, Statement of Allegations, Polo Digital Assets, Ltd (Poloniex), 25 May 2021; Ontario Securities Commission, Statement of Allegations, Mek Global Limited and PhoenixFin Pte Ltd (collectively KuCoin), (2 June 2021); Ontario Securities Commission, Statement of Allegations, Bybit Fintech Limited (Bybit), (21 June 2021).

[103] See Ontario Securities Commission, *In The Matter Of Coinsquare Ltd., Cole Diamond, Virgile Rostand And Felix Mazer, Settlement Agreement* (16 July 2020).

[104] See Canadian Securities Administrators, "Canadian securities regulators expect commitments from crypto trading platforms pursuing registration," (15 August 2022) online: https://www.securities-administrators.ca/news/canadian-securities-regulators-expect-commitments-from-crypto-trading-platforms-pursuing-registration/.

## 3. Cryptocurrency Investment Funds

Canada has a robust investor market for cryptocurrency managed investment products and pooled investment funds, including cryptocurrency mutual funds, and cryptocurrency exchange traded funds (ETFs) which allow for intraday trading on retail-accessible marketplaces in Canada.[105] The market (and product supply) for cryptocurrency investment funds was largely catalyzed by an October 2019 OSC panel decision overturning a prior OSC staff refusal to issue a receipt for the *3iQ Corp.* non-redeemable exchanged traded "Bitcoin Fund."[106]

Investment funds that sell products to Canadian investors are subject to a wide variety of regulatory parameters, which are contextualized to the type of investment fund, including registration requirements and initial and ongoing fitness, conduct, and reporting obligations, operational safeguards, compliance with prospectus and initial disclosure rules, controls on fund operations, ongoing disclosure and restrictions on marketing and sales.[107] Despite existing in Canada, a "spot" or custodial cryptocurrency ETF has not yet been approved for trading in the US, and many applications having been rejected to date.[108] The SEC has, however, approved Bitcoin futures ETFs.[109]

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[105] See Canadian Securities Administrators, "Types of Crypto Assets" online: https://www.securities-administrators.ca/investor-tools/crypto-assets/types-of-crypto-assets/ (last accessed 8 August 2022).

[106] See Ontario Securities Commission, *Reasons and Decision in the Matter of 3iQ Corp. and the Bitcoin Fund, 3iQ Corp (Re),* 2019 ONSEC 37, (29 October 2019), online (pdf): https://www.canlii.org/en/on/oncmt/doc/2019/2019onsec37/2019onsec37.pdf.

[107] See Ontario Securities Commission, "Investment Funds and Structured Projects," online: https://www.osc.ca/en/industry/investment-funds-and-structured-products; *see* (among others), National Instrument 81-102 – *Investment Funds;* National Instrument 81-106 – *Investment Fund Continuous Disclosure;* National Instrument 31-103, *supra* note 59*;* National Instrument 81-101 – *Mutual Fund Prospectus Disclosure;* National Instrument 41-101 – *General Prospectus Requirements.*

[108] Rosmarie Miller, "Rejected Bitcoin ETF Sponsor Considers Suing SEC," (13 July 2022), online: *Forbes,* https://www.forbes.com/sites/rosemariemiller/2022/07/13/rejected-bitcoin-etf-sponsor-considers-suing-sec/?sh=a6ca39445614.

[109] Mat Di Salvo, "SEC Delays Decision on Cathie Wood's ARK 21Shares Bitcoin ETF," (13 July 2022), online: *Decrypt,* https://decrypt.co/105021/sec-delays-cathie-woods-ark-21shares-bitcoin-etf.

## 4. Cryptocurrency Derivatives

Regulators in Canada have taken a cautious approach to cryptocurrency derivatives and have identified the "inherent risks associated with cryptocurrency future contracts" as a result of the many unregulated venues that they are accessible on.[110] Several rules, guidance measures, and parameters have been established to deal with risk and instability in the cryptocurrency derivatives market. In December 2017, IIROC established standards for "minimum margin requirements for cryptocurrency futures contracts," which were updated and clarified in October 2021.[111] Also, several CSA member jurisdictions, pursuant to Multilateral Instrument 91–102, have prohibited binary options (which have been created in the US on Bitcoin[112]) with a "term to maturity of less than 30 days with or to an individual, or to a person or company that was created or is used solely to trade a binary option."[113]

## 5. Cryptocurrency Custodians

Regulatory guidelines are also imposed on businesses who desire to operate solely as a cryptocurrency trust company or dedicated custodian. There any various market segments for cryptocurrency custodial services including registered cryptocurrency investment funds, institutional investors, high net work individuals, family office direct holdings, and the provision of custodial services to CTPs and other registered financial institutions. Providing custodial services for cryptocurrencies creates many risks including managing and safeguarding private keys, avoiding identify fraud for unauthorized transactions, ensuring timely access for clients, and risk management and prudential oversight to ensure solvency in business operations.[114]

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[110] Canadian Securities Administrators, "Canadian Securities Administrators Remind Investors of Inherent Risks Associated with Cryptocurrency Futures Contracts" (18 December 2017) online: https://www.securities-administrators.ca/aboutcsa.aspx?id=1641.

[111] Investment Industry Regulatory Organization of Canada, "Margin Requirements For Cryptocurrency Futures Contracts," (14 October 2021), online: https://www.iiroc.ca/news-and-publications/notices-and-guidance/margin-requirements-cryptocurrency-futures-contracts-0.

[112] U.S. Commodity Futures Trading Commission, "CFTC Statement on Self-Certification of Bitcoin Products By CME, CFE and Cantor Exchange," Release Number 7654-17 (1 December 2017) online: https://www.cftc.gov/PressRoom/PressReleases/pr7654-17.

[113] See Ontario Securities Commission, "CSA Multilateral Notice of Multilateral Instrument 91–102, Prohibition of Binary Options and Related Companion Policy" (28 September 2017) online: http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20170927_91-102_binary-options.htm.

[114] CSA Staff Notice 21-329, *supra* note 96.

Regulatory controls necessary for cryptocurrency custodians include, among others, ensuring private keys are protected from internal and external attacks, storage solutions, insurance, testing and improvement of external and internal controls (such as hardware security modules or multi-party authorizations), audits, capital and other prudential safeguards.[115] Although the OSC has approved certain affiliated custodial arrangements for established global investment dealers,[116] the path to regulated cryptocurrency custodian generally involves becoming a "qualified custodian" under securities regulation,[117] or becoming a regulated financial institution like a bank or trust company.[118] Both applications involve significant ex-ante and ongoing costs and requirements including (depending on the nature of registration sought) minimum capital, audited financial reporting, standards of care, ongoing regulatory supervision, segregated asset rules, client asset verification, operational restrictions, conflicts safeguards and systems of controls.[119]

## 6. Reporting Issuer Continual Disclosure of Cryptocurrency Activities

In 2021, the CSA also provided disclosure guidance for reporting issuers who deal in, or transact with, cryptocurrencies.[120] In CSA Staff Notice 51-363 it was recommended that reporting issuers who deal in cryptocurrencies identify: the controls they use for asset segregation; cybersecurity safeguards; custodial, and sub-custodial arrangements, including the treatment of custodied cryptocurrencies in the event of the bankruptcy or insolvency of a custodian, and the due diligence they perform when

[115] *Ibid.*

[116] See Ontario Securities Commission, Decision in the Matter of Fidelity Clearing Canada ULC, (16 November 2021), online (PDF): https://www.osc.ca/sites/default/files/2021-11/oth_20211116_fidelus_0.pdf.

[117] See National Instrument 31-103, *supra* note 59 (this would entail obtaining status as a "Canadian custodian" or a "foreign custodian").

[118] Calgary-based Tetra Trust recently obtained regulated status as a trust company for cryptocurrency, see Vanmala Subramaniam, "Calgary fintech startup Tetra Trust becomes Canada's first regulated custodian of crypto assets," (8 July 2021) online: *The Globe and Mail,* https://www.theglobeandmail.com/business/article-calgary-fintech-startup-tetra-trust-becomes-canadas-first-regulated/.

[119] See NI 31-103, *supra* note 59; consider the process navigated recently by Tetra Trust, see Alberta, "Financial institutions – Information for financial service providers," https://www.alberta.ca/financial-institutions-information-financial-service-providers.aspx (last accessed 15 August 2022).

[120] See Canadian Securities Administrators, Staff Notice 51-363, *Observations on Disclosure by Crypto Assets Reporting Issuers,* (11 March 2021) online: https://www.asc.ca/securities-law-and-policy/regulatory-instruments/51-363.

assessing foreign custodians; their valuation models for cryptocurrencies; their use and reliance on CTPs; any prior security breaches or similar incidents; whether they retain the services of additional third parties in their cryptocurrency operations; and how they will fulfill material change reporting obligations.[121]

## 7. Regulatory Sandboxes for Cryptocurrency Constrained Testing

Regulatory sandboxes allow for a supervised, constrained testing and learning environment, where innovative products can be tested with real consumers, under contextual regulatory parameters, allowing regulators to learn, compile data, and assess risks and benefits of new financial innovations in real time, leading to more informed rule and policy construction.[122] Also, researchers at the BIS recently identified that venture equity funding in fintech firms increased after the introduction of a regulatory sandbox to a geographic location.[123]

The CSA launched a regulatory sandbox in 2017, as part of its 2016–19 business plan.[124] Since its inception, the CSA regulatory sandbox has provided exemptive relief to numerous cryptocurrency related enterprises, including CTPs, several cryptocurrency investment funds, blockchain-based international money remittance platforms, ICOs, utility token offerings, a primary listing platform for tokenized securities offered through a blockchain, and a secondary market trading venue for accredited investors in exempt market tokenized securities.[125] Alberta also recently

[121] *Ibid.* at. 3-7.
[122] See Wolf-George Ringe and Christopher Ruof, "Regulating Fintech in the EU: The Case for a Guided Sandbox," (2020) 11 *European Journal of Risk Regulation* 604; Ross P. Buckley, Douglas Arner, Robin Veidt and Dirk Zetzsche, "Building Fintech Ecosystems: Regulatory Sandboxes, Innovation Hubs and Beyond," (2020) 61 *Washington University Journal of Law and Policy* 55; Amy Harriman, "Playing in the Sandbox: Lessons U.S. Regulators Can Learn From The Successes of Fintech Sandboxes in the United Kingdom and Australia," (2020) 37 *Wisconsin International Law Journal* 615.
[123] Giulio Cornelli, Sebastian Doerr, Lavinia Franco and Jon Frost, "Funding for fintechs: patterns and drivers," (September 2021) online: *BIS Quarterly Review* https://www.bis.org/publ/qtrpdf/r_qt2109c.htm.
[124] See Canadian Securities Administrators, "CSA Regulatory Sandbox," online: https://www.securities-administrators.ca/resources/regulatory-sandbox/ (last accessed 28 August 2022).
[125] See Canadian Securities Administrators, "CSA Regulatory Sandbox, Crypto Asset Trading Platform Decisions," https://www.securities-administrators.ca/resources/regulatory-sandbox/decisions/ (last accessed 3 September 2022).

passed the *Financial Innovation Act* (FIA), thereby creating a provincial regulatory sandbox (the first province in Canada to do so), which allows financial and fintech companies to develop and test new financial products and services including cryptocurrency and blockchain initiatives.[126]

## B. Money Services Businesses and Anti-Money Laundering Controls

There are extensive controls currently in place in Canada to combat money laundering and terrorism finance using cryptocurrencies.[127] These safeguards, however, only apply to businesses or entities that deal in cryptocurrencies, not the cryptocurrencies themselves, or the software or hardware devices that allow for self-custody of cryptocurrency or peer-to-peer (P2P) interactions.[128] In theory, blockchain technology provides regulators with advantages when combatting money laundering and terrorism finance because of the on-chain indelible record of blockchain transactions, which despite complexities in tracing (since criminals use a variety of mechanisms to obscure and wash transactions such as mixers, privacy coins, swaps, and other methods), at least allows for an easier discoverable transaction trail than cash.[129] Business who "deal" in virtual currencies[130] must register as "money services

[126] *Financial Innovation Act,* SA 2022, c F-13.2; Government of Alberta, "Innovating the finance sector," online: https://www.alberta.ca/innovating-the-finance-sector.aspx ("Companies that participate in the regulatory sandbox may be exempt from some or all of the legal requirements set out in each of the following Acts: *Loan and Trust Corporations Act*; *Credit Union Act*; *ATB Financial Act*; *Consumer Protection Act* (Exemptions to the *Consumer Protection Act* would also require approval from the Minister of Service Alberta); *Personal Information Protection Act* (Exemptions to the *Personal Information Protection Act* would also require approval from the Office of the Information and Privacy Commissioner. This ensures personal information would be protected. Exemptions would also require approval from the Minister of Service Alberta); *Financial Consumers Act.*"); (The FIA also "establishes a regulation-making authority that would allow it to apply to other legislation if needed.")

[127] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17. ("PCMLTFA").

[128] Clements, Emerging Canadian, *supra* note 61 at 43-47.

[129] "A Round Table Discussion on Stablecoins: *supra* note 38 at 13

[130] Under the PCMLTFA, "virtual currency" is defined as "a) a digital representation of value that can be used for payment or investment purposes, that is not a fiat currency and that can be readily exchanged for funds or for another virtual currency that can be readily exchanged for funds; or (b) a private key of a cryptographic system that enables a person or entity to have access to a digital representation of value referred to in paragraph (a)." See PCMLTFA, *supra* note 127 at s.1(1).

businesses" (MSBs) with FINTRAC, and are subject to similar regulatory requirements as MSBs that deal in fiat currencies pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA),[131] and its associated regulations.[132]

MSBs that are virtual currency dealers are subject to a litany of risk-based compliance, registration, KYC, AML, and CTF safeguards, and third party verification procedures, including (among others):[133] screening for politically exposed persons and heads of international organizations; determining beneficial ownership for companies and institutions; record-keeping obligations, ascertaining beneficial ownership for certain transfers including compliance with the "travel rule"[134], and large-value and suspicious transaction reporting.[135] Virtual currency dealers who are MSBs face significant

[131] PCMLTFA, *supra* note 127; see Government of Canada, "Money services businesses," https://www.fintrac-canafe.gc.ca/msb-esm/msb-eng#x1 (last accessed 15 August 2022) (The guidance notes that money services businesses (MSBs) who "deal" in virtual currencies include persons or entities that: provide "invoice payment services or payment services for goods and services" using cryptocurrencies; provide virtual currency "exchange" services including "exchanging funds for virtual currency, virtual currency for funds, or virtual currency for another virtual currency"; and virtual currency transfer services including "transferring virtual currency at the request of a client," or "receiving a transfer of virtual currency for remittance to a beneficiary.")

[132] Regulations Amending the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations and the Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations: SOR/2022-76, Canada Gazette, Part II, Volume 156, Number 9. ("PCMLTFA Regulations").

[133] See PCMLTFA *supra* note 127; PCLTFA Regulations, *supra* note 132; Government of Canada, Money-services businesses, *supra* note 131; Osler, "Anti-money laundering in Canada: A guide to the June 1, 2021 changes," (2021) online (PDF): https://www.osler.com/osler/media/Osler/reports/anti-money-laundering/Anti-money-laundering-in-canada-guide.pdf.

[134] See Government of Canada, "Travel rule for electronic funds and virtual currency transfers," online: https://www.fintrac-canafe.gc.ca/guidance-directives/transaction-operation/travel-acheminement/1-eng (last accessed 4 September 2022) (The "travel rule" requires virtual currency dealers, who are also money services businesses, to ensure that "the name, address and the account number or other reference number (if any) of the person or entity who requested the transfer (originator information); and the name, address and the account number or other reference number (if any) of the beneficiary" is included with information sent or received in an electronic funds or virtual currency transfer.)

[135] See Government of Canada, Money services business, *supra* note 131.

penalties for non-compliance of these rules.[136] FINTRAC has also published guidelines on money laundering and terrorism finance indicators in virtual currency transactions.[137]

The rules under the PCMLTFA and associated regulations have also been recently amended to cover crowdfunding platform services which raise virtual currency on their own behalf, or for other people or entities - effectively permanently crystalizing the temporary orders made in early 2022 under the *Emergencies Act*.[138] Crowdfunding platform services are now subject to extensive record keeping, KYC, AML, identity verification, reporting and other compliance obligations and oversight by FINTRAC, including record keeping requirements for the "purpose" of the virtual currency fundraising.[139]

## C. Cryptocurrency Payment Service Providers and Related Regulation

There are unique risks and financial market stability concerns when cryptocurrencies are utilized as payment mechanisms, many of which are discussed extensively below in the subsection on considerations for stablecoin regulation in Canada.[140] When considering cryptocurrency payment services, it is necessary, at a minimum, to ensure internal controls and full traceability of all transfers within Canada and internationally. There are emerging retail payments supervisory frameworks in Canada, but some uncertainty on how they apply to cryptocurrencies, their intermediaries, and self-custody digital wallets.[141] The federal *Retail Payments Activities Act* ("RPAA") was

[136] See Government of Canada**,** "Penalties for non-compliance," online: https://www.fintrac-canafe.gc.ca/pen/1-eng (last accessed 4 September 2022).
[137] See Government of Canada, FINTRAC, "Money laundering and terrorist finance indicators – Virtual currency transactions," online: https://www.fintrac-canafe.gc.ca/guidance-directives/transaction-operation/indicators-indicateurs/vc_mltf-eng (last accessed 8 August 2022).
[138] PCMLTFA*, supra* note 127; *See* Franklin, Rizvi and. Stacey, *supra* note 55.
[139] Franklin, Rizvi and Stacey, *supra* note 55.
[140] See *Infra* Section IV(d).
[141] See Bank of Canada, "Retail Payments Supervision," online: https://www.bankofcanada.ca/core-functions/retail-payments-supervision/#Key-milestones (last accessed 15 August 2022).

enacted in June 2021,[142] endowing the BoC with supervisory responsibility for "payment service providers" (PSPs),[143] and requiring PSPs to register, submit to operational risk mitigation measures and end-user fund safeguards, and comply with reporting requirements.[144] A PSP is an entity that performs electronic payments, and may include "payment processors," "digital wallets," and "money transfer services."[145] However, regulations, or formal guidance on the full scope of the RPAA, particularly its application to user self-custodied digital cryptocurrency wallets or hardware storage devices, has not yet been issued.[146]

Also, the BoC has indicated that it will not engage in fee dispute resolution, offer "broad consumer protection measures," or respond to fee or privacy complaints.[147] Privacy vulnerabilities have been cited as a significant concern when using cryptocurrencies in payment functions - since consumer financial information could potentially be shared across (and outside) the crypto and DeFi ecosystem.[148] Consumers are also exposed to payments-related risks if cryptocurrency payments don't settle properly, or

[142] *Retail Payments Activities Act,* S.C. 2021, c.23, s.177 ("RPAA"). The RPAA will come into force in "stages," with the federal cabinet deciding how, and in what way, each provision comes into force. *See* Bank of Canada, "Retail Payments Supervision," online: https://www.bankofcanada.ca/core-functions/retail-payments-supervision/ (last accessed 4 September 2022).

[143] Bank of Canada, Retail Payments Supervision, *supra* note 142 (PSPs, "may include a variety of entities that perform electronic payment functions, such as payment processors, digital wallets, money transfer services and other payment technology companies that offer any of these services: providing or maintaining a payment account, holding funds, initiating an electronic funds transfer, authorizing, transmitting, receiving or facilitating instructions about an electronic funds transfer clearing or settling.")

[144] *Ibid.*

[145] *Ibid.*

[146] See McCarthy Tetrault, "Fintech Regulatory Developments: 2021 Year in Review," (4 January 2022), online: https://www.mccarthy.ca/en/insights/blogs/techlex/fintech-regulatory-developments-2021-year-review#_ftn2.

[147] Bank of Canada, Retail Payments Supervision, *supra* note 142 (the Bank of Canada notes that it does not offer "broader consumer protection, such as dispute resolution between a payment service provider and its end users, concerns about fee charged by payment service providers, privacy complaints.")

[148] G7 Working Group on Stablecoins, "Investigating the impact of global stablecoins", (October 2019), at 9, online (pdf): *Bank for International Settlements, Committee on Payments and Market Infrastructure,* https://www.bis.org/cpmi/publ/d187.pdf.

hacks or flawed code results in lost payments.[149] Also, unlike a licensing regime, the BoC won't apply proficiency or financial condition requirements to PSPs.[150] It uncertain whether "payment functions" under the RPAA applies to certain cryptocurrencies like stablecoins, and the Department of Finance has indicated that it is currently undertaking efforts to establish "criteria" under the RPAA, and will determine "whether payments in non-fiat currencies (e.g. stablecoins) are subject to the RPAA."[151]

## D. Taxation and Estate Planning

The *Canada Revenue Agency* (CRA) has adopted the position that cryptocurrency is not legal tender, and should be treated like a commodity for the purposes of the *Income Tax Act*.[152] In this regard, it is analogized to gold or silver which fluctuates in value based on market factors.[153] Whether the acquisition of a crypto-asset is a taxable event depends on the circumstances of the transaction, and purpose of the acquisition.[154] If the purpose is for asset value speculation (akin to purchasing an investment), then the acquisition price will determine the holder's "cost" basis for tax purposes, which is relevant in the analysis of tax consequences when the cryptocurrency is later sold.[155] The tax consequences are different if a cryptocurrency is acquired as consideration for the payment of goods or services (considered a "barter" transaction by the CRA), and the receiver of cryptocurrency will generally be

[149] President's Working Group on Financial Markets, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency, "Report on Stablecoins," (November 2021), at 13, online (pdf): https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf ("PWG Report").

[150] See Bank of Canada, "Retail Payments Advisory Committee – Brief Overview of Retail Payments Supervision," (23-24 September 2021), at 4, online (pdf): https://www.bankofcanada.ca/wp-content/uploads/2021/08/retail-payments-advisory-committee-brief-overview-retail-payments-supervision.pdf.

[151] *Ibid.* at pg. 1.

[152] See Government of Canada, "Guide for cryptocurrency users and tax professionals," online: https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency/cryptocurrency-guide.html ("CRA Guide"); Canada Revenue Agency, Document No. 2013-051470117 (23 December 2013); Simon Grant, Kwang Lim and Matthew Peters, BLOCKCHAIN & CRYPTOCURRENCY REGULATION CANADA, 4TH EDITION (2022) at 256-268.

[153] Grant, Lim and Peters, *supra* note 152 at 259-261.

[154] CRA Guide, *supra* note 152.

[155] CRA Guide, *supra* note 152; Grant, Lim and Peters, *supra* note 152 at 259-261.

required to include the fair value of the cryptocurrency received as business income.[156]

When disposing of a cryptocurrency in a sale transaction there is a material distinction of whether the seller must account for any gains as capital gains, or as income.[157] This assessment requires a contextual determination for each case.[158] Generally buying and selling cryptocurrency will give rise to capital gains (or losses) for an investor, unless the disposition is done in the context of a business of transacting cryptocurrencies, or an "adventure or concern in the nature of trade," in which case the profits will be business income and not capital gains.[159] Also, there may be circumstances where income taxes are payable by an estate for a deceased who died holding cryptocurrency, since a deceased is deemed to dispose of property on their death for fair market value.[160]

There is still, however, lingering ambiguity in diverse areas of cryptocurrency taxation, including aspects of valuation, barter, record keeping, and certain sales tax implications.[161] There is also risk that a person who acquires a cryptocurrency for its use as a payment mechanism for goods and services may incur income tax consequences if the cryptocurrency appreciated prior to its use (and thus disposition) as a medium of exchange.[162] If cryptocurrency is acquired as a result of mining (proof of work consensus) or staking (proof of stake consensus) then the CRA's position is that the miner or staker is subject to income tax at the time the cryptocurrency is earned, based on the premise that mining or staking is compensation for services rendered to the blockchain network.[163] Canadians are also required to file with the CRA Form T1135 if the total cost of specified foreign property, including cryptocurrency, exceeds $100,000CDN during the tax year, although the application of this filing to cryptocurrency has given rise to interpretive ambiguities due to uncertainties on the location of self-custodied cryptocurrencies on globally distributed public blockchain networks.[164]

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[156] CRA Guide, *supra* note 152; Grant, Lim and Peters, *supra* note 152 at 259-261.
[157] CRA Guide, *supra* note 152.
[158] *Ibid.*
[159] *Ibid.*
[160] Grant, Lim and Peters, *supra* note 152 at 264.
[161] *Ibid.* at 258-262.
[162] *Ibid.*
[163] CRA Guide, *supra* note 152; Canada Revenue Agency, Document No. 2018-077666I7 (8 August 2019); Grant, Lim and Peters, *supra* note 152 at 259-261.
[164] See William Musani and Ashvin Singh, "Foreign Property Reporting: Where is your Crypto?" Tax for the Owner-Manager, Canadian Tax Foundation (October 2021).

## E. Environmental Regulation for Cryptocurrency Mining Operations

A common critique of cryptocurrencies that use a "proof-of-work" (PoW) consensus mechanisms, such as Bitcoin, is that they produce tremendous environmental costs and other externalities (like noise nuisance), that aren't otherwise justified by their social benefits.[165] There is no overarching regulatory framework for PoW cryptocurrency mining operations in Canada,[166] despite significant environmental concerns.[167] There are, however, diverse provincial utilities regulations that apply to cryptocurrency mining operations, including necessary approvals if a mining operation operates a power plant;[168] land-use plan approvals for setting up a mining operation at certain locations, electric load approvals for large electricity usage, technical studies and pre-approvals, and federal requirements for facilities operating proximate to First Nations lands, including requisite consultation with indigenous communities.[169]

In 2019, the Quebec *Régie de l'énergie* approved a "blockchain" consumer category for cryptocurrency mining with allocated energy reserve blocks.[170] In 2021 Régie de l'énergie requested limitations on energy consumption for mining operations during the winter.[171] *Hydro-Québec* has also recently announced the launching of a process for allocating capacity for cryptographic operations, starting in mid-September 2022,

[165] See Jon Truby, Rafael Dean Brow, Andrew Dahdal, and Imad Ibrahim, "Blockchain, climate damage, and death: Policy interventions to reduce the carbon emissions, mortality, and net-zero implications of non-fungible tokens and Bitcoin," (2022) 88 *Energy Research & Social Science.*

[166] Brady Chapman and Ken Tennenhouse, "Cryptocurrency Mining Opportunities for Western Canada's Energy Industry," (8 April 2022), online: *MLT Aikins*, https://www.mltaikins.com/energy/cryptocurrency-mining-opportunities-for-western-canadas-energy-industry/.

[167] Matthew Keen, "Cryptocurrency mining in Canada: Environmental and legal issues," (5 December 2018), online: *Lawyer's Daily,* https://www.thelawyersdaily.ca/articles/8845/cryptocurrency-mining-in-canada-environmental-and-legal-issues.

[168] With respect to "captured gas" from a natural gas-powered cryptocurrency mining operation, a recent enforcement decision of the *Alberta Utilities Commission* provides clarity on statutory exemptions for "own use" power generation. See, Enforcement staff of the Alberta Utilities Commission, AUC Decision 26379-D02-2021 (19 August 2021).

[169] Chapman and Tennenhouse, *supra* note 166.

[170] Régie de l'énergie decision D-2019-052 (29 April 2019).

[171] Régie de l'énergie decision D-2021-007 (28 January 2021).

with restrictions on energy allocation for entities involved in cryptocurrency mining.[172] Of note, the recent provisional agreement on the EU *Markets in Crypto-Assets* (MiCA),[173] will require certain cryptocurrency service providers to declare information on their environmental and climate footprint, as well as adhere to mandatory minimum sustainability standards for blockchain consensus mechanisms, including PoW.[174]

# IV. Current Governance Concerns, Challenges, and Recommendations

## A. Cybersecurity and Hacking Risks

Hacking remains an ever present risk on programmable blockchain networks and in the cryptocurrency and DeFi ecosystem due to software vulnerabilities (bugs), and the complicated interaction of human participants and self-executing smart contract code.[175] The recurrent threat of SIM swaps,[176] routing attacks,[177] oracle attacks,[178]

[172] See Hydro Québec, "Québec's blockchain industry," online: https://www.hydroquebec.com/blockchain/ (last accessed 10 August 2022).
[173] European Parliament, "Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937," online: https://eurlex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0593 (last accessed 4 September 2022).
[174] *Ibid.*
[175] Mike Orcutt, "Once hailed as unhackable, blockchains are now getting hacked" (19 February 2019), online: *MIT Technology Review,* https://www.technologyreview.com/2019/02/19/239592/once-hailed-as-unhackable-blockchains-are-now-getting-hacked/.
[176] Paddy Baker, "BlockFi Says Hacker SIM-Swapped Employee's Phone, No Funds Were Lost" (19 May 2020), online: *CoinDesk,* https://www.coindesk.com/markets/2020/05/19/blockfi-says-hacker-sim-swapped-employees-phone-no-funds-were-lost/.
[177] Barry Sookman, "Blockchain Vulnerabilities and Civil Remedies to Recover Stolen Assets," (2022) 2 *The International Journal of Blockchain Law* 25 at 28.
[178] Giulio Caldarelli and Joshua Ellul, "The Blockchain Oracle Problem in Decentralized Finance – A Multivocal Approach" (2021) 11:16 *Applied Sciences*.

private key security hacks, [179] phishing scams,[180] ransomware,[181] "flash loan" attacks,[182] and malware,[183] combine to make investing in cryptocurrencies, particularly through self-custodied digital wallets, continually risky for individual holders who often lack technological acumen and infrastructure. Investors are also routinely exposed to hacks on DeFi applications. In October 2021, $16 million was hacked, by a Canadian university student, from the *Indexed Finance* protocol,[184] and $130 million was stolen from *Cream Finance's* lending protocol.[185] Investors in the metaverse have also been subject to numerous hacks, including a recent hack on the popular *Axie Infinity* metaverse application.[186]

Blockchain technology makes it very difficult to recover lost or stolen cryptocurrency, even with a successful court-ordered remedy like an injunction, tracing, recovery, or court-mandated asset freeze which, in many cases, can be very difficult to obtain, and may additionally trigger legal interpretive challenges like whether cryptocurrency is

[179] Saurabh Singh, A.S.M. Sanwar Hosen,and Byungun Yoon, "Blockchain Security Attacks, Challenges, and Solutions for the Future Distributed IoT Network" (26 January 2021) 9 *IEEE Access* 13938.

[180] Estevao Costa, "The Benefits and Vulnerabilities of Blockchain Security" (19 October 2021), online: *CENGN,* https://www.cengn.ca/information-centre/innovation/the-benefits-and-vulnerabilities-of-blockchain-security/.

[181] Sookman, *supra* note 177 at 34.

[182] See Scott Chipolina, "Cream Finance Suffers Third Hack, Loses Over $130 Million", (27 October 2021), online: *Decrypt,* https://decrypt.co/84590/cream-finance-suffers-third-hack-losing-over-130-million; Martin Young, "PackcakeBunny Attacked With Massive $200M Flash Loan Exploit", (19 May 2021), online: *Yahoo Finance*, https://finance.yahoo.com/news/pancakebunny-attacked-massive-200m-flash-050619340.html.

[183] See *R. v. Vachon-Desjardins*, 2022 ONCJ 43.

[184] Christopher Beam. "The Math Prodigy Whose Hack Upended DeFi Won't Give Back His Millions," (18 May 2022), online: *Bloomberg Businessweek,* https://www.bloomberg.com/news/features/2022-05-19/crypto-platform-hack-rocks-blockchain-community.

[185] Tim Copeland, *Ethereum DeFi protocol Cream Finance hacked for more than $130 million,* (27 October 2021), online: *The Block Crypto,* https://www.theblockcrypto.com/post/122241/ethereum-defi-protocol-cream-finance-hacked-for-115-million.

[186] Daniel Van Boom, "A Fake Job Offer Reportedly Led to Axie Infinity's $600M Hack," (6 July 2022), online: *CNET,* https://www.cnet.com/personal-finance/crypto/a-fake-job-offer-reportedly-led-to-axie-infinitys-600m-hack/.

property,[187] if so, what type[188], and where is it situated?[189] Another emerging vulnerability is in "blockchain bridges" that connect diverse programmable blockchains with each other, allowing for the transfer of cryptocurrencies between blockchains and the ability of DeFi participants to avoid high transaction fees (also known as "gas fees") when using the Ethereum blockchain directly.[190]

Blockchain bridges have been the focal point of numerous recent hacking attacks, with an estimated $1 billion of cryptocurrency stolen this way in 2022.[191] Ironically, what is often touted as the core value proposition of blockchain technology – its immutable, unalterable record[192] – may in fact serve as a primary friction for the recovery of lost assets in the context of a hack or fraud, since reversing transactions on a blockchain is very difficult without a significant measure such as a "hard fork."[193]

## B. Criminal Enterprise, Tax and Sanction Evasion

Cryptocurrencies may also give rise to new criminal enterprises (like "ransomware-as-as-service" where ransomware toolkits are licensed), or otherwise incentivize their use in illicit activities, because of the "distinct" features and advantages of borderless and decentralized operations, "convenient access, storage and transfer," and pseudo-anonymity.[194] Early uses of Bitcoin included the facilitation of illicit transactions, such

[187] Sookman, *supra* note 177 at 35.
[188] *Copytrack Pte Ltd. v. Wall*, [2018] BCSC 1709.
[189] Sookman, *supra* note 177 at 35.
[190] Ryan Browne, "Hackers drain nearly $200 million from crypto startup in 'free-for-all' attack," (2 August 2022), online: *CNBC*, https://www.cnbc.com/2022/08/02/hackers-drain-nearly-200-million-from-crypto-startup-nomad.html.
[191] Sidhartha Shukla, "Crypto Firm Nomad Loses Nearly $200 Million in Bridge Hack," (2 August 2022) online: *Bloomberg,* https://www.bloomberg.com/news/articles/2022-08-02/crypto-bridge-nomad-drained-of-nearly-200-million-in-exploit.
[192] Clements, Assessing the Evolution, *supra* note 11 at 75-76.
[193] Bank for International Settlements, Committee on Payments and Market Infrastructures, "Distributed ledger technology in payment clearing and settlement," (February 2017), online (pdf): https://www.bis.org/cpmi/publ/d157.pdf.
[194] Shane T. Stansbury, Written Testimony to United States Senate Committee on Banking, Housing, and Urban Affairs, Hearing on "Understanding the Role of Digital Assets in Illicit Finance," (17 March 2022), online (pdf): https://www.banking.senate.gov/imo/media/doc/Stansbury%20Testimony%203-17-22.pdf.

as drug trafficking, on the *Silk Road* website.[195] Since then, it has been used to facilitate terrorism finance, human trafficking, child exploitation, extortion, and ransomware.[196] Further, while public blockchains allow law enforcement authorities to view transactions, it is not easy to trace ownership of privately controlled digital wallets, or coin transfers given the emergence of "mixing," "tumbling," or "chain hopping" services, and "privacy coins" (like *Monero*) which aid in coin tracing obfuscation.[197] Cryptocurrencies (and automated smart-contract platforms like *Tornado Cash*) also help to facilitate money-laundering efforts,[198] and conceal criminal behavior that has been conducted "off-chain."[199] They can also aid in tax and regulatory sanctions evasion, [200] the latter being a recently cited concern in relation to Iran.[201]

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[195] U.S. Department of Justice, "Manhattan U.S. Attorney Announces The Indictment of Ross Ulbricht, The Creator And Owner Of The 'Silk Road' Website,"(4 February 2014), online: https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-indictment-ross-ulbricht-creator-and-owner-silk-road.

[196] Stansbury, *supra* note 194; U.S. Gov't Accountability Off., GAO22-105462, Virtual Currencies: Additional Information Could Improve Federal Agency Efforts to Counter Human and Drug Trafficking (December 2021), online (pdf): https://www.gao.gov/assets/gao-22-105462.pdf; Chainanalysis, "The 2022 Crypto Crime Report" (February 2022), p. 3, online: https://go.chainalysis.com/2022-Crypto-Crime-Report.html.

[197] Stansbury, *supra* note 194.

[198] See Mengqi Sun, "Tornado Cash's Sanctions Show Shift in Crypto Regulatory Focus," (12 August 2022), online: *The Wall Street Journal,* https://www.wsj.com/articles/tornado-cashs-sanctions-show-shift-in-crypto-regulatory-focus-11660336224?mod=hp_minor_pos10; MacKenzie Sigalos, "Crypto criminals laundered $540 million by using a service called RenBridge, new report shows," (10 August 2022), online: *CNBC,* https://www.cnbc.com/2022/08/10/crypto-criminals-laundered-540-million-using-renbridge-elliptic-says.html.

[199] Stansbury, *supra* note 194;There is some contestation, however, on the extent that cryptocurrencies foster money laundering activity and whether there is a "false narrative" of their role in illicit enterprise, see Hailey Lennon, "The False Narrative Of Bitcoin's Role In Illicit Activity," (19 January 2021), online: *Forbes,* https://www.forbes.com/sites/haileylennon/2021/01/19/the-false-narrative-of-bitcoins-role-in-illicit-activity/?sh=74887d603432.

[200] Greg Iacurci, "Cryptocurrency poses a significant risk of tax evasion," (31 May 2021), online: *CNBC,* https://www.cnbc.com/2021/05/31/cryptocurrency-poses-a-significant-risk-of-tax-evasion.html.

[201] Kyle Barr, "Iran Plans to Use Crypto to Pay for Imports to Help Get Around Sanctions," (9 August 2022), online: *Gizmodo,* https://gizmodo.com/iran-crypto-imports-sanctions-1849389297.

DeFi protocols and applications, the concerns of which are discussed in detail below,[202] disintermediate regulated entities that are subject to extensive KYC, AML and CTF controls.[203] Current regulatory controls are focused on identifiable intermediaries – like CTPs, or other cryptocurrency dealers or custodians – and not smart-contract based DeFi protocols that operate automatically on public blockchains like the Ethereum network.[204] As a result, illicit actors may self-custody cryptocurrencies, using private digital software wallets, or hardware devices, that they control, without the intervention of intermediary service providers, and access DeFi exchanges, lending protocols, mixers, privacy coins, chain-hopping services, yield farming applications, or automated market marking applications as a pseudo-anonymous means of international money laundering, or other regulatory or tax evasion.[205]

International regulators have recently utilized unprecedented measures to prosecute illicit activity using cryptocurrency, including recent sanctions against *Tornado Cash,* which isn't an individual or a business, but rather is a cryptocurrency "mixer" that exists as software code on a decentralized blockchain.[206] The Canadian federal 2022 budget identified concerns around the use of cryptocurrency to "avoid global sanctions and fund illegal activities," and proposed $17.7 million over five years, starting in 2022-23, for a financial sector legislative review on the "digitalization of money" with the first phase directed at digital currencies including cryptocurrencies and stablecoins, and a Canadian CBDC.[207]

## C. Governance Risks in Self-Hosted Cryptocurrency Wallets

Currently, there are no regulatory restrictions or registration requirements in Canada for digital "wallets" or other self-managed, and self-hosted, software or hardware devices that allow individuals, or organizations, to self-custody cryptocurrencies and control their own private keys.[208] Regulatory frameworks in Canada are focused on centralized intermediaries and businesses who provide dealing, transaction,

[202] *Infra* Section IV(e).
[203] Clements, Emerging Canadian, *supra* note 61 at 32.
[204] *Ibid.*
[205] *Ibid.* at 43-47.
[206] Tory Newmyer and Jeremy B. Merril, "Top crypto company defies U.S. sanctions on service that hid stolen assets," (24 August 2022), online: *Washington Post,* https://www.washingtonpost.com/business/2022/08/24/crypto-sanctions-tether/.
[207] See, Government of Canada, Budget 2022, Chapter 9, "Tax Fairness and Effective Government," online: https://budget.gc.ca/2022/report-rapport/chap9-en.html#m171.
[208] Clements, Emerging Canadian, *supra* note 61 at 27-28, 43-47.

payments, transfer or custodial services to clients, as a key point of "risk transmission" and "transaction volume," but the regulatory parameters have not extended to self-custodied private digital software wallets or hardware devices that cryptocurrency investors may utilize on their own, without the aid of an intermediary, third party custodian, or CTP.[209]

Currently the federal Department of Finance, with assistance from the BoC, is investigating the extent that the RPAA, and related regulations, will apply to digital wallets that simply hold cryptocurrencies, and as of the date of this report, formal guidance or regulations have not been issued on this point.[210]

Self-hosted cryptocurrency wallets facilitate a true P2P international, pseudo-anonymous, financial ecosystem that allows for cross-border transactions and interactions. P2P transactions are not usually covered under AML or CTF laws and regulations because these typically only apply to financial intermediaries.[211] Recent non-binding guidance, however, from the international *Financial Action Task Force* (FATF) has recommended global regulators apply AML and CTF controls to people who "control" or "sufficiently influence" the underlying DeFi service, which may include

[209] *Ibid.*; the focus on custodial services and intermediated dealing is consistent with both the historical approach to financial industry regulation, and evidence of how people normally purchase and use cryptocurrencies. 2020 research from the Rand Corporation estimated that 99 percent of cryptocurrency and privacy coin transactions were executed on centralized cryptocurrency exchanges, see Erik Silfversten et al., "Exploring the use of Zcash cryptocurrency for illicit or criminal purposes" (2020) *RAND Europe* at 6; further, centralized services and exchanges have also been a point of vulnerability, operational instability, fraud, and hacks. See Robert McMillan, "The Inside Story of Mt. Gox, Bitcoin's $460 Million Disaster" (3 March 2014), online: *Wired* https://www.wired.com/2014/03/bitcoin-exchange/; Ontario Securities Commission, "OSC Panel approves settlement with Coinsquare, Cole Diamond, Virgile Rostand and Felix Mazer" (21 July 2020), online: https://www.osc.ca/en/news-events/news/osc-panel-approves-settlement-coinsquare-cole-diamond-virgile-rostand-and-felix-mazer.

[210] See Bank of Canada, "Retail Payments Supervision," https://www.bankofcanada.ca/core-functions/retail-payments-supervision/#holding-funds ("Holding funds: Work to interpret this function is ongoing and more information will be released when it becomes available.") (last accessed 9 September 2022).

[211] Financial Action Task Force, "Virtual Assets and Virtual Asset Service Providers," (October 2021), at 18-19, online (pdf): https://www.fatf-gafi.org/media/fatf/documents/recommendations/Updated-Guidance-VA-VASP.pdf ("FATF Guidelines").

both protocol developers and early stage investors.[212] When a cryptocurrency is self-custodied, users must individually assess wallets on their own without any regulatory guidance or minimum standards, and this creates a knowledge deficit at a minimum, but it can also lead to investor harm, or lost cryptocurrencies, via theft (in the event of a hack) or negligence for lost keys.[213] It can also facilitate illicit activity and "obscure" proceeds of crime.[214]

Self-hosted digital wallets are also not subject, at the moment, to KYC or AML safeguards, or transaction reporting in Canada, and do not trigger FINTRAC registration as an MSB because a digital wallet is not a "virtual currency dealer."[215] Simply put, self-hosted wallets are tools that allow individuals to take custody and control of their own cryptocurrencies, safeguard private keys, and interact directly with blockchain networks or DeFi applications without the aid of an intermediary or service provider.[216] As highlighted by the *Indexed Finance* hack (which was perpetrated by a Canadian, alleging a lawful arbitrage trade, and a "code is law defence[217]), pseudonymous self-custodied digital wallets also make it very hard to detect market manipulation, or recover stolen cryptocurrencies.[218]

Also, court ordered remedies for fraudulently obtained cryptocurrencies, or other cryptocurrency seizures, are most effective when there is a third-party or centralized intermediary that holds custody; thus self-custodied digital wallets, where an individual safeguards private keys, presents tremendous practical challenges for the recovery of cryptocurrency.[219] Also, DeFi transactions are recorded in an immutable record, yet

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[212] "Targeted Update on Implementation of the FATF Standards on Virtual Assets and Virtual Asset Service Providers" (June 2022) at 19, online (pdf): *Financial Action Task Force,* https://www.fatf-gafi.org/media/fatf/documents/recommendations/Targeted-Update-Implementation-FATF%20Standards-Virtual%20Assets-VASPs.pdf.

[213] Clements, Emerging Canadian, *supra* note 61 at 43-47.

[214] FATF Guidelines, *supra* note 211 at 8.

[215] See Government of Canada, "Money services businesses," https://www.fintrac-canafe.gc.ca/msb-esm/msb-eng#x1 (last accessed 11 August 2022); Alex Davis, "The case for self-hosted wallets in face of global regulations," (20 June 2022), online: *The Lawyer's Daily,* https://www.thelawyersdaily.ca/articles/37392/the-case-for-self-hosted-wallets-in-face-of-global-regulations.

[216] Davis, *ibid.*

[217] See *Cicada 137 LLC v. Medjedovic,* 2022 ONSC 369 (CanLII).

[218] Beam, *supra* note 184.

[219] A Round Table Discussion on Stablecoins: *supra* note 38 at 9.

"identifiers" for transactions are limited to blockchain addresses, not the identities behind or beneficial ownership of self-hosted digital wallets.[220]

International regulatory bodies have recently proposed measures to mitigate money laundering, tax and sanctions evasion, criminal enterprise, and terrorist finance risks in self-hosted wallets. Newly proposed EU rules will create an "un-hosted wallet" reporting requirement that if a customer of a cryptocurrency service provider sends more than 1000 Euro to or from an un-hosted wallet then the cryptocurrency service provider must verify whether the wallet is effectively owned or controlled by this customer.[221] However, these rules do not extend to "person to person transfers" conducted without an intermediary.[222]

## D. Regulatory Parameters for Stablecoins

To date, no regulatory body or financial agency in Canada has announced supervisory parameters, or an overarching registration, taxonomy, disclosure or governance framework for stablecoins,[223] despite some varieties resembling securities such as an investment contract or an evidence of a deposit (not otherwise exempted under securities law),[224] or a money market mutual fund, or ETF.[225] The interpretation of a stablecoin as a security relies on the fact that they are predominantly used today for cryptocurrency trading strategies, serving as collateral to create leverage on CTPs, moving stores of value between CTPs and DeFi protocols, and for income earning opportunities on DeFi lending applications, and not for consumer or retail payments activities or global remittance.[226] The jurisdictional claim of securities regulators over stablecoins in Canada weakens if stablecoins become a commonly used medium of exchange in consumer payments applications.[227] Other stablecoins may also resemble derivatives as swaps.[228]

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[220] Crenshaw, *supra* note 3 at 9.
[221] See European Parliament, "Crypto assets: deal on new rules to stop illicit flows in the EU," (29 June 2022), online: https://www.europarl.europa.eu/news/en/press-room/20220627IPR33919/crypto-assets-deal-on-new-rules-to-stop-illicit-flows-in-the-eu.
[222] *Ibid.*
[223] Clements, Defining the Regulatory Perimeter, *supra* note 35.
[224] *Ibid.* at 5-10.
[225] *Ibid.,* at 10-11*; see* G7 Working Group on Stablecoins, "Investigating the impact of global stablecoins, (October 2019), at 1,3*, Bank for International Settlements, Committee on Payments and Market Infrastructures*, online (pdf): https://www.bis.org/cpmi/publ/d187.pdf.
[226] Clements, Defining the Regulatory Perimeter, *supra* note 35 at 5-10.
[227] *Ibid.* at 5-10.
[228] *Ibid.* at 11-12.

Canada is not idiosyncratic in this regard, as other jurisdictions (particularly the US) have also been slow to enact stablecoin regulatory frameworks.[229] Of note, the recently announced provisional agreement in the EU (MiCA) creates regulatory parameters for stablecoins including claims for stablecoin holders against stablecoin issuer reserves, certain prudential controls for issuers including only holding reserves that meet certain liquidity quality standards, a one-to-one ratio of deposits to issued stablecoins, and adequate minimum liquidity requirements.[230]

There are many risks in stablecoins, and the risks are contextual to the design of the stablecoin and the operation of the stablecoin issuer.[231] For example, uncollateralized algorithmic stablecoins like Terra (UST) which failed catastrophically in May 2022, have unique dependencies on independent market actors, and continual demand in a parallel cryptocurrency (in Terra's case LUNA), to ensure operational stability,[232] Also, Terra's stablecoin relied heavily for demand on an unregulated, associated borrowing platform (*Anchor* protocol) which also had unique risks, and was being propped up for stability by Terra stakeholders.[233] Off-chain "fiat backed" stablecoins (those that hold liquid assets on reserve to ensure a pegged value), introduce three categories of risk: consumer and investor protection, micro-prudential (stablecoin issuer firm-level risks);

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*see* Diana Qiao, "This Is Not A Game: Blockchain Regulation and Its Application to Video Games," 40 *Northern Illinois University Law Review* 176, at 217-281 (2020).

[229] Many US regulatory proposals or Congressional bills seeking to regulate stablecoins have either stalled, or died on the order paper including, PWG Report, *supra* note 149; *Managed Stablecoins are Securities Act of 2019* (H.R. 5197); *Keep Big Tech Out of Finance Act of 2019* (H.R. 4813); *Stablecoin Classification and Regulation Act of 2020* ("Stable Act") (H.R. 8827); *Digital Asset Market Structure and Investor Protection Act* (2021) (H.R. 4741); *Stablecoin Innovation and Protection Act of 2022* (Discussion Draft); and the *Lummis-Gillibrand Responsible Financial Innovation Act*, (introduced Senate June 2022).

[230] Council of the EU, "Digital finance: agreement reached on European crypto-assets regulation (MiCA)," (30 June 2022), online: https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/digital-finance-agreement-reached-on-european-crypto-assets-regulation-mica/.

[231] Clements, Built to Fail, *supra* note 35 at 134-137.

[232] *Ibid.* at 139-144.

[233] See Krisztian Sandor, "Investors Flee Terra's Anchor as UST Stablecoin Repeatedly Loses $1 Peg," (9 May 2022), online: *CoinDesk,* https://www.coindesk.com/markets/2022/05/09/investors-flee-terras-anchor-as-ust-stablecoin-repeatedly-loses-1-peg/; Zhiyuan Sun, "Terra injects $450M UST into Anchor reserve days before protocol depletion," (18 February 2022), online: *CoinTelegraph,* https://cointelegraph.com/news/terra-injects-450m-ust-into-anchor-reserve-days-before-protocol-depletion.

and macro-prudential (financial systemic risks).[234] Consumers and investors of stablecoins face data privacy, cybersecurity, supply modification, fee transparency, operational, governance, reserve composition, custody, quality, and valuation risks.[235]

Stablecoin investors also have legal and restitutionary risks as an unsecured creditor in the event of a stablecoin issuer's insolvency or windup.[236] Stablecoin issues face micro-prudential risks including insolvency, cybersecurity, operational stability, ensuring sufficient internal risk management controls and governance mechanisms.[237] Privately issued stablecoins also present macro-prudential systemic and market integrity risks when used as a widespread payment devise including (among others), interconnection risks, fire-sale contagion and confidence effects, shadow banking, payments-related systemic risks, concentration risks and "too big to fail" blockchain settlement infrastructure, deposit and currency substitution, bank like "run risks," and fiat de-monetization.[238]

Securities regulators have many tools to combat these risks, if they were to assert jurisdiction over stablecoins in Canada.[239] However, securities-based regulatory effectiveness in mitigating all stablecoin risks (particularly macro-prudential) is limited, and certain "gaps" remain if stablecoins are exclusively regulated under securities law, including macro-prudential backstops (like lender of last resort, or deposit insurance for stablecoin bank-style mass redemption runs); payments-related systemic risks;

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[234] Clements, Defining the Regulatory Perimeter, *supra* note 35 at 12.

[235] *Ibid.* at 5-12.

[236] *Ibid.;* G7 Working Group on Stablecoins, "Investing the impact of global stablecoins," *Bank for International Settlements, Committee on Payments and Market Infrastructures,* (October 2019), at 10, online (pdf): https://www.bis.org/cpmi/publ/d187.pdf ("G7 Working Group Report").

[237] Clements, Defining the Regulatory Perimeter, *supra* note 35 at 14-15.

[238] *Ibid.* at 14-15.

[239] *Ibid.* at 20-24 (Describing how there are many regulatory measures used under conventional securities law that could be applied to the operations of stablecoin issuers to ensure risk mitigation in the event that securities regulators asserted jurisdiction over stablecoins. Such measures include disclosures on reserve composition, custody, fees, operations and governance; controls on reserve quality, segregation, safekeeping, concentration, liquidity and valuation; re-sale rules; internal controls such as proficiency standards, compliance, conflicts avoidance policies, cybersecurity, wind-up rights; micro-prudential safeguards such as audits, insurance, capital requirements; books and records oversight and reporting; investor protection measures including redemption rights, dispute resolution processes, primary and secondary market information disclosure and liability for misrepresentations; suitability, know your client, know your product; and marketplace and trading standards for secondary market transactions in stablecoins).

settlement and clearing risks; risks relating to the global scaling of an underlying blockchain network that becomes a critical clearing and settlement system (financial market infrastructure); interjurisdictional standardization for cross-border and global payments; limited consumer protection standards, and redress avenues, for payments-based stablecoins; and a lack of the full scope of AML, illicit finance, and CTF controls.[240]

As a result, regulating stablecoins in Canada requires inter-agency cooperation, tiered frameworks, and a taxonomy for contextual parameters for diverse forms, across the financial regulatory landscape, to adequately address all stablecoin risks, and must also seek international cooperation and harmony and data-sharing, given the interconnectedness and potential impact of the failure of a global stablecoin issuer.[241]

## E. Decentralized Finance (DeFi) Exchanges, Applications, Protocols

Many DeFi protocols and applications currently operate in Canada without registration or regulatory oversight, including no KYC screening, AML, or CTF prevention measures.[242] These DeFi applications can be accessed through self-custodied cryptocurrency wallets to facilitate pseudo-anonymous international cryptocurrency transactions and global P2P interactions.[243] These DeFi applications attempt to "replicate functions of our traditional financial system" and provide analogous financial products and services to traditional institutions, including exchanges, collateralized loans, income earning deposits, index funds and other investments, passive income earning and market making opportunities, and derivatives exposure using decentralized blockchain networks and automated, self-executing smart contracts that are composable, interoperable, and open source.[244]

DeFi applications present many challenges for regulators in Canada since they operate without a traditional intermediary, or a custodial service, and are conducted through automated, open-source, smart contracts or software protocols allowing for global P2P interactions on decentralized, programmable blockchains, accessible by

[240] Clements, Defining the Regulatory Perimeter, *supra* note 35 at 24-28.
[241] *Ibid.* at 14-15.
[242] Clements, Emerging Canadian, *supra* note 61 at 36-40, 47-52.
[243] *Ibid.*
[244] Crenshaw, *supra* note 3 at 4; Clements, Emerging Canadian, *supra* note 61 at 47-52; World Economic Forum, "Decentralized Finance: DeFi Policy-Maker Toolkit" (8 June 2021), online: https://www.weforum.org/whitepapers/decentralized-finance-defi-policy-maker-toolkit/.

users with self-custody wallets.[245] As a result, despite a DeFi lending and borrowing protocol resembling a depositary institution, or an investment dealer, it is uncertain whether traditional regulatory frameworks for DeFi protocols even apply,[246] and if so, who is responsible for compliance? Is it the protocol developers? The users? Are the governance token holders responsible for compliance? The software code itself? The miners or stakers performing consensus activities on the underlying blockchain? These questions are currently unsettled. The developers may not even be resident in Canada, and open-source code may also be protected as a form of free speech.[247] The myriad of potential regulated parties creates tremendous enforcement costs and uncertainties.[248]

DeFi also allows for the creation of "synthetic" cryptocurrencies that mirror the performance of real-world securities, such as the synthetic US stocks (called "synths" created through Terra's *Mirror Protocol*).[249] Synths may also reference the price of other cryptocurrencies, such as "wrapped tokens" referencing the price of Bitcoin and Ether which are used to facilitate token transfers across diverse blockchains.[250] Synths create regulatory enforcement challenges for the international regulatory community to prevent illegal securities distributions or derivatives trading.[251] Further, by "disintermediating" traditional financial market participants and institutions, DeFi

[245] See Clements, Emerging Canadian, *supra* note 61 at 47-52; Dirk A. Zetzsche, Douglas W. Arner and Ross P. Buckley, "Decentralized Finance (DeFi)" (March 2020) IIEL Issue Brief 02/2020, European Banking Institute Working Paper Series 59/2020; Lewis Cohen, Angela Angelovska-Wilson and Greg Strong, "Decentralized Finance: Have Digital Assets and Open Blockchain Networks Found Their 'Killer App'? (2021) *Global Legal Insights, Blockchain & Cryptocurrency Regulation.*

[246] See *Bank Act*, SC 1991, c 46; National Instrument 31-103, *supra* note 59; *Loan and Trust Corporations Act*, RSA 2000, c L-20 at ss.1(v) & 1(k).

[247] See Alex Colangelo and Alana Maurushat, "Exploring the Limits of Computer Code as a Protected Form of Expression: A Suggested Approach to Encryption, Computer Viruses, and Technological Protection Measures," (2006) 51:1 *McGill Law Journal* 47.

[248] Primavera De Filippi and Aaron Wright, *Blockchain and the Law: The Rule of Code*, (Cambridge: Harvard University Press, 2018) at 175-176.

[249] See Mirror Finance (mAssets), online: https://docs.mirror.finance/protocol/mirrored-assets-massets (last accessed 2 September 2022).

[250] See "Decentralised Finance (DeFi)", (25 May 2022) at 30, online (pdf): *EU Blockchain Observatory and Forum,* https://www.eublockchainforum.eu/sites/default/files/reports/DeFi%20Report%20EUBOF%20-%20Final_0.pdf; Cryptopedia Staff, "What Are Wrapped Cryptocurrencies?" (28 June 2022), online: *Gemini* https://www.gemini.com/cryptopedia/wrapped-bitcoin-vs-bitcoin-wbtc-tbtc-wnxm-hbtc-crypto (last accessed 2 September 2022).

[251] Clements, Emerging Canadian, *supra* note 61 at 36-40, 47-52.

investors and consumers lose regulated gatekeeping protections and stability functions such as information disclosures, internal operational controls, asset segregation and custody parameters, risk management and governance standards, market making, AML and CTF controls, and liquidity and capital constraints.[252]

Some DeFi applications, including automated P2P borrowing and lending protocols,[253] and synthetic asset "minting" protocols may create securities or derivatives,[254] while some smart contract-based DeFi prediction markets may resemble binary options which are prohibited in some provinces.[255] Others resemble illegal lotteries, betting pools or prediction markets.[256] Automated DeFi exchanges may also perform a similar marketplace function to CTPs caught by CSA Staff Notice 21-327,[257] despite operating without investor safeguards such as disclosures, platform-level operational, integrity and internal controls, or protocol registration.[258]

Recently published reports by the BIS casts doubt on the extent that DeFi networks, applications, and protocols are in fact "decentralized" or whether instead they represent an "illusion of decentralization," and emerging "proof-of-stake" consensus mechanisms may give rise to ongoing centralization concerns and concentration risks.[259] Similar assertions of centralization have been recently levied at the popular

[252] See Tom CW Lin, "Infinite Financial Intermediation" (2015) 50 *Wake Forest Law Review* 643 at 645-646.
[253] Johannes R Jensen, Victor von Wachter & Omri Ross, "An Introduction to Decentralized Finance (DeFi)", (2021) 26 *Complex Systems Informatic and Modeling Quarterly* 46 at 50-1.
[254] Clements, Emerging Canadian, *supra* note 61 at 49-52. (Describing how a DeFi lending platform may create a security, and the protocol perform a similar function to an investment dealer pursuant to National Instrument 31-103, *supra* note 59, but it is not always clear who the issuer of the security is. For example, on a lending protocol is the security issuer an anonymized individual borrower (which creates a nearly impossible enforcement problem), or is it the open-source smart contract code (and if so, how do you assign responsibility)? Also, are the developers responsible for regulatory compliance obligations? What if they don't profit? Are the DAO token holders also responsible?)
[255] Ontario Securities Commission, *CSA Multilateral Notice of Multilateral Instrument 91–102, Prohibition of Binary Options and Related Companion Policy* (28 September 2017), http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20170927_91-102_binary-options.htm.
[256] Clements, Emerging Canadian, *supra* note 61 at 41-52.
[257] Clements, Emerging Canadian, *supra* note 61; CSA Staff Notice 21-327, *supra* note 92.
[258] *Ibid*.
[259] Aramonte, Huang and Schrimpf, *supra* note 18.

DeFi exchange *Uniswap,* given the concentrated holdings of its UNI governance token in the hands of developers and early stage investors.[260]

Emerging iterations of DeFi represent a market failure with continuing information and technological capacity asymmetries, and conflicts, which create unfair advantages for developers and early stage or sophisticated investors.[261] These asymmetries, and informational and relationship opacities, create disadvantages and vulnerabilities for unsophisticated investors, and justify the imposition of regulatory controls since DeFi protocol developers lack sufficient incentives to design internal governance measures or provide sufficient risk disclosures.[262] DeFi applications and protocols also give rise to traditional financial market pathologies such as leverage, liquidity mismatch, governance and operational issues and illicit activities.[263] They also create significant legal uncertainty including (among others): determining the nature of the legal relationship between the protocol and its participants, whether a binding contract is established, and legal formalities are satisfied (and between whom);[264] the nature of the legal claim;[265] the location of the appropriate forum for resolution of disputes, and what remedies are available to protocol participants as contractual counterparties.[266]

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[260] Max Dilendorf, "Uniswap – An Illusion of Decentralization," (2022) 3 *The International Journal of Blockchain Law* 32.

[261] Crenshaw, *supra* note 3.

[262] *Ibid.*

[263] See "IOSCO Decentralized Finance Report" (March 2022), online (pdf): *International Organization of Securities Commissions,* https://www.iosco.org/library/pubdocs/pdf/IOSCOPD699.pdf.

[264] Robert Schwinger, Harriet Jones-Fenleigh and Jonathan Hawkins, "Spotting and Managing Litigation Risk in DeFi," (2022) 2 *The International Journal of Blockchain Law* 14 at 15-16 (the authors note that it is possible that instead of a "contract" between willing counterparts, a "partnership" is instead formed with DeFi protocol participants comprising the partners, thus attracting unlimited liability under certain jurisdictions, with uncertainties on the nature of duties owed to each other as partners. In the event that a contract is established, the nature, and satisfaction of formalities of contractual formation are also jurisdiction specific.)

[265] *Ibid.* at 15-16 (noting the uncertainty of whether the claim is in contract, tort, negligence, conversion, breach of duty in relation to a partnership, or some allegation of fraud, or unfair trade practice).

[266] *Ibid.* at 17-18 (discussing how remedial uncertainties are exacerbated by the "immutable" nature of distributed ledger transactions which makes them very difficult to reverse or rectify and may require an "offsetting transaction" which imposes programming costs).

Even with the formation of regulatory policy, enforcement in DeFi will be challenging,[267] and may require blocking orders against non-compliant websites, a remedy that has been successfully obtained in Canada in the context of copyright infringement.[268] It has been suggested in academic literature that regulators could incentivize the development and operation of regulated "user interfaces" as "permissioned access points" serving as gatekeepers to DeFi protocols, which would take on KYC and AML responsibilities as a virtual asset service provider and evaluate the underlying DeFi protocol.[269]

## F. Governance of Decentralized Autonomous Organizations (DAOs)

Decentralized autonomous organizations (DAOs) are organizations (including for-profit businesses and not-for-profit entities) that exist and function on a blockchain, without centralized control, using coded smart contracts to define and enforce governance and organizational rules.[270] This organizational form can give rise to many efficiencies and benefits including governance and capital transfer speed, wide

[267] See Clements, Emerging Canadian, *supra* note 61 at 53-55 (noting how enforcement challenges are exacerbated by the fact that it is unclear what regulator has jurisdiction over DeFi, and there may be international distinctions, as to what courts or legal parameters apply to an unincorporated distributed ledger blockchain system, using an automating, self-governed software protocol to execute transactions, that is accessible by users in multiple jurisdictions where the substantive claim to jurisdiction could be based on entirely different concepts including contract, tort, partnership law, joint venture law, antitrust, or blockchain specific legislation); see Gogel et al., *supra* note 39.

[268] *Teksavvy Solutions Inc. v. Bell Media Inc*., 2021 FCA 100.

[269] Alexander Lipton and Lewis Cohen, "DeFi: A Pathway Forward," (2021) 1 *The International Journal of Blockchain Law* 12 (The authors suggest that there are complexities, however, to be further assessed for this type of regulatory solution including how such permissioned access and eligibility is determined, how activity layers are established, and cybersecurity and privacy ensured. There are also concerns about what types of protocols these "permissioned access points" would be able to interface with, and the effect that such a regulatory solution will have on innovation given a potentially negative impact on protocol compossibility through a permissioned "user interface" system).

[270] David Adlerstein, David Kirk, Sabina Beleuz Neagu, and Kevin Schwartz, "Recent Developments Highlight Fundamental Legal Considerations for DAOs," (2022) 3 *The International Journal of Blockchain Law* 16 at 16; Andrew McAfee & Jonathan Ruane, "What a DAO Can – and – Can't - Do" (10 May 2022), online: *Harvard Business Review*, https://hbr.org/2022/05/what-a-dao-can-and-cant-do.

stakeholder participation, increased transparency, streamlined voting proxies and delegation, and lower risk of conflicts and self-dealing.[271]

DAOs (as well as certain DeFi applications and protocols) integrate cryptocurrencies called "governance" or platform "native" tokens" (as described above),[272] that serve different contextual functions including interactions and transactions within the DAO, and voting on key operational decisions, governance matters and other functions of the DAO.[273] The DAO may also have an offline governance mechanism, committee, or "curator"[274] with delegated authority from governance token holders, which functions as an external oversight board.[275] The governance parameters, and the operational structure, of DAOs are highly contextual.[276] They often vary significantly around issues such as quorum for consensus, and the nature of rights (including economic or profit participation rights) conferred on governance token holders.[277]

A DAO may also resemble a collective investment scheme between its token holders.[278] The question of whether a governance token is also a "security" is unsettled.[279] Prior governance token distributions which conferred profit participation rights to US investors have been found to be securities by the SEC.[280] Canadian regulatory guidance on ICOs would result in a similar determination for a Canadian

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[271] Aaron Wright, "The Rise of Decentralized Autonomous Organization: Opportunities and Challenges" (2021) 4:2 *Stanford Journal of Blockchain Law & Policy* 1 at 5-8.
[272] See *supra* Section II(b).
[273] Hannah Meakin, Peter McBurney, and Albert Weatherill, "Decoding DeFi Regulation: Challenges and Opportunities," (2022) 3 *The International Journal of Blockchain Law* 19 at 19-20.
[274] "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO" (25 July 2017), online (pdf): *Securities and Exchange Commission,* https://www.sec.gov/litigation/investreport/34-81207.pdf.
[275] Meakin, McBurney, and Weatherill, *supra* note 273 at 21.
[276] Wright, *supra* note 271 at 5.
[277] See Timothy Nielsen, "Cryptocorporations: A Proposal for Legitimizing Decentralized Autonomous Organizations," (2019) 019:5 *Utah Law Review* 1105 at 1110; Nathan Tse, "Decentralised Autonomous Organisations and the Corporate Form," (2020) 51:2 *Victoria University Wellington Law Review* 313 at 320.
[278] See U.S. Securities and Exchange Commission, "SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities," (17 July 2017), online: https://www.sec.gov/news/press-release/2017-131 (the "DAO Report").
[279] See Kyle Bersani, "Separating Governance Tokens from Securities: How The Utility Token May Fall Short of the Investment Contract," (2022) 43(3) *Cardozo Law Review* 1305.
[280] See the DAO Report, *supra* note 278.

governance token distribution that resembled a traditional security.[281] Some governance tokens may, however, include unique properties uncharacteristic of a security, such as being distributed as a reward for loyalty and not in a capital raise context, or without the expectation of an appreciation in value.[282]

Certain governance tokens, which trade on secondary markets and decentralized exchanges, such as the LUNA token for the failed Terra network may, however, exhibit characteristics of an "investment contract" or collective investment scheme.[283] Governance tokens have particular risks that would inform regulatory design parameters and disclosures.[284] Diverse governance tokens are listed on global CTPs, and the SEC has recently launched an investigation into whether diverse tokens are

[281] See CSA Staff Notice 46-307, *supra* note 15; CSA Staff Notice 46-308, *supra* note 15.

[282] Bersani, *supra* note 279 at 1308, 1326, 1335-1341.

[283] A recent class action lawsuit was filed against decentralized blockchain network *Solana* alleging that its governance token SOL was a security, s*ee* Martin Young, "Class Action lawsuit claims Solana's SOL is an unregistered security," (8 July 2022), online: *CoinTelegraph,* https://cointelegraph.com/news/class-action-lawsuit-claims-solana-s-sol-is-an-unregistered-security.There are several arguments in support of LUNA also being a security including: an early distribution to developers, founders, and early stage investors and concentration and control remaining with original players allowing for effective control of the Terra ecosystem; active efforts by LUNA developers to create secondary market liquidity; ongoing, centrally-driven, actions of the Terra Foundation, Luna Foundation Guard and influential individuals within the ecosystem, to support LUNA and UST, establish liquidity for LUNA on secondary markets, and create payment use cases for UST including ensuring stability in the Anchor protocol by topping up reserves; LUNA price moved in correlation with the general uptake of the Terra ecosystem and demand for UST and the Anchor Protocol. See Clements, Built to Fail, *supra* note 35; Muyao Shen, "How $60 Billion in Terra Coins Went Up in Algorithmic Smoke," (20 May 2022) online: *Bloomberg,* https://www.bloomberg.com/graphics/2022-crypto-luna-terra-stablecoin-explainer/.

[284] There are contextual nuances to governance tokens, in the event they are determined to be securities, which would inform potential disclosure regimes and regulatory frameworks. For example, holders of governance tokens would benefit from disclosures relating to risks, operational controls, governance mechanisms and associated rights (like voting or profit participation), dependencies on third parties, interconnection to related or affiliated entities or protocols. Regulatory frameworks would also need to consider liability for misrepresentations, conflicts safeguards, controls on promotion and marketing by key developers. See generally, Bersani, *supra* note 279.

in fact securities (and thereby trading without requisite regulatory compliance).[285] DAOs are also likely to integrate stablecoins into their operation to efficiently facilitate scaled operations and payment consideration for the goods and services offered by the DAO.[286]

There is uncertainty on the legal status of a DAO in Canada, but in many ways it resembles a partnership between governance token holders.[287] As a result, participation in DAO governance, by investing in a governance token, could give rise to potential unlimited liability as a constructive general partner, if a DAO is negligent or contributes to economic loss (for example if the DAO failed to create adequate security measures to withstand a hack).[288] The uncertain location of governance token holders can also complexify remedies and regulatory enforcement, and DAOs don't generally have boards of directors, so the nature and existence of fiduciary obligations is uncertain.[289]

A DAO may also give rise to several voting pathologies including self-interested voting,[290] and voter fatigue, thereby increasing the voting power of centralized (and well-funded) intermediaries like venture capital firms, given the costs of information gathering to make informed governance decisions.[291] Further, commercial entities that contract with DAOs risk adverse consequences in a contractual dispute, given the uncertain legal status of the DAO as an organization, or the pseudonymity of its governance token holders.[292] Resolving this question requires certainty on the legal status of the DAO itself, which may require provincial legislative solutions throughout Canada for clarity – such as that recently enacted in Wyoming.[293]

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[285] *See* Michelle del Castillo, "Every U.S. Crypto Exchange (And Binance) Is Being Investigated by The SEC, Says Senator Lummis Staffer," (4 August 2022) online: *Forbes,* https://www.forbes.com/sites/michaeldelcastillo/2022/08/04/every-us-crypto-exchange-and-binance-is-being-investigated-by-the-sec-says-senator-lummis-staffer/?sh=5196983922c2

[286] "A Round Table Discussion on Stablecoins, *supra* note 38 at 9.

[287] See Alex Davis, "Decentralized Autonomous Organizations: A Canadian Legal Perspective," (19 November 2020) online: *Lawyers Daily,* https://www.thelawyersdaily.ca/articles/22506/decentralized-autonomous-organizations-a-canadian-legal-perspective.

[288] Adlerstein, Kirk, Beleuz Neagu, and Schwartz, *supra* note 270 at 16.

[289] Wright, *supra* note 271 at 5.

[290] Vitalik Buterin, "Moving beyond coin voting governance" (16 August 2021), online: *Vitalik* https://vitalik.ca/general/2021/08/16/voting3.html.

[291] IOSCO Decentralized Finance Report, *supra* note 263 at 24.

[292] *Ibid.*

[293] WY Stat § 17-31 (2021), *Decentralized Autonomous Organization Supplement.*

Also, several "novel issues" emerge in the context of legal disputes involving smart contracts in the operation of a DAO.[294] Despite its colloquial description as a "contract," the execution of automated software code is not "law" but rather a programmed instruction to a computer.[295] There are many reasons why you wouldn't want auto-execution in a contractual context, especially for technical contracts in financial markets with sophisticated counterparties.[296] There is a possibility that the code will not execute as expected or might be manipulated in a way that produces an unintended result.[297] Yet, lawsuits in the context of DAOs are difficult to initiate given uncertain counterparties,[298] causes of action, pleadings, and jurisdictional forums, and remedial avenues of redress are difficult to obtain as the court cannot control the code, order it rewritten, or easily seize, redirect or otherwise custody misappropriated cryptocurrencies.[299]

## G. Challenges and Concerns with Cryptocurrencies in the "Metaverse"

There is no universal definition of the metaverse, but colloquially it refers to a technology-driven integration of physical and digital experiences using augmented and virtual reality, distributed ledger technology, artificial intelligence, and cryptocurrencies.[300] There is no one "metaverse" but rather a potential intersection of various digitally immersive and interoperable spaces which facilitate diverse human interactions and commerce.[301] The metaverse conceptually allows for the creation of virtual communities, digital assets, cryptocurrencies, and interactions that both exist

[294] Andrew Hinkes, "Legal Disputes Involving DAOs Create Novel Issues for Lawyers," (2021) 1 *The International Journal of Blockchain Law* 21.
[295] *Ibid.*
[296] Ryan Clements, "Evaluating the Costs and Benefits of a Smart Contract Blockchain Framework for Credit Default Swaps," (2019) 10(2) *William & Mary Business Law Review* 369.
[297] See Beam, *supra* note 184.
[298] Hinkes, *supra* note 294 (The author notes this uncertainty includes whether the DAO can be a party of a lawsuit and what the legal status of the DAO is, as it varies in different jurisdictions, and also has not been defined in all jurisdictions.)
[299] *Ibid.*
[300] Dr. Matthias Artzt and Gary Weingarden, "Metaverse and Privacy," (2022) *3 The International Journal of Blockchain Law* 25 at 25.
[301] *Ibid.*

parallel to, and potentially even augment, our physical lives.[302] It is part of a broader "Web3" evolution, which is conceptually aimed at shifting control of the internet away from central parties and towards "more equitable" decentralized and democratized ownership, operating processes, and governance.[303]

The metaverse gives rise to many privacy, intellectual property, and data security implications and legal considerations which are beyond the scope of this cryptocurrency-focused report.[304] Many budding metaverse blockchain ecosystems have associated platform cryptocurrencies that perform a utility or governance function, or transfer other rights within the ecosystem of the project, which may be securities subject to existing regulatory parameters.[305] Others allow for the creation and transfer of NFTs, or the fractionalization of NFTs, that represent ownership or other rights within a particular metaverse ecosystem, which may also be securities.[306]

## H. Non-Fungible Token Jurisdiction, Fractionalization and Marketplaces

To date, no Canadian financial regulatory agency, including the CSA, has announced, or enacted regulatory parameters for the sale or trading of NFTs in Canada.[307] The NFT market is unregulated. The EU *Markets in Crypto Asset Regulation* (MiCA) carved out unique single NFTs from the applicable guidelines, while recommending AML laws for NFT trading platforms, and tasking the EU Commission with determining whether NFTs need a bespoke regulatory regime.[308] Building on the guidance provided by the CSA for CTPs, there are two layers of analysis for whether securities regulation applies to an NFT: first, is an NFT a security on its own; and second, does the relationship between the NFT trading platform and the user of the platform create a security or a derivative (similar to the jurisdictional hook for commodity cryptocurrencies pursuant to CSA IIROC Staff Notice 21-327.)[309]

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[302] Matthew Ball, "The Metaverse Will Reshape Our Lives. Let's Make Sure It's for the Better," (18 July 2022) online: *Time,* https://time.com/6197849/metaverse-future-matthew-ball/

[303] Hannah Meakin, Peter McBurney, and Albert Weatherill, "Decoding DeFi Regulation: Challenges and Opportunities," (2022) 3 *The International Journal of Blockchain Law* 19 at19-20.

[304] See Artzt and Weingarden, *supra* note 300 at 25.

[305] See Meakin, McBurney and Weatherill, *supra* note 303 at 19-21.

[306] Artzt and Weingarden, *supra* note 300 at 30.

[307] Clements, Emerging Canadian, *supra* note 61 at 41-43.

[308] Council of the EU, *supra* note 230.

[309] Clements, Emerging Canadian, *supra* note 61 at 41-43.

The question of whether an NFT is a "security" (and thus the issuers of NFTs and the platforms that trade them subject to securities regulation) is driven by a contextual analysis that takes into consideration several factors including the intention behind its purchase, how it is held and marketed, whether marketplace intermediaries make offering, placement and timing decisions and promotional efforts, and whether there is a form of "securitization" of otherwise independently held rights to income or royalty streams relating to the underlying digital or real asset.[310]

NFTs may also be "fractionalized," whereby multiple owners purchase a "slice" of an NFT, and mobilize the "financialization" of this unique crypto-asset.[311] There are many factors which support the notion that fractionalized NFTs are "securities" as investment contracts, or real estate investment trusts (for off-chain fractional ownership), and not intangible property as a digital collectible.[312] For instance, the value of fractionalized NFTs is largely determined by investment demand, platform liquidity, and the promotion of the marketplace, including strategic placement decisions on its website, or targeted social media and other marketing by the platform and third party promoters.[313] Also, by fractionalizing an NFT it allows for enhanced liquidity, opens up a wider investment pool, and eases the exchange listing process – all of which support the notion that these types of NFTs are for investment purposes and not for delivery and custody as a digital asset or collectible.[314] Several US state securities regulators have recently initiated enforcement proceedings against online casino developers for issuing NFTs that are securities.[315]

## I. Fraud and Insider Trading in the Crypto Ecosystem

The crypto ecosystem has also given rise to a host of consumer fraud, Ponzi-style investment schemes and investor vulnerabilities. Numerous enforcement actions, and criminal indictments, have been initiated recently by the US *Securities and*

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[310] *Ibid*. at 40-43; see Samir Patel, "If NFTs Rules The World: A New Wave of Ownership," (2022) 2 *The International Journal of Blockchain Law* 19.
[311] Chiu and Allen, *supra* note 25 at 403.
[312] *Ibid* at 406.
[313] *Ibid* at 406; see John Cahill, Jana S. Farmer and William H. Behr, "First DOJ NFT Insider Trading Charges Mark New Enforcement Era," (29 June 2022) online: *Bloomberg Law,* https://news.bloomberglaw.com/us-law-week/first-doj-nft-insider-trading-charges-marks-new-enforcement-era-16.
[314] Chiu and Allen, *supra* note 25 at 403; Cahill, Farmer and Behr, *supra* note 313.
[315] Chris Prentice, "State securities regulators order virtual casino firm to stop selling NFTs," (17 April 2022), online: *Reuters,* https://www.reuters.com/technology/state-securities-regulators-order-virtual-casino-firm-stop-selling-nfts-2022-04-13/.

*Exchange Commission* (SEC) and the US *Department of Justice* (DOJ) in diverse matters including the largest known NFT fraudulent scheme to date, fraudulent ICO schemes, a global Ponzi-scheme relating to the sale of unregistered crypto securities and a "purported proprietary trading bot," and a fraudulent crypto investment fund.[316]

The OSC has also initiated successful enforcement actions against several non-compliant CTPs who offer services to Canadian investors without adhering to applicable Canadian registration and regulatory conditions.[317] A former employee of US-based *Coinbase* (the largest publicly traded CTP) was recently charged with insider trading,[318] and recent empirical work suggests that insider trading on Coinbase may be a systematic problem.[319] The DOJ also recently brought its first ever indictment against an individual (Nathaniel Chastain) involved in an alleged insider-trading scheme involving NFTs on the *OpenSea* NFT marketplace,[320] the services of which are available to Canadian investors. The Chastain case has significant implications for uncertainties in securities regulatory jurisdiction over NFTs, and what

[316] United States Department of Justice, Office of Public Affairs, "Justice Department Announces Enforcement Action Charging Six Individuals with Cryptocurrency Fraud Offenses in Cases Involving Over $100 Million in Intended Losses," (30 June 2022), online: https://www.justice.gov/opa/pr/justice-department-announces-enforcement-action-charging-six-individuals-cryptocurrency-fraud; Scott Chipolina and Stefania Palma, "SEC charges 11 in 'massive' crypto Ponzi scheme," (2 August 2022), online: *Financial Times,* https://www.ft.com/content/c011817f-7f1f-4462-95b5-d4e0fecd9004.

[317] Ontario Securities Commission, "OSC holds global crypto asset trading platforms accountable," (22 June 2022), online: https://www.osc.ca/en/news-events/news/osc-holds-global-crypto-asset-trading-platforms-accountable.

[318] See Allyson Versprille, Silla Brush, Lydia Beyoud, and Greg Farrell, "Ex-Coinbase Manager Arrested in US Crypto Insider-Trading Case," (12 July 2022), online: *Bloomberg,* https://www.bloomberg.com/news/articles/2022-07-21/ex-coinbase-manager-arrested-in-us-crypto-insider-trading-case.

[319] Félez-Viñas, Ester and Johnson, Luke and Putnins, Talis J., "Insider Trading in Cryptocurrency Markets" (8 August 2022), online: https://ssrn.com/abstract=4184367; Justina Lee, "Coinbase Insider Trading May Be Wider Than US Case: Study," (17 August 2022) online: *Bloomberg,* https://www.bloomberg.com/news/articles/2022-08-17/coinbase-insider-trading-may-be-wider-than-us-case-study-says.

[320] John Cahill, Jana S. Farmer and William H. Behr, "First DOJ NFT Insider Trading Charges Mark New Enforcement Era," (29 June 2022) online: *Bloomberg Law,* https://news.bloomberglaw.com/us-law-week/first-doj-nft-insider-trading-charges-marks-new-enforcement-era-16 (the indictment alleges that Nathaniel Chastain, who was responsible for selecting NFTs to be featured on *OpenSea*, purchased select NFTs prior to their listing, using anonymous wallets to hide his identity, and then transferred the NFTs to self-custody hot wallets that he controlled).

types of NFT transactions fall within the remit of securities regulators, since the accused allegedly invested money in NFTs with a view to selling them for a profit (not for purchase merely as a digital collectible).[321] Even through it is a US case, it could be persuasive in Canada given the similarity in the jurisprudence for open-ended definitional sub-prongs of "security" in provincial statutes such as "investment contract."[322]

## J. Intermediated Crypto Lending, Liquidity Transformation and Staking

In May 2022, as cryptocurrency markets corrected to price in monetary policy tightening, a series of high-profile cryptocurrency projects including DeFi ecosystem and stablecoin issuer *Terra,*[323] Caisse de dépôt et placement du Québec funded cryptocurrency lender *Celsius,*[324] cryptocurrency hedge fund *Three Arrows Capital,*[325] and TSX-traded cryptocurrency lender *Voyager,*[326] all catastrophically failed, cascading instability throughout the crypto-ecosystem and accelerating downward

[321] *Ibid.*

[322] See OSA, *supra* note 57 at s.1(a)("security")(n); ASA, *supra,* note 62 at s.1("security")(ggg)(xiv); BCSA, *supra,* note 62 at s.1(1)("security")(l); *Pacific Coast Coin Exchange, supra* note 80; *In the Matter of Universal Settlements International Inc., supra* note 79; *Re Shelter Corporation of Canada Ltd., supra* note 79; *Pia Williamson, supra* note 79; *Jenson, supra* note 79; *R. v. Sisto Finance NV,* (1994), 17 OSCB 2467.

[323] Craig Lord, "Shouldn't stablecoins be stable? What's behind TerraUSD's collapse," (12 May 2022), online: *Global News,* https://globalnews.ca/news/8830474/stablecoin-terrausd-luna-collapse-cryptocurrency-explained/; Don Pittis, "Crypto markets tumble and investors get their fingers burned," (13 May 2022) online: *CBC,* https://www.cbc.ca/news/business/crpto-tumble-column-don-pittis-1.6450411.

[324] Rita Trichur, "The Caisse needs to explain why it made such a risky bet on crypto lender Celsius," (28 July 2022), online: *The Globe and Mail,* https://www.theglobeandmail.com/business/commentary/article-caisse-depot-celsius-network-cryptocurrency/.

[325] MacKenzie Sigalos, "From $10 billion to zero: How a crypto hedge fund collapsed and dragged many investors down with it," (11 July 2022), online: *CNBC,* https://www.cnbc.com/2022/07/11/how-the-fall-of-three-arrows-or-3ac-dragged-down-crypto-investors.html.

[326] Danny Nelson and David Z. Morris, "Behind Voyager's Fall: Crypto Broker Acted Like a Bank, Went Bankrupt," (13 July 2022) online: *CoinDesk,* https://www.coindesk.com/layer2/2022/07/12/behind-voyagers-fall-crypto-broker-acted-like-a-bank-went-bankrupt/.

selling pressure.[327] These failures also resulted in tremendous retail investor loss, revealing a dangerous segment of the cryptocurrency ecosystem that was operating without regulatory controls or safeguards.[328] As noted above,[329] failed DeFi project Terra and its UST stablecoin was operating without investor safeguards.[330] The May crash also revealed numerous large cryptocurrency "lenders" (such as Celsius) operating a form of cryptocurrency "shadow bank" - taking in retail cryptocurrency deposits and originating new cryptocurrency loans.[331] There are also media reports that dominant fiat-backed stablecoin issuer *Tether* has regularly engaged in unregulated fractional reserve shadow banking by lending out its collateral reserves.[332]

The cryptocurrency market crash of May 2022 has also revealed that, despite new technology (blockchain), cryptocurrency intermediaries like Celsius and Terra still inject conventional pathologies into the financial system, namely liquidity transformation, investor runs, leverage, interconnectedness, fire sales, contagion, evasion, rehypothecation, and spillover effects, and that financial engineering can't

[327] Declan Harty, "Crypto's no good, very bad week just keeps getting worse," (12 May 2022), online: *Fortune,* https://fortune.com/2022/05/12/crypto-slump-bitcoin-ether-terra-stablecoin/.

[328] See Alexander Osipovish and Caitlin Ostroff, "TerraUSD Crash Led to Vanished Savings, Shattered Dreams," (27 May 2022) online: *The Wall Street Journal,* https://www.wsj.com/articles/terrausd-crash-led-to-vanished-savings-shattered-dreams-11653649201; MacKenzie Sigalos, "Homeless, suicidal, down to last $1,000: Celsius investors beg bankruptcy judge for help," (2 August 2022) online: *CNBC,* https://www.cnbc.com/2022/08/02/celsius-investors-owed-4point7-billion-beg-judge-to-recover-life-savings.html; Oliver Knight and Coindesk, "Over 2,000 Terra investor say false marketing is what caused them to lose their money," (13 June 2022) online: *Fortune,* https://fortune.com/2022/06/13/binance-us-over-2000-terra-investors-say-false-marketing-is-what-caused-them-to-lose-their-money/.

[329] See supra Section II(e).

[330] See Clements, Built to Fail, *supra* note 35; Clements, Defining The Regulatory Perimeter, *supra* note 35.

[331] See Kadhim Shubber and Joshua Oliver, "Inside Celsius: how one of crypto's biggest lenders ground to a halt," (12 July 2022), online: *Financial Times,* https://www.ft.com/content/4fa06516-119b-4722-946b-944e38b02f45.

[332] Zeke Faux, "Crypto mystery: Where's the US$69B banking the stablecoin Tether," (8 October 2021), online: *BNN Bloomberg,* https://www.bnnbloomberg.ca/crypto-mystery-where-s-the-us-69b-backing-the-stablecoin-tether-1.1663664.

turn risky assets into safe assets.[333] Liquidity transformation (also called "maturity transformation") occurs when a financial asset, like a deposit, is used to create another financial instrument (like a loan).[334] There is evidence of cryptocurrency liquidity transformation to date, since retail cryptocurrency deposits were taken in by Celsius and then used to generate income by lending them to DeFi protocols (like Anchor), and through the use of "staked Ether," a cryptocurrency that financializes deposited Ether through a "derivative token."[335]

The problem with liquidity transformation is that the transformed financial asset is often not as liquid as, and may deviate in value from, the initial financial asset, and this is why banks are subject to extensive regulatory controls like capital reserves, supervision, liquidity parameters, operational and governance controls, orderly resolution, and depositary insurance when they transform deposits into loans.[336] Without such controls, when depositors seek to redeem or withdraw their assets, an intermediary who has performed liquidity transformation could have a liquidity crisis and not be able to satisfy withdrawal demand - such was the case with Celsius.[337] Also, through liquidity transformation, Celsius interfaced retail cryptocurrency deposits

[333] See James Mackintosh, "The Fire Burning Beneath Crypto's Meltdown," (22 June 2022), online: *The Wall Street Journal,* https://www.wsj.com/articles/the-fire-burning-beneath-cryptos-meltdown-11655884851?st=7qr363w72otlfsb; Eliot Brown and Caitlin Ostroff, "Behind the Celsius Sales Pitch Was a Crypto Firm Built on Risk," (30 June 2022), online: *The Wall Street Journal,* https://www.wsj.com/articles/behind-the-celsius-sales-pitch-was-a-crypto-firm-built-on-risk-11656498142?mod=article_inline; Hannah Lang, Carolina Mandl and Elizabeth Howcroft, "How crypto lender Celsius stumbled on risky bank-like investments," (15 June 2022) online: *Reuters,* https://www.reuters.com/business/finance/how-crypto-lender-celsius-stumbled-risky-bank-like-investments-2022-06-15/.

[334] Bill Nelson, "Liquidity Transformation Always Finds The Path of Least Regulation," (23 September 2021), online: *Bank Policy Institute,* https://bpi.com/liquidity-transformation-always-finds-that-path-of-least-regulation/.

[335] Nansen Research, "On-Chain Forensics: Demystifying stETH's 'De-peg,'" (29 June 2022), online: https://www.nansen.ai/research/on-chain-forensics-demystifying-steth-depeg.

[336] Nelson, *supra* note 334.

[337] Gene Grant, "The Celsius meltdown is an old-fashioned bank run – except there's no bank," (14 June 2022), online: *Fortune,* https://fortune.com/2022/06/14/celsius-meltdown-bank-run-crypto-crash-regulation-finance-gene-grant/.

into Terra's unregulated and highly risky DeFi *Anchor* protocol,[338] which had no regulatory controls.[339] Celsius also used an intermediated governance token (CEL) to entice retail participation,[340] and there are reports that its services were widely available to Canadian residents.[341]

Crypto intermediaries serve as a gateway for retail investors to access the highly risky world of DeFi returns, but evidence from the May 2022 crash suggests that many investors don't understand the risks, and believed their deposits were otherwise safe and analogous to bank deposits based on how intermediaries marketed their services.[342] Joint CSA-IIROC Staff Notice 21-329 does not provide guidelines on intermediated DeFi services such as crypto-staking, cryptocurrency deposits, liquidity

[338] Oliver Knight, "How Crypto Lender Overheated," (16 June 2022), online: *CoinDesk,* https://www.coindesk.com/business/2022/06/16/how-crypto-lender-celsius-overheated/; MacKenzie Sigalos, "From $25 billion to $267 million: How a major crypto lender collapsed and dragged many investors down with it," (July 18, 2022), online: *CNBC,* https://www.cnbc.com/2022/07/17/how-the-fall-of-celsius-dragged-down-crypto-investors.html?__source=sharebar|twitter&par=sharebar.

[339] See Clements, Built to Fail, *supra* note 35.

[340] See Kadhim Shubber and Joshua Oliver, "Inside Celsius: One of crypto's biggest lenders having a 'Lehman Brothers moment,'" (July 13, 2022), online: *Financial Post,* https://financialpost.com/fp-finance/cryptocurrency/inside-celsius-one-of-cryptos-biggest-lenders-having-a-lehman-brothers-moment.

[341] See Brigitte Noel and Jeff Yates, "Caisse de dépôt and the Crypto Casino," (26 May 2022), online: *Radio Canada,* https://ici.radio-canada.ca/recit-numerique/4095/caisse-depot-cryptomonnaie-celsius-quebec.

[342] See Osipovish and Ostroff, *supra* note 328; Allyson Versprille, "FDIC Probing How Bankrupt Crypto Broker Voyager Marketed Itself," (7 July 2022), online: *Bloomberg,* https://www.bloomberg.com/news/articles/2022-07-07/fdic-probing-how-bankrupt-crypto-broker-voyager-marketed-itself?sref=pHjsxMFh#xj4y7vzkg.

transformation, DeFi yield farming, or crypto-lending,[343] which services are widely provided by international CTPs.[344] Intermediated DeFi and lending services may create new securities or derivatives, as an "evidence of indebtedness" based security or "investment contract," and they may also resemble a conventional deposit.[345] In staking, a cryptocurrency is "staked" for a reward to facilitate a consensus mechanism on a proof-of-stake (PoS) blockchain network and to help the network maintain stable operations.[346] Given a lack of regulatory parameters for these services, there are no safeguards, internal controls, or standardized disclosures for investor protection.[347]

## K. Influencers, Promotion, Advice and Other Investor Protection Concerns

There are many emerging investor and consumer protection challenges in cryptocurrencies. Developers lack the necessary incentives to provide full disclosures, or create internal controls, and this justifies the imposition of mandatory disclosure

[343] Clements, Emerging Canadian, *supra* note 61 at 36-40 ("In both yield farming and staking, an individual's crypto assets are used to support other crypto asset ecosystems in a way that generates a return for the user (often called a "reward" coming in the form of a new crypto asset). In staking, an investor's crypto assets are used to validate transactions in a PoS blockchain network. By "locking in" their crypto the user is helping maintain the stable operations of the PoS system and achieve consensus on transaction validations (similar to crypto-mining in a proof of work system, but more energy efficiently and without high computational costs). In return, the user who "stakes" their crypto receives a reward. Yield farming is distinct and has been described as the "rocket fuel of DeFi." Here, a user's cryptocurrency is lent in a variety of ways to smart contracts on other Dapps, such as lending protocols and stablecoins, which earn the investor more cryptocurrency on the cryptocurrency they lend.")

[344] See Binance Earn, "Stop Investment Solution," online: https://www.binance.com/en/earn#flex-item (last accessed 2 September 2022); Kraken, "Earn Rewards by Staking Coins and Fiat," online: https://www.kraken.com/features/staking-coins (last accessed 2 September 2022); Gemini, "Gemini to Support Ethereum 2.0 Trading and Staking" (17 December 2020), https://www.gemini.com/blog/gemini-to-support-ethereum-2-0-trading-and-staking (last accessed 2 September 2022); Coinbase, "Earn staking rewards on Coinbase," https://www.coinbase.com/staking (last accessed 2 September 2022).

[345] Clements, Emerging Canadian, *supra* note 61 at 36-40.

[346] See Binance Academy, "What is Staking?" (10 April 2021), https://academy.binance.com/en/articles/what-is-staking; see Werner Vermaak, "Crypto Staking Guide 2021," (19 January 2021) online: *CoinMarketCap,* https://coinmarketcap.com/alexandria/article/crypto-staking-guide-2021.

[347] Clements, Emerging Canadian, *supra* note 61 at 36-40.

and business registration obligations for DeFi lending protocols and algorithmic stablecoins.[348] The crypto-ecosystem at large (and particularly DeFi) creates many asymmetries, and an unfair playing field, for building accessible and inclusive financial architectures, since only a small number of individuals have the ability to assess code, and not everyone will have the resources to engage technical experts to asset vulnerabilities such as flawed code.[349]

Unified parameters around cryptocurrency and DeFi promotion, celebrity-led endorsements, and social media influencers have not been clearly established across Canada,[350] although there are emerging US and international regulatory parameters, enforcement, and class action lawsuit activity in this area.[351] There is also uncertainty on what happens to custodied cryptocurrencies when an intermediary goes insolvent (currently a matter of contention in the *Celsius* bankruptcy proceedings[352]), or whether stablecoin holders have claims as unsecured creditors against an issuer's reserve holdings which help maintain a peg.[353] Other investor vulnerabilities include a lack of technology standards for self-custody wallets, and no safeguards for investment

[348] Crenshaw, *supra* note 3.
[349] *Ibid.*
[350] Clements, Emerging Canadian, *supra* note 61 at 47-48.
[351] See David Yaffe-Bellany, "How influencers Hype Crypto, Without Disclosing Their Financial Ties," (27 May 2022), online: *The New York Times,* https://www.nytimes.com/2022/05/27/technology/crypto-influencers.html; Eamon Javers, Paige Tortorelli, and Scott Zamost, "Some social media influencers are being paid thousands to endorse cryptocurrency projects," (11 August 2022), online: *CNBC,* https://www.cnbc.com/2022/08/11/some-influencers-paid-thousands-to-endorse-cryptocurrency-projects.html; Matt Binder, "Inside the shady world of influencers promoting cryptocurrency," (25 June 2021), online: *Mashable,* https://mashable.com/article/influencers-altcoin-scams; Robert Burnson, "Coinbase Customers Sue Over Stablecoin That's 'Anything But'" (12 May 2022), online: *Bloomberg,* https://www.bloomberg.com/news/articles/2022-05-13/coinbase-customers-sue-over-stablecoin-that-was-anything-but; Adi Robertson, "Spain will regulate influencers promoting cryptocurrency," (17 January 2022), online: *The Verge,* https://www.theverge.com/2022/1/17/22887752/spain-cnmv-crypto-asset-advertising-influencer-rules.
[352] See MacKenzie Sigalos, "Homeless, suicidal, down to last $1000: Celsius investors beg bankruptcy judge for help," (3 August 2022), online: *CNBC,* https://www.cnbc.com/2022/08/02/celsius-investors-owed-4point7-billion-beg-judge-to-recover-life-savings.html.
[353] See Nizan Geslevich Packin, "Bankruptcy and Crypto," (15 July 2022), online: *Forbes,* https://www.forbes.com/sites/nizangpackin/2022/07/15/bankruptcy-and-crypto/?sh=52cc670a7df5.

advice relating to non-security cryptocurrencies.[354] Further, there are currently no clear regulatory standards for determining, with precision, whether a particular cryptocurrency or DeFi application is "decentralized."[355] Simply describing a cryptocurrency as "decentralized" in a white paper does not negate centralized influence, or other "economic realities" that may suggest control of a cryptocurrency by programmers and early-stage investors.[356] So-called "governance" tokens are routinely offered in tranche offerings to the public that resemble conventional securities capital raises,[357] with subsequent secondary market trading,[358] and may in fact be an act of regulatory arbitrage around securities rules.

## L. Blockchain Fragmentation Vulnerabilities

One of the challenges to date in the mass adoption of blockchain technology is that it has shown difficulties scaling and achieving network effects.[359] As recently noted by researchers at the BIS, decentralized blockchain networks operate by using rewards to incentivize validators.[360] Yet, as a particular blockchain network becomes more popular, validation fees increase, and the network becomes more congested, leading to slower validation times.[361] This inability to scale, lack of network effects, higher and

[354] Clements, Emerging Canadian, *supra* note 61 at Sections III(ii), III(iii) & IV(i).
[355] Silicon Valley mega-investor Andreessen Horowitz, one of the earliest participants in the VC funding ecosystem for DeFi development, recently called on the U.S. Senate Banking committee to develop regulated standards for "decentralized" applications and organizations (DAOs) including a standardized definition for "decentralized" and legal entity status for DAOs, see A16Z, "Our Proposals to the Senate Banking Committee," online: https://a16z.com/2021/10/05/our-proposals-to-the-senate-banking-committee/ (last accessed 16 August 2022).
[356] See Chair Gary Gensler, "Prepared Remarks at the Securities Enforcement Forum" (4 November 2021), online: https://www.sec.gov/news/speech/gensler-securities-enforcement-forum-20211104.
[357] See Andrey Shevchenko, "DeFi Governance Tokens Tread Carefully as the SECs Invisible Hand Looms, (30 June 2020), online: *CoinTelegraph,* https://cointelegraph.com/news/defi-governance-tokens-tread-carefully-as-the-secs-invisible-hand-looms; Ethan L. Silver and William Brannan, "Could Compound's Governance Token COMP Be Deemed a Security?" (21 July 2020), online: *Lowenstein Sandler* https://www.lowenstein.com/news-insights/publications/articles/could-compound-s-governance-token-comp-be-deemed-a-security-silver-brannan.
[358] See CryptoRank, "Governance Token Watchlist," https://cryptorank.io/tag/governance (last accessed 15 August 2022).
[359] Boissay, Cornelli, Doerr and Frost, *supra* note 12.
[360] *Ibid.* at 1.
[361] *Ibid.* at 3-5

more volatile fees for performing network validations (called "gas" fees), and congestion when a network becomes more popular, explains in part why blockchain technology has not widely displaced legacy infrastructure for payments or securities trading, and why there is significant "fragmentation" and competition, across the cryptocurrency landscape, for newer or "alternative" blockchains.[362]

Blockchain fragmentation is evident when one scans the crypto ecosystem to see numerous "Ethereum killers" (like *Cardano*, *Polkadot*, *Tezos*, *Solana*, *Avalanche*, and others) that purport to improve scalability while lowering transaction fees.[363] Newer "alternative" chains to Ethereum come at the cost of reduced security, decentralization, interoperability and an increase in governance and safety risks.[364] Technology developments including "bridges," "cross-chains," and "layer 2 solutions" have emerged as antidotes to the fragmented blockchain ecosystem,[365] increasing interoperability, but at the expense of cybersecurity, as these bridges have shown significant vulnerability to hacks.[366]

## M. Settlement, Concentration, Interconnection and Systemic Risk

As noted above on cryptocurrency shadow banking and unregulated lending,[367] cryptocurrency markets have the potential to transmit risk and volatility in a contagion selloff that affects broad market participants. The extent of systemic risk from cryptocurrency is driven by similar factors to those in traditional finance, namely leverage, duration and liquidity mismatch, opacity, and interconnection.[368] The level of systemic risk is also contingent on the interconnectedness between the cryptocurrency market and the larger financial system, including the amount of

[362] *Ibid.*

[363] See Megan DeMatteo, "The Top 'Ethereum Killers' Compared," (10 February 2022) online: *CoinDesk,* https://www.coindesk.com/tech/2022/02/10/the-top-ethereum-killers-compared/

[364] Frederic Boissay, Giulio Cornelli, Sebastian Doerr and Jon Frost, *supra* note 12 at 1.

[365] *Ibid.* at 5 (Describing how "Layer 2 solutions" record transactions in bulk "off chain" and then report back to an underlying "Layer 1," such as Ethereum, Solana or Avalanche, in "bundles." Layer 2 solutions remedy high transaction fees on Layer 1 validations, but at the cost of adding in an element of centralization).

[366] Jennifer Korn, "Another crypto bridge attack: Nomad loses $190 million in 'chaotic' hack," (3 2022), online: *CNN,* https://www.cnn.com/2022/08/03/tech/crypto-bridge-hack-nomad/index.html.

[367] See *supra* Section IV(j).

[368] *Ibid.*

leverage in the financial system, and the resilience of the system during market corrections and when leverage positions are unwound.[369] Further, systemic risks from cryptocurrency-originated leverage and volatility are dependent on whether volatility and contagion pressures are contained within the crypto-ecosystem, or extend out to the traditional financial system, and the latter becomes more likely if cryptocurrencies are widely held, or used for payments, collateralized lending, and deposits.[370]

To date, it appears that crypto-systemic risk has been contained to the cryptocurrency ecosystem, as bank exposures have been limited.[371] Canadian prudential banking regulator, the *Office of the Superintendent of Financial Institutions* (OSFI), also recently established limitations on bank exposures to cryptocurrencies (building on a prior consultation[372]) identifying regulatory capital and liquidity treatment standards.[373] Cryptocurrencies may have novel systemic dynamics that transcend the "transactional aspects of finance," given their near infinite ability to "synthesize" financial interests (and allowing for an unlimited supply of new cryptocurrencies that can be used as collateral to borrow against, thereby increasing leverage and interconnectedness) and "scale up" trading speed and volume.[374] The increase of leverage in the financial system adds to its fragility, leading to pro-cyclical pressures during crises and accelerating volatility.[375] The infinite copycat potential in open-source blockchain code, which can allow for continued synthesis of cryptocurrencies has been described

[369] See Jon Cunliffe, "Is 'crypto' a financial stability risk?" – speech by Jon Cunliffe, Bank of England (13 October 2022), https://www.bankofengland.co.uk/speech/2021/october/jon-cunliffe-swifts-sibos-2021.

[370] See International Monetary Fund, The Crypto Ecosystem and Financial Stability Challenges, (October 2021), pp.44-45, online: https://www.imf.org/-/media/Files/Publications/GFSR/2021/October/English/ch2.ashx.

[371] Financial Times, "Can crypto contagion infect mainstream finance?" (30 June 2022), online: https://www.ft.com/content/03bb9296-b645-4311-abb2-14bc3ab66443.

[372] See Office of the Superintendent of Financial Institutions, "Prudential treatment of crypto asset exposures," (5 July 2021), online: https://www.osfi-bsif.gc.ca/Eng/fi-if/in-ai/Pages/prucypt.aspx.

[373] See Office of the Superintendent of Financial Institutions, "Interim arrangements for the regulatory capital and liquidity treatment of crypto asset exposures," (18 August 2022), online: https://www.osfi-bsif.gc.ca/Eng/fi-if/rg-ro/gdn-ort/adv-prv/Pages/crypto22.aspx.

[374] Saule T. Omarova, "New Tech v. New Deal: Fintech As A Systemic Phenomenon," (2019) 36(2) *Yale Journal on Regulation* 36.

[375] See HILARY J. ALLEN, DRIVERLESS FINANCE: FINTECH'S IMPACT ON FINANCIAL STABILITY, (Oxford University Press 1st eds., 2022).

as "wrapping complexity," which can accelerate volatility in a crisis as cascading tokens are sold.[376]

Cryptocurrency markets may also give rise to payment settlement risks in the event that cryptocurrencies or stablecoins are used as dominant consumer payment mechanisms, or if DeFi expands to widespread consumer financial transactions, as the settlement layer for DeFi transaction clearing on public blockchains could become a form of systemically important financial market infrastructure.[377] Further, a dominant stablecoin issuer who experienced network effects, and acquired significant off-chain collateral reserves may also become a globally systemically important financial institution.[378] In the future, the BoC may look to designate a programmable blockchain (like Ethereum) or a widely held stablecoin issuer, as a "clearing and settlement system" that creates either "systemic risk" or "payments systemic risk," and then becomes subject to extensive regulation under the *Payments Clearing and Settlement Act* ("PCSA") and related regulations.[379]

It is also possible that the Minister of Finance could designate a stablecoin issuer subject to the *Canadian Payments Act* ("CPA") as a "payment system" that, "(a) is national or substantially national in its scope; or (b) plays a major role in supporting transactions in Canadian financial markets or the Canadian economy."[380] Under such a designation, the Minister of Finance could impose significant restrictions on the stablecoin issuer as a "payment system."[381] Widely used, global stablecoins, could

[376] Matthias Nadler & Fabian Schär, "Decentralized Finance, Centralized Ownership? An Iterative Mapping Process to Measure Protocol Token Distribution" (2020), online: https://doi.org/10.48550/arXiv.2012.09306.

[377] See Fabian Schär, "Decentralized Finance: On Blockchain- and Smart Contract-Based Financial Markets," (15 April 2021), 103(2) *Review Second Quarter Economic Research, Federal Reserve Bank of St. Louis*, online: https://research.stlouisfed.org/publications/review/2021/02/05/decentralized-finance-on-blockchain-and-smart-contract-based-financial-markets

[378] See Timothy G. Massad, "Facebook's Libra 2.0: Why you might like it even if we can't trust Facebook," (June 2020), online (pdf): *Economic Studies at Brookings*, https://www.brookings.edu/wp-content/uploads/2020/06/ES-6.22.20-Massad-1.pdf.

[379] *Payment Clearing and Settlement Act,* SC 1996, c 6, Sch, s.4(1) ("PCSA") (This would impose a variety of regulatory measures such as enhanced supervision, governance, custody, business, risk management and liquidity safeguards, and collateral eligibility requirements (in the case of stablecoins)).

[380] *Canadian Payments Act,* RSC 1985, c C-21, at s.37(1).

[381] Alex Vronces, "Is Canada ready for a stablecoin invasion?" (15 November 2021), online: *Medium of Exchange*, https://themox.substack.com/p/is-canada-ready-for-a-stablecoin-invasion.

require a "supervisory college" approach, similar to how global systemically important financial institutions are supervised.[382] Although any consideration of systemic risk determination requires a point in time assessment of the level of systemic risk having regard to scale, capitalization, interconnectedness, and the existence of network effects.[383] Notably, MiCA in the EU contemplates transaction limits (200 million Euros in transactions per day) to avoid certain stablecoins becoming a dominant payment mechanism that demonetizes the Euro.[384]

Also, there are novel systemic risks in cryptocurrencies and DeFi given the possibility that the automated self-execution of financial instruments using smart contracts, and the indelible record created by the blockchain which is difficult to reverse, turns out to be a technological bug, and not a positive feature.[385] Intermediaries are also needed to resolve unanticipated disputes.[386] In the context of a financial crisis, smart contracts may accelerate instability because there are no mitigating opportunities for margin calls to prevent asset fire sales that can generate contagion pressures.[387] Fire sale and contagion risks are particularly acute in cryptocurrency since the crypto-ecosystem exhibits strong price co-movements, and also largely shares the same investor base.[388]

Additionally, the cryptocurrency market ecosystem has significant concentration risk. Vast Bitcoin holdings are controlled by miners, early adopters, and exchanges,[389] and

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[382] Douglas Arner, Raphael Auer & Jon Frost, "Stablecoin: risks, potential and regulation," (November 2020), *BIS Working Papers No 905, Bank for International Settlements,* at 15-16 (This could require a "cooperative design approach" like that used for SWIFT or Euroclear, and also may require regulation as a financial market utility.)

[383] *Ibid.*

[384] Ryan Browne, "EU Agrees on landmark regulation to clean up crypto 'Wild West'" (1 July 2022) online: CNBC, https://www.cnbc.com/2022/06/30/eu-agrees-to-deal-on-landmark-mica-cryptocurrency-regulation.html.

[385] See Kelvin F.K. Low and Eliza Mik, "Pause the Blockchain Legal Revolution," (2020) 69(1) *International & Comparative Law Quarterly* 135; Edmund Schuster, "Cloud Crypto Land," 84(5) *The Modern Law Review* 974.

[386] Aramonte, Huang and Schrimpf, *supra* note 18; Schuster, *supra* note 385.

[387] Allen, *supra* note 375.

[388] Boissay, Cornelli, Doerr and Frost at, *supra* note 12 at 5-6.

[389] See Billy Bambrough, New Research Reveals 'Systemic Risk' To Bitcoin As Its Price Crashes Under $60,000, (27 October 2021), online: *Forbes,* https://www.forbes.com/sites/billybambrough/2021/10/27/new-research-reveals-systemic-risk-to-bitcoin-as-its-price-crashes-under-60000/?sh=51530373e066.

95 percent of the outstanding Bitcoins are linked to 2 percent of wallets.[390] The BIS has recently noted that cryptocurrency miners are able to "extract value" and manipulate transactions in cryptocurrency and DeFi markets.[391] Recent reports note that on the *Aave* DeFi lending protocol, 18 percent of deposits emanated from a single user, and when this user made a large platform withdrawal, borrowing rates spiked.[392] Many early stage investors, programmers, developers and venture capital firms control vast proportions of governance tokens on DeFi applications and DAOs, which undermines assertions of a "decentralized" financial system.[393] Voting rights on governance tokens can also be delegated, while retaining other economic rights associated with the token.[394] Further, according to a 2021 IMF report, exchange platform *Binance* handles over half of global cryptocurrency trading volumes, and *Tether* controls half the supply of stablecoins.[395]

Related to concentration risk, there are significant interdependencies in the cryptocurrency and DeFi ecosystem, such as reliance on price oracles which can be

[390] See Olga Kharif, "Bitcoin Whales' Ownership Concentration is Rising During Rally," (18 November 12020), online: *BNN Bloomberg,* https://www.bnnbloomberg.ca/bitcoin-whales-ownership-concentration-is-rising-during-rally-1.1524504.
[391] Raphael Auer, Jon Frost and Jose María Vidal Pastor, "Miners as intermediaries: extractable value and market manipulation in crypto and DeFi," (16 June 2022), online: *BIS Bulletin No 58,* https://www.bis.org/publ/bisbull58.htm.
[392] See Alexis Goldstein, "18% of Aave's Crypto Deposits Were Likely From A Single User, Markets Weekly" (5 November 2021), online: *Markets Weekly,* https://marketsweekly.ghost.io/one-quarter-of-aaves-total-deposits-were-a-single-user/; Macauley Peterson, "$4.2 Billion Withdrawn from AAVE's Money Market Protocol," (29 October 2021), online: *Blockworks*, https://blockworks.co/4-2-billion-withdrawn-from-aaves-money-market-protocol/.
[393] See "Are Blockchains Decentralized? Unintended Centralities in Distributed Ledgers" (June 2022), online (pdf): *Trail of Bits* https://assets-global.website-files.com/5fd11235b3950c2c1a3b6df4/62af6c641a672b3329b9a480_Unintended_Centralities_in_Distributed_Ledgers.pdf; James Angel & Ryosuke Ushida, "Regulatory Considerations on Centralized Aspects of DeFi Managed by DAOs" in FC 2021 International Workshops, in Matthew Bernhard et al, eds, *Financial Cryptography and Data Security FC 2021 International Workshops* (Berlin: Springer 2021) 21 at 33; Andrey Shevechenko. "Report: governance remains highly centralized in many DeFi projects" (30 October 2020) online: *Coin Telegraph* https://cointelegraph.com/news/report-governance-remains-highly-centralized-on-many-defi-projects; Chainalysis Team "Dissecting the DAO: Web3 Ownership is Surprisingly Concentrated" (27 June 2022), online (blog: Chainalysis https://blog.chainalysis.com/reports/web3-daos-2022/.
[394] Angel and Ushida, *ibid.*
[395] See International Monetary Fund, *supra* note 370.

exploited or malfunction, and copied into the code of new blockchains.[396] The presence of concentration, collusion, exploitation and malfunction risk, and interdependencies poses an ongoing threat for retail investors of cybersecurity risk, exploitation, market manipulation, persistent volatility, impaired liquidity, and large price swings from the actions of a small number of actors.[397]

# V. Conclusion

As this report has highlighted, there is currently a robust and wide-ranging regulatory governance framework in place for cryptocurrency in Canada.[398] The governance of cryptocurrencies, and the intermediaries and trading platforms that interface with retail investors, is aided by the application of conventional financial market regulatory principles, including consumer and investor safeguards to protect against information and power asymmetries and undisclosed conflicts, rules against exploitation, market manipulation and fraud, micro-prudential controls for the stability of key institutions, and market integrity and financial stability (macroprudential) safeguards to protect against systemic risk and ensure efficient risk and capital allocation.

Yet there are still many lingering concerns, challenges, uncertainties and regulatory gaps in cryptocurrency governance in Canada.[399] There are also hurdles to widespread DeFi consumer adoption which would be aided by regulatory clarity.[400] The previous section has provided numerous recommendations for particular governance concerns within the cryptocurrency and DeFi ecosystem.[401] Given the challenges of regulating programmable, globally distributed, decentralized blockchain networks, regulatory experimentation and new regulatory tools may need to be tested in constrained environments like regulatory sandboxes, which may also look to integrate "crypto native tools," to help "modernize" disclosure systems and means of

[396] Caldarelli and Ellul, *supra* note 178.
[397] See Ray Fernandez, "Pentagon finds concerning vulnerabilities on blockchain," (28 June 2022), online: *TechRepublic,* https://www.techrepublic.com/article/pentagon-finds-concerning-vulnerabilities-on-blockchain/.
[398] See *supra* Section III.
[399] See *supra* Section IV.
[400] Clements, Emerging Canadian, *supra* note 61 at 53 ("DeFi applications and interfaces can be complex and difficult to use with limited fiat on-ramps, and many applications lacking strong governance mechanisms.")
[401] See *supra* Section IV.

delivery and make them more accessible and effective for cryptocurrency investors and users in Canada.[402]

[402] Professor Chris Brummer has recently outlined several mechanisms for how "crypto-native tools," including "Disclosure NFTs", and "Disclosure DAOs," could be integrated with disclosure frameworks based on consumer protection laws to provide more "functionality" and "security" in the cryptocurrency ecosystem than traditional disclosure tools conventionally used in securities regulation. See Christopher J., Brummer, "Disclosure, Dapps and DeFi" (24 March 2022). *forthcoming*, *Stanford Journal of Blockchain Law and Policy*, online: https://ssrn.com/abstract=4065143.

# Freedom of Expression

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## Summary

This paper examines the Canadian courts' approach to the justification, scope, and limits of freedom of expression. The paper also discusses a number of the freedom of expression issues raised by the convoy protests, such as the right to access government owned property in order to communicate with others, the regulation of hate speech, the restriction of insults and harassment in public spaces, the right to protest, the right to erect fixed structures as part of a protest, the protection of captive audiences from unwanted speech, and the spread of disinformation and conspiracy theories.

## The justification for freedom of expression

There are a variety of arguments for protecting freedom of expression, but all seem to focus on one or a combination of three values: truth, democracy, and individual autonomy. It is said that freedom of expression must be protected because it contributes to the public's recognition of truth or to the growth of public knowledge; or because it is necessary to the operation of a democratic form of government; or because it is important to individual self-realization or personal autonomy.[1] Most accounts assume that a commitment to freedom of expression, which extends protection to political, artistic, scientific, and personal expression, rests on the contribution the freedom makes to all three values. This was the view of McLachlin J. in *Keegstra* 1990, 806: "The broad wording of s.2(b) of the Charter is arguably inconsistent with a justification based on a single facet of expression. This suggests that there is no need to adopt any one definitive justification for freedom of expression. Different justifications for freedom of expression may assume varying degrees of

[1] When discussing the protection of freedom of expression under s.2(b) of the Charter, the Supreme Court of Canada has said that the freedom is "an essential feature of Canadian parliamentary democracy" (*Dolphin Delivery* 1986, 584); that it is "one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society" (*Dolphin Delivery* 1986, 583); that it is "the means by which the individual expresses his or her personal identity and sense of individuality" (Ford 1988, 749); that it is an important way of "seeking and attaining truth" (*Irwin Toy* 1989, 976); that it is "the matrix, the indispensable condition, of nearly every other form of freedom" (*Sharpe* 2001, 23, quoting the US Supreme Court in *Palko* 1937).

importance in different fact situations".

Freedom of expression does not simply protect individual liberty from state interference. Rather, it protects the individual's freedom to communicate with others – to speak to others, and to hear what others have to say. The right of the individual is to participate in an activity that is deeply social in character and that involves socially created languages and the use of collective resources such as the streets and the internet. Freedom of expression is valuable because human agency and identity emerge in discourse - in the joint activity of creating meaning. Human reflection and judgment are dependent on socially created languages, which give shape to idea and feeling. We become individuals capable of thought and judgment when we join in conversation with others and participate in collective life. The different accounts of the value of freedom of expression (democratic, truth, and self-realization-based accounts) highlight the many roles that expression plays in the life of the individual and the community -- that different relationships and different forms of communication contribute to the realization of human agency and the formation of individual identity.

Recognition that individual agency and identity emerge in communicative interaction is crucial to understanding not only the value of expression but also its potential for harm. Our dependence on expression means that words can sometimes be harmful. Expression can threaten, it can harass, and it can undermine self-esteem. Expression can also be deceptive or manipulative.

## The premises of freedom of expression

A commitment to freedom of expression means that an individual must be free to speak to others, and to hear what others may say, without interference from the state. It is said that the answer to bad or erroneous speech is not censorship, but rather more and better speech. Importantly the listener, and not the speaker, is seen as responsible (as an independent agent) for her/his actions, including harmful actions, whether these actions occur because he/she agrees or disagrees with the speaker's message. In other words, respect for the autonomy of the individual, either as speaker or listener, means that speech is not ordinarily regarded as a *cause* of harmful action. A speaker does not cause harm simply because he/she persuades the audience of a particular view, and the audience acts on that view in a harmful way.

Underlying the commitment to freedom of expression (and the refusal to treat speech as a cause) is a belief that humans are substantially rational beings capable of

evaluating factual and other claims and an assumption that public discourse is open to a wide range of competing views that may be assessed by the audience. The claim that 'bad' speech should not be censored, but instead answered by 'better' speech, depends on both of these assumptions -- the reasonableness of human judgment and the availability of competing perspectives. A third, but less obvious, assumption underpinning the protection of freedom of expression is that the state has the effective power to either prevent or punish harmful action by the audience. Individuals will sometimes make poor judgments. The community's willingness to bear the risk of such errors in judgment may depend on the state's ability to prevent the harmful actions of audience members or at least to hold audience members to account for their actions.

The courts, though, recognize that the assumptions about the audience's agency or judgment, which underlie the protection of expression, may not always hold, and indeed never hold perfectly. Prohibitions on false, or misleading, product claims have been supported because advertisers have overwhelming power in the 'marketplace of ideas' and information (and others have limited opportunities, or lack incentives, to correct misleading ads) and because so much commercial advertising is non-rational or visceral in its appeal. Similarly, the restriction of defamatory speech rests on a recognition that false claims made about an individual are not easily corrected through 'more speech'. The harm of defamatory speech may persist because the audience is not always in a position to assess the false and damaging claims and because (people being as they are) the correcting speech may not spread as effectively as the original defamation.

Freedom of expression doctrine has always permitted the restriction of expression that occurs in a form and/or context that discourages independent judgment by the audience or that impedes the audience's ability to assess the claims made. When speech *incites* or *manipulates* the audience to take harmful action, the speaker may be seen as responsible for, and perhaps even as a participant in, any violence or harm that follows. For example, in *On Liberty* 1859, J. S. Mill thought that the authorities would be justified in punishing a fiery speech given in front of the home of a corn merchant to a crowd of farmers angry about crop prices. A heated speech delivered to such a group appeals to passion and prejudice and might lead to impulsive and harmful actions. Speech is described as incitement when the time and (reflective) space between the speech and the (called for) action is so limited that the speaker may be viewed as leading the audience into action rather than simply trying to persuade them to act.

In American free speech jurisprudence, the classic example of a failure in the

conditions of ordinary discourse comes from a judgment of Justice Holmes, who said that: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic” (*Schenk* 1919). The theatre audience in such a case would not have time to stop and think before acting on the communicated message. The panic that would follow the yell of fire in these circumstances would almost certainly result in injury.

The examples given by Mill and Holmes involve circumstances that limit the audience’s ability to assess, carefully or dispassionately, the communicated message. The assumption is that ordinarily, when an individual communicates with others, she/he appeals to their independent and reasoned judgment. In exceptional circumstances, however, an individual’s words may appeal to passions and fears and may encourage unreflective action. In these circumstances the state may be justified in restricting or punishing the expression. Speech may be treated as a *cause* of audience action when the time and space for independent judgment are compressed or when emotions are running so high that audience members are unable or unlikely to stop and reflect on the claims being made. While the line between rational appeal or conscious argument, on the one hand, and on the other, manipulation or incitement, may not be easy to draw (and indeed is a relative matter) it is at least possible to identify some of the circumstances in which reasoned or independent judgment is significantly constrained.

# The scope of freedom of expression

## The intention to convey a message

Section 2(b) of the Canadian Charter of Rights and Freedoms protects “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication” – although the provision is often referred to as simply freedom of expression. Section 1 of the Charter provides that the rights protected may be subject to limits that are “prescribed by law” and are “reasonable” and “demonstrably justified in a free and democratic society”. The adjudication of rights claims under the Charter then involves two steps. The first step is concerned with whether a Charter right has been breached by a state act. In deciding this, the court must define the scope of the constitutionally protected activity or interest and then determine whether this activity has been interfered with by the state. At this stage, the burden of proof is said to lie with the party claiming a breach of the right. The second step in the adjudicative process is concerned with whether the interference with the right is justified. The limitation decision is described by the courts as a balancing of

competing interests or values. At this stage, the burden of proof lies with the party seeking to uphold the limitation, usually the state.

In *Irwin Toy* 1989 the Supreme Court of Canada said that if "[a]n activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the [s. 2(b)] guarantee" (*Irwin Toy* 1989, 968).[2] Expression, said the court, can take "an infinite variety of forms", including the written and spoken word, the arts, and physical gestures" (*Irwin Toy* 1989, 607). The court used the example of illegal or unauthorized parking to illustrate the potential breadth of the category of expression. In most cases people park illegally because they cannot find an available or convenient space or because they are unwilling to pay parking charges. But, said the court, if an individual parks his/her car illegally as a protest against the way in which parking spaces are allocated or against some other policy or practice, then the act of illegal parking will fall within the scope of s. 2 (b) because it is intended to convey a message.[3]

An act of expression or communication is characterized by the actor's intention to articulate and convey to an audience an idea or feeling. When communicating, the speaker wants the audience to recognize that his/her act is meaningful - that the act is intended to convey a message to them and should be viewed as such. The communicative act will be successful if the audience recognizes the speaker's intention and is able to grasp the act's meaning. The meaning of an act, such as unlawful parking, may not always be obvious to others and so may not be successfully communicated to its intended audience. Nevertheless, an act will count as expression if the actor intends by his/her act to convey a message to others, and more particularly if she/he wants her/his audience to recognize his/her act as meaningful. Even if expression is an intentional act of the speaker, the meaning of this act will be shaped by the language of expression, and by the listener's assumptions and attitudes.

Expression may be confrontational, uncivil, and even insulting and still carry a message – still engage its audience. However, because expression operates at many

[2] The majority judgment in *Irwin Toy* 1989 was written by Dickson CJ. and Lamer and Wilson JJ. A dissent was written by McIntrye J., who did not take issue with the majority's approach to s. 2(b).

[3] The illegal parking example, though, is more complicated than the court acknowledges, because the parking law is not simply a limitation on the individual's expression but is integral to his/her communicative act. The individual, in the example, has expressed his/herself by breaking the law and now argues that the law amounts to a restriction on his/her expression - and presumably should not be enforced against her/him. He/she is seeking to be exempted from the law that gave his/her act meaning and significance.

levels, engaging its audience both cognitively and emotionally, there is no bright or simple line separating acts intended by the actor to convey a message and acts that appeal to / or affect the audience at a non-cognitive or visceral level. The Canadian courts have adopted a relaxed approach to the definition of the freedom's scope – recognizing that the distinction between expression (an act intended to convey a message) and other forms of human action is often difficult to draw. They have often been quick to find that the act restricted by the state is expression and have focused instead on the issue of reasonable limits under s.1, finding it easier to address questions about the communicative character of the act or the nature of the speaker's appeal to his/her audience, within the framework of interest balancing.

The Supreme Court of Canada has held that the category of expressive acts (acts intended to carry a message) protected under s. 2(b), includes commercial advertising (*Irwin Toy* 1989), labour picketing (*Dolphin Delivery* 1986), hate speech (*Keegstra* 1990), soliciting for the purposes of prostitution (*Ref. re s 193 CC)*, and obscenity/pornography (*Butler* 1995). The freedom also gives protection to the donation and expenditure of money in support of expression (*Harper* 2004) and access to government-owned property for purposes of expression (*Montreal By-law* 2005). Even if the expenditure of money is not ordinarily an act of expression (is not intended to convey a message to an audience) it is often necessary to effective expression.

The court has said that protection is given to expression "irrespective of the particular meaning or message sought to be conveyed" (*Keegstra* 1990, 729), because "in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual" (*Irwin Toy* 1989, 968). The court has also said that it will not exclude an act of expression from the scope of the freedom simply because the act is thought to be without value (*Keegstra* 1990, 760). The underlying values of truth, democracy, and self-realization play an active or explicit role later in the court's analysis, only after it has defined the category of expression, and most clearly at the s. 1 limitations stage.

## The exclusion of violent expression

There are two exceptions to the Supreme Court of Canada's broad definition of the scope of freedom of expression under s. 2(b). First, the court has said that an act of expression will be denied s.2(b) protection if its method or location is incompatible with the values underlying the freedom – truth, democracy, and self-realization (*Montreal Bylaw* 2005). The court in *Irwin Toy* 1989 recognized that its broad definition of expression, at the first step of the test, meant that violent acts, including terrorist

action, might fall within the protection of the right, and so decided to carve out an exception for such acts. According to the court, a violent act, even if intended to carry a message, does not fall within the scope of s. 2(b), because it does not advance the freedom's underlying values (*Irwin Toy* 1989, 970). Expression that *advocates* violence is protected under s. 2(b) but may be limited under s.1. However, if the expressive act has a violent *form* – is itself violent - then it will be denied protection under s.2 (b) and the state will not be required to justify its restriction under s.1. Initially the court held that threats of violence do not fall within this exception and are protected under s.2(b). In deciding not to include threats within the exception the court recognized that the line between unpleasant but constitutionally protected expression and unprotected abusive or threatening expression cannot be drawn without taking account of the social, political, economic, and historical context in which the expression occurs – which is the kind of analysis the court ordinarily leaves to the s. 1 stage. However, later in *Khawaja* 2012, the court revised its position and held that because threats of violence undermine "the very values and social conditions that are necessary for the continued existence of freedom of expression" they also fall outside the scope of s.2(b) protection (*Khawaja* 2012, 70). In that case, the court held that that the Criminal Code ban on "terrorist activity" did not breach s. 2(b) of the Charter because this activity involved "acts of violence or threats of violence" (*Khawaja* 2012, 71).

The court has also said that s. 2(b) protection does not extend to expression that takes place on a state-owned property that is not generally open to the public for expression (is not a public arena/forum). This exclusion is a Canadian adaptation of the US courts' public forum doctrine and will be discussed later in this paper.

## The purpose/effect distinction

The court has also narrowed the scope of s. 2(b) by drawing a distinction between two types of state restriction on expressive activity: state acts that have as their purpose the restriction of expression and those that, although not designed to restrict expression, nevertheless have this effect. The court in *Irwin Toy* 1989, 974 distinguished between, on the hand, government action that is intended to restrict "the content of expression" either "by singling out particular meanings that are not to be conveyed" or restricting particular forms or means of expression that are tied to content, and, on the other hand, government action that is intended "to control only the physical consequences of certain human activity, regardless of the meaning being conveyed."

The significance of the purpose/effect distinction, which roughly parallels the

distinction in American jurisprudence between content restrictions and time, place, and manner restrictions, is that a government act that is intended to limit expression, and in particular the expression of certain messages, will be found to violate s. 2 (b) automatically, while a government act that simply has the effect of limiting expression will be found to violate s. 2 (b) only if the person challenging the state act can show that the restricted expression advances the values that underlie freedom of expression. Specifically, he/she must show that the restricted expression contributes to the realization of truth, participation in social and political decision-making, and diversity in the forms of individual self-fulfillment and human flourishing (*Irwin Toy* 1989, 976). Yet it is unclear why an act that the court has already decided is expressive – conveys meaning – would not, at least in some minimal way, advance individual self-realization. In *Montreal Bylaw* 2005, a case in which a strip club challenged a noise by-law that prohibited the amplification of sound onto the street, the Supreme Court of Canada found that the club's expression advanced the value of individual self-realization because it informed passersby about a leisure activity. If this speech advances free speech values, it is difficult to imagine what forms or instances of expression would not satisfy this requirement.

Because the court has defined *expression* broadly to include all acts intended to convey a message, any act is potentially an act of expression. This also means that any law is potentially a restriction on expression - on how a particular individual has chosen to express her/himself. Understandably, the courts are reluctant to require substantial justification for a law, such as a parking restriction, that would not ordinarily be seen as impeding expressive freedom. In these cases, the individual speaker will almost always have other ways to communicate her/his message that are no less effective. There may, however, be exceptional cases in which the means or location of expression is critical, for symbolic reasons, to the effectiveness of the message, or where there are no other ways or places to effectively communicate the message.

The only way to make sense of the *effect* rule, is to see it as establishing (albeit indirectly) a lower or variable standard of justification for time, place, and manner restrictions than the ordinary s.1 standard. These restrictions are treated differently, not because the restricted expression is, or might be, less valuable (less directly connected to the values underlying the freedom) but because the impact of such a restriction on freedom of expression interests will depend on the adequacy of the alternatives available for the message or the speaker. The question asked by the court then should not be whether the speech advances free expression values but instead whether the particular time, place, or manner of the expression (that is restricted) is important or necessary to the effective communication of the speaker's message. If an individual can effectively communicate her/his message in other ways, or at other

places or times, then the restriction may be viewed as minor. Some time, place, and manner restrictions, though, may have a significant impact on the individual's ability to express her/himself and so should be upheld only if they are judged to be necessary under s.1.

## Limits on freedom of expression

### Prescribed by law

If the court decides that the state has restricted expression under s. 2(b), it then considers whether the restriction is justified under s. 1 of the *Charter*. The first issue for the court, at the limitations stage, is whether the restriction is "prescribed by law". To be prescribed by law, the restriction must have the form of law, such as a statute, regulation, or binding policy, and it must not be vague, although it is sufficient if the restrictive rule provides "an intelligible legal standard" for determining when conduct is caught by the ban (*NS Pharmaceuticals* 1992).

### The Oakes Test

In *Oakes* 1986, which was decided shortly after the Charter's enactment, the Supreme Court of Canada set out a general test for determining whether a restriction on a right is "reasonable" and "demonstrably justified" under s.1. The first part of the *Oakes* test asks whether the purpose of the restrictive law is substantial enough to justify the limitation of a fundamental right or freedom. The next two steps involve an assessment of the means chosen to advance that purpose. The rational connection test asks whether the means (the restriction) rationally or effectively advance the law's substantial and pressing purpose. The minimal impairment test asks whether the measure restricts the protected activity (expression) no more than is necessary to advance the law's purpose. The rational connection and minimal impairment tests are, of course, closely related. A law that does not rationally advance the pressing and substantial purpose, for which it was enacted, can be seen as unnecessarily restricting the right or freedom. Similarly, a law that restricts the right or freedom more than is necessary to advance its pressing and substantial purpose (that does not minimally impair the freedom) is to that extent ineffective or irrational. At the final stage of the *Oakes* test, the court asks whether the benefit of the restrictive measure is proportionate to its impairment of the freedom.

In those cases, in which the court finds that a restriction is not justified under s. 1, the decision is most often based on the minimal impairment test, and, occasionally, on

the rational connection test. Undoubtably these tests have come to play a central role in the court's assessment of limits under s. 1, because they appear to involve nothing more than a judgment about the relationship of the law's means to its ends. The court may strike down the law not because its purpose is objectionable or because the constitutional values it impedes outweigh the values it advances, but simply because the means chosen to advance that purpose are ineffective or will impair the protected freedom unnecessarily.

However, the rational connection and minimal impairment tests do not simply involve an instrumental judgment about the effectiveness of the law. If the rational connection test, for example, was failed only when the law's means were entirely unrelated to its ends, or wholly ineffective in advancing those ends, then it would never, or at least very rarely, be failed. Indeed, it would be difficult to attribute to a law a purpose that seemed to be entirely unconnected to its provisions. Instead, the rational connection test must involve some sort of effectiveness threshold, with a court determining whether the law *reasonably* advances the pressing and substantial purpose for which it was enacted. Similarly, it will be very rare that an alternative measure that is less rights-restrictive will advance the law's substantial purpose as completely or effectively. The part of the law that is said to be irrational or overbroad (so that the law does not minimally impair the right) will seldom be entirely ineffective in advancing the law's purpose.

Because the court's application of the rational connection and minimal impairment tests involves a judgment about the relative effectiveness of the law's means (in whole or in part), other considerations easily enter the court's analysis. The application of these tests then often includes a judgment about the value of the restricted expression compared to the importance of the restrictive law's purpose. For example, a law may fail the minimal impairment test when the court considers that a small increase in the law's overall effectiveness in achieving its substantial and pressing purpose does not justify its broad interference with the protected right. The fact that judgments about rational connection and minimal impairment generally involve an assessment of the relative value/harm of the restricted expression may explain why the final *balancing* step of the *Oakes* test seldom plays anything more than a formal role in the court's s.1 analysis. The outcome of the final test is invariably the same as the outcome of the minimal impairment test because the court has already engaged in a form of proportionality analysis at that earlier step.

## Context and deference

The Supreme Court of Canada has said that freedom of expression can only be overridden when its exercise would result in a substantial harm to social or individual interests. At the same time though, the court has adopted a contextual approach to the assessment of limits on the freedom (*Dagenais* 1994, 878). In deciding whether a limit is justified, the court will consider the necessity or importance of the restriction but also the extent to which freedom of expression interests are impaired by the restriction. As earlier noted, the court has defined the scope of s. 2(b) broadly so that it protects all non-violent forms of expression; however, when the court assesses limits on the freedom under s.1, it distinguishes between core and marginal forms of expression, describing the different forms of expression as more or less valuable. The court recognizes that a broad and inclusive definition of the scope of the right means that there may be a significant variation in the *value* of different instances of protected expression.[4] Political expression, for example, is considered by the court to be core expression that can be restricted only for the most substantial and compelling reasons. In contrast, obscenity, commercial advertising, and hate speech are regarded as marginal forms of expression, because they are less directly connected to the values underlying the freedom. As a consequence, they may be restricted for less substantial reasons.

In *Keegstra* 1990, for example, Dickson CJ., writing for the majority of the court, said that, while hate speech falls within the protection of s. 2(b) of the Charter, it "strays some distance from the spirit of s.2(b)" and so its restriction under s.1 can be more easily justified. Hate speech, said Dickson CJ., undermines the autonomy and democratic participation of the members of the group targeted by the speech, and works against the realization of truth or the growth of public knowledge because it advances false claims.

The courts have also been willing, in certain circumstances, to *defer* to legislature's judgment about the need for a restriction on expression. In *Irwin Toy* 1989, which involved a legislative ban on advertising directed at children, the court signaled that it would show deference to the legislature's judgment about the need for a particular restriction on a right such as freedom of expression, "[w]here the legislature mediates between the competing claims of different groups in the community" (*Irwin Toy* 1989,

[4] Cory J. in *Lucas* 1998, 459: "Quite simply, the level of protection to which expression may be entitled will vary with the nature of the expression. The further that expression is from the core values of this right the greater will be the ability to justify the state's restrictive action".

990). The court should not simply "second-guess" the legislature's judgment about where to draw the line between competing claims. The court also thought that when determining whether the restriction satisfied the minimal impairment requirement, the court should not "take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups" (*Irwin Toy* 1989, 993). Underlying the court's call for deference is, first, a concern that the Charter "not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons" and second a belief that the court should be slow to displace the compromises struck by democratic institutions (*Irwin Toy* 1989, 993).[5]

There are two different ways in which the court may defer to the legislature's judgment. The first involves deference to findings of fact by the legislature. The court may decide to lower the standard of proof that the legislature must meet when establishing the factual basis for the justification of a restriction. In *Irwin Toy* 1989 there was little dispute that protecting children from manipulation was an objective important enough to justify restricting free expression. The more difficult issue was whether or not the government had proved that the restriction on advertising advanced this important purpose effectively and without unnecessarily impairing freedom of expression. In seeking to justify the restriction on advertising directed at children, who were under the age of thirteen, the legislature relied on social science evidence that children were unable to critically assess advertisements. However, this evidence was not clear cut, particularly on the question of whether children over the age of six were subject to the manipulative influence of advertising. The court, though, decided that it ought not to second-guess the legislature's assessment of the social science evidence in this case. The principal reason for this deference seems to have been the Court's sense of its limited competence in such matters and the inappropriateness of substituting its own reading of the evidence for that of the elected legislature (*Irwin Toy* 1989, 990). The second form of judicial deference relates to the legislature's accommodation of competing values or interests. If the legislature has made an apparently reasonable judgment that concerns about the manipulation of children (or some other interest) justify the restriction of certain forms of expression, the court should not simply substitute its own judgment for that of the legislature. The reason for this form of

[5] In *Thomson* 1998, 90, Justice Bastarache describes some of the contextual factors that the court should take into account when accessing limits under s.1. In particular, he notes that "the vulnerability of the group which the legislator seeks to protect … that group's own subjective fears and apprehension of harm … and the inability to measure scientifically a particular harm in question, or the efficaciousness of a remedy" are all relevant factors when the court is "assessing whether a limit has been demonstrably justified....".

deference may be the Court's lingering doubt about the legitimacy of second-guessing the value judgments of democratic institutions.

# The regulation of hate speech

## The law in Canada

In 1970 the Canadian government enacted criminal restrictions on the advocacy of genocide (s. 318), the incitement to hatred likely to lead to a breach of the peace against an identifiable group – a group identified on the basis of race, religion, and ethnicity (s. 319(1)), and the wilful promotion of hatred against an identifiable group, (s. 319(2)). These additions to the *Criminal Code* were made on the advice of the *Cohen Commission* 1966, which had reported to Parliament a few years earlier.

To be convicted of promoting hatred under s. 319(2) of the Criminal Code, an individual must be shown to have engaged in speech that either stirred up hatred in its audience or created a risk that such hatred would be stirred up, and to have done this intentionally or at least with knowledge that her/his speech was likely to have this effect (*Mugesera* 2005, 102). The *Code* includes several defences to the charge of hate speech, including that a person shall not be convicted under the section "if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject or on an opinion based on a belief in a religious text" (s. 319(3)(b)) or "if he can demonstrate that his claims are true" (s. 319(3)(a)) or "if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true" (s. 319(3)(c)). A prosecution under the criminal hate speech ban can only be commenced with the consent of the provincial Attorney-General.

In 1977 the federal government amended the Canada Human Rights Act [CHRA] to include a ban on "telephonic" communication that is likely to expose the members of an identifiable group to hatred or contempt. The scope of the s. 13 ban was later extended to include hate speech on the internet. Section 13 of the CHRA was repealed by the federal government in 2013, although the current government has promised to reintroduce s. 13 in a slightly modified form. The human rights codes of British Columbia, Alberta, Saskatchewan, and the Northwest Territories include a provision similar to s. 13 that is applicable to signs and publications.

The human rights code ban on hate speech is complaint driven. An individual or organization can make a complaint under the code, which is investigated by a human

rights commission.[6] The commission must decide whether the complaint has substance and should be referred to a tribunal for adjudication. The purpose of the human rights code ban on hate speech is not to condemn and punish the person who committed the discriminatory act, but rather to prevent or rectify discriminatory practices or to compensate the victims of discrimination for the harm they have suffered. In contrast to the criminal ban on hate speech, an individual may be found to have breached the human rights code ban even though she/he did not *intend* to expose others to hatred or realize that her/his communication might have this effect. The focus is on the effect of the act and not the intention with which it was performed. The ordinary remedy against an individual who is found to have breached the human rights code ban is an order that she/he cease her/his discriminatory practices.

The *Criminal Code* prohibits the wilful promotion of hatred against an "identifiable" group – a group identified by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability. The human rights code restrictions on hate speech protect an even wider range of groups.

Criminal restrictions on *incitement* to hatred apply only to speech that is closely tied (by time and place) to ensuing violence. For example, s. 319(1) of the Canadian *Criminal Code*, which prohibits the incitement of hatred against an identifiable group, is breached only when "the incitement is likely to lead to a breach of the peace." The judgment that speech is likely to have such an effect (the recognition of a *causal* link between the speech and the action) rests in part on the character of the expression, but more significantly on the context in which it occurs, and in particular the absence of space for the audience to make a careful or independent judgment before acting. A speaker, who calls on a group (whose emotions are running high) to take immediate action, may be seen as leading the audience into that action – as causing, or contributing to, the harm that follows.

The Canadian courts, though, have upheld restrictions on hate speech, even when violence is not the certain and imminent consequence of the speech. The leading hate speech cases in Canada involve the restriction of racist claims that are meant to persuade members of the general community about the dangerous or undesirable character of the members of a particular group. The law rests on a belief that those who hear racist claims may come to view the target group differently and may be encouraged to act towards the group's members in a discriminatory or even violent way. There are two challenges faced by any attempt to reconcile the regulation of hate

[6] In BC complaints go directly to the tribunal. In Saskatchewan the commission refers complaints to the courts.

speech with the right to freedom of expression. The first concerns the claim that there is a causal link between the expression of hateful views and the spread of hatred (and acts of discrimination and violence) in the community. The second concerns the claim that it is possible to isolate for restriction a narrow category of extreme or hateful speech that reinforces, or contributes to, hatred in the community.

## The constitutionality of the criminal ban on hate speech: R. v. Keegstra

In *Keegstra* 1990, the leading Canadian hate speech case, the Supreme Court of Canada held that the Criminal Code ban on the "wilful promotion of hatred" was a justified limit on the Charter's freedom of expression right. Chief Justice Dickson, writing for the majority of the court, held that s. 319(2) restricted expression and so breached s. 2(b). However, he found that the restriction was justified under s. 1, the *Charter*'s limitation provision, because its purpose -- to prevent the spread of hatred in the community -- was "substantial and compelling" and because it limited only a narrow category of extreme speech that "strays some distance from the spirit of s.2(b)" (*Keegstra* 1990, 99). Justice McLachlin, in her dissenting judgment, agreed that preventing the spread of hateful ideas was an important public purpose but did not accept that the criminal prohibition advanced this purpose effectively and at minimal cost to freedom of expression.

At the outset of his s.1 analysis, Chief Justice Dickson identified two "very real harms" caused by hate speech (*Keegstra* 1990, 64). He noted first the emotional or psychological injury experienced by the members of the target group. According to Dickson CJ., the "derision, hostility and abuse encouraged by hate propaganda" negatively affect the members of the group because their "sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded to the groups" with which she/he identifies (*Keegstra* 1990, 65). Because an individual's identity is partly constituted by her/his association and interaction with others, she/he experiences attacks on the group(s), to which she belongs, personally and sometimes very deeply. The second harm identified by Dickson CJ. is the injury that hate speech causes to "society at large" (*Keegstra* 1990, 66). If members of the larger community are persuaded by the message of hate speech, they may engage in acts of violence and discrimination, causing "serious discord" in the community (*Keegstra* 1990, 66).

Chief Justice Dickson was prepared to say that hate speech causes or contributes to the spread of hatred in the community, because he was sceptical about the role of

reason in the communicative process, at least in certain circumstances.[7] He repeated the Cohen Commission's observation that "individuals can be persuaded to believe almost anything if the information or ideas are communicated using the right technique and in the proper circumstances" (*Keegstra* 1990, 66).

The Chief Justice also found that the restriction was narrow in its scope and therefore limited in its impact on freedom of expression. He noted that the restriction applies only when an individual wilfully *promotes* hatred. To promote hatred, the *actus reus* of the offence, involves more than the simple encouragement of hateful views. It involves, instead, the active support or instigation of such views. Dickson CJ recognized that the causal link between a particular act of expression and the generation of hatred in the community might be difficult to establish and that to require "direct proof" of a link "between a specific statement and hatred of an identifiable group" could severely limit the effectiveness of the ban. In his view, the *actus reus* of the offence would be established if the speech creates a "risk of harm". In determining this, the court will consider whether the speech is of the kind that might lead to the spread of hatred (*Keegstra* 1990, 119).

As well, the speaker must *wilfully* promote hatred. According to Dickson CJ., the speaker must "subjectively desire the promotion of hatred" or they must recognize that the promotion of hatred is the likely consequence of their expression – that it is "certain or substantially certain" that hatred will be stirred up by the speech (*Keegstra* 1990, 111).[8] As the court noted in the later judgment of *Mugesera* 2005, 104, "[a]lthough the causal connection need not be proven, the speaker must desire that the message stir up hatred". In *Keegstra* 1990, Dickson CJ. accepted that, when deciding if the accused intended to promote hatred, "the trier will usually make an inference as to the necessary *mens rea* based upon the statements made" (*Keegstra* 1990, 117). In other words, the court will generally look to the content and tone of the speech, as well as its intended audience, when determining whether the speaker intended to stir up

[7] McLachlin J. in *Keegstra* 1990, 853, suggested a more immediate problem with the majority's scepticism about audience reason: "The argument that criminal prosecution for this kind of expression will reduce racism and foster multiculturalism depends on the assumption that some listeners are gullible enough to believe the expression if exposed to it. But if this assumption is valid, these listeners might be just as likely to believe that there must be some truth in the racist expression because the government is trying to suppress it."

[8] In *Ahenakew* 2009, a Saskatchewan court held that even though Mr. Ahenakew had made a number of "revolting" anti-Semitic statements to a reporter he had not intended to promote hatred but had instead been provoked to respond in anger to the reporter's questions.

hatred.[9]

Finally Chief Justice Dickson thought that the hate speech ban did not interfere with freedom of expression in a significant way, because the provision restricts only a narrow category of extreme expression (that causes or is likely to cause hatred) and does not catch expression that is merely unpopular or unconventional (*Keegstra* 1990, 105). According to Dickson CJ., the term "hatred" connotes "emotion of an intense and extreme nature that is clearly associated with vilification and detestation" and so "[o]nly the most intense forms of dislike fall within the ambit of this offence" (*Keegstra* 1990, 116). Hatred "belies reason" and when directed against the members an identifiable group, it signals that they are to be "despised, scorned, denied respect, and made subject to ill-treatment" because of their group membership (*Keegstra* 1990, 116).

## The constitutionality of human rights code regulation – CHRC v. Taylor and Whatcott v. Sask. HRC

The Supreme Court of Canada in *Taylor* 1990 upheld s.13 of the CHRA, as a justified limit on freedom of expression, adopting a line of reasoning similar to that taken in the *Keegstra* 1990 decision. Chief Justice Dickson, writing for the majority of the court, noted the "substantial psychological distress" caused by hate speech and "the damaging consequences" that this speech would have for the target group members, including "loss of self-esteem, feelings of anger and outrage and strong pressure to renounce cultural differences that mark them as distinct" (*Taylor* 1990, 40). He further noted that hate speech may "convince listeners, even if subtlely, that members of certain racial or religious groups are inferior", resulting in acts of discrimination and even violence (*Taylor* 1990, 40). As in *Keegstra* 1990, he interpreted the scope of the s.13 ban narrowly so that it was limited to extreme speech that stirred up hatred. He reiterated that hatred involves "unusually strong and deep-felt emotions of detestation, calumny and vilification" and that it "allows for no 'redeeming qualities' in the person" (*Taylor* 1990, 46). At the same time, he acknowledged that "the nature of human rights legislation militates against an unduly narrow reading of s. 13(1)" (*Taylor* 1990, 59).

[9] The Supreme Court of Canada in *Mugesera* 2005, 103 when describing the elements of the s. 319(2) offence of wilfully promoting hatred, noted that it is necessary for the court to look at the speech in "its social and historical context". But if, as Chief Justice Dickson acknowledged (when discussing the *actus reus* of the offence), it is difficult to establish a link between speech and the promotion of hatred (the inculcation or reinforcement of racist attitudes among the audience) what inferences about intention or foreseeability can the court draw from the speaker's words?

There was, however, an important difference between the criminal and human rights bans on hate speech. Section 13, in contrast to the *Criminal Code* ban, did not require proof of an intention to spread hatred. As Chief Justice Dickson observed, the focus of the section "is solely upon likely effects, it being irrelevant whether an individual wishes to expose persons to hatred or contempt on the basis of their race or religion" (*Taylor* 1990, 66). In *Keegstra* 1990, Dickson CJ decided that the *Criminal Code* ban on hate speech was a justified restriction on freedom of expression, because it extended only to speech that *wilfully* promotes hatred. Nevertheless, in the *Taylor* 1990 decision, he held that the absence of an intention requirement did not undermine the constitutionality of s. 13, because the purpose of human rights legislation is to "compensate and protect" the victim rather than "stigmatize or punish" the person who has discriminated (*Taylor* 1990, 70). Even though "the section may impose a slightly broader limit upon freedom of expression than does section 319(2) of the *Criminal Code* ... the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision" (*Taylor* 1990, 61).[10]

A number of years later in *Whatcott* 2013, the Supreme Court held that the hate speech ban in the Saskatchewan Human Rights Code was, with one modification, a justified restriction on the Charter's freedom of expression right. Section 14 (1) (b) of Saskatchewan code prohibits signs and other forms of representation that "exposed or tended to expose to hatred … a person or class of persons based on one of the prohibited grounds", which included race, ethnicity, gender, sexual orientation, and disability. The section, though, also prohibits speech that "ridicules, belittles or affronts the dignity" of a person based on such grounds and the court decided that this element of the ban could not be sustained under the Charter, and severed it from the rest of the section.

In upholding the remainder of the ban, the court followed its earlier decision in *Taylor* 1990. Justice Rothstein, writing for the court, noted that the harm of hate speech goes

[10] The absence of a formal intention requirement in the law may not be so significant, since it is hard to imagine that hatred could be stirred up unintentionally or unwittingly. In *Keegstra* 1990, the court said that the intention to promote hatred could generally be inferred from the speaker's words. Someone who expressed extreme views will either have intended to stir up hatred, or, at least, recognized this as the possible outcome of their speech. Indeed, in all of the cases in which the CHRT found a breach of s. 13, the expression was so extreme that it is unlikely that the addition of an intention or knowledge requirement would have led to a different result. In most of these cases the call for violence against the target group was explicit (Moon 2008).

beyond the "emotional distress" caused to individual group members. Hate speech, he said, has a "societal impact": "If a group of people are considered inferior, sub-human, or lawless, it is easier to justify denying the group and its members equal rights or status" (*Whatcott* 2013, 74). In this way hate speech "lays the groundwork for later, broad attacks on vulnerable groups [which] can range from discrimination to ostracism, segregation, violence and, in the most extreme cases, to genocide" (*Whatcott* 2013, 74). Hate speech "seeks to de-legitimize group members in the eyes of the majority, reducing their social standing and acceptance in society" and making it "easier to justify discriminatory treatment" (*Whatcott* 2013, 71).

Rothstein J. confirmed that the test for whether speech is likely to "stir up hatred" is "whether a reasonable person aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred" (*Whatcott* 2013, 56). Rothstein J. thought that it is unrealistic to expect proof of "a precise causal link" between the speech and harm and that instead common sense and experience (of the reasonable person) can serve to establish the connection in a particular case (*Whatcott* 2013, 132). The decision-maker must look at the content and tone of the speech, such as the use of inflammatory and derogatory language, to determine whether the speech is likely to encourage hatred in the audience.

Justice Rothstein emphasized that the ban catches only a narrow category of extreme expression – speech that vilifies the members of a group, accusing them "of disgusting characteristics, inherent deficiencies, or immoral propensities" (*Whatcott* 2013, 43). The ban, said Rothstein J., does not extend to speech that merely discredits, humiliates, or offends the members of a group. Drawing on the jurisprudence of the Canadian Human Rights Tribunal, he identified certain "hallmarks of hate" (indicators of extreme speech), such as portraying a group as "a powerful menace that is taking control of the major institutions in society and depriving others of their livelihoods, safety, freedom of speech and general well-being", or "as preying upon children", or as responsible "for the current problems in society and the world", or "as dangerous or violent by nature, devoid of any redeeming qualities and … innately evil", or as like "animals, vermin, excrement, and other noxious substances" (*Whatcott* 2013, 44-5). The various hallmarks of hatred, set out by Rothstein J., involve claims about the inferiority or dangerousness of the target group that may encourage or reinforce hateful views among the audience. Despite Justice Rothstein's assertion that the ban does not target the "ideas" expressed but simply the "mode" of their public expression, these claims express extreme or hateful views about the members of certain groups (*Whatcott* 2013, 51).

In both the *Whatcott* 2013 and *Taylor* 1990 decisions, there is a tension between the Supreme Court's broad description of the purpose of the human rights code ban on hate speech and its narrow definition of the scope of the ban. The purpose of the ban, according to the court, is to prohibit speech that negatively affects the dignity or status of the members of an identifiable group and is tied to the code's larger purpose of "prevent[ing] the spread of prejudice and … foster[ing] tolerance and equality in the community" (*Taylor* 1990, 37). But if the purpose of the ban is understood in such broad terms, it is difficult to see why its scope should be confined to extreme or hateful expression. Speech that encourages feelings of dislike and suspicion may well lead to acts of discrimination. Group stereotyping, for example, may have a damaging impact on the group's standing in the community, and may encourage discriminatory treatment of its members.

However, any attempt to exclude all racial or other prejudice, including stereotypes, from public discourse would require extraordinary intervention by the state. Because discriminatory speech is so commonplace, it is impossible to establish clear and effective rules for its identification and exclusion. Because discriminatory attitudes and assumptions are so pervasive, it is vital that they be confronted and contested in the public sphere – that they be treated as objectionable or erroneous political views that must be publicly addressed.

## Insults and harassment

There are a variety of laws in Canada that restrict insults directed at individuals or groups in closed environments. It is accepted that racist, sexist, and other insults should be banned in the workplace, in schools, and in other similar environments, where they are difficult to avoid. The workplace environment is both closed and hierarchical and so a higher standard of civility may reasonably be expected. There is also increasing support for bans on racist amd other insults in public spaces, such as the streets.

When insults are directed at group members in the workplace or the streets, the abuser and the abused, occupy the same physical space – the school yard, the office, the street. The insults can be difficult to avoid whether they come from one or a few individuals in the workplace or from a succession of unconnected individuals in the streets. Most abuse, though, now takes place online – on twitter, and other social media platforms. Social media has enlarged the space in which harassment and abuse occur. The parameters of the virtual space that abuser and abused occupy are less easily defined and can encompass a potentially large group of individuals. Abuse

online can be anonymous, extensive, and persistent.[11]

Several provinces have enacted cyber-bulling laws, which apply primarily in the education context. These laws prohibit a number of activities, such as threats, harassment, counselling suicide, and impersonating someone online.[12] The Criminal Code prohibits criminal harassment (s. 264(1)) and uttering threats (s. 264.1(1)), and now includes a ban on publishing or transmitting intimate images of a person, without that person's consent (s. 162.1(1)).

## Access to State Property

The right of access to state-owned property under s. 2(b) took shape in two Supreme Court of Canada judgments, *Commonwealth of Canada* 1991, and *Montreal By-Law* 2005. In *Commonwealth of Canada* 1991, the court described government ownership of property as "quasi-fiduciary" in nature, noting that the government "owns places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns" (*Commonwealth of Canada* 1991, 154). L'Heureux-Dube J. recognized that, if "the public had no right whatsoever to distribute leaflets or engage in other expressive activity on government-owned property (except with permission), then there would be little if any opportunity to exercise their rights of freedom of expression" with the consequence that "only those with enough wealth to own land, or mass media facilities … would be able to engage in free expression" (*Commonwealth of Canada* 1991, 198).

In *Commonwealth of Canada* 1991, officials at Dorval airport in Montreal prevented members of the Committee for the Republic of Canada from communicating their

[11] The 2021 Supreme Court of Canada decision of *Ward* 2021 highlights some of the challenges in addressing insults or harassment in the new communication landscape. The majority judgment focused on the impact of the speech on Ward's audience and whether this speech was likely to lead them to treat Gabriel and other disabled individuals as less than human. The majority decided that the speech was not sufficiently extreme to breach the anti-discrimination provisions of the Quebec Charter of Human Rights and Freedoms. The dissenting judgment focused instead on the impact of the speech on Gabriel himself and whether he would feel bullied or humiliated by it.

[12] In *Crouch* 2015 a Nova Scotia court struct down the province's cyber-bullying law on the ground that it was an unnecessarily broad restriction of freedom of expression because it applied to both private and public communication, provided no defences and did not require proof of harm. The N.S. government has now reintroduced a more narrowly drawn cyber-bullying ban.

political views to passersby in the public areas of the airport. The committee members were told that their activities (speaking with passersby and distributing leaflets) violated a federal airport regulation that prohibited the "conduct [of] any business or undertaking, commercial or otherwise at an airport, and any form of soliciting or advertising". The committee members challenged the restriction on their activity, arguing that under the Charter they had a right to express themselves in the public areas of the airport and that this right had been violated by the airport authorities.[13]

The court agreed that the airport authority's interference with the committee members' communication of political views in the public areas of the terminal amounted to a restriction on freedom of expression that could not be justified under s. 1. However, three different approaches to the issue of communicative access to state property were put forward by the members of the court.

Chief Justice Lamer thought that the question of whether an individual has a right to communicate on state-owned property should be resolved under s. 2(b) and should depend simply on whether the communication is compatible with the state's use of the property. In his view, the state does not breach s. 2(b) when it restricts expression that is incompatible with its use of the property. However, a restriction that is not based on the incompatibility of the expressive activity with the state's use of the property must be justified by the state under s. 1. Lamer J. illustrated the flexibility of his test, using the example of the Library of Parliament:

> [N]o one would suggest that an individual could under the aegis of freedom of expression, shout a political message of some kind in the Library of Parliament or some other library. This form of expression in such a context would be incompatible with the fundamental purpose of the place, which essentially requires silence. When an individual undertakes to communicate in a public place, he or she must consider the function which that place must fulfil and adjust his or her means of communicating so that the expression is not an impediment to that function. To refer again to the example of a library, it is likely that wearing a T-shirt bearing a political message would be a form of expression consistent with the intended use of such a place. (*Commonwealth of Canada* 1991, 157)

In the case before the court, Lamer CJ. found that leafletting in the public areas of the airport was compatible with the ordinary operation of the property.

[13] At issue in the case, as well, was whether the distribution of political leaflets was caught by the airport regulation, which seemed to be directed primarily at commercial activity.

However, Chief Justice Lamer's compatibility standard could be applied either strictly or loosely. It is almost always possible to find that a particular act of communication is incompatible, to some degree, with the state's property use because it may cause some disruption or inconvenience. As well, state properties often serve multiple purposes. While the streets and parks, for example, may serve as spaces for public interaction and discussion, they are mainly used for transportation and recreation. These different functions will sometimes be in tension or conflict with each other. Resolving this tension, though, is not simply a matter of deciding that one use of the property (communication) is incompatible with the state's primary use of the property.

Madame Justice L'Heureux-Dube, in her concurring judgment, took the view that any time the state restricts expression on its property it violates s. 2 (b) and must justify the restriction under s.1. Any restriction of expression on state property then must satisfy the substantial purpose, rational connection, minimum impairment, and proportionality standards of s. l. In her view, no other approach fits with the broad construction the Supreme Court has given to s. 2 (b) in its earlier decisions. In the case before the court, L'Heureux-Dube J. found that the airport's restriction on communication in its public areas violated s. 2 (b) and that the limit was not justified under s. 1. She considered airports to be "contemporary crossroads", the functional equivalent of other public thoroughfares, and so should be on the same "constitutional footing" as streets and parks (*Commonwealth of Canada* 1991, 205).

L'Heureux-Dube J., while claiming to reject the "rigid categorization" of the US. public forum doctrine, thought that certain state properties could, as a matter of fact, be described as public arenas (a term she used to distinguish her approach from the American public forum doctrine), in the sense that they are generally open to the public and can easily accommodate public communication. In her view, "some but not all, government-owned property is constitutionally open to the public for engaging in expressive activity" (*Commonwealth of Canada* 1991, 198). She thought that "the Charter's framers did not intend internal government offices, air traffic control towers, prison cells and Judges' Chambers to be made available for leafleting or demonstrations" (*Commonwealth of Canada* 1991, 198). She argued that when deciding whether a property should be viewed as a "public arena" and "appropriately open for public expression", the courts should consider such things as "the traditional openness of such property for expressive activity"; "whether the public is ordinarily admitted to the property as of right"; "the compatibility of the property's purpose with such expressive activities"; "the impact of the availability of such property for expressive activity on the achievement of s. 2(b) 's purpose"; and "the availability of other public arenas in the vicinity for expressive activities" (*Commonwealth of Canada* 1991, 203).

Justice L'Heureux-Dube argued that, when assessing access claims, the courts should engage in a flexible balancing of competing interests; yet her approach under s 1 involved dividing state properties into two categories, public arenas, and non-public arenas/private state properties, based on a general judgment about the compatibility of communicative access with the state's property use. The decision to attach the label public arena or private space to a particular property is the critical step in Justice L'Heureux-Dube's s 1 approach. It matters how a state-owned property is classified, because the two kinds of property seem to attract different standards of review. If a property is classified as a public arena, public communication must be permitted, unless the state can show good reasons for restricting it. L'Heureux-Dube J. thought that "those areas traditionally associated with, or resembling, sites where all persons have a right to express their views by any means at their disposal, should be vigilantly protected from legislative restrictions on speech" (*Commonwealth of Can*ada 1991, 225). In the case of properties that are not public arenas, however, restrictions on access will always be justified. L'Heureux-Dube J. held that the open area of the airport was a public arena, so that the airport authorities had breached the group's s. 2(b) right when it prevented them from speaking.

McLachlin J. adopted what she saw as the reasonable "middle ground" on the issue of communicative access to state property, "between the extremes of the right to expression on all government property and the right to expression on none" (*Commonwealth of Canada* 1991, 242). She thought that if the state had "the absolute right to prohibit and regulate expression on all property which it owns", as an incident of ownership, the purpose of freedom of expression - to permit members of society to communicate their ideas and values to others - would be "subverted" (*Commonwealth of Canada* 1991, 230). She also rejected as extreme the position that any denial of communicative access to government-owned property violates freedom of expression and must be justified under s. 1 of the Charter. In her view, the purposes of freedom of expression do not justify "conferring on the public a constitutional right to express itself publicly on all public property, regardless of its use and function" (*Commonwealth of Canada* 1991, 231). McLachlin J. argued that, when deciding access cases, the court should "focus on determining when, as a general proposition, the right to expression on government property arises" (*Commonwealth of Canada 1991*, 236). In her view, a state restriction on communicative access to property will not breach s 2(b), if it is determined that communication on that property will not advance the values underlying the freedom. However, if the court decides that communicative access to the property will advance the freedom's underlying values, a restriction on communication in that place will violate s.2 (b) and the court must then determine under s.1 whether the state has other grounds to support the restriction on expression. She held that the open area of the airport was a public

forum.

In Justice McLachlin's view, communicative access to certain state-owned properties, such as prison cells, judge's private chambers, private government offices, and publicly owned broadcasting facilities, will not advance the values of democracy, truth, and autonomy that underlie the constitutional protection of freedom of expression: "These are not places of public debate aimed at promoting either the truth or a better understanding of social and political issues. Nor is expression in these places related to the open and welcoming environment essential to the maximization of individual fulfillment and human flourishing" (*Commonwealth of Canada* 1991, 241). A restriction on communicative access to a *private* state-owned property will not violate s.2(b) and so will not require justification under s. 1. On the other hand, McLachlin J. considered that the purposes of the guarantee of free expression are served by protecting expression in public forums, such as streets and parks, that have "by tradition or designation been dedicated to public expression" (*Commonwealth of Canada* 1991, 241). The use of these places for political, social, or artistic expression "would clearly seem to be linked to the values underlying the guarantee of free speech" (*Commonwealth of Canada* 1991, 241). A restriction on communicative access to a public forum will violate s. 2(b) and so will require justification under s. 1.[14]

In *Montreal By-law*, 2005, McLachlin CJ., along with Deschamps J., again adopted a version of the public forum doctrine. This time, though, she wrote for the majority of the court. The case concerned a charge brought against a strip club under a city by-law that prohibited the projection of noise out onto the street using sound equipment. In addressing the issue of access to state-owned property, the majority made a small adjustment to the second part of the test the court had previously set out in *Irwin Toy* 1989 for determining whether s. 2(b) had been breached. The first part of the test asks whether the act - in this case the sound projected on to the street by the strip club -- has "expressive content". At the second stage, the court must decide whether either the "method or location" of the expression remove that protection. In its original version, as set out in the *Irwin Toy* 1989 decision, this second step of the test excluded from the scope of s 2(b) any expression that was violent in form. The court in *Irwin Toy* 1989 recognized that its broad definition of expression, at the first step of the test, meant that violent acts, including terrorist action, might fall within the protection of the right, and so decided to carve out an exception for such acts. In *Montreal By-law* 2005,

[14] In *Ramsden* 1993, a case decided shortly after *Commonwealth of Canada* 1991, the Supreme Court of Canada held that a municipal ban on placing posters on utility poles breached the Charter, under any one of the tests put forward in *Commonwealth of Canada* 1991.

the court added to this exclusion of violent acts, an exclusion of expression that occurs in certain locations. The majority argued that just as certain methods of expression do not deserve protection under s. 2(b), because they do not advance the values underlying the freedom, communication in certain locations should also be denied protection because it does not advance these values.

For the majority in *Montreal By-law* 2005, the central question, in every case involving communicative access to state-owned property, is whether free expression on the particular property will undermine the values that underlie the commitment to free expression – truth, democracy, and self-realization. In answering this question, the court will consider "the historical or actual function of the place" (*Montreal By-law* 2005, 74). Access to state-owned properties that have historically been open to the public will ordinarily be protected under s. 2(b), because speech in such a place will advance freedom of expression values. The court will also consider the actual function of a state-owned property: whether the space is "essentially private" in its operation or instead public, in the sense that the "function of the space — the activity going on there … [is] — compatible with open public expression" (*Montreal By-law* 2005, 76). The majority observed that "[m]any government functions, from cabinet meetings to minor clerical functions, require privacy" so that enabling free access to these places for communication "might well undermine democracy and efficient governance" (*Montreal By-law* 2005, 76). This test provides a "preliminary screening process" in which it is determined that some locations fall within, and others outside, the scope of s. 2 (b) protection, allowing people to "know where they can and cannot express themselves" (*Montreal By-law* 2005, 79). It also means that governments will "not be required to justify every exclusion or regulation of expression under s.1" (*Montreal By-law* 2005, 77). In the case before the court, the majority found that the streets are public spaces "where expression of many varieties has long been accepted" (*Montreal By-law* 2005, 81). The majority saw no reason to think that permitting expression there "would subvert the values of s. 2 (b)" (*Montreal By-law* 2005, 81). The majority, however, went on to find that the by-law was a justified restriction under s.1.

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McLachlin CJ. and Deschamps J. claimed to derive a public/private forum distinction from an assessment of the freedom of expression value of access to different state properties. It may be that in many or most cases, communicative access to private government offices, and similar state-owned properties, will not generate reflection or debate and will simply interfere with the state's use of its property. But we cannot exclude in every case the possibility that communication on/in one of these properties might advance the values of freedom of expression, particularly if we accept that communication is deserving of protection even when it is disruptive or confrontational. A protestor's self-realization may be advanced, for example, if she/he is able to enter

the prime minister's office and speak to her/him or to call out to passersby from the office's window, even though these actions will interfere with other important interests. The classification of properties as either public or private then rests not, as the majority claimed, on an assessment of the contribution of communicative access to the values that underlie the freedom (a vague standard in any event) but instead on a judgment about the general compatibility of expression with the state's use of the property. If a property is classified as a private forum (if it is not ordinarily open to the public or if expression is generally incompatible with its use) then all expression can be excluded, even expression that might not significantly disrupt the state's property use.

In the *Commonwealth of Canada* 1991 and *Montreal By-Law* 2005 cases, the court recognized that discussion of public issues would be seriously impeded if private citizens did not have some right to communicate on state-owned property and so rejected the argument that state-owned property fell outside the scope of Charter review and was insulated from all claims of access. Yet, at the same time, the court was unwilling to treat the denial of communicative access to state property as simply a restriction on expression that violates the Charter, unless it advances a substantial public interest. Instead, the court gave the state's property *use* a form of priority over the individual's communicative access. Rather than deciding in each case whether the individual's access claim is compatible with the state's property use, the court makes a general threshold judgment about the openness or accessibility of the property to public communication. If a property is classified as a public forum, then communicative access will be protected, even though it may sometimes involve a degree of interference with ordinary or alternative uses of the property. An individual should be free to communicate on the property unless her/his speech breaches some other legal standard or needs to be regulated to make space for other uses of the property including speech by others. On the other hand, if the property is considered a private forum, because communicative access is generally incompatible with its use by the state, the state can exclude all communicative access, without need for additional justification.

Public forums do not come neatly packaged with clear and fixed parameters. The court's definition of the shape or scope of a particular public forum or private space will almost certainly be affected its understanding of the available alternatives. A private government location may be narrowly defined, carved from a larger arena - a judge's chambers rather than a courthouse (*CBC* 2011). As well, there may be times when access is so important that the state should be required to accommodate communication even if this involves compromising its use of the property. Sometimes there may be no other locations for the communication of a particular message. While the need to ensure safety and security at a prison, for example, will justify the

restriction of most claims of access, the denial of all access claims would preclude meaningful investigation into prison operations by the press or representatives of public interest groups.[15]

In *Vancouver Transit* 2009, the city transit authority sold advertising space on the outside of transit vehicles. The authority's longstanding policy, though, was to accept commercial ads but not political ads. This policy was challenged by the Canadian Federation of Students and the BC Teachers' Federation, both of which wanted to place ads on transit vehicles in advance of a provincial election. The Supreme Court of Canada in *Vancouver Transit* 2009 held that the city's transit vehicles were public forums, where individuals interact with one another (*Vancouver Transit* 2009, 43). The important question, said the court, is "whether the historical or actual function … of the space [is] incompatible with expression or suggest that expression within it would undermine the values underlying free expression" (*Vancouver Transit* 2009, 42). Even though buses have not been used for advertising "as long as city streets, utility poles and town squares", they have been and continue to be used for this purpose in Vancouver and elsewhere (*Vancouver Transit* 2009, 42). It followed then, said the court, that expressive activity "neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression" (*Vancouver Transit* 2009, 42). The court then found that the exclusion of political advertising from transit vehicles breached s. 2(b) and could not be justified under s.1. The court was unsympathetic to the transit authority's arguments that passengers are a captive audience or that the authority might be associated with the messages, particularly since "political speech … is at the core of s. 2(b) protection" (*Vancouver Transit* 2009, 80). While the transit authority could decide to discontinue the practice of selling advertising space on its vehicles, so that the property ceased to be a public forum, as long as it continued to sell advertising, it could not exclude access to speakers based on the content of their speech.[16]

[15] McLachlin CJ. and Deschamps J. in *Montreal By-law* 2005, 78: "[W]e must accept that, on the difficult issue of whether free expression is protected in a given location, some imprecision is inevitable. … [T]he public-private divide cannot be precisely defined in a way that will provide an advance answer for all possible situations."

[16] In the US, the courts have called these spaces "designated public forums" – expressive forums created by the state.

# Public demonstrations and street speech

## Public protest

Even though public assemblies are protected under s.2(c) of the Charter, freedom of peaceful assembly, cases involving demonstrations or assemblies are often addressed under s.2(b), as freedom of expression issues. The scope of s.2(c) is discussed in the background paper by Professor Jamie Cameron.

Street speech, such as public demonstrations and street corner leafletting, was once viewed as an important alternative to communication in the mainstream/established media. At an earlier time, the concentration of media ownership, and the reliance of newspapers and broadcasters on advertising as their primary source of revenue, meant that critical perspectives were often excluded from these forums. The streets were sometimes the only platform available to those who lacked either the resources or connections to access the mainstream media.

The communication landscape, though, has changed dramatically since the courts first championed the individual's access to the 'poor man's printing press'. The emergence of the internet, as a significant conduit for the expression of ideas and information, seemed to lessen concerns about media concentration and unequal access to communicative opportunities. Yet, despite the rise of new media, public demonstrations and leafletting continue to occur with the same and perhaps even greater frequency. The continuing appeal of street speech may reflect, first, a desire to create a common space in which public engagement (politics) is possible. The fragmentation of public discourse, quickened by the rise of new media, has led to the loss of a shared public conversation, and a common body of information on which community members can draw when discussing, and deciding on, collective action. Because street speech occurs in a publicly accessible space, its message can (appear to) reach a general audience. Second, while the internet overcomes geographic distances, a demonstration in public space bridges physical and emotional distance, by bringing individuals together, and giving them a sense of presence, and connection with others, that is lacking in mediated forms of communication (Castells 2015, 10). In contrast to the disembodied, depersonalized, and passive character of internet communication, street speech is experienced as performative and physically engaging. Third, a street protest can make visible the extent and depth of support for a position.

Street demonstrations are often intended as a challenge, rather than simply a

contribution, to the dominant political discourse. The object of the demonstration is to confront others or to gain attention by disrupting ordinary life, or the ordinary use of public spaces. In *Bracken* 2017, the Ontario Court of Appeal, emphasized that a "a protest does not cease to be peaceful simply because protestors are loud and angry" (*Bracken* 2017, 51). In that case a lone protestor standing at the entrance to the city hall had communicated his message using a megaphone. In *Fleming* 2019 the Supreme Court of Canada confirmed that the police could not prevent lawful expression because this expression "might provoke or enrage others" (*Fleming* 2019, 66).

A demonstration is an act of solidarity, a coming together of similarly minded individuals, but also collective act of expression. It is meant to be outward looking, to engage a broad audience and contribute to public discussion. Bystanders are seldom the demonstration's intended or ultimate audience, nor are the politicians or corporate leaders, who may be the subject of the protest, but are usually protected from direct exposure to the protesters. Despite its apparent 'publicness', street speech is unlikely to reach a significant audience, unless it is covered by the traditional/mainstream media or gains significant exposure on social media.

The physical or performative character of a demonstration means that its message is often simple and unnuanced. A street march can express emotion or feeling, but cannot itself convey a thoughtful, developed political position. For this reason, street protests are sometimes described as action rather than speech – a physical display rather than a discursive engagement (*Dupond* 1978). But while demonstrations may not be an effective vehicle for the communication of ideas and positions on complex public policy issues, they can raise the profile of an issue or concern that has not been given attention in the mainstream media. Demonstrations create other opportunities for speech, including media interviews and reporting of the movement's platform or demands. Online communication and street demonstrations are not simply alternative modes of protest but are instead complementary components of most contemporary protest movements. Street protests are organized, promoted, and reported online.

Because demonstrations have a physical and collective character, they can cause public disturbance. Indeed, public protests are often significant or effective as speech, precisely because they are confrontational and potentially disruptive. Because demonstrations invariably interfere with other *ordinary* property uses, municipal governments (and courts) must decide how to trade-off competing speech and security/safety interests. Protests in parks or street corners that involve small groups of individuals are unlikely to cause any significant interference with other uses of these spaces. Larger demonstrations, though, can cause significant disruption to other

interests, even if only temporarily, and so their timing and location are often the subject of negotiation between the protestors and the municipal authorities. Demonstrators may be required to give advance notice or obtain a licence before engaging in any large street protest. In some cases, the authorities have sought to confine particular protests to “designated” protest spaces or “free speech zones”. This has become an increasingly popular way to contain protests and minimize their disruptive impact, particularly in the case of demonstrations targeting high-profile political meetings. Unless a permission is unreasonably withheld, or the conditions attached to it are unreasonably constraining – removing the protest from public view or limiting its potential audience - the courts are unlikely to intervene. These practical arrangements, and the policing of demonstrations, are discussed in Professor Robert Diab’s background paper.

## Protest camps

The Occupy movement began as a protest in Zuccotti Park in New York City in 2011, but quickly spread around the world, including to Canada. The protest was a response to the global financial crash that occurred a few years earlier. Initially, the protest, was directed at the questionable dealings of major financial institutions that had led to the crash, the failure of governments to hold these institutions to account, and the unjust way in which the costs of the crash fell on the least well-off in society. Occupy, though, also became a general protest against the growing disparity in wealth in the US and elsewhere, between the 1% and the rest. Over time, another dimension to the Occupy message emerged, with the establishment of encampments that were intended to provide a model for a more democratic and sustainable form of community.

Because the locations of the Occupy encampments in Canada were public forums, such as the St James Park in Toronto, individuals had a right to protest in these spaces. The issue that eventually led to the shutting down of the encampments in Toronto and elsewhere was the extent to which these encampments interfered with other ‘ordinary’ uses of the properties. The argument accepted by the Canadian courts was that because the protest involved fixed structures, took up large sections of these public spaces, and were operating for an indefinite period, they prevented others from

making use of these properties.[17]

In *Batty* 2011, Brown J. of the Ontario Superior Court judge upheld a Trespass Notice issued by the City of Toronto that required the removal of structures, equipment, and debris from the park. The judge accepted that part of the protestors' message was that "it is both possible and necessary to build a community structure different from that prevailing in most places of our society" (*Batty* 2011, 108).[18] However, in the judge's view, the Charter did not give the protestors a right to "appropriate[e] to their own use – without asking their fellow citizens – a large portion of the common public space for an indefinite period" (*Batty* 2011, 12). He noted that the trespass order only limited the form and scope of the protest and would not prevent the protestors from spending up to 18 hours a day at the park continuing their protest.

Fixed structures erected in public spaces, for the time they are up, exclude other people or activities from the space they occupy. There is no easy answer to the question of how such spaces should be shared, between different people and uses, which is a reminder that the regulation of protest involves practical trade-offs between competing uses of public space. However, in upholding the trespass order, the judge in *Batty* 2011 seemed to give significant weight to commercial interests and neighbourhood aesthetics. In the judge's view, the ordinary or primary use of the property, personal recreation, should not be impeded for any length of time by exceptional political uses. Many of the residents, who complained about the encampments, said they felt uncomfortable strolling with friends, or walking their dogs, in the park. Many storekeepers in the vicinity complained that their business had been negatively affected because potential customers were avoiding the area.

In *Weisfeld* 1994, a case that was decided a few years after *Commonwealth of Canada* 1991, a 'peace camp' on Parliament Hill, had been established by a group that was protesting Cruise missile testing in Canada. The protestors erected several tents, and later a make-shift shelter, and maintained a table with pamphlets and

[17] In *Zhang* 2010, the BC Court of Appeal held that a billboard and meditation hut erected beside the street by members of the Falun Gong, as part of a protest against the treatment of the group by the Chinese government, was protected expression under s. 2(b). The Court went on to find that a City of Vancouver by-law that prohibited the erection of any structures along the streets, without advance permission from the city was overbroad because it failed to set out a purpose, or to provide a procedure and guidelines for obtaining a permit. An amended version of the by-law was upheld in *Zhang* 2014. The revised by-law provided specific guidelines concerning the erection of structures that were part of a political protest.

[18] Legal action also led to the shutdown of occupy encampments in other cities, such as Calgary, Victoria, and Vancouver.

petitions. The group was eventually served with a notice under the provincial trespass law, requiring them to dismantle the camp. When they refused to do so, the RCMP intervened and took down the tents and structures and arrested one of the protestors who refused to leave his shelter. Shortly after the police action, the Public Works Nuisance Regulations were amended to prohibit the erection, use, or occupation of any structure on Parliamentary grounds, without the permission of the Minister. The Federal Court of Appeal dismissed a claim by the protestors that the removal of the tents and structures under the trespass law, and the ban on structures in the amended regulation, were unconstitutional. Justice Linden decided that, while these actions breached s. 2(b), they were nevertheless justified restrictions under s.1. Linden J. thought that in addition to “safety, health, maintenance, and security concerns” the government also had a legitimate interest in “preserving the aesthetic beauty of Parliament Hill”, which is “a powerful symbol of Canada” and its “democratic traditions”.

## Captive audiences

In a society in which communication, other than with family, friends, and co-workers, is mostly mediated (through broadcast, print, and internet) listening is generally a choice. The ability of individuals to opt out of online conversations or to choose not to read or access information from particular sources has contributed to the formation of ‘echo chambers’, in which individuals are exposed to a limited range of perspectives. Even when individuals choose to read or listen to opinions, with which they disagree, because the communication is mediated, they are not required to react to its message or to engage in any way with the speaker.

However, in public spaces, such as the streets, individuals may be directly exposed to, or confronted with, messages they find objectionable. As earlier noted, the courts have been willing to uphold restrictions on speech that is harassing, because it is directed at particular individuals or groups, often in a persistent way, and is intended to denigrate or humiliate them. In exceptional situations, the courts have also been willing to uphold speech restrictions that protect ‘captive audiences’ from offensive speech in public locations, even when the speech is not directed at particular individuals.

Restrictions protecting captive audiences represent a second tier of censorship. Even if a particular form or content of expression is not harmful in a way that would justify its general restriction, if it is judged to be offensive or objectionable, its location may be regulated to protect audiences from exposure. In deciding whether to recognize a captive audience claim, a court must consider, first, how easy, or difficult, it is for the

unwilling audience to avoid exposure to the communication, and second, whether the communication is offensive or objectional to such an extent that an unwilling audience should be protected from exposure. There is no simple answer to the question of how direct the exposure to the speech must be before the audience is 'captive'. Nor is there a simple or objective way for a court to decide whether the speech is so offensive or objectionable that a captive audience ought to be protected from it. Such a determination cannot rest simply on an individual's assertion that she/he is offended by the speech. It must rest instead on conventional or community standards of propriety or decency, which are variable and contestable (*Vancouver Transit* 2009, 77).

The Supreme Court of Canada, in *Labaye* 2005, said that individuals have a right not to be confronted with sexually explicit images they find offensive or inappropriate. In the court's view, individuals should be free "to live within a zone that is free from conduct that deeply offends them" (*Labaye* 2005, 40). The court described the harm of being confronted in public with "unacceptable and inappropriate conduct", as "the loss of autonomy and liberty that public indecency may impose on individuals in society, as they seek to avoid confrontation with acts they find offensive and unacceptable" (*Labaye* 2005, 40). However, judgments about decency necessarily rest on conventional standards of propriety. While many in the community may be offended by, and favour the exclusion of, certain images, others may take no offence to these images.

Several Canadian provinces have enacted laws establishing bubble or buffer zones around abortion clinics. The Access to Abortion Act in BC, for example, creates access zones around abortion clinics, and the homes and offices of abortion providers.[19] These zones, which are carved out of space this is otherwise public, exclude protestors from the immediate vicinity of clinics, and ensure unobstructed access for the clinic's employees and patients. The BC Court of Appeal in *Spratt* 2008 held that the BC law was a reasonable restriction on the freedom of expression rights of anti-abortion protestors. In the court's view, the law was intended to ensure "equal access to abortion services", to enhance "privacy and dignity for women using the services" and to improve "security for service providers" (*Spratt* 2008, 71). The court thought that "[w]omen entering the clinic should not be held hostage to the message the protestors wish to send" (*Spratt* 2008, 82). The buffer zone established by the law "offers distance and therefore protection to the staff and patients of the clinic from the physical threats and emotional upset caused by the actions of the protestors and the

[19] The zone for clinics could be up to 50 metres and for service providers' homes, 160 metres.

proximity of their strong message" (*Spratt* 2008, 76). The court also thought that because "the line between peaceful protest and virulent or even violent expression against abortion is easily and quickly crossed … a clear rule against any interference" is the best way to achieve the law's purpose (*Spratt* 2008, 80). When the object of the law is to ensure unimpeded access, it is impractical to require the authorities to make a decision about "each individual approach to everyone entering the clinic" (*Spratt* 2008, 80).

The B.C. Court of Appeal in *Spratt* 2008, drew on an earlier Ontario case, *Dieleman*1994. In that case an Ontario superior court judge, when issuing an injunction against protests in the immediate vicinity of several abortion clinics, said that freedom of expression "does not include the right to have one's message listened to" *Dieleman*1994, 723). The judge thought that "an important justification for permitting people to speak freely is that those to whom the message is offensive may simply 'avert their eyes' or walk away. Where that is not possible, one of the fundamental assumptions supporting freedom of expression is brought into question" (*Dieleman*1994, 724).

However, while audience members should not be required to stop and listen to a speaker's words, they are not entitled to have the public sphere organized in such a way that they can avoid exposure to messages they would rather not hear. Captive audience claims should only succeed when an individual is directly confronted with messages that are offensive or invasive, based on conventional standards of privacy and decency. Protection from exposure to speech we don't like must be exceptional, otherwise we risk turning public spaces into places that can only be used for personal or commercial purposes.[20]

# Disinformation and the Challenge to Freedom of Expression

## Lying and the Zundel case

In *Zundel* 1992, a leading writer and publisher of Holocaust denial material was prosecuted under s. 181 of the Criminal Code, which prohibits the wilful publication of "a statement, tale or news that [the publisher] knows is false and causes or is likely to

[20] *Vancouver Transit* 2009, 77: "Citizens … are expected to put up with some controversy in a free and democratic society."

cause injury or mischief to a public interest". Section 181 had been included in the first Canadian Criminal Code in 1892. The crime of spreading 'false news' had been introduced in England in 1275 (although repealed there in 1887) and was intended to protect the nobility from scurrilous attacks. The case against Zundel was brought under this obscure provision because the Attorney-General of Ontario had declined to give his consent to the prosecution of Zundel under the Criminal Code ban on the wilful promotion of hatred. While the case began as a private prosecution, the crown took carriage of the case prior to the trial. A jury found that Zundel knew that his claims were false and so found him guilty of the offence. However, the Supreme Court of Canada in a majority judgment written by McLachlin J. decided that s.181 breached s. 2(b) and could not be justified under s.1.

McLachlin J. decided not just that lies fall within the scope of s. 2(b) because they convey a message but that they sometimes have public value:

> Exaggeration - even clear falsification - may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty to animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., 'cruelty must be stopped.' A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. … All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfillment. To accept the proposition that deliberate lies can never fall under s. 2(b) would be to exclude statements such as the examples above from the possibility of constitutional protection. I cannot accept that such was the intention of the framers of the Constitution (*Zundel* 1992, 754).

McLachlin J. thought that lies sometimes have value and so are protected under s.2 (b), particularly when they advance worthy ends. But as is the case with all lies, they are an abuse of the communicative relationship, and they undermine general trust in public discourse. Her examples of valuable lies, and most notably the doctor's exaggerated claims about vaccination, have not aged well. In recent years, there has been a proliferation of disinformation online that is unimpeded by the filtering or fact-checking of traditional media and has encouraged distrust of authority and expertise. This disinformation includes assertions that medical experts are making false claims about the safety and effectiveness of vaccines.

Once McLachlin J. had decided that lies are protected speech, so that s. 181 breached s.2(b), it fell to the state to justify this restriction on expression under the terms of s.1.

In Justice McLachlin's view, neither the language of the provision nor its legislative history pointed to a legitimate purpose for the law. She thought that even if the dissenting judges were right that the purpose of the provision could now be viewed as the protection of racial and social tolerance, the ban on false news was vague and overbroad and so failed the minimal impairment element of the *Oakes* test. She was concerned that in applying the provision a court would infer "knowledge of falsity" when the statement "diverge[d] from prevailing or officially accepted beliefs" (Zundel 1992). She thought then that an individual might be convicted under the provision "for virtually any statement which does not accord with currently accepted 'truths'" (Zundel 1992).[21]

## The internet and disinformation

The emergence of the internet, as a significant conduit for personal conversation and public discussion, seemed to lessen concerns about media concentration and unequal access to communicative resources. The internet opened public discourse to more voices. It became possible for individuals to by-pass existing media structures and to communicate to others without filters.

However, our reliance on the internet has contributed significantly to the fragmentation of audiences. This is an issue that predates the internet but has been exacerbated by it. While the internet provides access to a remarkably wide range of views and information, internet users tend to expose themselves to a relatively narrow range of opinions that reinforce the views they already hold. Selective access occurs by choice but also by design. The habit of going to sources that confirm one's existing views (confirmation bias) is reinforced by the algorithms used by search engines such as Google and platforms such as YouTube and Facebook that direct individuals to sites that are similar to those they have visited in the past. This may not count as censorship, at least as that term is commonly used, but it has the same effect – determining or selecting the information and opinions to which individual users are exposed. The result of this selection is what is sometimes referred to as an 'echo chamber' or 'filter bubble' – in which individuals hear their existing views fed back to them or become immersed in more and more extreme versions of these views, while believing they are being exposed to views that are either mainstream or widely-held.

[21] In *Alvarez* 2012, the US Supreme Court similarly affirmed the free speech value of lies. The court struck down the Stolen Valor Act 2005, which prohibited an individual from falsely claiming to have received a military medal. Alvarez had been charged with wearing a medal that had not been awarded to him. Four members of the court held that "falsity" was not enough to remove speech from First Amendment protection and expressed concern that deceit would often be inferred from the falsity of the speech.

The character of public speech has changed in the internet era: how we speak to one another and how we receive that speech. Audiences have become more fragmented. Disinformation and conspiracy theories seem to spread easily and widely. (The issue of disinformation is addressed in the background paper by Professor Emily Laidlaw.) There is little common ground in the community on factual matters or the reliability of different sources of information, which has made it difficult, even impossible, to discuss issues and to agree or compromise on public policy. An individual's beliefs, even 'beliefs' about factual matters are often based not on judgment or reason but instead on group membership. Those who hold competing positions seem rarely to engage with one another and, when they do, their engagement is often combative. A growing number of people feel they should not be expected to hear speech with which they disagree, or which is critical of their views. The spaces or platforms in which public speech occurs have become increasingly privatized and therefore outside the scope of the constitutional right to freedom of expression.

The principal threat to public discourse then may no longer be censorship, and state censorship in particular, but rather the spread of disinformation (within a fragmented public sphere) that undermines agreement on factual matters, and trust in different sources of information or knowledge.

## Note on freedom of the press

Section 2 (b) of the Charter provides that "everyone" has the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". The terms "press" and "media" in s 2(b) seem to refer, not to particular institutions, but rather to the various methods or means of communication. Everyone has the right to express themselves using the different media that may be available to them. An individual has the right to express him/herself by speaking to others face to face or through mediated forms of communication such as the press, radio, television, or the internet. In this way, the Charter's language is different from that of the First Amendment of the US Bill of Rights, which provides that "Congress shall make no law … abridging the freedom of speech, or of the press". In the US, the separation of these two rights has sometimes been taken to mean that "the press" have special rights, as an institution, that stem from the role they play in a democratic society of informing the public on important issues and holding governments to account.

In Canada, the courts have sometimes said that organizations engaged in gathering

and disseminating news and opinion may be able to make claims that others cannot make. In *CBC v. NB* 1996, LaForest J., writing for the majority of the Supreme Court of Canada emphasized the importance of "a free and vigorous press" in informing the public and supporting meaningful debate in the public domain (*CBC v. NB* 1996, 23). In a more recent decision, Justice Abella stressed the importance of a "strong, independent and responsible press" that "holds people and institutions to account, uncovers the truth and informs the public" (*Vice Media* 2018, 125). She noted that s. 2(b) "contains a distinct constitutional press right which protects the media's core expressive functions – its right to gather and disseminate information for the public benefit without undue interference" (*Vice Media* 2018, 112). In *Denis* 2019, a case involving source confidentiality, the court emphasized the "unique" role of the media in the "maintenance of a free and democratic society" (*Denis* 2019, 45). Yet, at the same time, the court in *Denis* 2019 insisted that freedom of the press is not a distinct right – that freedom of expression, "includes freedom of the press" and "protects both those who express ideas and opinions and those who read or hear them" (*Denis* 2019, 46).

Prior to the internet, the functions of gathering and disseminating news were performed by particular institutions, generally large-scale newspapers, and broadcasters, and so freedom of the press was associated with the institutional media. It was at the time natural to conflate institution and function. However, with the rise of the internet as the main vehicle for the communication of news and opinion, the link between function and institution has been broken. In addition to the online versions of traditional media, there are now many small-scale online news sites and blogs operated by citizen journalists. Low entry costs have made it possible for almost anyone to set up a website that provides news and opinion.

Despite the court's occasional suggestions that the institutional media have certain special rights, any special claims made by the media arise not from their organizational structure or institutional status but rather from the function they perform, the collection and dissemination of news (Oliphant 2013, 289). Freedom of expression protects certain actions, such as news gathering, that are not in themselves expressive, but are necessary to effective communication and meaningful public discourse. Press rights then are special in this limited sense. Freedom of the press claims can be made by any individual or group that is engaged in the important task of gathering and disseminating news. These claims may include the protection of source confidentiality and access to locations that are not automatically open to everyone. It may also be the case that freedom of the press rights, while formally available to anyone who gathers and disseminates news, can only be made by organizations and individuals that adhere to the professional standards that are

traditionally, although not invariably, followed by mainstream media, such as checking sources and correcting errors. The requirement of due diligence in reporting is not always met by citizen journalists or smaller partisan news sites, either because they lack the necessary resources to fact check or because accuracy is not their primary concern.

Two areas in which “the press” (those engaged in journalism) have successfully made free speech claims that are either not available to others or are broader in scope than the claims open to others are (i) the “responsible communication” defence to a defamation claim and (ii) the protection of confidential sources. In both cases, the special rights’ claim is based on the function performed by the individual or group – news gathering and dissemination. The right is, or should, only be available to individuals or organizations that adhere to the ethical standards of journalism. This is explicit in the case of the “responsible communication” defence, and an element of the public interest requirement that must be met by journalists claiming the right to protect confidential sources. The recognition of these press rights has occurred not through the direct application of the Charter but instead through the reinterpretation of common law rules to conform with Charter values (defamation) or through legislative intervention (source protection).

## Conclusion

The convoy protests brought to the fore, once again, some of the challenges in adapting freedom of expression doctrine to the new communication landscape. The old categories and distinctions of free speech doctrine do not easily map on to this new landscape. Free speech doctrine took shape in a different communication environment and must adapt to different media structures and communication practices and to a new set of concerns and issues. The principal threat to public discourse may no longer be censorship, and state censorship in particular, but rather the spread of disinformation, within a fragmented public sphere, that undermines agreement on factual matters, and trust in different sources of information or knowledge.

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# Freedom of Peaceful Assembly and Section 2(c) of the *Charter*

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# Executive Summary

Those who participated in the 2022 protest convoy were exercising their rights under the *Canadian Charter of Rights and Freedoms* when the federal government declared an emergency, creating a large secure zone and dispersing the truckers' demonstration. These rights, including and especially freedom of peaceful assembly, form the backdrop to consideration of the federal government's decision to declare an emergency under the *Emergencies Act* and enact regulations for bringing the demonstrations to an end.

Though it is one of the *Charter*'s fundamental freedoms, s.2(c)'s freedom of peaceful assembly received little or no attention in the first 40 years of *Charter* interpretation and jurisprudence. The circumstances of the protest convoy and its dispersal under the *Emergencies Act* bring s.2(c) into the spotlight and call for a discussion of the guarantee.

This background paper proposes a conception of peaceful assembly under the *Charter* that can guide and inform the work of the POE Commission. Specifically, the paper examines s.2(c)'s underlying values and purposes to create a foundation for peaceful assembly. In addition, it considers how s.2(c) should be interpreted, proposing a definition of peaceful assembly and standard of breach. Finally, it considers justifiable limits on assembly under s.1 of the *Charter*, identifying principles that guide the determination of reasonable limits. In developing this proposal, the analysis relies on the *Charter* jurisprudence, and draws additionally on other sources, including the First Amendment of the US Constitution, and international human rights guarantees.

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# I. Introduction

Cascading public assemblies, movements, and protests in recent years have energized freedom of assembly, bringing this concept to the forefront of rights discourse. A dynamic that has surfaced in international, U.S., and Canadian settings calls attention to the distinctive role public assemblies play, leveraging collective action to propel a dynamic form of experiential democracy. The impetus to assemble as a collective and create a public presence is ingrained in tradition and entrenched

in the democratic imagination. Assemblies are enormously variable and can be notoriously fluid, unpredictable, and volatile, inspiring hopes for transformative change and yet stoking fears of collective frenzy and a descent into rank disorder. In 2022, a movement to protest vaccine mandates led to a protest of unprecedented scope and duration in Canada's capital city, and other sites across the country.

In January of 2022, a convoy of trucks set out from British Columbia with Ottawa as the destination for a protest against COVID-19 vaccine mandates. Building unexpected support and publicity along the way, the convoy arrived in Ottawa late in January. Far from unannounced, truckers celebrated their arrival and the protest quickly received international attention. A convoy of truckers and their trucks, who were joined by professing sympathetic political and ideological purposes, numbered in the hundreds. The protest locked the capital city down for more than two weeks, causing untold distress and disruption to Ottawa residents and businesses.[1]

With the convoy settled in and little prospect of a voluntary dispersal, the federal government declared a public order emergency under s.17(1) of the *Emergencies Act*, and Cabinet adopted the Emergency Measures Regulations (EMR) and Emergency Economic Measures Order (EEMO).[2] Section 19(1) of the *Act* authorizes the government to prohibit or regulate public assemblies and to designate and secure "protected places" (*i.e.*, create secure or exclusion zones).[3] The public order emergency was declared on February 14th and ended seven days later on February

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[1] For a sympathetic account of the Ottawa convoy protest, see A. Lawton, *The Freedom Convoy: The Inside Story of Three Weeks That Shook the World* (Toronto: Sutherland House Books, 2022).

[2] *Emergencies Act*, R.S.C. 1985, c.22, s.17(1); Emergency Measures Regulations & Emergency Economic Measures Order, *Canada Gazette*, Part II, vol. 156 Extra (February 15, 2022).

[3] Section 19(1) provides that a public assembly "that may reasonably be expected to lead to a breach of the peace" may be prohibited or regulated.

22, 2022. That was the time it took to disperse the convoy assembly and remove trucks from the streets of Ottawa.[4]

The Preamble of the *Act* declares that special temporary measures are subject to the *Canadian Charter of Rights and Freedoms* and *Canadian Bill of Rights*, and "have regard" to the *International Covenant of Civil and Political Rights* ("ICCPR").[5] Freedom of peaceful assembly, which is at the center of the Ottawa convoy protest and its dispersal, is protected by s.2(c) of the *Charter* and article 21 of the *ICCPR*.[6] Though the rise and prevalence of COVID-19 restrictions on public gatherings had already lifted its profile, the protest convoy and its dispersal under emergency powers is a catalyzing moment in the history of peaceful assembly under the *Charter*. Alongside a variety of protests and demonstrations in recent years, the protest convoy has drawn s.2(c) of the *Charter* into the spotlight. In combination, these events place s.2(c)'s freedom of peaceful assembly at a crossroads, not simply presenting an opportunity, but also posing a challenge – at last – to acknowledge and protect this guarantee.

Forty years after the *Charter*'s enactment in 1982, s.2(c) has not received an authoritative interpretation. There is no definition of peaceful assembly in Supreme Court of Canada jurisprudence, and no doctrinal framework to determine the permissibility of limits on this guarantee. This background paper is a work in progress that addresses that gap in the *Charter* jurisprudence, offering a starting point for a

[4] The protest against vaccine mandates was not limited to the Ottawa demonstration, but included assemblies that blocked the Ambassador Bridge and disrupted the movement of traffic and goods at the Alberta-US border. These and other sites that form part of the background to the decision to declare a public order emergency are noted but not discussed. The Ottawa demonstration poses the key s.2(c) issues that are addressed in this paper.

[5] Preamble of the *Act*, *supra* note 2. See the *Canadian Charter of Rights and Freedoms*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11; see also ICCPR, 19 December 1966, 999 UNTS 171 (entered into force March 23, 1976; accession by Canada on May 19, 1976).

[6] Article 4 of the *ICCPR* allows States Parties to derogate from their responsibilities under the Covenant during public emergencies. Though freedom of assembly is not one of art. 4(2)'s non-derogable rights, derogations from art.21 and other guarantees are subject to a rigorous standard of justification. See General Comment No. 29 on States of Emergency, CCPR/C/21/Rev.1/Add.11, at para. 4 (August 31, 2001) (stating that any measures that derogate are limited to the extent strictly required by the exigencies of the situation, and relate to the duration, geographic coverage, and material scope of the state of emergency).

conception of peaceful assembly under the *Charter*.[7] The paper is commissioned by the Public Order Emergency Commission ("POE" or "Rouleau Commission"), and its purpose is to inform the work of the Commission. The doctrinal framework that it develops and proposes represents the views of its author and not of the Commission. To achieve its purposes the discussion proceeds in three parts.

Part I provides textual and contextual perspectives on peaceful assembly and is divided into three sections. The first offers a brief historical account of public assembly and is followed by a short review of the key textual provisions, including s.2(c) of the *Charter*, that guarantee freedom of peaceful assembly. A third section proves a brief overview of the assembly clause in the First Amendment of the U.S. Constitution, and takes the form of a cautionary tale. That discussion provides the backdrop to the central objective of the paper, which is to propose a framework for interpreting s.2(c) of the *Charter*.

Part II is also divided into three sections that work in combination to build a framework for interpreting and protecting s.2(c). Identifying s.2(c)'s purposes is the first step because, as explained below, differentiating peaceful assembly from its companion guarantees of free expression and free association is an elemental step in the process. The purposes that are distinctive to s.2(c) are the cornerstone of the paper and the foundation for a doctrine of peaceful assembly under the *Charter*.

Once its values and purposes have been identified, the meaning and scope of s.2(c) can be addressed. As explained below, the proposal defines an assembly as a peaceful gathering of two or more persons for a communicative purpose. The government violates s.2(c) when it prohibits or regulates a gathering that falls within that definition. Of particular interest in interpreting the guarantee is the definition of "peaceful" assembly, and whether an assembly remains peaceful until it becomes

[7] The current s.2(c) scholarship includes: B. Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada", (2018) 8:1 *UWO J. Leg. Stud.* 4; K. Kinsinger, "Restricting Freedom of Peaceful Assembly During Public Health Emergencies", 30:1 *Constitutional Forum* 19 (2021); K. Kinsinger, "Positive Freedoms and Peaceful Assemblies: Reenvisioning Section 2(c) of the *Charter*, in D. Newman, D. Ross & B. Bird, eds., *The Forgotten Fundamental Freedoms of the Charter* (Toronto: LexisNexis Canada Inc., 2020) 377; N. Eziani, "Understanding Freedom of Peaceful Assembly in the *Canadian Charter of Rights and Freedoms*", in Newman, Ross & Bird, *ibid.*, 351; R. Stoykewych, "Street Legal: Constitutional Protection of Public Demonstration in Canada", (1985), 43:1 *U. Tor. Fac. Law. Rev.* 43.

violent, or can fall outside the scope of the guarantee when it crosses a lower threshold of engaging in disruptive or unlawful conduct.

The third part of the analysis grapples with the crucial question of the nature, scope, and timing of reasonable limits on assemblies and gatherings. In addressing that task, the paradox is that an element of disruption is inherent in the concept of assembly, but what makes public gatherings powerful – especially in the form of demonstrations and protest movements – unavoidably invites regulation. Developing a doctrinal framework that can address the dilemma of simultaneously protecting and regulating disruption is no small task.

After outlining the details of a doctrinal framework for s.2(c), Part III concludes with reflections on the importance of this moment in the *Charter*'s history, and the imperative that should be addressed, of invigorating s.2(c)'s peaceful assembly guarantee. Without clarity and a doctrinal framework of its own, s.2(c) is likely to remain in hiatus, staying in place as a stalled and even a failed *Charter* guarantee. Without purporting to provide all the answers, this paper aims to propel s.2(c) into the foreground and motivate debate about the role this guarantee plays in promoting and protecting the *Charter*'s democratic objectives.

# II. Background perspectives on freedom of assembly

## A. A venerated tradition

If gatherings convene to serve any number of purposes or none at all, meeting with one another is an imperative of human behaviour, and assembling to form a collective presence in public is an age-old practice with deep roots in Britain, the US, and Canada. In charging a jury in 1839, Baron Alderson spoke of transmitting the right of assembly "unimpaired to posterity" and declared that "the constitution of this country does not … punish persons who, meaning to do that which is peaceable in an orderly manner," are "only in error" in their views.[8]

History-defining movements are part of a tradition that values public assembly as a vital cultural practice of American democratic society. Before and from colonial times, public assembly was revered as a transformative agent of social and democratic evolution. Assemblies, gatherings, and movements have played a powerful and

[8] Cited in T. Abu El-Haj, "The Neglected Right of Assembly", 56 *UCLA L. Rev.* 543 (2009), at 566-67 ("Neglected Assembly").

salutary role in propelling and shaping change, especially at critical moments in U.S. constitutional history.[9] That history counts antebellum abolitionism and women's suffrage among the 19th century movements of the disenfranchised that brought "a different lived experience" to the assembly clause, providing a "visceral reminder" of the importance of protecting that right.[10] In addition, the history of assembly encompasses the rise of labour and other movements, as well as social, religious, political and cultural causes at a local level.[11] Even a brief account of this history must mention of insidious limits on freedom of assembly, like 19th century American laws that prohibited African Americans from congregating or attending gatherings, including for religious worship.[12]

The demonstrations sweeping the US in the 1950s and volatile 1960s included the Civil Rights movement, opposition to the Vietnam War, radical student and political protest, and the rise of women's and gay rights movements. The right of assembly reached an apex in the First Amendment jurisprudence in this period, but then quieted. Recent years have again exposed deep fractures in America's political and social fabric that provoked political protests, like Occupy Wall Street (OWS), Black Lives Matter, and many other movements.[13] Nor has the rise and hegemony of internet technology dampened the impetus for individuals and groups to gather in physical space, as an act of solidarity, to foreground the needs and aspirations of communities.

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[9] J. Inazu, "The Forgotten Freedom of Assembly", 84 *Tulane L. Rev.* 565 (2010), at 570 ("Forgotten Assembly")(exploring the pattern of assembly in six periods of American history, from the closing years of the 18th century to the mid-20th century).

[10] J. Inazu, *ibid.* at 588 (also quoting Akhil Amar, *The Bill of Rights: Creation and Reconstruction*).

[11] "Streets remained important places for political, social, and, increasingly, ethnic gatherings into the late 19th century". T. Abu El-Haj, "All Assemble: Order and Disorder in Law, Politics, and Culture", 16 *J. of Constitutional Law* 949 (2014), at 969 ("All Assemble").

[12] J. Inazu, "Forgotten Assembly", *supra* note 9, at 584 (stating that these restrictions did not simply silence political dissent but were an assault on an entire way of life, "suppressing worship, education, and community among slave and free African Americans"). See also J. Hansford, "The First Amendment Freedom of Assembly as a Racial Project", *The Yale L.J. Forum* 685, at 692-3 (Jan. 20, 2018).

[13] See Abu El-Haj, "All Assemble", *supra* note 11, at 957-68 (discussing OWS); Hansford, "Racial Project", *ibid.*; W. Smith, "Policing, Protest, and Rights", (2018), 32:3 *Public Affairs Q.* 185; O. Moulds, "Fracking the Bedrock of Democracy: The United States Policing of Protests Violates the Right of Peaceful Assembly under the ICCPR", (2021), 36:4 *AM U. Intl. Law Rev.* 887; P. Gillham, B. Edwards & J. Noaks, "Strategic Incapacitation and the Policing of Occupy Wall Street in New York City, 2011", (2011) 23:1 *Intl. J. of Research & Policy* 81; N. Winnett, "Don't Fence us in: A First Amendment Right to Freedom of Assembly and Speech", (2005), 3:2 *First Amend. L. Rev.* 465.

To the contrary, technology complements and enriches the traditional concept of assembly, and freedom of assembly now includes a concept of virtual or online assembly.[14]

Canada also has an enviable history of public engagement through assemblies, protests, and movements that includes signpost events such as the 1919 Winnipeg General Strike and Depression era riots.[15] And, more than fifty years before the 2022 protest convoy, the Abortion Caravan of 17 women set out from Vancouver for Ottawa, where women "occupied" the prime minister's front lawn, led a rally of 500 women on Parliament Hill, chained themselves to chairs in the visitor's gallery, and shut down the House of Commons.[16]

In more recent times, demonstrations at political events and international summits have called police tactics into question.[17] The uprising of Quebec students in 2011-12, styled the "Maple Spring", comprised a series of ongoing street demonstrations that led to "les manifs casseroles", when the city of Montreal joined in, banging kitchen utensils in solidarity, and legislation placing significant restrictions on street demonstrations.[18] And, with engagement in more than twelve cities, the Occupy movement had a significant presence in Canada.[19] In addition, rallies have coalesced around movements for PRIDE, Black Lives Matter, Idle No More, and the inquiry into

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[14] See *infra* III.B.d., Virtual or online assembly.

[15] See M. Beare and N. Des Rosiers, "Introduction", in A. Deshman, M. Beare & N. Des Rosiers, eds., *Putting the State on Trial: The Policing of Protests During the G20 Summit* (Vancouver: UBC Press, 2014), at 3-9 (generally describing these historical protest movements).

[16] See K. Wells, *The Abortion Caravan: When Women Shut Down Government in the Battle for the Right to Choose* (Canada: Second Story Press, 2020).

[17] See generally W. Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: UBC Press, 2000); Deshman, Beare & Des Rosiers, *Putting the State on Trial*, *supra* note 15.

[18] To counter the wave of street demonstrations, the province of Quebec enacted Bill 78, *An Act to enable students to receive instruction from the postsecondary institutions they attend*, S.Q. 2012, c.12 (in force from May 18, 2012 to July 1, 2013). Among other things, Bill 78 required organizers to give notice to the police at least eight hours in advance, of any assemblies involving 50 or more participants). See A. Savard, "Quebec's Wave of Resistance: From the Maple Spring to the General Strike", <https://www.academia.edu/27136524/Quebecs_wave_of_resistance_From_the_Maple_Spring_to_the_general_strike>.

[19] In Canada, the movement had a presence in at least 15 Canadian cities; see generally CBC News, "Occupy Canada rallies spread in economic 'awakening'" (13 October 2011), online: <https://www.cbc.ca/news/canada/occupy-canada-rallies-spread-in-economic-awakening-1.1031793>.

Canada's murdered and missing Aboriginal women.[20] Aboriginal and environmental blockades at Muskrat Falls in Labrador and Fairy Creek and Wet'suwet'en Nation territory in British Columbia have been mounted to protest and stop environmentally concerning economic activities, including logging and pipelines.[21] Added to the list of public protests are innumerable gatherings that convened across the country, at different times and settings, to protest COVID-19 pandemic restrictions.[22]

Even on the briefest of accounts, there is no question as to the pedigree of public assemblies and movements, or the pivotal they play today in shaping Canada's social and democratic profile.

## B. Textual guarantees

Freedom of peaceful assembly is constitutionally guaranteed by s.2(c) and is one the *Charter*'s four fundamental freedoms.[23] In addition, s.1(e) of the *Canadian Bill of Rights* protects freedom of assembly without any prescriptive requirement that it be peaceful in nature.[24] In this, the legal and constitutional status of free assembly in Canada aligns with a host of constitutional and human rights instruments that guarantee this entitlement.

For instance, the First Amendment of the U.S. Constitution includes the "assembly clause", which guarantees the "right of the people peaceably to assemble".[25] Elsewhere, freedom of peaceful assembly is protected by Article 20 of the Universal

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[20] See generally CBC News, "Canadians hold protests, vigils for black lives lost at the hands of police" (5 June 2020), online: https://www.cbc.ca/news/canada/canadian-floyd-anti-racism-rallies-1.5599792 (Black Lives Matter); <https://idlenomore.ca/about-the-movement/> (Idle No More); "Vancouver rallies for missing, murdered Indigenous women", online: <https://www.aljazeera.com/news/2022/2/14/vancouver-rallies-for-missing-murdered-indigenous-women> (missing and murdered Indigenous women).

[21] See generally, CBC News, "Battle over Muskrat Falls", (27 October 2016), online: <https://www.cbc.ca/news/indigenous/muskrat-falls-what-you-need-to-know-1.3822898>. Muskrat Falls is a hydroelectric project in Labrador. The Fairy Creek protests and blockade to prevent old-growth logging on Vancouver Island in B.C. are ongoing, since August 2020, as are demonstrations against the pipeline on traditional Wet'suwet'en Nation traditional territory in northwestern B.C.

[22] See *infra* note 32 (listing some of the *Charter* decisions arising from these restrictions).

[23] The others are freedom of conscience and religion (s.2(a)); freedom of expression, including the press and media (s.2(b); and freedom of association (s.2(d)).

[24] S.C. 1960, c.44, s.1(e) (guaranteeing "freedom of assembly and association").

[25] The First Amendment also guarantees freedom of religion and freedom of speech, stating, in part, that "Congress shall make no law … abridging the freedom of speech".

Declaration of Human Rights (UDHR), [26] Article 21 of the International Covenant on Civil and Political Rights (ICCPR),[27] Article 11 of the European Convention on Human Rights (ECHR),[28] and Article 15 of the American Convention on Human Rights (ACHR).[29] As well, it is included in Article 8 of the International Covenant on Economic and Social Rights (ICESR) and Article 15 of the Convention on the Rights of the Child (CRC, Article 15).[30]

Despite its roots in the text, s.2(c)'s guarantee of peaceful assembly was neglected and overlooked in the *Charter*'s first forty years, from 1982 to 2022. For most of this history, s.2(c) was rarely considered and barely mentioned in the jurisprudence.[31] To some extent that changed when pandemic restrictions on gatherings were challenged under s.2, including s.2(c); in some instances, a breach was found and justified under s.1.[32]

The starting point in addressing peaceful assembly's lack of stature in the *Charter* jurisprudence is the text itself. Freedom of peaceful assembly has independent status as one of s.2's cornerstone fundamental freedoms, and must be interpreted and

[26] GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 art 20 [*UDHR*].
[27] 19 December 1966, 999 UNTS 171 art 21, (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].
[28] 4 November 1950, 213 UNTS 221 art 11, (entered into force 3 September 1953) [*ECHR*].
[29] 22 November 1969, OAS 36 art 15, (entered into force 18 July 1978) [*ACHR*].
[30] 16 December 1966, 993 UNTS 3 art 8, (entered into force 3 January 1976) [*ICESCR*]; 20 November 1989, 1577 UNTS 3 art 15, (entered into force 2 September 1990) [*CRC*].
[31] But see *Mounted Police Association of Ontario v Canada*, [2015] 1 S.C.R. 3, at paras 48, 64 (including s.2(c) in discussion of s.2's other fundamental freedoms and s.2(d)).
[32] See *Koehler v Newfoundland & Labrador*, 2021 NLSC 95 (considering the scope of s.2(c) and rejecting a claim that restrictions on entry to the province violated freedom of peaceful assembly); *Beaudoin v British Columbia*, 2021 BCSC 512 (finding a breach of s.2(c) but concluding that the province's Gatherings and Events Order did not violate s.2(c)); *Gateway Bible Baptist Church et al. v Manitoba et al.*, 2021 MBQB 219 (finding that restrictions on religious gatherings did not violate s.2(a)(c) & (c)); *Ontario v Trinity Bible Chapel*, 2022 ONSC 1344 (discussed below).

enforced as such.[33] One problem is that s.2(c) has not been differentiated from s.2's other fundamental freedoms.

In *Ontario v Trinity Bible Chapel*, the Court rejected challenges to various COVID-related restrictions on religious gatherings, stating that the interests protected by other s.2 subsections – including freedom of assembly – were "subsumed by the s.2(a) analysis".[34] To this the Court added that, "[t]here is *no value* added by repeating or repackaging the analysis under different constitutional headings," because the "factual matrix underpinning the various *Charter* claims" was "largely indistinguishable".[35] Leaving aside the point that violating all four of the *Charter*'s fundamental freedoms might constitute a form of "egregious constitutional harm", the Court's unwillingness to consider each as an independent guarantee is troubling.[36]

Though freedom of expression and freedom of assembly are not the same, it has been assumed that questions about expressive activity in public space should be addressed under s.2(b).[37] In that way, the *Charter*'s guarantee of expressive freedom evolved without aligning with s.2(c) and its concept of assembly. Meanwhile, an affinity between peaceful assembly and freedom of association was dampened by s.2(d)'s selective focus on labour relations issues.[38] Without being excluded, other forms of

[33] During the drafting of the *Charter*, the government agreed with the recommendation to separate freedom of assembly and freedom of association "to ensure that they are looked upon as separate freedoms". A. Dodek, ed., *The Charter Debates: The Special Joint Commission on the Constitution*, *1980-81*, *and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018), at 142 (*per* then Minister of Justice Chrétien).

[34] *Trinity Bible Chapel*, *supra* note 32, at para 115.

[35] *Ibid.* (emphasis added).

[36] *Ibid.* at para 114. See also *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 34 (not addressing freedom of expression or association because freedom of religion is "sufficient"); *R v Khawaja*, 2012 SCC 69 at para 66 (concluding that if s.2(b) is not infringed there is no infringement of s.2(a) or s.2(d)).

[37] See discussion *infra* notes 59, 125.

[38] Section 2(c) and (d) both protect collective entitlements, and under s.2(c) the right attaches to the collective entity, or assembly itself, as well as to individuals who participate as members of the assembly. The s.2(d) jurisprudence has been enmeshed in labour issues from the start and is idiosyncratic as a result. See *infra* note 126.

associational freedom have played a limited role in informing the interpretation of s.2(d).[39]

Lost in the first forty years of *Charter* jurisprudence is consideration of peaceful assembly's distinctive values and objectives. Accepting that an assembly or gathering in public space may be engaged in expressive or associational activity, the point in setting the right of assembly apart from ss.2(b) and (d) "is the assembly itself".[40] Put another way, the assembly is, in its own right, "the constitutional event".[41] In this it is instructive, in reflecting on s.2(c)'s lack of development, to take heed of First Amendment history because there and – even as it was celebrated – the right of assembly became invisible in the U.S. Supreme Court jurisprudence. The problem was that "[t]he rhetorical tributes to assembly in Supreme Court opinions and popular discourse overshadowed what was lacking": a "clear doctrinal framework" for adjudicating assembly clause cases.[42]

## C. The First Amendment's assembly clause: a cautionary tale

The First Amendment was quiet until the 1919 World War I espionage cases, but evolved rapidly in the ensuing years. During the First Amendment's formative years, the US Supreme Court jurisprudence clearly linked and closely equated the speech and assembly clauses. An influential example is Brandeis J.'s concurring opinion in *Whitney v California,* which, in 1927, stated that, "without free speech *and assembly* discussion would be futile".[43] Though the two freedoms were only linked once before, following *Whitney* the Supreme Court endorsed that nexus in more than one hundred opinions.[44] Examples include *DeJonge v Oregon*, where Chief Justice Hughes described the right of peaceable assembly as "a right cognate to those of free speech and a free press" and equally fundamental.[45] And in *Thomas v Collins*, Justice Rutledge declared that the First Amendment's "indispensable democratic freedoms" have a "preferred place" in the constitutional scheme, and added that the right of

[39] See, e.g., *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, and *Harper v Canada (Attorney General)*, 2004 SCC 33 (discussing s.2(d) in the context of federal election limits on third party spending).
[40] Abu El-Haj, "All Assemble", *supra* note 11, at 1033.
[41] T. Zick, "Recovering the Assembly Clause", 91 *Texas L. Rev.*375 (2012) at 398 ("Recovering Assembly).
[42] J. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly*, (U.S.A.: Yale U. Press, 2012), at 61.
[43] *Whitney v California*, 274 US 375 at 387 (1927) (emphasis added).
[44] Inazu, "Forgotten Assembly", *supra* note 9, at 597.
[45]299 US 353 at 364 (1937).

assembly guards "not solely religious or political" causes but also "secular causes, great and small".[46]

The assembly clause maintained its presence in the jurisprudence up to and through its high-water mark during the Civil Rights movement, when the US Supreme Court rendered several monumental decisions under the First Amendment.[47] For reasons that are doctrinal in the main, the assembly clause atrophied and over time was subsumed in the speech clause.[48] As Inazu and others explain, First Amendment doctrine forged an inextricable link between the speech and assembly clauses but failed, in doing so, to differentiate and validate peaceable assembly as an independent, stand-alone constitutional right.[49]

By the time s.2(c) was enacted, freedom of assembly had little or no profile in the First Amendment jurisprudence, and has not played a role in US Supreme Court decision making for more than thirty years.[50] In that evolution of doctrine, it was forgotten that "the right of assembly, like the right to petition, was originally considered central to securing democratic responsiveness and active democratic citizens".[51] That lapse has inspired a rich and urgent scholarship calling for a revival of the assembly clause to

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[46] *Thomas v Collins*, 323 US 516 at 530-31 (1945). See also *NAACP v Alabama ex rel. Patterson*, 357 US 449 at 460 (1958) (confirming the close nexus between the freedom of speech and freedom of assembly).

[47] See, e.g., *Edwards v South Carolina*, 372 US 229 (1963); *Cox v Louisiana*, 379 US 536 (1965); *Brown v Louisiana*, 383 US 131 (1966); *Shuttlesworth v City of Birmingham*, 394 US 147 (1969).

[48] Two developments contributed to the assembly clause's attenuated status. First, the Court developed and recognized associational rights and a concept of expressive association. Unlike s.2(d) of the *Charter*, which expressly guarantees freedom of association, the text of the First Amendment protects freedom of assembly but not freedom of association, which was incorporated into the jurisprudence by judicial interpretation. Second, two doctrines became dominant under the speech clause; the first is the speech-conduct doctrine, which has adverse implications for the protection of actions undertaken by an assembly; and the second is the time, place, and manner doctrine, which provides a doctrinal construct for limits on free speech activities in public spaces. See *infra* note 95.

[49] In addition to Inazu, *supra* note 42, see Abu El-Haj, "Neglected Assembly", *supra* note 8, at 589 (arguing that while the right of assembly protects collective action and collective public deliberation, freedom of speech protects individuality); Abu El-Haj, "All Assemble", *supra* note 11, at 100 (stating that by treating assembly as a form of speech courts fail to understand the distinct qualities of assembly and why assembly should operate differently).

[50] Inazu, *Liberty's Refuge*, *ibid.* at 62.

[51] Abu El-Haj, "Neglected Assembly", *ibid.* at 588.

protect movements that bring the precarity of vulnerable communities to the forefront of public attention.[52]

The cautionary tale for Canada is that the *Charter*'s guarantee of peaceful assembly is at risk of being consigned to irrelevance. There it may languish indefinitely, as a meaningless and failed promise of the *Charter*. The protest movements of recent years, including the convoy protest and its implications for freedom of peaceful assembly, call for a change in that narrative. If not at this time, in these circumstances, then it is unclear when s.2(c) will assume a role in defining the *Charter*'s fundamental freedoms. As the First Amendment demonstrates, the challenge is to differentiate peaceful assembly and doctrinalize the distinctive role it plays in advancing and promoting the *Charter*'s democratic objectives.

## III. Part III: Toward a conception of peaceful assembly under s.2(c) of the *Charter*

Section 2's fundamental freedoms, comprising the freedoms of conscience and religion (s.2(a)), expression and the press (s.2(b)), peaceful assembly (s.2(c)), and association (s.2(d)), are abstract in nature and pose two critical questions of interpretation. The first is conceptual or philosophic, and concerns the nature and scope of the entitlement. This contemplates an inquiry into how and why the *Charter* protects each of these fundamental freedoms. The second arises under the *Charter*'s structural equation of breach and justification. Initially, the analysis considers the guarantee and whether it has been violated, and then turns to s.1 and the question whether the violation is a reasonable limit that is justified in a free and democratic society.[53]

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[52] See especially Abu El-Haj, "Neglected Assembly", *ibid.*; "All Assemble", *supra* note 11; and "Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly" (2015), 50:1 *Mo. L. Rev.* 961; J. Inazu, ***Liberty's Refuge***, *supra* note 42; "Forgotten Assembly", *supra* note 9; "Virtual Assembly" (2013), 98:5 *Cornell L. Rev*. 1093; "Unlawful Assembly as Social Control" (2017) 64:2 *U.C.L.A. Law Rev.* 2; and T. Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (New York: Cambridge U. Press, 2008); "Parades, Picketing, and Demonstrations", in A. Stone & F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford U. Press, 2021); "Recovering Assembly", *supra* note 41.

[53] Section 1 of the *Charter* guarantees its rights and freedoms, subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". *Charter*, *supra* note 5.

A conception of s.2(c) comprises three vital elements: one, a foundation in the underlying values and purposes of a right of free and peaceful assembly; two, a definition of s.2(c) entitlement; and three, a principled framework for determining reasonable limits on peaceful assembly under s.1 of the *Charter*. Note that in the absence of a s.2(c) jurisprudence, the First Amendment of the US Constitution and international human rights guarantees can provide guidance in developing a conception of s.2(b).[54] Citing and discussing those sources does not alter the objective of aligning this proposal for s.2(c)'s interpretation with the principles and doctrines of the *Charter*'s s. 2 jurisprudence.

## A. Peaceful assembly's underlying values and purposes

Public assemblies and gatherings are a form of collective action undertaken in solidarity that – in the act of assembling – creates an embodiment or presence. If the concept is abstract, its realism is not. Images in Canada and around the world vividly and graphically attest to the raw, voluble and transgressive power of mass movements, protests and demonstrations. These dynamics pose risks and generate fears of disruption, disorder, and even chaos. Any theory of peaceful assembly for s.2(c) must answer those fears, but its underlying values must also be understood. Public assembly requires management, but must be valued for the role it plays in promoting collective participation in public democracy.

An interpretation of s.2(c) must begin by addressing peaceful assembly's underlying values and purposes. In principle, freedom of assembly works in concert with s.2's other fundamental freedoms, forming part of an interrelated system that serves core democratic functions. As such, it depends for its protection on overlapping rights, such as freedom of expression and association.[55] Assemblies invariably form in pursuit of a religious, expressive, or associational purposes, and will often be a "conduit" for the

[54] These sources include General Comment No.37, (2020) on the right of peaceful assembly, Human Rights Committee, September 17, 2020, CCPR/C/GC/37; and European Commission for Democracy Through Law ("Venice Commission"), Guidelines on Freedom of Peaceful Assembly, 3rd ed., CDL-AD (2019)017rev. The Venice Commission is an advisory body of the Council of Europe, composed of constitutional law experts, and its role is to provide legal advice to member states. See also Clément Voule, Pedro Vaca, & Rémy Ngoy Lumbu, "Joint Declaration on Protecting the Right to Freedom of Peaceful Assembly in Times of Emergencies," (15 September 2022), online: <https://www.ohchr.org/sites/default/files/documents/issues/fassociation/2022-09-15/JointDeclarationProtectingRightFreedominTimesEmergencies15Sept2022.pdf>.

[55] T. Emerson, *The System of Freedom of Expression* (USA: Random House, 1970), at 286. See also General Comment No. 37, *supra* note 54, at para 9.

exercise of the *Charter*'s other fundamental freedoms.[56] As stated in *Koehler*, the right to peacefully assembly furthers the other fundamental freedoms, protecting "the right of citizens to gather to express views concerning matters related to the functioning of a free society".[57]

Gatherings engage in expressive activity, and s.2(b) and (c) are closely connected as a result.[58] The s.2(b) jurisprudence addresses some aspects of assembly, such as labour picketing, which receives a high degree of constitutional protection, and the concept of access to public property for expressive purposes.[59] In addition, s. 2(b) and (c) are directly in interface in an assembly, because participants typically engage in a range of s.2(b) activities. Section s.2(b)'s definition of expression as "any attempt to convey meaning" is inclusive of verbal and non-verbal communication, and can encompass an array of movements – like parading, marching and picketing.[60] As explained below, the expressive activities of participants at an assembly are protected by s.2(b), but subject to the *Criminal Code*, human rights legislation, and other laws that place justifiable limits on expression.

As the collective enactment or embodiment of individual expressive activity, it follows that a s.2(c) assembly incorporates and advances values – like self-government, truth seeking, and self realization – that are entrenched in the jurisprudence.[61] As well, an essential and defining feature of s.2(b) is its protection for unpopular, unconventional, and dissident points of view.[62] In much the same way, the Supreme Court of Canada grounded s.2(d)'s guarantee of associational freedom in a conception of

[56] Kinsinger, "Positive Freedoms and Peaceful Assembly", *supra* note 7, at 380.
[57] *Koehler v Newfoundland & Labrador*, *supra* note 32, at para 49.
[58] See Professor Moon's Background Paper on Freedom of Expression, commissioned by the POE Commission.
[59] On labour picketing, see *RWDSU, Local 55 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156; *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733. On s.2(b) access to public property, see *City of Montreal v 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141.
[60] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 at 968, and noting, at 969, that even parking a car in a reserved zone might be protected by s.2(b).
[61] See *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577 at 765-67; *Irwin Toy*, *ibid.* at 976.
[62] The *Charter* guarantees freedom of expression to ensure that "everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream". *Irwin Toy*, *ibid.* at 968.

empowerment for those who join with others to elevate their voice and exercise transformative power.[63]

A capacity to empower unheard, marginalized voices is at the core of s.2(c), and these rationales apply with particular force to the right of assembly. As First Amendment scholar Thomas Emerson explained, assembly is "an essential technique for the propagation of new, minority, or unconventional opinion", and the "indispensable instrument of virtually all minority movements."[64] The phenomenon of a public assembly or gathering can leverage a message of protest or dissent, forcing the community to pay attention and become involved in redressing grievances.[65]

These views are echoed in commentaries on the interpretation of international human rights guarantees. The ICCPR's guarantee of peaceful assembly can and has been used to recognize and realize a wider range of rights, including economic, social and cultural rights, and is particularly important to marginalized individuals and groups.[66] The entitlement fosters "a culture of open democracy, enable(s) non-violent participation in public affairs, and invigorate(s) dialogues on issues of public interest".[67] Echoing that conception, the Venice Commission's Guidelines describe peaceful assembly as the "foundation of democratic, tolerant and pluralist society", enabling "individuals and groups with different backgrounds to interact peacefully with one another, giving voice to minority opinions, and bringing visibility to marginalized or underrepresented groups".[68]

In these ways, s.2(c)'s guarantee of peaceful assembly aligns with s.2(b)'s underlying values and s.2(d)'s concepts of collective entitlement and empowerment. Rather than devalue it or render it redundant or superfluous, that conceptual alignment fortifies s.2(c): a degree of synchronicity with s.2's other freedoms complements and re-inforces peaceful assembly's status as an independent *Charter* guarantee. Shoehorning peaceful assembly into s.2(b) and relegating it to insignificance is

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[63] *Mounted Police*, *supra* note 31 (stating, at para. 55, that s.2(d) "empowers groups whose members' individual voices may be all too easily drowned out", and, at para. 58, that banding together "empowers vulnerable groups and helps them work to right imbalances in society", protecting "marginalized groups" and making possible a more equal society).

[64] Emerson, *Freedom of Expression*, *supra* note 55, at 287.

[65] *Ibid.*

[66] General Comment No. 37, *supra* note 54, at para. 2.

[67] *Ibid.*

[68] Venice Commission Guidelines, *supra* note 54, at para.1. Note also the Joint Declaration, *supra* note 54 (*underscoring* the importance of this right as an essential component of democracy and further *underlining* the importance of this right during emergencies; emphasis in original).

therefore wrong in principle, because it defeats the intent and purpose of s.2(c). Although it shares values in common with ss.2(b) and (d), the *Charter*'s guarantee of peaceful assembly is grounded in its own conception of freedom that is collective, spatial, and performative in nature.

Those distinctive values can be brought to the surface and inform a conception of peaceful assembly under the *Charter*. First, in comprising two or more individuals, an assembly is necessarily collective in nature. The Supreme Court of Canada acknowledged as much, defining assembly as a form of collective, not individual, action, and stating that the right of peaceful assembly is, by definition, a group activity incapable of individual performance".[69] The Court also confirmed that "[r]ecognizing group or collective rights complements rather than undercuts individual rights".[70] In principle, s.2(c) guarantees the right for people to come together and form a "way of speaking as a collective."[71]

Moreover, there is distinctive value in the assembly itself, as a form of communication. Thomas Emerson spoke of the "dynamic quality" of an assembly and its "important advantages for effective expression that do not exist in any other form of communication."[72] For instance, a public assembly or gathering incorporates concepts of space and presence, or place. As Butler explains, "the critical expressive benefits of proximity and immediacy" inhere in these "embodied" places.[73] In her account, the power to gather "is itself an important political prerogative, quite distinct from the right to say whatever they have to say".[74] In conceptual terms, an assembly is a "concerted bodily enactment", in excess of what is said, that constitutes "a plural form of performativity".[75] Challenging the assumption that "verbalization remains the norm for thinking about expressive political action" validates an assembly's way of being present, whether by "[s]howing up, standing, breathing, moving, standing still" and engaging or not in other actions.[76] An assembly under these terms can have purposes

[69] *Mounted Police*, *supra* note 31, at para 64.
[70] *Ibid.* at paras 64, 65.
[71] J. Butler, *Notes Toward a Performative Theory of Assembly* ("*Performative Assembly*")(USA: Harvard U. Press, 2015), at 155.
[72] Emerson, *Freedom of Expression*, *supra* note 55, at 286.
[73] Butler, *Performative Assembly*, *supra* note 71, at 21.
[74] *Ibid.* at 9.
[75] *Ibid.*
[76] *Ibid.* at 18.

as trivial as gathering to snap fingers together or as monumental as transformative change.[77]

Movements can galvanize the condition of vulnerability, finding ways of "expressing and demonstrating precarity that importantly engage embodied action and forms of expressive freedom that belong more properly to public assembly".[78] More plainly, public gatherings enable disadvantaged and disempowered groups and communities to forge a collective entity and leverage their voice. For instance, the Canadian movements and assemblies described in brief above are an exercise in public democracy, protecting "the people and their aspirations for collective public deliberation and action on issues of public importance".[79] As such, they engage the *Charter's* democratic aspirations and objectives. In the words of Occupy Toronto protestors, the camp and "living in the space was the movement", and it allowed participants "to experiment and learn about constructing a fair and equitable society".[80] Those purposes are at the core of s.2(c)'s democratic functions.

To emphasize the central proposition, the act of assembling is the relevant constitutional event, and the value of it inheres in and attaches to the assembly, *qua* assembly.[81] It is the assembly, both abstract in conception and infinitely varied in practice, that is protected by s.2(c). To subsume its distinctive expressive properties into a conception of expression under s.2(b) – even a broad one – misses the essence of this entitlement and disregards its status as a textually guaranteed *Charter* right. When the state prohibits, restricts or disperses an assembly, it violates s.2(c) of the *Charter*.[82]

The next section returns to the text of s.2(c) to define the meaning of "peaceful assembly" and consider a test or standard to determine a breach or violation of the guarantee.

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[77] Zick, "Recovering Assembly", *supra* note 41, at 398 (stating that the First Amendment protects the right of individuals who assemble for the purpose of snapping their fingers, chanting in tongues, or simply showing solidarity or strength through numbers).
[78] Butler, *Performative Assembly*, *supra* note 71, at 15.
[79] Abu El-Haj, "Neglected Assembly", *supra* note 8, at 547.
[80] *Batty v City of Toronto*, 2011 ONSC 6862 at 26.
[81] Zick, "Recovering Assembly", *supra* note 41, at 398.
[82] The state violates freedom of assembly when the focus of restrictions or regulations is the assembly itself. M. Kaminski, "Incitement to Riot in the Age of Flash Mobs", 81 *U. Cin. L. Rev.* (2013), at 38. The analogy under the *Charter* is to s.2(d) and restrictions that regulate activity because it is collective in nature. *Dunmore v Ontario*, *infra* note 85.

## B. The nature and scope of peaceful assembly under s.2(c) of the *Charter*

### 1. The scope of the guarantee

As a latecomer to *Charter* interpretation, s.2(c) benefits from the jurisprudential groundwork in place. Early on, the Supreme Court of Canada proposed a generous and purposive interpretation of the *Charter*'s rights and freedoms that led, under s.2, to a broad scope of entitlement and requirement that limits be justified under s.1. Like freedom of religion and freedom of expression, freedom of peaceful assembly should receive a generous interpretation that requires the state to justify most limits under s.1.[83]

Meanwhile, s.2(d) presented more of a challenge because its enmeshment in labour union entitlements, like collective bargaining and the right to strike.[84] As already noted, s.2(c) is necessarily collective in nature, and aligns with s.2(d) in this. Though it took time, the Court eventually defined s.2(d) as a collective entitlement, and stated that the central inquiry in every case is whether the state precluded activity because of its associational nature, "thereby discouraging the collective pursuit of common goals".[85] By analogy to s.2(d), the key issue under s.2(c) is whether the government discouraged the collective pursuit of a common purpose by restricting or prohibiting a public gathering or assembly.

A number of questions must be asked to define the scope of this guarantee and determine when freedom of peaceful assembly has been violated.

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[83] *Irwin Toy*, *supra* note 60 (setting a low threshold of breach for most s.2(b) issues); see also *Syndicat Northcrest v Amselem*, 2004 SCC 47 (adopting a generous definition of religion under s.2(a) and setting non-trivial or insubstantial interference as the threshold for breach).

[84] In *Reference re Public Service Employee Relations Act*, [1987] 1 SCR 313, 1 RCS 313 ("the *Alberta Reference*), the Court excluded collective bargaining and the right to strike from s.2(d) of the *Charter*; [1987] 1 S.C.R. 313. Years later that decision was overruled; see *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27, and *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4. With few exceptions, the jurisprudence continues to be dominated by labour relations issues.

[85] *Dunmore v Ontario*, 2001 SCC 94 at para 16.

### a. The meaning of assembly

Defined as a gathering of two or more persons, an assembly can take place spontaneously or by plan, in public, private and even virtual space. An assembly might ordinarily but not exclusively be public in nature. Under the First Amendment, the assembly clause presupposes gatherings that are public in nature, marshalling a presence that is accessible to – and in many situations unavoidable by – the public.[86] While General Comment No. 37 states that article 21 of the ICCPR protects peaceful assemblies wherever they take place, the Venice Commission Guidelines concentrate on assemblies that occur "in a publicly accessible space;" at the same time, the Guidelines acknowledge that other forms of assembly – like private meetings with no public audience – might attract some level of protection.[87]

Though excluding private gatherings would align s.2(c) with its public, and democracy-affirming purposes, meetings that lack a public interface could engage the guarantee – for instance, when a meeting in private space projects a noisy presence into the public environment or otherwise interferes with public sensibilities (*i.e.*, the intrusive projection of light or images). And, though uncommon, it is not unprecedented for the state to regulate private gatherings. As discussed above, racist laws in the US banned gatherings of African Americans that, at the time, were considered presumptively dangerous.[88] Finally, it is well known that the public/private dichotomy is analytically difficult; while an assembly might take place in public space that is privately owned, publicly owned space might be private in nature.

On balance, the scope of s.2(c) should not be limited to assemblies that are "public" in nature. A definition of assembly that would include all gatherings of two or more persons anywhere is unquestionably broad. It could be narrowed by addressing restrictions on non-public gatherings under s.2(d)'s freedom of association guarantee. Another option would be to align s.2(c) with s.2(a), and add a requirement that any violation of free assembly must be more than trivial or insubstantial.[89]

Finally, the concept of an assembly is not limited to its concretization at a discrete time and place, but includes activities that are "integral" to the assembly, such as mobilizing

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[86] See T. Zick, *Speech Out of Doors*, *supra* note 52 (focusing attention on the "expressive topography" of the assembly clause in public places, as the critical venue of public deliberation, participation, and public citizenship); Abu El-Haj, "All Assemble", *supra* note 11 (explaining the role of the outdoor assembly in "law, politics, and culture").

[87] General Comment No 37, *supra* note 54, at para 6; Guidelines, *supra* note 54, at paras 12, 14.

[88] *Supra* note 12.

[89] *Amselem*, *supra* note 83.

resources, planning, preparing, and publicizing a gathering, and travelling to and from the assembly.[90]

### b. The purpose of an assembly

The next question is whether a s.2(c) assembly must have a purpose. Simply understood as a collection of two or more persons, "assembly" could encompass an unimaginable range of fortuitous and non-purposeful gatherings, including office workers who wait for the elevator and queues of unlimited variety.[91] On this, the First Amendment's assembly clause once again has an interesting history. Though the words were eliminated from the draft, the clause originally guaranteed the right of the people peaceably to assemble "for a common good".[92] Though it is not a textual prescription, a "purpose" is included in some conceptions of peaceful assembly. General Comment No. 37 describes peaceful assembly under art. 21 of the ICCPR as the "non-violent gathering by persons for specific purposes, principally expressive ones".[93] Along similar lines, the Venice Commission Guidelines are "primarily focused" on assemblies formed for a "common expressive purpose", broadly conceived as "an emotion, idea, or opinion relating to matters of public concern".[94] Under these definitions, what is expressive incorporates a wide range of conduct.[95]

Likewise, a broad concept of communication under s.2(c) can accommodate the myriad ways an assembly might reveal and express its purpose.[96] Here, as well, s.2(c) can take its definitional lead from s.2's other fundamental freedoms, particularly

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[90] General Comment No. 37, *supra* note 54, at para 33. See also the Venice Commission Guidelines, *supra* note 54, at para 54 (including the planning, preparation, and publicity in its conception of the right).

[91] In those instances, the gathering has no purpose beyond the task at hand, which is to catch the elevator, buy tickets for a movie, or attend an event.

[92] J. Inazu, "Forgotten Assembly", *supra* note 9, at 571-73 (detailing the drafting history of this clause).

[93] General Comment No. 37, *supra* note 54, at para 4.

[94] Guidelines, *supra* note 54, at para 12 & 42.

[95] The First Amendment's speech-conduct distinction poses problems for the assembly clause. As Emerson stated, the US Supreme Court's adoption of this distinction "removed a large segment of the right of assembly and petition, as well as other vital forms of expression, from any real protection under the First Amendment". *Freedom of Expression*, *supra* note 55, at 297. Many others make the same point; see., e.g. M.Kaminski, "Inciting Riot", *supra* note 82, at 36 (citing C. Edwin Baker and noting that the speech-conduct dichotomy "immediately relegates assemblies, *which are obviously conduct*, to a lesser constitutional status than speech); emphasis added).

[96] This could include finger snapping. Zick, "Recovering Assembly", *supra* note 77.

s.2(b)'s guarantee of expressive freedom. *Irwin Toy*'s low threshold definition of expression – as any attempt to convey meaning – served the dual purposes of granting s.2(b) a broad interpretation and establishing the principle of content neutrality.[97] With an exception for violent forms of expression, this principle means that the scope of s.2(b) is egalitarian and extends to all expressive content. Whether expressive activity is offensive or repugnant does not affect its constitutional status under s.2(b).[98]

Though all expressive content is *prima facie* protected, *Irwin Toy* added a caveat for violent forms of expression, which are excluded from s.2(b) and defined as "threats of violence or acts of violence."[99] Under s.2(c), the caveat is textual in nature and excludes assemblies or gatherings that are not "peaceful" from the scope of the guarantee. This is s.2(c)'s most critical variable, because it raises the threshold question whether assemblies can be excluded because they are disruptive, or only lose the guarantee's protection when they engage in violent activities.

### c. The meaning of peaceful assembly

A pivotal question under s.2(c) is whether an assembly is peaceful or not.[100] As a matter of definition, "peaceful" can mean "without violence" or "quiet and calm", and from that perspective, its meaning has critical implications for the scope of s.2(c).[101] The central question is whether an assembly is only non-peaceful when it poses a threat of, or engages in violence as a collective entity, or can also be excluded from s.2(c) because of disruptive or unlawful, but non-violent conduct.

Defining that criterion presents "acute interpretive difficulties" when applied to assemblies engaged in "civil disobedience and other nonconforming, but nonviolent activities."[102] An element of disruption is the essence of an assembly's power and transformative potential. Emerson acknowledged that public assemblies can be

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[97] *Irwin Toy*, *supra* note 60 (defining expression as any attempt to convey meaning). *Irwin Toy* added a second step to the s.2(b) analysis – the purpose-effect test – that can narrow the scope of the guarantee in some, but not many, circumstances.

[98] If an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. *Ibid.* at 969.

[99] *R v Khawaja*, 2012 SCC 69 at para 70 (rejecting the proposition that s.2(b)'s exclusion is limited to acts of physical violence and stating that s.2(b) excludes threats and acts of violence).

[100] Note that there is no requirement of a peaceful assembly in the assembly clause or s.1(e) of the Canadian Bill of Rights.

[101] *Cambridge Dictionary,* online: https://dictionary.cambridge.org/dictionary/english/peaceful

[102] Zick, "Recovering Assembly", *supra* note 41, at 387.

"rough, aggressive and turbulent", but added that "to exact a guarantee as a condition of assembly that no violation of law is forthcoming, is to eliminate the public assembly altogether".[103] The challenge under s.2(c) is to constitutionalize an element of disruption – as part of s.2(c)'s democracy-affirming objectives – but only to a point.

As C. Edwin Baker explains, peaceful assembly is the right of people to use the "peaceful presence of their bodies" to interfere with others' activities, because that interference is "part of the power of freedom of assembly".[104] Accordingly, any theory that "multiple numbers causes bad things to happen" undercuts the point of having a textual guarantee of free assembly.[105] Disruption may be central to the "efficacy of public protest", especially for groups and communities who are "otherwise politically marginalized."[106] As General Comment No. 37 states, "[p]eaceful assemblies can in some cases be inherently or deliberately disruptive and require a significant degree of toleration".[107]

Without more, disruptive conduct does not render an assembly unpeaceful. That said, participants in assemblies are noisy, intrusive, and disruptive may also violate penal and regulatory laws. Most definitions of peaceful assembly address that problem by drawing a distinction between disruptive and even unlawful activity, and violence. According to the Venice Commission Guidelines, conduct that may "annoy or give offence," and conduct that "temporarily hinders, impedes or obstructs the activities of third parties" are within the scope of the freedom.[108] Nor is the right compromised by pushing, shoving, and the disruption of vehicular or pedestrian traffic or daily activities.[109] As El-Haj maintains, the focus in defining peaceful or peaceably should be on the real risks of violence rather than on disorder and illegality.[110]

The Venice Commission Guidelines narrowly construe violence as "using, or overtly inciting others to use, physical force that inflicts or is likely to inflict injury or serious property damage where such injury or damage is likely to occur".[111] Along similar lines, General Comment No. 37 states that violence under article 21 of the ICCPR

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[103] Emerson, *Freedom of Expression*, *supra* note 55, at 288.
[104] C. Edwin Baker, "Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations", 78 *Nw. U. L. Rev.* 937, at 980 (1983).
[105] M. Kaminski, "Inciting Riot", supra note 82, at 38 (paraphrasing Baker).
[106]Abu El-Haj, "Defining Peaceably", *supra* note 52, at 980.
[107] *Supra* note 54, at para 44.
[108] *Supra* note 54, at para 19.
[109] *Ibid.* See also General Comment No. 37, *supra* note 54, at para 15.
[110] Abu El-Haj, "All Assemble", *supra* note 11, at 1039.
[111] Venice Commission Guidelines, *supra* note 54, at para 51.

entails the use of "physical force against others that is likely to result in injury or death, or serious damage to property".[112] In other words, the interpretive commentaries on the international guarantees set a high threshold on this issue, defining an unpeaceful assembly as one that is violent.

Short of violence, the question for s.2(c) is whether an assembly can lose the *Charter*'s protection because it is disruptive. This is where the relationship between an assembly and its participants is important. An assembly is a collective entity and, in general, isolated acts of violence by individuals cannot be attributed to the assembly. As the US Supreme Court stated in *NAACP v Claiborne Hardware Co.*, the incidence of some violence in the course of a boycott campaign against white merchants – and the "ephemeral consequences of relatively few violent acts" – did not colour the "entire collective effort" with the "taint" of violence.[113] Short of violence that is "manifestly widespread," transgressions by participants do not define or compromise the assembly.[114] Moreover, violence against participants in a peaceful assembly, whether by authorities or third parties, does not render an assembly unpeaceful.[115]

A violence threshold is high, but a scale-and-magnitude standard for determining when levels of disruption render an assembly unpeaceful may be problematic, because relatively low levels of disruption might be considered unpeaceful. In particular, a discretionary concept of disruption can place public gatherings and assemblies that advance unpopular causes at risk of being contained or dispersed, and its participants charged with relatively minor offences. On this, the structure of the *Charter* is important; limits on an assembly that is disruptive – but not unpeaceful – can and should be imposed under s.1.

To summarize to this point, the issue under s.2(c) is whether and how an assembly is conceptualized and protected *qua* assembly. Individuals who violate an assembly's purposes by committing criminal and other unlawful acts are accountable for their acts as individuals. The acts of participants do not taint the assembly or affect its constitutional status, unless and until transgressive acts become so manifest as to define the assembly. Though disruptive and even unlawful conduct does not

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[112] General Comment No. 37, *supra* note 54, at para 15.

[113] 458 U.S. 886, at 933; *Claiborne* was decided under the First Amendment's concept of associational freedom, and not its assembly clause.

[114] General Comment No. 37, *supra* note 54, at paras 17, 19.

[115] *Ibid.* at para 18. See also Venice Commission Guidelines, stating that the possibility of others joining an assembly – such as violent extremists – does not negate the right of those who remain peaceful, and nor does "sporadic violence or other punishable acts committed by others". *Supra* note 54, at para 50.

compromise its status as peaceful in nature, an assembly that engages in or threatens acts of violence is no longer peaceful.[116]

A broad conception of s.2(c) is consistent with the guarantee's values and purposes, aligns with s.2(b)'s exclusion for violent forms of expression, and fits the structural framework of the Charter. It harmonizes with the interpretation of peaceful assembly under human rights guarantees, where what is peaceful includes unlawful conduct that does not threaten or devolve into acts of violence. Moreover and to emphasize, that conception of entitlement does not mean that an assembly's unlawful conduct cannot be limited. What it means, instead, is that such restrictions must be justified under s.1.

This is a critical issue for the Commission that will rest on an interpretation of s.2(c), as well as findings of fact on the nature, scope, and scale of the protest convoy's activities. It will be essential to know whether and to what degree the assembly endorsed or promoted violence, violent conduct, or threats of violence; to what degree individuals committed transgressive acts and whether unlawful acts were committed in furtherance of the assembly's purposes; and – all things considered – whether the convoy's activities were peaceful or non-peaceful under s.2(c). This includes whether and when an assembly that was peaceful at the outset evolved into a gathering that was no longer peaceful in nature.

### d. Virtual or online assembly

Conventionally understood, the concept of an assembly contemplates a physical gathering of individuals, in a space that is physical in nature. Now challenged by the hegemony of digital technology, that view has been revised to include virtual and online forms of assembly. Rather than displace it, digital connectivity facilitates collective forms of expression and complements traditional means of participating in public assemblies.[117]

Online space moves the concept of an assembly's presence beyond physicality. Those with physical or economic constraints on mobility can participate through the relatively low cost mechanism of online assembly.[118] As the protest convoy and any number of public movements demonstrate, online platforms can be deployed to assist,

[116] Note that a threat of violence can arise in advance of or during an assembly.
[117] T. Zick, "Parades, Picketing, and Demonstrations", in Stone and Schauer, eds., *The Oxford Handbook of Freedom of Speech*, *supra* note 52; see also J. Inazu, "Virtual Assembly", *supra* note 52.
[118] Inazu, *ibid.* at 1110.

augment, and enlarge the purpose and presence of an assembly.[119] The UN Special Rapporteur on freedom of assembly and association noted the "power of digital technology in the hands of people looking to come together to advance democracy, peace, and development".[120] Adding that "access to the internet and digital technologies" is a key aspect of "unique and creative modes of protest and organizing", he concluded that freedom and access to technologies should be the rule, and limitations the exception.[121] As noted above, an assembly's integral activities – which include the planning, organization and dissemination of information about a gathering – are protected by s.2(c); this applies to online as well as offline activity.

International human rights instruments, such as the ECHR and ICCPR, acknowledge the internet's role in facilitating and engaging assemblies, and incorporate virtual assembly in their concept of peaceful assembly.[122] According to the Guidelines, the possibility of assemblies occurring wholly online cannot be ruled out.[123] Key issues for virtual assembly include blocking and denying access to the internet and social media, as well as state surveillance of online assembly participants.[124] Here, as well, online activities are protected by s.2(b) and subject to limits on expressive freedom that address the dissemination of hate propaganda or violation of human rights laws.

In principle, s.2(c)'s definition of assembly does not require a physical gathering. Section 2(c)'s concept of peaceful assembly should include forms of online assembly, as well as online participation in a physical assembly or gathering by assisting in the

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[119] See Professor Laidlaw's Background Paper for the POE Commission, titled "Mis- Dis- and Mal-Information and the Convoy: An Examination of the Roles and Responsibilities of Social Media". See also R. Teruelle, "Social Media, Red Squares, and Other Tactics: The 2012 Québec Student Protests", PhD. Thesis, Faculty of Information, University of Toronto (providing empirical evidence of the students' tactical use of social media, which enabled students and their supporters to demonstrate in the streets of Montreal for over 100 nights in a row).

[120] Cited in Laura O'Brien & Peter Micek, *Defending Peaceful Assembly and Association in The Digital Age: Takedowns, Shutdowns, And Surveillance* (July 2020) at 12, online: <https://www.accessnow.org/cms/assets/uploads/2020/07/Defending-Peaceful-Assembly-Association-Digital-Age.pdf>.

[121] *Ibid.* at 12, 13.

[122] General Comment No. 37, *supra* note 54, at paras. 13, 34. Guidelines, *supra* note 54, at paras. 20, 45, 65-73. See also Joint Declaration, *supra* note 54 (*reaffirming* the important role played by the internet, social media and other information and communication technologies in providing space for individuals and groups to mobilize and to organize assemblies; emphasis in original).

[123] Guidelines, *ibid.* at para 45.

[124] Guidelines, *ibid.* at paras 69, 70. See also *supra* note 120.

organization or support of the physical assembly and its activities. A gathering in public space, and whether virtual or physical, constitutes an assembly.

### e. A standard of breach

To summarise, s.2(c) extends to gatherings of two or more persons who form a peaceful assembly for a purpose that is broadly conceived as communicative in nature. The guarantee includes assemblies that are disruptive and engage in unlawful acts, but excludes assemblies that are not peaceful because they threaten to or commit violent acts. It sets a threshold for breach that focuses on the assembly, as a collective entity. The government violates s.2(c) when it prohibits or regulates a gathering that falls within this conception of peaceful assembly.

This definition is grounded in the distinctive values of free assembly and aligns wth s.2(b)'s closely allied guarantee of expressive freedom. As such, s.2(c) co-exists with, and neither displaces or is displaced by other guarantees like s.2(b). A doctrinal framework to determine access to public property for expressive purposes is in place under s.2(b), and whether or how it interacts with s.2(c) must be addressed.[125] Section 2(c) also has affinity with s.2(d) because both are collective entitlements, and protected as such. Yet the distinctive assumption of the s.2(d) jurisprudence arise from a foundation in labour relations that led to a higher threshold for breach under that guarantee. Section 2(c) should be analogized to s.2(a) and (b) and given a generous interpretation that sets a relatively low threshold for breach.[126]

The government can infringe s.2(c) in many ways that include prior restraint and notification schemes, orders pre-empting an assembly, dispersing a gathering, and punishing participants for their actions. Once interference with a peaceful assembly is established under these guidelines for s.2(c), the limits must be justified under s.1.

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[125] The question is whether s.2(b) doctrine that applies to expression applies to and potentially restricts access to public property for purposes of assembly under s.2(c). As a matter of first impression it does not seem sound, in principle, for s.2(b) doctrine to determine the scope of access to public space for s.2(c)'s related but distinctive purposes of peaceful assembly.

[126] Section 2(d)'s "substantial interference" standard arose in the context of a right of access to a process of collective bargaining, and an affirmative duty on the part of government to engage in that process. For that reason, proposals to apply that standard under s.2(c) should not be followed. But see Alexander, "Exploring a More Independent Freedom", *supra* note 7, at 14-17 (proposing this test for s.2(c)); see also Kinsinger, "Positive Freedoms and Peaceful Assembly", *supra* note 7.

## C. Reasonable limits on the freedom of peaceful assembly

Freedom of assembly presents difficult questions of regulation. Even when peaceful, public assemblies can be disruptive, intimidating, and upsetting to proximate – and often captive – communities. This complicates the analysis at both stages. As seen above, it informs the interpretation of s.2(c) and the meaning of a peaceful assembly. Under the approach mapped out above, most limits on an assembly, *qua* assembly, would be justified under s.1.

### 1. General principles

The s.1 analysis of statutory provisions that violate the *Charter* is governed by the *Oakes* test.[127] Rather than provide a formal analysis of the statutory provisions at issue in the inquiry – namely, s.19 of the *Act* and s.2 of the *EMR* or of others – this discussion identifies some key variables that arise in considering reasonable limits on assembly activities. This background paper does not address the issues that arise in policing public assemblies and movements in any detail.[128] Nor does it address questions about prior restraint and advance notification schemes, which are not at issue in this inquiry.[129]

In this, principles and guidelines from other jurisdictions are not binding under the *Charter*, but can be persuasive, especially in the absence of a s.2(c) jurisprudence. For instance, the analytical framework that developed under the *ICCPR* and *ECHR* is similar to the key concepts of justification under the *Oakes* test. Under those guarantees, the critical elements of legality, necessity, and proportionality of restrictions correspond with the *Oakes* test and its requirements that *Charter* violations must be prescribed by law, address a pressing and substantial objective, and meet a standard of proportionality.[130] As noted, the preamble of the *Emergencies Act* acknowledges Canada's responsibilities as a signatory to the ICCPR, as well as under the *Charter*.

Any discussion of reasonable limits on freedom of assembly – including the designation of secure zones and dispersal of a gathering – is fundamentally

[127] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.
[128] On these issues, see Professor Diab's Background Paper for the Commission, titled "The Policing of Large-Scale Protests in Canada: Why Canada Needs a Public Order Police Act", among others.
[129] On this issue, see General Comment No. 37, *supra* note 54, at paras 70-73, and the Guidelines, *supra* note 54, at paras 112-24.
[130] See generally General Comment, *ibid.* at para 36 (outlining those requirements).

contextual. That said, the analysis should proceed under a framework of principle that addresses two types of restrictions: bans and content-based prohibitions, and proverbial "time, place and manner" restrictions. In general, blanket bans that exclude or restrict an assembly because of its message or purpose are especially problematic. Other restrictions on the time, place or manner of an assembly must be proportionate and not unduly impair the freedom.

On the question of bans, the General Comment and Guidelines state that prohibiting an assembly is a measure of last resort that should only arise once less onerous restrictions are considered and tried.[131] Blanket bans are considered an "excessive restriction" and "presumptively disproportionate" for that reason.[132] Moreover, assemblies should not be banned in the capital city or all city streets; as well, designating perimeters around courts, parliaments, places of historical significance and other official buildings that are off limits for assemblies should be avoided, with any limits specifically justified and narrowly circumscribed.[133]

Content neutrality is another important principle, and restrictions should not be based on the purpose of an assembly or the content of its message. [134] In particular, assemblies with a political message should receive a "heightened level of accommodation and protection".[135] As discussed, an assembly that threatens or incites violence, or is based on a violent or criminally prohibited purpose (*i.e.*, hate propaganda), is not protected by s.2(c). Otherwise, and in principle, an assembly should not be prohibited, regulated, or dispersed because the state or surrounding community considers its purpose or message offensive. In this, the rules for expressive freedom apply, and restrictions should not be used to "stifle expression of opposition to a government, challenges to authority … or the pursuit of self-determination".[136] In general, the use of flags, uniforms, signs and banners that contain symbols and messages – some or many of which may be offensive and upsetting – should not be restricted.[137] On this, s.2(c) aligns with s.2(b) and the

[131] General Comment No.37, *supra* note 54, at para 37; Venice Commission Guidelines, *supra* note 54, at para 132. See also Joint Declaration, *supra* note 54, at para 2 (General Principles).
[132] General Comment, *ibid.* at paras 32, 38; Guidelines, *ibid.* at para 133.
[133] General Comment, *ibid.* at paras. 55, 56.
[134] *Ibid.* at paras 22, 48 (stating that a contrary approach "defeats the very purpose of peaceful assemblies" as a potential tool of political and social participation").
[135] *Ibid.* at para 32.
[136] *Ibid.* at para 49.
[137] *Ibid.* at para 51 (except where symbols are "directly and predominantly" associated with incitement to discrimination, hostility or violence).

distinction it draws between expression that is offensive and expression that is harmful. More generally, the principles outlined in the General Comment and Guidelines are consistent with the s.2(b) jurisprudence on blanket bans, content neutrality, offensive expression, and the exclusion of violent forms of expression from the *Charter*.

The General Comment and Guidelines impose positive duties on the state to facilitate and protect peaceful assemblies, including and especially controversial gatherings.[138] When an assembly annoys or offends others, the state may be obligated to protect an assembly's organizers and participants.[139] The General Comment and Guidelines emphasize that access to the internet and social media should not be blocked during or before an assembly, when it may be critical to marshall support and publicize a gathering.[140] The Guidelines include a direction that law enforcement authorities should adopt a "human-rights based approach", requiring officers to be trained, to prioritize human rights, and to be aware of their duty to facilitate, enable and protect the right to freedom of peaceful assembly.[141]

## 2. Proportionality

Though the two are not synonymous, the permissibility of "time, place and manner' restrictions evoke the concept of proportionality, encompassing the range of variables that assist in determining whether limits on assemblies have balanced the right against regulatory interests in a proportional way. Proportionality is a central principle in *Charter* analysis under s.1, as well as under international human rights guarantees. In this context, time, place and manner is used descriptively, without endorsing or incorporating First Amendment doctrine, which is the source of this concept.[142]

Although the context and setting are critical in regulating assemblies that vary radically in size, scale, purpose, duration and impact, some guidelines have developed. First, as to place, participants in general have the right to choose the location or route of an

[138] General Comment No. 37, *ibid.* at paras 23, 24 (stating that there are negative and positive obligations on the state before, during, and after an assembly, including positive duties to facilitate an assembly); Guidelines, *supra* note 54, at paras 74-89.
[139] Guidelines, *ibid.* at para 81.
[140] General Comment No. 37, *supra* note 54, at para 34; Guidelines, *ibid.* at para 70.
[141] Guidelines, *ibid.* at para 158, and paras 158-80.
[142] *Supra* notes 48, 95 (criticizing the time, place and manner doctrine for freedom of speech and its application to questions about freedom of assembly). In brief, the US doctrine is contra-indicated because it accepts a speech-conduct distinction that is not designed to, and cannot protect freedom of assembly.

assembly in publicly accessible places.[143] Moreover, assemblies must be permitted to gather "within sight and sound of their target audience", and should not be "relegated to remote addresses where they cannot effectively capture" the attention of an audience.[144] Restrictions on assembling in public space raise questions about the permissibility of "secure" or exclusion zones that exclude an assembly from public places or otherwise contain a gathering within a prescribed space.[145]

The time and timing of an assembly can also pose regulatory challenges. Apart from the question whether certain assemblies are inappropriate at certain times are issues about an assembly's duration. While an assembly must have a "sufficient opportunity" to manifest its views, a gathering of sustained duration like the Occupy movement in Canada raises proportionality issues about the merits of an assembly's indefinite and even permanent appropriation of public space.[146] At a certain point – which, depending on the circumstances, may be earlier or later – the duration of an assembly may impose a disproportionate impact on other public interests.

Finally, the degree of disruption an assembly poses raises proportionality issues about the relative balance between enabling an assembly – which often comprises disadvantaged voices – to claim a venue for voicing its message or purpose, and the impact it has on its proximate community. While disruption is expected and must be accommodated as part of the entitlement, at some point the exercise of that right is outweighed by the legitimate interest in restoring the functions of public space prior to the assembly.

## 3. Dispersal

The General Comment frowns on dispersal, stating that it is only permissible in exceptional circumstances, such as violence or clear evidence of an imminent threat of violence.[147] Where there is a high level of disruption – such as the extended

[143] Guidelines, *supra* note 54, at para 61.
[144] General Comment, *supra* note 54, at paras 22, 53, 55.
[145] On February 4, 2022, police created a "red zone" in Ottawa that restricted vehicle traffic, and that was followed by the secure zone under the *EMR* which, on February 17th created a zone regulating any access to roughly 3 square km. in downtown Ottawa. Note that the General Comment and Guidelines both frown on containment (or kettling) practices. See General Comment, *ibid.*, at para 84, and Guidelines, *supra* note 54, at para 217.
[146] *Ibid.* at para 54. See also Guidelines, *supra* note 54, at para 146 (stating that restrictions on the time or duration of an assembly must be based on the circumstances of the case, adding that in some cases the protracted duration of an assembly may be integral to the message or to the effective expression of that message).
[147] *Ibid.* at para 85.

blocking of traffic – an assembly can be dispersed when the disruption is "serious and sustained".[148]In similar fashion, the Guidelines state that dispersal is appropriate when there is an imminent threat of violence, as well as when an assembly is unlawful because it violates criminal law and constitutes a serious violation of the rights of others.[149] Depending on the size, location and circumstances, dispersal might also be deemed necessary in the interests of public order or health.

## 4. A short note on statutory provisions

Statutory provisions in other provincial and federal laws might engage s.2(c)'s guarantee of peaceful assembly. The point of this discussion is not to list and analyze those laws, but more to note that the *Emergencies Act* and *EMR* are exceptional, but not singular, in raising questions about the regulation of assemblies and gatherings. This includes any number of pandemic restrictions on gatherings at the federal, provincial, and local levels of government to address the spread of COVID-19. Limits that may be reasonable must be justified as a violation – not only of s.2(a) or (b) – but also of s.2(c) and its guarantee of the right to assemble.

The *Emergencies Act* and *EMR* both engage s.2(c)'s guarantee of peaceful assembly. Section 19(1) of the *Act* authorizes the regulation and prohibition of a public assembly that "may reasonably be expected" to lead to a breach of the peace, and to designate and secure an undefined range of public spaces.[150] Section 2(1) of the *EMR* prohibits individuals from participating in a public assembly that may "reasonably be expected" to lead to a breach of the peace, and s.4(1) prohibits travel to an area in which a s.2(1) assembly is taking place.[151] Section 5 prohibits individuals from asking for or providing property for use in a s.2(1) assembly.[152] Finally, s.6(1) prescribes a number of places that are designated as protected and secured, including "any other place" that is not defined in any way other than ministerial designation, or discretion.[153] These provisions, potentially among others, raise issues about the permissibility of these limits on freedom of assembly and association.

In addition, there are *Criminal Code* offences that have implications for s.2(c). For instance, s.63(1)(a) prescribes that an assembly is unlawful when it causes "persons

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[148] *Ibid.*

[149] Guidelines, *supra* note 54, at para 179 (adding that, in this scenario, prosecuting demonstrators after the assembly is not a safer and more practicable alternative).

[150] s.19(1)(a) and (d); *supra* note 2.

[151] *EMR*, *ibid.*

[152] *Ibid.*

[153] Section 6(f), *ibid.*

in the neighbourhood" to fear on reasonable grounds that the assembly "will disturb the peace tumultuously".[154] A question that arises is whether "tumultuously" in this context requires an element of violence, or includes circumstances that have become "greatly agitated, confused or disturbed".[155] Under the *Criminal Code*, an unlawful assembly is not punishable until it reaches the point of riot and "begins to disturb the peace tumultuously".[156] A definition of tumultuousness that includes agitation and confusion, for purposes of a breach of peace under s.64, raises concerns about the breadth of the offence and its implications for s.2(c).[157]

Under s.63(1)(b), an assembly is also unlawful when it "needlessly and without reasonable cause" provokes others to breach the peace tumultuously.[158] The mere existence of some assemblies is provocative, without more, and can provoke a hostile reaction. As discussed above, the acts of third parties who breach the peace or commit acts of violence do not render an assembly unpeaceful.[159] And, at least under the international human rights guarantees, the authorities have an obligation to protect an assembly and its participants from third party groups or individuals who seek to undermine their exercise of constitutional rights.

Although the focus of the Commission – and this paper – is the *Emergencies Act* and *EMR*, both of which directly regulate public assembly, other provisions, under the criminal law and in other statutes, have implications for s.2(c)'s freedom of peaceful

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[154] Under this definition, an assembly consists of three of more persons who have a common intent to carry out "any common purpose". Section 63(1), *Criminal Code*, S.C. 1985.

[155] *Collins English Dictionary,* online https://www.collinsdictionary.com/dictionary/english/tumultuous ; see also *Oxford Learners Dictionary* (defining tumultuous as 1. "very loud; involving strong feelings, especially feelings of approval; and 2. "involving a lot of change and confusion and/or violence"; https://www.oxfordlearnersdictionaries.com/definition/american_english/tumultuous ; *Merriam-Webster Dictionary* (defining "tumultuous" as "1. marked by tumult: loud, excited, and emotional; 2. Tending or disposed to cause or incite a tumult; and 3. marked by violent or overwhelming turbulence or upheaval"; https://www.merriam-webster.com/dictionary/tumultuous .

[156] Section 64, *Criminal Code*.

[157] See M. Kaminski, "Inciting Riot"*, supra* note 82, at 57 (stating that a riot statute based on tumultuous conduct that rests on a risk of public alarm without requiring actual harm violates the assembly clause).

[158] Section 63(1)(b).

[159] Section 64, *Criminal Code*.

assembly.[160] An interpretation of s.2(c) in this review of the *Emergencies Act* and *EMR* can be of service in other settings where freedom of peaceful assembly has been engaged, but not analyzed or enforced due to the lack of an analytical framework for this *Charter* guarantee.

## IV. Concluding thoughts

Social and political movements formed to advance and promote a variety of causes have commanded public attention in recent years. These movements provide an invaluable service to the democratic community, surfacing and even compelling a dialogue on questions of reform and social justice. Foremost of all – at least in point of time – is the 2022 protest convoy and occupation of the nation's capital.

These movements unquestionably engage s.2(c) of the *Charter*, which protects freedom of peaceful assembly. Perhaps oddly, this guarantee has been ineffective, if not silent, in the first forty years of the *Charter*'s development. The rise of demonstrations and protest movements in recent years underscores this gap in the *Charter* jurisprudence, and calls for a correction in a narrative of *Charter* rights that has overlooked this guarantee. Despite its overlap with other fundamental freedoms, particularly s.2(b), freedom of peaceful assembly requires its own interpretation and doctrinal framework. The POE Commission is not a court of law, but has the opportunity to address s.2(c), consider the role peaceful assembly plays in public, democratic discourse, and discuss the interpretation of this guarantee, including reasonable limits that are justifiable.

This paper offers assistance in that regard, principally by addressing the values and purposes of a right to assemble – distinct from freedom of expression and association – as well as by suggesting an interpretation of s.2(c) and proposing guidelines for determining the reasonableness of limits under s.1 of the *Charter*. The goal throughout has been to inform the work of the Commission and, in reaching beyond that objective, to explain why s.2(c) matters and – to be forthright – to advocate for this guarantee.

In the absence of a jurisprudence, s.2(c)'s interpretation is guided by the established principles of *Charter* interpretation, and informed, to the extent it is applicable, by the

[160] The First Amendment scholarship analyzes the use of offences such as unlawful assembly and incitement to riot to punish those who participate in demonstrations. See, e.g., J. Inazu, "Unlawful Assembly", *supra* note 52 (providing an extensive historical and contemporary analysis of unlawful assembly laws); Kaminski, *supra* note 82 (providing a comprehensive analysis of riot offences and proposing a model law).

First Amendment tradition and authoritative commentaries on international guarantees. The paper endeavours to explain why s.2(c) should be invigorated and show how a framework of analysis can be developed. Engaging s.2(c)'s role is critically important, not only to validate the legitimacy and value of experiential, collective and public democracy, but also to create clarity – and principled guidelines for determining limits on assemblies that overstep the boundaries of s.2(c)'s protection.

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# Governing Emergencies in an Interjurisdictional Context

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# I. Introduction

All levels of government in Canada have active roles in managing and governing emergencies. Thus, while the *Emergencies Act* has only recently been invoked for the first time, Canada—as a whole—has ample experience with the use of emergency management legislation in relation to extreme events. Legislation similar to the *Emergencies Act* exists in every province and territory, governing the use of emergency measures at the provincial/territorial and municipal level. Indigenous governments, too, implement emergency measures by exercising their inherent jurisdiction, treaty rights and delegated powers under the *Indian Act*.

In the last five years, there have been 15 provincial and territorial declarations of emergency with the associated use of emergency measures (8 COVID-19, 3 wildfires, 3 flooding and storms, 1 other – see Appendix 1). Thousands more states of emergency have been declared by Indigenous governments and local governments during this same timeframe.

This paper reviews the roles of different governments in governing emergencies and it describes the general structure of emergency management legislation. It examines the range of emergency measures that can be authorized by provincial and territorial legislation, with a particular focus on powers that are potentially relevant to the events of February 2022. Finally, the paper identifies mechanisms for support and coordination between federal and provincial/territorial government for assisting with emergency response.

This paper is descriptive not prescriptive: it describes emergency management legislation and its recent implementation; it does not take a position on when and whether the use of these legislative powers is justified.

This paper is also limited in scope. It focuses only on centralized emergency management legislation—enacted to cover a range of threats, hazards and extreme events—in order to understand how the federal *Emergencies Act* is one piece of a network of emergency management legislation across the country. It is important to note that many areas of law and many different kinds of legislation also govern emergencies in one way or another (e.g. insurance law or the *Quarantine Act*).

# II. Roles & Responsibilities of Governments

Under the *Constitution Act, 1867* legislative powers are divided between the Parliament of Canada and provincial legislatures. In turn, municipal governments (or local governments) exercise powers delegated to them through provincial legislation. Indigenous peoples in Canada exercise inherent jurisdiction according to their own laws and governance.[1] Governing emergencies in Canada is necessarily a multi-jurisdictional endeavour.

## A. Federal

Parliament has constitutional scope to regulate emergencies under its 'Peace, Order and Good Government' power in section 91 of the *Constitution Act*, which permits Parliament to enact temporary measures for responding to an emergency.[2] The courts have held that this scope of authority includes subject-matters that are not normally within federal jurisdiction (i.e. would otherwise be the exclusive jurisdiction of the provinces), but that any legislative act must be temporary. Powers exercised under the *War Measures Act* were upheld by the courts as constitutional under the Peace, Order and Good Government clause.[3]

At present, Canada relies on two primary statutes to govern emergency management: the *Emergencies Act* and the *Emergency Management Act*.[4]

The *Emergencies Act* is the legislation that is the focus of the Public Order Emergency Commission. The Act sets out the specific requirements for declaring a national emergency and for the use of exceptional emergency powers to address the emergency. This legislation is entirely focused on emergency response and, as such, lies dormant if and until a situation arises in which the federal government decides to

[1] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available online <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.
[2] *Re: Anti-Inflation Act*, [1976] 2 SCR 373.
[3] *Fort Frances Pulp and Paper Co. v Manitoba Free Press Co*, [1923] 3 DLR 629, 1923 CanLII 429 (UK JCPC); *Reference to the Validity of Orders in Council in relation to Persons of Japanese Race*, [1946] SCR 248; *Reference re Wartime Leasehold Regulations*, [1950] SCR 124.
[4] *Emergencies Act*, RSC 1985, c 22 (4th Supp) and *Emergency Management Act*, SC 2007, c 15.

activate it. The *Emergencies Act* was invoked for the first time since its 1988 enactment in response to the events in February 2022.

As we will see from the discussion below, the *Emergencies Act* is distinctive from provincial and territorial emergency management legislation because of the specificity of its requirements. First, the *Emergencies Act* defines emergency with relative precision: the Act sets out four categories of emergency (each with multiple components that must be met by a given situation) and, whichever category is relevant, it must also meet the definition of a national emergency (s. 3). Moreover, these definitional requirements are buttressed by a legal standard that the decision-maker must have "reasonable grounds" to believe these requirements are met (e.g. s 17). Second, once an emergency is declared, the *Emergencies Act* does not grant the executive open-ended access to emergency powers. Rather, the Act sets out specific categories of emergency measures that can be used specific to each category of emergency. Third, the *Emergencies Act* contemplates a measure of coordination with other jurisdictions, despite the urgent conditions under which the Act is intended to be invoked. The federal government is required to consult with affected provinces prior to declaring an emergency (e.g. s 25) and any emergency measures issued under the Act, must be implemented in a way that does not "unduly impair" provincial measures and with the view of achieving "concerted action" with the provinces (e.g. s 19(3)). Fourth, the *Emergencies Act* embeds mechanisms for accountability: the ability of Parliament to cancel a declaration of emergency (ss 58-59), a Parliamentary review committee (s.62) and an after-the-fact inquiry (s. 63). As we will see below, this level of oversight and these types of constraints on the use of emergency powers are distinctive in Canadian emergency management legislation.

The second centralized emergency management statute at the federal level is the *Emergency Management Act*, which establishes a program for emergency management. This Act sets out a suite of powers and responsibilities for preparing for emergencies, developing emergency plans and for coordinating across different government departments and levels of government. For example, under the *Emergency Management Act,* the Minister of Public Safety is responsible for "monitoring potential, imminent and actual emergencies and advising other ministers accordingly" (s 3(1)(d)). It also requires each federal minister to "identify the risks that are within or related to his or her area of responsibility — including those related to critical infrastructure" and to prepare emergency plans, test, maintain and implement those plans, and conduct exercises and training in relation to those plans (s 6). Unlike the *Emergencies Act,* the powers under the *Emergency Management Act* do not need to be activated in special circumstances; rather, those are powers that should be

exercised continually to ensure the federal government is learning about and mitigating hazards and preparing for potential emergencies.

While these are currently the two centralized emergency statutes at the federal level, it is important to keep in mind that Parliament has the option of passing separate legislation to deal with specific emergencies, and can do so by moving through the law-making process more quickly in these exceptional cases (see: Standing Orders of the House of Commons, 71; e.g. *COVID-19 Emergency Response Act*; *COVID-19 Emergency Response Act, No. 2*). The federal government's additional emergency management responsibilities are closely linked to other spheres of federal authority, such as national security, international affairs, and quarantine.

The federal government plays a vital role in providing assistance to provincial and territorial emergency response and recovery. This is discussed in Part IV below.

## B. Provincial/Territorial

Most emergencies are local or regional events and fall primarily within the constitutional authority of the provinces under the constitutional clauses that allocate to the provinces authority over: property and civil rights (s. 92(13)), municipalities (s. 92(8)), generally matters of a local nature (s.92(16)), and management of forest resources (s. 92A) (relevant to wildfire emergencies). Each province and territory of Canada has a central emergency management statute.[5] All of these statutes are similar in purpose and structure. As discussed below, there is considerable experience with the use of provincial/territorial emergency management legislation in response to natural hazards and, now, the COVID-19 pandemic. The use of provincial emergency powers in Ontario and Nova Scotia in response to the convoy and blockades, however, is distinctive.

### i. Purpose and Basic Structure

Provincial and territorial emergency management legislation performs largely the same functions as the federal *Emergencies Act* and *Emergency Management Act* combined; that is: delegating roles and responsibilities for emergency management and setting out the conditions and process for declaring a state of emergency and issuing temporary emergency measures. Similarly, provincial and territorial legislation delegates powers to municipalities to manage local emergencies. While these statutes

[5] See Appendix 2 for an overview of comparative features and the citations to each statute.

do not typically contain purpose provisions,[6] the purpose of the legislation is implied in the operative provisions: to enable rapid, coordinated government responses that minimize the impacts on people and property of a serious and urgent event. To this end, provincial and territorial emergency typically establishes a lead emergency management department and requires that the province/territory develop and maintain an emergency plan. While there are portions of these statutes that address prevention and mitigation of emergencies, and recovery from these events, this paper focuses on legislated roles and responsibilities specific to emergency response.

Specifically, this part examines how provincial and territorial legislation addresses the following questions:

- What is an emergency?
- Who decides to declare an emergency?
- What procedures must be followed to declare an emergency?
- What mechanisms are in place to hold emergency responses accountable?

These features are discussed in the section below and are summarized in the Comparative Features Table in Appendix 2.

### ii. Comparative Legislative Features

*What is an emergency* – Unlike the federal *Emergencies Act*, provincial and territorial legislation does not parse out specific categories of emergencies with distinct requirements and powers. In no case is there a distinct requirement for 'public order' situations under these statutes.

The standard legislative definition of 'emergency' is all-encompassing; for example, take the definition in the New Brunswick *Emergency Measures Act*:

> *"emergency" means a present or imminent event in respect of which the Minister or municipality, as the case may be, believes prompt*

[6] The Quebec *Civil Protection Act*, is an exception. It states "The purpose of this Act is the protection of persons and property against disasters, through prevention measures, emergency response planning, response operations in actual or imminent disaster situations and recovery operations." (s 1). Ontario has a specific purpose section to preface the use of emergency orders: "7.0.2 (1) The purpose of making orders under this section is to promote the public good by protecting the health, safety and welfare of the people of Ontario in times of declared emergencies in a manner that is subject to the *Canadian Charter of Rights and Freedoms*."

> *coordination of action or regulation of persons or property must be undertaken to protect property, the environment or the health, safety or welfare of the civil population.* (section 1)

Here we can see three features:

- a present or imminent event,
- that requires prompt coordination of action,
- to protect the safety and welfare of people and/or prevent or limit damage to property or the environment.

There are some variations on this standard formulation. Ontario and Nunavut have additional qualifying language that there must be the potential for "serious" harm to people or "substantial" damage to property, setting a high threshold for declaring an emergency under these Acts.[7] And Manitoba distinguishes between "routine emergencies" (emergencies that can be addressed by first responder agencies without additional resources, without evacuation orders and without needing a declaration of emergency) and "major emergencies" (emergencies that are not routine emergencies).[8]

Quebec and British Columbia have more specific definitions that depart from the standard formulation above by limiting emergencies to natural hazards and accidents.

> *Quebec: "an event caused by a natural phenomenon, a technological failure or an accident, whether or not resulting from human intervention…"* (section 2(1))

> *British Columbia: a circumstance that "is caused by accident, fire, explosion, technical failure or the forces of nature…"* (section 1)

Yukon defines a peacetime disaster and a war emergency. The definition for peacetime disaster is similar to the Quebec and BC definitions and it also explicitly excludes "enemy attack, sabotage or other hostile action." Its definition for war emergency reads:

> *Yukon: "'war emergency' means the state existing as a result of a proclamation issued by Her Majesty or under authority of the Governor*

[7] Ontario, Quebec, Nunavut.
[8] *The Emergency Measures Act*, CCSM c E80, s1.

> *in Council that war, invasion or insurrection, real or apprehended, exists."* (section 1)

Quebec and BC would not have been able to declare states of emergency under their emergency management legislation in response to blockades or convoy events, since this type of situation is not covered by the definition. Yukon *may* have been able to use emergency powers under its legislation in response to a public order disruption, but only after the federal government acted to declare the situation an emergency due to a real or apprehended insurrection.

Finally, some statutes also provide a definition of "disaster",[9] defined as a situation in which major harm and/or damage has occurred or is occurring. Where an "emergency" is defined prospectively (in anticipation of a major event to mobilize a response), a "disaster" is what results from a major event where the emergency response failed to prevent or fully mitigate its harmful impacts.

Canadian history is replete with examples of provincial and territorial states of emergency in response to natural hazards such as wildfires, floods and storms. The COVID-19 pandemic also prompted many provinces and territories to declare emergencies under their legislation (Appendix 1). In principle, some major public order disturbances could meet the threshold requirements for declaring a provincial or territorial state of emergency in many jurisdictions, as noted above. However, this has not been the practice in Canada. Notable public order events (the Oka crisis and the October crisis) prompted provincial Attorneys General to call on the military's aid to the civil power. But there are no examples that I am aware of (other than Ontario 2022), in which a province or territory has declared a state of emergency under post-War emergency management legislation in response to a public order disturbance. In other circumstances, anticipated protests and demonstrations have been pre-emptively regulated through specific by-laws or regulations (e.g. 2010 Winter Games By-Law No. 9962 (City of Vancouver, 2009)), responded to through separate, stand-alone emergency legislation (e.g. Bill 78, *An Act to enable students to receive instruction from the postsecondary institutions they attend* (Quebec National Assembly 2012)), or by invoking the riot provisions of the *Criminal Code* (e.g. Vancouver Stanley Cup riot 2011). This makes the exercise of powers under Ontario's *Emergency Management and Civil Protection Act* and Nova Scotia's *Emergency Management Act* unique.

[9] Alberta, Manitoba, New Brunswick, PEI, Quebec and Yukon (see in text discussion above).

Canada lacks significant judicial attention to the declaration of emergencies under emergency management legislation. While the question of what is an "emergency" or a "disaster" is the subject of lively and enduring debates in research and commentary[10], declarations of emergency in Canada have rarely been the subject of legal challenge. In principle, the declaration of an emergency under emergency management legislation is subject to judicial review on ordinary constitutional and administrative law grounds. I am aware of only one successful challenge of the declaration of emergency.

This arose in the context of a successful nuisance claim in which the defendant governments sought to rely on the *Emergency Program Act* as a defence of lawful authority. In response to a sinkhole, the district declared a state of local emergency (with a seven-day sunset clause) and evacuated the neighbourhood, and the Minister then renewed that declaration of local emergency on seven-day intervals for over three years. In this case, the Court held that, after three months of renewals, the renewals were no longer a reasonable exercise of power and ceased to be lawful. The Court interpreted the statute to have an implicit temporariness requirement and, in the absence of any steps by the governments to resolve the situation, could not be said to be a situation that required "prompt coordination of action" (*Rosewall v Sechelt (District of)*, 2022 BCSC 20, paras 22-42, 75-85). The case shows that, even in the face of open-ended emergency definitions, courts are (in some circumstances) willing to read in implicit limitations to the definition and will require the government to provide some justification for its use of emergency powers.

Judicial challenges to declarations of emergency in response to the COVID-19 pandemic were filed, but only one has thus far generated detailed judicial reasoning on the merits. In *Bricka v The Attorney General of Quebec*, 2022 QCCA 85, the Quebec Court of Appeal upheld the public health emergency declared under the Quebec *Public Health Act*.[11] The applicant argued that the Act required the National Assembly to approve renewals of the declared emergency beyond 30 days. The Court rejected this argument as not supported by the plain language of the statute (para 28). Another court case challenged Ontario's use of the *Emergency Management and Civil Protection Act* in response to COVID; however, this was dismissed summarily because the claimant did not raise justiciable claims about the lawfulness of the

[10] Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge University Press, 2016); E.L. Quarantelli, ed, *What is a Disaster? Perspective on the question* (Routledge, 1998).

[11] The provision of the *Public Health Act* at issue in this case is identical to the provision in the *Civil Protection Act*, which is the legislation that governs disasters.

declaration or associated orders (*Humphries v AG Ontario*, 2020 ONSC 4460). Another case appears to have been dropped when the claimants lost their motion to have cabinet documents released (*Mercer v Commissioner in Executive Council (The)*, 2021 YKSC 24). In both decisions, the Courts' reasons suggest a deferential approach to declarations of emergency.

These cases help illustrate the difficulties with challenging in court the declaration of emergencies under this type of legislation. One difficulty is the open-ended definition of what constitutes an emergency and the fact that the decision-maker need only 'believe' (NB, NS, PEI) or 'be satisfied' (AB, BC, NWT, SK) that an emergency exists. Only in Quebec, Ontario and Nunavut do the statutes each require that the decision-maker be satisfied that *specific* statutory criteria are all met.[12] Older caselaw suggests that all the government would need to show, if challenged in court, is that the decision-maker held this belief or was satisfied.[13] (This differs from the federal *Emergencies Act* which requires a reasonable basis for the belief.) However, the current state of administrative law in Canada is intended to foster "a culture of justification"[14] and it is possible this could lead the courts to require a more fulsome justification by the decision-maker about why the conditions of the statute were believed to have been met. In sum, with such broad enabling language, it can be hard (absent egregious circumstances) to articulate compelling grounds for judicial review.

A second hurdle to judicial review, as demonstrated in *Mercer*, is that public interest immunity often protects Cabinet confidentiality. This means that the deliberations about whether to declare an emergency are not accessible to those seeking to challenge the decision as unlawful. This compounds the difficulty of articulating a basis for a legal challenge and supporting that claim through legal argument, because the claimant will not necessarily know the specific information available to decision-makers about conditions on the ground or their reasoning (whether well-founded or misguided) for declaring an emergency. Ontario's declaration of emergency in February 2022 is illustrative of the amount of detail shared with the public in support of the decision (reproduced in the section on Ontario below). This declaration simply declares that the criteria in the Act have been met without offering reasons supporting this statement.

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[12] Note that in Nunavut these specific statutory requirements are threshold criteria for a territorial emergency but not a local emergency.

[13] For example, *David Suzuki Foundation et al v. The AG for BC*, 2004 BCSC 620 (CanLII) at paras 142-146. See also *Humphries*, *supra* para 19.

[14] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, para 14; *Bricka, supra* para 46.

*Who decides* – Nearly every statute delegates the power to declare a provincial or territorial emergency to either the responsible Minister or Cabinet (Lieutenant Governor in Council). Ontario's legislation empowers both Cabinet and the Premier to declare a provincial emergency (s 7.0.1).

*Procedural Requirements* – Generally speaking, provincial and territorial legislation contain basic procedural requirements such as public notice and sunset clauses. With the exception of Newfoundland & Labrador, all provincial/territorial declarations of emergency must be immediately communicated to those affected (with the same requirement for terminating a state of emergency). In nearly all jurisdictions, the declaration of emergency must contain some minimum content: namely, describing the emergency and stating the area which is affected (with the exception of Newfoundland & Labrador and Yukon).[15] Unlike the federal *Emergencies Act*, provincial/territorial legislation does not require the decision-maker to consult with other jurisdictions or affected communities prior to declaring an emergency.[16]

Since emergency measures are, by definition, temporary, emergency legislation generally contains sunset clauses for the automatic expiry of declarations and their associated emergency measures, unless renewed. The timeframe of the sunset period varies from 10 days (Quebec) to 90 days (Yukon, Alberta for pandemics), but is most commonly 14 days. Exceptionally, Newfoundland's legislation does not contain a sunset clause and the emergency declaration continues until terminated by the Lieutenant Governor in Council or by an Act of the legislature (section 12).

*Accountability* – Provincial and territorial legislation differs significantly from the *Emergencies Act* in the approach to oversight and accountability. Provincial and territorial legislatures do not place a significant oversight role. Only Ontario and Quebec statutes provide that the legislature can cancel a state of emergency (Ontario s. 7.0.9 and Quebec s. 92) and the Newfoundland & Labrador statute recognizes that a state of emergency can be terminated by an Act of the legislature (s. 12). The Alberta legislation provides that only the legislature (and not the executive branch) can renew

[15] The exceptions to this 'minimum content' requirement are Newfoundland & Labrador (section 12) and Yukon (section 6), which only require notice of the declaration.

[16] The Nova Scotia *Emergency Management Act*, under which the Minister holds the power to declare a state of emergency, states the Minister should consult "where practical" with members of Cabinet (s 12). The Ontario legislation allows the Premier to act unilaterally and then consult with and (potentially) have the declaration confirmed by Cabinet (section 7.0.1(2)). The honour of the Crown would require that governments consult with Aboriginal peoples whose aboriginal and treaty rights may be adversely affected by the declaration of emergency and exercise of emergency powers (*Haida Nation*).

a provincial state of emergency (section 18(4)). The Ontario and Quebec statutes allow the legislature to renew states of emergency for longer periods of time than executive renewals (s. 7.0.7(3) and s. 89, respectively).

The Ontario and Quebec statutes also require that the Premier (Ontario) or Minister (Quebec) provide a report to the legislature on the use of emergency powers (s. 7.0.10 and s 98, respectively).

Parliamentary review committees and commissions of inquiry – accountability mechanisms that feature in the federal *Emergencies Act* – are not legislative requirements of any provincial or territorial emergency management laws.

In a recent pandemic decision, the Quebec Court of Appeal emphasized the importance of legislative oversight stating:

> "In our democratic tradition, it is not for the national assembly to exercise executive power, but it must nevertheless control its exercise. The decision to declare a state of emergency rests with the government and it is responsible to the national assembly. The latter 'may disallow by a vote the declaration of a health emergency and any renewal' (s. 122 *PSA*)." (*Bricka, supra* para 31, translated)

Finally, the O*ntario Emergency Management and Civil Procedures Act* also requires that the Premier, Minister or delegate shall report to the public regularly during an emergency (s.7.0.6).

In sum, this overview of provincial and territorial legislation has shown that, on the whole, provincial and territorial legislation is much more permissive than the federal *Emergencies Act* when it comes to the declaration of an emergency. While BC, Quebec and possibly Yukon could not have accessed emergency measures under their existing legislation in response to the February 2022 events, all other provinces and territories had this option which would have opened the possibility of using a broad range of emergency powers without the same level of procedural protection or oversight we see in the federal *Emergencies Act*.

## C. Municipal

Provincial and territorial emergency management statutes set out responsibilities of the municipalities for local emergency management, as well as a number of procedures and constraints on the exercise of municipal emergency powers. This section provides some detail on the legislative framework for municipal emergency powers. In short: legislation sets out responsibilities and powers for municipalities that

are similar to provinces/territories, but at a smaller scale and with strict oversight from the provincial/territorial government.

First, it's important to note that it is not just municipal governments who have jurisdiction over local emergency management. In some cases, provincial/territorial legislation also recognizes Métis settlement councils (Alberta), Inuit community councils (Newfoundland and Labrador), Indian bands where certain agreements are in place (Alberta, PEI), regional districts (BC, Newfoundland & Labrador), provincial parks (Manitoba) or other areas designated by the Minister.

Municipalities (or other specified local authorities) are responsible for local emergency management, which at a minimum typically requires establishing an emergency management 'group' or 'organization', appointing a lead or coordinator, and developing and maintaining an emergency plan. Often provincial/territorial legislation or regulations specify the required contents of a local emergency plan.

Provincial/territorial legislation provides for the declaration of a state of local emergency (SOLE) and a range of emergency powers that can be exercised by a local authority when it has declared a SOLE. In many instances the process, threshold for triggering a SOLE, and range of emergency powers are the same for local authorities as they are for the province (Alberta, BC, Manitoba, New Brunswick, Nova Scotia, PEI, Quebec and Saskatchewan). Relevant differences between provincial/territorial declarations and SOLEs in these provinces are: the requirement of local authorities to provide notice to the province and that the sunset period for SOLEs is shorter than for a provincial emergency (typically 7 days instead of 14).

In other jurisdictions, the legislation delegates a narrower scope of powers for municipalities than for the provincial/territorial government (Newfoundland & Labrador, Nunavut, Northwest Territories). And in Ontario and Yukon, the delegation of powers to the province/territory and to municipalities is framed in different ways, which complicates making a straightforward narrow vs broader diagnosis.[17]

Municipalities are often said to be 'creatures of the province' and, while this is widely critiqued as an oversimplification, it is reflected in the structure of provincial and

[17] In both instances, the legislation includes open-ended language that the municipality can make all orders necessary to implement their emergency plan (Ontario s 4, Yukon s 9(2)(c)).

territorial emergency management legislation.[18] Emergency management legislation is hierarchical and the province/territory wields considerable oversight and power in relation to municipalities. Generally speaking, the province/territory can: order changes to a local emergency plan, direct the municipality to carry out certain planning functions, require the municipality to activate its emergency plan, and cancel a SOLE at any time. In some jurisdictions, the province/territory must approve a renewal or extension of a SOLE.[19]

I did not conduct a survey of the use of SOLEs across Canada for this paper, due to time and space constraints. We do know that Ottawa declared a SOLE in response to the convoy (February 6, 2022). Ontario's *Emergency Management and Civil Protection Act* provides:

> 4 (1) The head of council of a municipality may declare that an emergency exists in the municipality or in any part thereof and may take such action and make such orders as he or she considers necessary and are not contrary to law to implement the emergency plan of the municipality and to protect property and the health, safety and welfare of the inhabitants of the emergency area (section 4(1)).

While no specific emergency orders were issued under the SOLE, the city's news release indicated that the SOLE facilitated government procurement (i.e. the ability to source needed supplies and services using atypical procedures and without issuing a competitive call for bids). It also played an important communicative role to convoy participants and to other levels of government. Ottawa's state of emergency was in effect until February 24th.

## D. Regional

In some jurisdictions, regional entities have specific roles and responsibilities assigned by provincial legislation. For instance, in Quebec, regional districts are required to have emergency plans with mandatory contents (s. 16) and they have considerable responsibility in overseeing the emergency management practices of

[18] Warren Magnusson, "Are Municipalities Creatures of the Provinces?" (2005) 39:2 Journal of Canadian Studies 5; Dan Henstra, ed, *Multilevel governance and emergency management in Canadian municipalities* (McGill-Queen's University Press, 2013); Alexandra Flynn, "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019) 56:2 Osgoode Hall Law Journal 271.

[19] BC s. 12(6), Manitoba s. 11(5), Nova Scotia s. 20, NWT s. 18, PEI s. 16, Saskatchewan s. 22.

local governments within their district (e.g. s. 59). In Newfoundland & Labrador, two or more local governments can join together to form a regional emergency management committee, develop a regional emergency management plan and, if needed, declare a regional emergency (s. 8). And in Alberta, the Act provides local governments the ability to delegate some or all of their emergency management powers to a regional services commission, under certain conditions (s. 11.3)

## E. Indigenous

Indigenous peoples exercise laws and jurisdiction over emergencies as well. How this authority is exercised by Indigenous peoples and received by Canadian institutions is a complicated web of inherent, negotiated and delegated jurisdiction as a result of Canada's colonial history and present. Indigenous peoples developed laws, governance and practices for living in relation with the environment, including hazards such as wildfire and floods, long before the arrival of settler governments.[20] With colonization came disease, and therefore experience with governing during devastating epidemics.[21] These laws and practices flow from the inherent jurisdiction of Indigenous peoples to govern themselves—to freely determine their political status, their representative institutions and to pursue their own goals.[22] Despite the severe disruption to the transmission of knowledge through residential schools and other colonial practices, Indigenous communities continue to draw on this deep experience with emergencies to address current situations such as wildfires and the COVID-19 pandemic.[23] Thus, Indigenous responses to emergencies may look different from the responses of federal, provincial/territorial or local governments (e.g. alternative evacuation measures that seek to avoid replicating conditions associated with residential schools, or stronger travel or border controls). These differences are

[20] Royal Commission on Aboriginal Peoples (Ottawa: Government of Canada, 1996) ch 4; Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus Dubber and Tatjana Hörnle eds, *Oxford Handbook on Criminal Law* (Oxford University Press, 2014).

[21] Crystal Verhaeghe, Emma Feltes and Jocelyn Stacey, *Dada Nentsen Gha Yatastɨg/ Tŝilhqot'in in the Time of COVID* (Tŝilhqot'in National Government, 2021) at 7.

[22] UN Declaration on the Rights of Indigenous Peoples, *supra*.

[23] E.g. *Dada Nentsen Gha Yatastɨg*, *supra*; Kira M. Hoffman et al, "The right to burn: barriers and opportunities for Indigenous-led fire stewardship in Canada" (2022) 7:1 FACETS 464, online <https://doi.org/10.1139/facets-2021-0062>; Waikaremoana Waitoki and Andre McLachlan, "Indigenous Māori responses to COVID-19: He waka eke noa?" (2022) 57:5 *International Journal of Psychology* 567, online: <**https://doi.org/10.1002/ijop.12849**>.

consistent with rights to self-determination and self-government, rights that are affirmed in federal legislation.[24]

In addition, specific roles and responsibilities over emergency management are often described in modern treaties and self-government agreements, arrangements negotiated between Indigenous peoples and Crown governments. In many instances, these agreements position Modern Treaty Nations/Self-Governing Nations as analogous to local governments. This means that Modern Treaty Nations/Self-Governing Nations have decision-making authority over their people and lands (to, for instance, declare a local emergency), but that provincial and federal law will override these decisions in the face of a conflict (e.g. Maa-Nulth Final Agreement (2011), s. 13.26.0; Sioux Valley Dakota Nation Governance Agreement (2013), ss 16.03; 46.05). Other agreements provide that where impacts of the emergency extend beyond treaty lands, then the provincial or territorial laws apply (e.g. *Yukon First Nations Self Government Act*, s 20). Under these modern treaties and self-governing agreements, Nations may enact and implement their own emergency management laws (e.g. Tsawwassen First Nation, *Emergency Management Act*, 2020).

Band Councils, created and imposed by the federal government under the federal *Indian Act*,[25] exercise powers delegated by the *Indian Act* over reserve lands and members. Parliament has not legislated on the specific matter of emergency management on reserves, leaving this matter to Band Councils to address through the exercise of delegated powers. The *Indian Act* delegates several powers that have particular salience to emergency management, e.g.:

> **81 (1)** The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
>
> > **(a)** to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
> >
> > **(b)** the regulation of traffic;
> >
> > **(c)** the observance of law and order …

[24] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.
[25] *Indian Act, RSC 1985*, c I-5.

Indigenous Services Canada (ISC) encourages Band Councils to devise their own emergency plans, and provides resources to do so.[26] ISC does not provide emergency services support directly, but rather has entered into bilateral agreements with the provinces to fund the provinces to provide emergency services on reserves.[27]

The Government of Canada recognizes that relationships with Indigenous peoples regarding emergency management are in a time of transition. On its website, ISC states:

> "In recognition of Indigenous peoples' right to self-determination, ISC is exploring opportunities to transition to new multilateral approaches where First Nations are included in emergency management as full and equal partners."[28]

Moreover, new tripartite arrangements specific to emergency management are emerging to support Indigenous nations in exercising fulsome leadership in emergency management in their territories and with respect to their people.[29]

Crown relationships with Indigenous peoples underscore the fact that emergency management is already multi-jurisdictional and that roles and responsibilities between governments are being actively redefined.

## III. Scope & Use of Provincial/Territorial Emergency Measures

This part of the paper examines the scope of emergency measures that can be authorized by provincial and territorial legislation. It first provides a general overview

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[26] Indigenous Services Canada, Roles and responsibilities during emergencies, online: <https://www.sac-isc.gc.ca/eng/1309372584767/1535120244606>.

[27] Brittany Collier, *Emergency Management on First Nations Reserves,* Publication No. 2015-58-E, online: <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2015-58-e.pdf>.

[28] Indigenous Services Canada, Roles and responsibilities during emergencies, online: <https://www.sac-isc.gc.ca/eng/1309372584767/1535120244606>.

[29] E.g., Collaborative Emergency Management Agreement between the Tŝilhqot'in Nation, Canada and British Columbia (2022), online: <https://www.tsilhqotin.ca/wp-content/uploads/2022/07/2022_Collaborative_Emergency_Management_Agreement.pdf>.

of these powers. Then it turns to a closer examination of the scope of powers in Ontario, Nova Scotia and Alberta, and their actual or potential application to a major public order disruption.

## A. Overview

It is useful to again contrast the features of provincial/territorial emergency management legislation to the federal *Emergencies Act*. Under the *Emergencies Act*, the federal government has discrete categories of emergency measures it can implement that are specific to each of the four categories of national emergency. For instance, the Act allows for orders that allow search and seizure of a person's house or property in response to an international emergency but not a public welfare emergency (such as a flood).

Most provincial and territorial legislation takes the opposite approach: it authorizes the executive branch to *take all measures necessary* to address the emergency. Alberta, BC, Manitoba, Nova Scotia, Ontario, Newfoundland & Labrador, Nunavut, NWT, PEI, Quebec, Saskatchewan and Yukon all have open-ended language, such as the above, used to delegate emergency powers to the executive.

The order in council issued in British Columbia in response to the 2018 wildfires is illustrative of this broad approach:

> IT IS HEREBY ORDERED pursuant to Section 9(1) of the Emergency Program Act (RSBC 1996, Ch.111) that a state of emergency exists in the Province of British Columbia due to the threat of interface fire affecting lives and property;
>
> IT IS FURTHER ORDERED that the Ministry of Public Safety and Solicitor General, Emergency Management BC, the Fire Commissioner and their employees, servants and agents; the RCMP "E" Division, and "local authorities" within the Province of British Columbia as defined in the Emergency Program Act, their employees, servants and agents, are empowered pursuant to Section 10(1) of the Emergency Program Act, *to do all acts and implement all procedures that are considered necessary to prevent, respond to or alleviate the effects of the emergency***.** (Ministerial Order No M326, Aug 15 2018; emphasis added)

The open-ended 'basket clause' language in provincial/territorial legislation needs to be interpreted in relation to the surrounding text of the statute (as we will see below,

with Ontario there are interpretative arguments that it is not as open-ended as it seems). However, in most cases the legislative text is clear that the list of enumerated powers is only illustrative and not exclusive.

All provincial and territorial statutes explicitly delegate powers to:

- Control travel and movement across the jurisdiction,
- Coordinate the provision of essential goods and services.

Almost all provincial and territorial statutes explicitly delegate powers to:

- Implement the emergency plan (all but Yukon),
- Order evacuation (all but Yukon),
- Cause the demolition of structures, trees, crops, etc. (all but Yukon),
- Require qualified persons to provide aid (all but Yukon and Ontario),
    - Ontario's legislation allows for authorizing "but not requiring" qualified persons to provide services (s 7.0.2(4)12)
- Acquire or use real or personal property (all but Quebec and Yukon),
    - Quebec's legislation limits this to acquiring supplies for disaster victims (s 93(10))
- Enter into any building or property without a warrant (all but Nunavut, Ontario, and Yukon)
- Fix prices for essential supplies or services, or prohibit price gouging (all but Manitoba, PEI, and Quebec)

It is also common for emergency legislation to permit conscription (Alberta, New Brunswick, NFLD, Nova Scotia, Nunavut, NWT, PEI, and Saskatchewan).

The following sections look at the powers delegated by the legislation in Ontario, Nova Scotia and Alberta specifically in relation to the types of measures that were exercised in relation to the convoy and blockades. These measures included: the prohibition and restriction of travel, movement and gathering in specific areas for specific purposes; removal and detention of property (i.e. trucks); gathering information about participants in specified activities; stopping or slowing the financing and provisioning of specified activities; and securing the flow of essential goods and provision of essential services. We begin with the two jurisdictions that issued emergency measures in response to the convoy/blockades (Ontario and Nova Scotia) and then turn to Alberta's legislation. Finally, it is important to note the limits of provincial jurisdiction under the Canadian constitution: provinces cannot directly regulate banks nor movement across international borders, which are matters of federal jurisdiction,

and they cannot regulate activities that are outside of their provincial boundaries (e.g. property in another province).

## B. Ontario

The Premier of Ontario declared a provincial state of emergency on February 11, 2022. Ontario was the only province to declare an emergency in response to the trucker convoy. I am not familiar with any other instance in which a province or territory has declared a state of emergency in response to a public order disturbance such as this. The entirety of the declaration reads:

> WHEREAS the interference with transportation infrastructure, including essential trade corridors, and other critical infrastructure that is currently occurring in locations throughout the Province prevents the movement of people and the delivery of essential goods and services and constitutes a danger of major proportions that could result in serious harm to persons and substantial damage to property;
>
> AND WHEREAS the criteria set out in subsection 7.0.1 (3) of the Act have been satisfied;
>
> NOW THEREFORE, an emergency is hereby declared pursuant to section 7.0.1 of the Act in the whole of the Province of Ontario.[30]

This declaration was confirmed by the the Lieutenant Governor in Council (LGIC) on February 12th.[31] Also on February 12, the province issued the emergency order Ontario Regulation 71/22 (Critical Infrastructure and Highways), [32] which was amended on February 14. The provincial emergency ended on February 23 and the emergency order was revoked on April 15, 2022.

The Critical Infrastructure and Highways emergency regulation temporarily did four things:

1. Defined ‘critical infrastructure’ (a definition which included 400-highways, international and interprovincial border crossings and other types of infrastructure);

[30] *Declaration of Emergency*, O Reg 69/22.
[31] *Confirmation of Declaration of Emergency*, O Reg 70/22.
[32] *Critical Infrastructure and Highways*, O Reg 71/22.

2. Prohibited individuals from impeding access to or impeding the ordinary use of *critical infrastructure* (including through the use of motor vehicles) and prohibited knowingly aiding individuals from doing so;
3. Prohibited individuals from impeding access to or impeding the ordinary use of *any highway, walkway or bridge* where it would:
    - (i) prevent delivery of essential services or goods,
    - (ii) seriously disrupt ordinary economic activity, or
    - (iii) cause serious interference with safety, health or well-being of members of the public;
4. Granted enforcement powers:
    - Police can order individuals to cease the impugned activity,
    - Police or the Registrar can order owners/operators to remove impugned vehicles,
    - If owner/operator does not remove vehicle when ordered, police can remove and detain vehicle,
    - Registrar can cancel or suspend the license, plate portion of a motor vehicle permit or the CVOR certificate.

The Critical Infrastructure and Highways regulation appears to fall within the scope of powers set out in Ontario's *Emergency Management and Civil Protection Act*, specifically the power to regulate or prohibit travel in relation to a specified area. A number of additional powers appear relevant to collecting information and removing trucks from blockades. Below is the scope of powers provision of the Act, with relevant phrases bolded:

Scope of Measures, Ontario

7.0.2 (4) In accordance with subsection (2) and subject to the limitations in subsection (3), the Lieutenant Governor in Council may make orders in respect of the following:

1. Implementing any emergency plans formulated under section 3, 6, 8 or 8.1.

2. **Regulating or prohibiting travel or movement to, from or within any specified area**.

3. Evacuating individuals and animals and **removing personal property from any specified area** and making arrangements for the adequate care and protection of individuals and property.

4. Establishing facilities for the care, welfare, safety and shelter of individuals, including emergency shelters and hospitals.

5. Closing any place, whether public or private, including any business, office, school, hospital or other establishment or institution.

6. To prevent, respond to or alleviate the effects of the emergency, constructing works, restoring necessary facilities and appropriating, using, destroying, removing or disposing of property.

7. Collecting, transporting, storing, processing and disposing of any type of waste.

8. Authorizing facilities, including electrical generating facilities, to operate as is necessary to respond to or alleviate the effects of the emergency.

9. **Using any necessary goods, services and resources within any part of Ontario, distributing, and making available necessary goods, services and resources and establishing centres for their distribution.**

10. **Procuring necessary goods, services and resources**.

11. Fixing prices for necessary goods, services and resources and prohibiting charging unconscionable prices in respect of necessary goods, services and resources.

12. **Authorizing, but not requiring, any person, or any person of a class of persons, to render services of a type that that person, or a person of that class, is reasonably qualified to provide**.

13. **Subject to subsection (7), requiring that any person collect, use or disclose information that in the opinion of the Lieutenant Governor in Council may be necessary in order to prevent, respond to or alleviate the effects of the emergency**.

14. Consistent with the powers authorized in this subsection, **taking such other actions or implementing such other measures** as the Lieutenant Governor in Council considers necessary in order to prevent, respond to or alleviate the effects of the emergency.

When making orders under section 7.0.2(4), the LGIC must attend to further requirements of the Act. Orders must be made in accordance with the purpose provision—to promote the public good in a manner subject to the *Charter* (s. 7.0.2(1)); they must be measures that the LGIC reasonably believes will be effective and are a reasonable alternative to other measures (s. 7.0.2.(2)). And the implementation of

emergency measures must be limited in their intrusiveness, and applied in areas of the province where necessary and only for as long as needed (s 7.0.2(3)).

In its report on the use of its emergency legislation, Ontario states that it addressed the financing of the convoy through alternate means (a Court order to freeze the distribution of donations), and that existing regulations under the *Highway Traffic Act* had not been sufficient to address the convoy and blockades.[33] The province further states that the Critical Infrastructure and Highways regulation "provided additional tools for law enforcement to address obstructions."

No legal challenge was brought to the use of the provincial emergency powers. As bolded above, the legislation clearly empowers measures that regulate movement and travel, permits the removal of personal property from an affected area (e.g. trucks), using or procuring goods (e.g. tow trucks) and authorizing people to provide a service (e.g. operating tow trucks). In addition, enforcement measures such as allowing the cancellation of a driver's license are rationally connected to the prohibitions under the emergency order and therefore seem to fit comfortably within clause 14.

There are two obvious limitations under the provincial statute to the events at hand: Ontario could not compel tow truck drivers to provide services in the emergency response, and Ontario's reach only extends to its own provincial boundaries (i.e. it cannot cancel out of province licenses).

## C. Nova Scotia

While Nova Scotia did not declare that convoy and blockades constituted an emergency, it was the first province to exercise emergency powers in response to the convoy. At the time of the convoy, Nova Scotia still had in place a provincial state of emergency declared for the COVID-19 pandemic.

Under this existing state of emergency, on January 28, 2022 the province issued an emergency directive prohibiting protesters from blockading specific areas and prohibiting the financing, organizing aid and encouragement of blockades.

The province's press release states:

[33] Report on Ontario's Declared Provincial Emergency from February 11, 2022 to February 23, 2022 (March 31, 2022), online: <https://www.ontario.ca/page/report-ontarios-declared-provincial-emergency-february-11-2022-february-23-2022>.

> "The Province today, January 28, issued a directive under the Emergency Management Act prohibiting protesters from blockading Highway 104 near the Nova Scotia-New Brunswick border.
>
> The directive also applies to people who stop or gather alongside Highway 104, the Nova Scotia- New Brunswick border, or at the Cobequid Pass toll area in support of the 2022 Freedom Convoy, the Atlantic Hold the Line event, or others organized to interfere with traffic. Allowing people to gather in those areas would put themselves and others at risk.
>
> Individuals and corporations could be fined for failing to comply with the directive. Individuals or other entities who finance, organize, aid or encourage blocking the highway could also be fined."[34]

This prohibition was later extended to cover all roads in Nova Scotia when, on February 4th, the province issued a second emergency directive "prohibiting protesters from blockading or disrupting traffic on any road, street or highway in Nova Scotia."[35]

The Nova Scotia *Emergency Management Act* takes an inclusive approach to authorizing emergency powers, meaning that the scope of measures listed are illustrative and further measures not specified under the Act can be issued. Key phrases are bolded in the box below:

Scope of Measures, Nova Scotia

Section 14 …

the Minister may, during the state of emergency, in respect of the Province or an area thereof, … **do everything necessary** for the protection of property and the health or safety of persons therein and, **without restricting the generality of the foregoing**, may

(a) cause an emergency management plan or any part thereof to be implemented;

[34] "Highway border blockades banned under new order" (28 January 2022), Emergency Management Office, online: <https://novascotia.ca/news/release/?id=20220128011>.
[35] "New order bans blockades of provincial highways, roads and streets" (4 February 2022), Emergency Management Office, online: <https://novascotia.ca/news/release/?id=20220204008>.

(b) **acquire or utilize or cause the acquisition or utilization of personal property by confiscation or any means considered necessary**;

(c) **authorize or require a qualified person to render aid of such type as that person may be qualified to provide**;

(d) **control or prohibit travel to or from an area or on a road, street or highway**;

(e) **provide for the maintenance and restoration of essential facilities, the distribution of essential supplies and the maintenance and co-ordination of emergency medical, social and other essential services**;

(f) cause or order the evacuation of persons and the removal of livestock and personal property threatened by an emergency and make arrangements for the adequate care and protection thereof;

(g) authorize the entry by a person into any building or upon land without warrant;

(h) cause or order the demolition or removal of any thing where the demolition or removal is necessary or advisable for the purpose of reaching the scene of an emergency, of attempting to forestall its occurrence or of combating its progress;

(i) **order the assistance of persons needed to carry out the provisions mentioned in this Section**;

(j) regulate the distribution and availability of essential goods, services and resources;

(k) authorize and make emergency payments;

(l) assess damage to any works, property or undertaking and the costs to repair, replace or restore the same;

(m) assess damage to the environment and the costs and methods to eliminate or alleviate the damage.

The emergency directives prohibiting blockading or disrupting the flow of traffic anywhere in the province would seem to fall squarely within paragraphs (d) and (e) of the Act. Moreover, additional powers could have been accessed, if needed, to require tow truck driver assistance to clear vehicles.

This emergency directive was not challenged in court, leaving questions about its legality unanswered. In particular, the connection between the specific emergency measure introduced (prohibiting highway blockades/interference) and the original

declaration of a state of emergency (the COVID-19 pandemic) is arguably tenuous. The two presumably have quite different purposes: the state of emergency is to slow the spread of disease and protect public health whereas the emergency measure was to prevent blockades that interfere with the flow of goods/services through major travel corridors. In addition, the Nova Scotia prohibition appears to be considerably broader than the one issued by the province of Ontario. Ontario's Critical Infrastructure and Highways regulation contained a specific definition of what it meant to unlawfully impede a highway (road, walkway, etc.) and explicitly excluded 'an impediment that is trivial, transient, or minor in nature' (s 3). Such specificity was not contained in the public announcement of the Nova Scotia emergency directive.

## D. Alberta

The province of Alberta did not declare an emergency in relation to the blockades, though in principle such a major event could have met the legislative definition, allowing access to a wide range of emergency powers:

> Definition of emergency: "emergency" means an event that requires prompt co-ordination of action or special regulation of persons or property to protect the safety, health or welfare of people or to limit damage to property or the environment. (s 1(1)(f))

Premier Kenney stated that it was not necessary to declare a provincial emergency because it would not add to enforcement powers already available under the province's *Critical Infrastructure Defence Act*[36] (though, no charges were laid under this legislation).[37]

It does seem that additional powers would have been available under Alberta's *Emergency Management Act,* which takes an inclusive approach to authorizing the use of emergency powers. Specifically, emergency powers could have been used to obtain tow trucks or other equipment within the province to remove blockading vehicles and the Act clearly allows for the compulsion of delivering essential services

[36] Sarah Turnbull, "Alberta not following Ontario's lead with state of emergency over protest, blockade: Kenney" (11 Feb 2022) CTV News, online: <https://www.ctvnews.ca/canada/alberta-not-following-ontario-s-lead-with-state-of-emergency-over-protest-blockade-kenney-1.5778391>.

[37] Rob Breakenridge, "Coutts blockade proves the sham that is Alberta's infrastructure protection law" (15 Feb 2022), Calgary Herald, online: <https://calgaryherald.com/opinion/columnists/breakenridge-coutts-blockade-proves-the-sham-that-is-albertas-infrastructure-protection-law>.

(e.g. requiring tow truck drivers to clear trucks). And further enforcement powers, such as the cancellation of drivers' licenses of non-compliant individuals, could have also been authorized through this Act. Key phrases and paragraphs are bolded in the box below:

Scope of Measures, Alberta

**19(1)** On the making of the declaration and for the duration of the state of emergency, **the Minister may do all acts and take all necessary proceedings including** the following:

(a) put into operation an emergency plan or program;

(b) authorize or require a local authority to put into effect an emergency plan or program for the municipality;

(c) **acquire or utilize** any real or personal property considered necessary to prevent, combat or alleviate the effects of an emergency or disaster;

(d) **authorize or require or make an order to authorize or require any qualified person to render aid of a type the person is qualified to provide**;

(e) **control or prohibit or make an order to control or prohibit travel to or from any area of Alberta;**

(f) **provide for or make an order to provide for the restoration of essential facilities and the distribution of essential supplies and provide, maintain and co-ordinate or make an order to provide, maintain and co-ordinate emergency medical, welfare and other essential services in any part of Alberta**;

(g) order the evacuation of persons and the removal of livestock and personal property from any area of Alberta that is or may be affected by a disaster and make arrangements for the adequate care and protection of those persons or livestock and of the personal property;

(h) authorize the entry into any building or on any land, without warrant, by any person in the course of implementing an emergency plan or program;

(i) cause the demolition or removal of any trees, structures or crops if the demolition or removal is necessary or appropriate in order to reach the scene of a disaster, or to attempt to forestall its occurrence or to combat its progress;

(j) **procure** or fix prices or make an order to procure or fix prices for food, clothing, **fuel, equipment**, medical supplies, or other essential supplies **and the use of any property, services, resources or equipment within any part of Alberta for the duration of the state of emergency**;

(k) authorize the conscription or make an order for the conscription of persons needed to meet an emergency.

**(1.1) In addition to any other orders the Minister is authorized to make under this Act, the Minister may make any order necessary, in the Minister's opinion, to lessen the impact of the emergency.**

While an emergency was not declared and these powers were not used, it is useful to note another key difference between Alberta's *Emergency Management Act* and the *Critical Infrastructure Defence Act*: emergency measures are intended to be temporary in nature, whereas the prohibitions on movement and assembly in the *Critical Infrastructure Defence Act* are permanent prohibitions.

## IV. Mechanisms for Inter-Jurisdictional Coordination

Federal, provincial and territorial emergency laws do not operate in separate siloes. Operationally, governments often work together to coordinate on emergency management. Legislation and other formalized arrangements often describe and authorize inter-jurisdictional coordination. Even the *Emergencies Act*, with its narrow temporal focus on immediate response, anticipates some degree of coordination between federal and provincial governments. As noted above, the Act requires the federal government to consult with provincial counterparts prior to declaring a national emergency (e.g. s 25). And it requires that emergency measures are implemented in a coordinated fashion with provincial measures (e.g. s 19). However, the *Emergencies Act* is not the orienting framework for interjurisdictional coordination. This is a primary role of the federal *Emergency Management Act*.[38] Within and beyond the federal *Emergency Management Act*, numerous mechanisms for interjurisdictional coordination exist in Canada. I provide an outline of these mechanisms in this section.

[38] Canada, Parliament, *House of Commons Debates,* 39th Parl, X Sess, Vol 141, No 093 (7 December 2006) at 1719.

## A. Background Assumptions About Coordination

In order to understand interjurisdictional coordination, it is important to note the scalar or "pyramidal" approach to emergency management in Canada.[39] The working assumption is that emergencies will be addressed by the most immediate authority – initially the individual or household (hence the recommendation for each household to have a 72-hour emergency kit)[40]—and then the local authority. Regional bodies, provinces, territories and the federal government will only step in once local capacity has been exceeded.[41] Indeed, researchers estimate that 80% of emergencies are handled solely at the local level.[42] An Auditor General of Canada's report found that emergencies happen more frequently on reserves than elsewhere, in part due to poor socio-economic conditions, lack of capacity, and inadequate funding.[43] Local authorities and Indigenous governing bodies thus play a central role in emergency management: when the focus is on emergency response, they are first responders. When the focus widens to prevention, mitigation and disaster risk reduction, they still play a central role in building resilient communities.[44]

As Juillet and Koji note, this 'scaling up' approach to emergency management—whereby other governments step in only when local capacity is exceeded—requires excellent multi-level coordination (at 31-32). Unfortunately, effective coordination has long been a challenge identified in Canadian emergency management, even after

[39] Luc Juillet and Junichiro Koji, "Policy Change and Constitutional Order: Municipalities, Intergovernmental Relations, and the Recent Evolution of Canadian Emergency Management Policy" in Dan Henstra ed, *Multilevel governance and emergency management in Canadian municipalities* (McGill-Queen's University Press, 2013) 25 at 31-2.

[40] *Your Emergency Preparedness Guide* (Ottawa: Public Safety Canada, 2012), online: <https://www.getprepared.gc.ca/cnt/rsrcs/pblctns/yprprdnssgd/yprprdnssgd-eng.pdf>.

[41] *An Emergency Management Framework for Canada*, 3d ed (Ottawa: Public Safety Canada, 2017), online <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2017-mrgnc-mngmnt-frmwrk/2017-mrgnc-mngmnt-frmwrk-en.pdf> at 4.

[42] Juillet and Koji, *supra* at 31.

[43] Office of the Auditor General of Canada, Chapter 6 – Emergency Management on Reserves (Fall, 2013), online: <https://publications.gc.ca/collections/collection_2013/bvg-oag/FA1-2013-2-6-eng.pdf>; Brittany Collier, *Emergency Management on First Nations Reserves,* Publication No. 2015-58-E.

[44] Juillet and Koji, *supra* at p 33-4.

significant legislative and policy reforms were undertaken post-9/11, including the enactment of Canada's *Emergency Management Act*.[45]

Much federal-provincial-territorial coordination work takes place through policy frameworks and working groups. Since 2007, Canada has relied on a policy document named, *An Emergency Management Framework for Canada* (last updated in 2017), with associated strategies and action plans.[46] These documents set out strategic priorities, such as building a public safety broadband network to facilitate effective communication amongst emergency responders across the country. Researchers point out that, while these policy frameworks have improved coordination across federal-provincial-territorial governments, coordination on the ground is in fact hampered by the absence of municipalities and Indigenous governing bodies in these arrangements.[47]

This scalar approach to emergency management is noticeably hierarchical, both in terms of responsibility but also in terms of control. This is especially true when it comes to municipal-provincial coordination. As we saw above, most provincial emergency management legislation gives the province significant control over local emergency management, including the ability to direct a local authority to declare an emergency and to cancel a local emergency and take over emergency response when an event exceeds the capacity of the local authority. These hierarchical arrangements are expanded further in instances where regional entities play a formalized role: local governments are overseen (and potentially directed by) regional entities, and the regional entities are overseen (and potentially directed by) the province.

Interestingly, the *Emergency Services Act* of Newfoundland & Labrador replicates this hierarchical arrangement with respect to provincial-federal relations. It has a unique legislated requirement to respond to a request by Canada. Section 13 of this statute reads:

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[45] Juillet and Koji, *supra* at p 26; Standing Senate Committee on National Security and Defence, *National Emergencies: Canada's Fragile Front Lines* (March 2004), online: <https://sencanada.ca/en/content/sen/committee/373/defe/rep/rep03vol1-e>; Chief Maureen Chapman and George Abbott, *Addressing the New Normal: 21st Century Disaster Management in British Columbia* (2018), recommendations 18-28, online: <https://www2.gov.bc.ca/assets/gov/public-safety-and-emergency-services/emergency-preparedness-response-recovery/embc/bc-flood-and-wildfire-review-addressing-the-new-normal-21st-century-disaster-management-in-bc-web.pdf>.

[46] Emergency Management Strategy for Canada: Toward a Resilient 2030 (2019); Federal, Provincial, and Territorial Emergency Management Strategy Interim Action Plan 2021-22.

[47] Juillet and Koji, *supra*.

> 13. Where the Governor in Council has declared an emergency under the Emergencies Act (Canada), the Lieutenant-Governor in Council shall, where requested by the Governor in Council, order that the provisions of this Act with respect to emergency response be activated to the extent that is appropriate and practicable.

It is possible to imagine different—more horizontal arrangements—for emergency management, whereby emergencies trigger all governments to come to the table and work collaboratively in an emergency response. While these arrangements have been proposed and advocated for in the law reform process, the hierarchical and formal authority model baked into Canadian federalism is what continues to be reflected in legislative definitions of roles and responsibilities.[48]

## B. Federal Aid

In practice, emergency managers see the federal government's role as primarily financial.[49] The federal government frequently provides financial aid and resources (often military resources) to assist with emergency response and recovery. Sections 4 and 7 of the federal *Emergency Management Act* empower the federal Minister to provide assistance—financial and otherwise—if the province has requested it. Through Disaster Financial Assistance Arrangements (a program run by Public Safety Canada),[50] the federal government and the provinces/territories have a set formula for sharing the cost of disaster financial assistance.

Resources are also often provided through the Canadian Armed Forces under the "public service" provision of the *National Defence Act*.[51] The Canadian Forces have a standing disaster assistance program, Operation LENTUS, which deploys personnel and equipment when needed in disaster response.[52] There were seven deployments in 2021 to disasters across the country.

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[48] Juillet and Koji, *supra*.

[49] Malcolm Grieve and Lori Turnbull, "Emergency Planning in Nova Scotia" in Dan Henstra ed, *Multilevel governance and emergency management in Canadian municipalities* (McGill-Queen's University Press, 2013) 62 at 66.

[50] Public Safety Canada, "Disaster Financial Assistance Arrangements (DFAA)", online: <https://www.publicsafety.gc.ca/cnt/mrgnc-mngmnt/rcvr-dsstrs/dsstr-fnncl-ssstnc-rrngmnts/index-en.aspx>.

[51] *National Defence Act*, RSC 1985, c N-5, s.273.6.

[52] Government of Canada, Operation LENTUS, online: <https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/operation-lentus.html>

The *National Defence Act* also creates the ability for provincial attorneys general to call "service in aid of the civil power". The Canadian Armed Forces must respond to such a request, which can be made by a province if a riot or disturbance of the peace exceeds their capacity to respond. The aid of the civil power was used by the province of Quebec during the FLQ crisis in 1970 and again during the Oka crisis in 1990, but to my knowledge has not been invoked since.

## C. Agreements & Mutual Aid

In contrast to aid that is called in in the midst of emergency response, emergency management legislation also authorizes a proactive approach, enabling responsible ministers to enter into agreements with other jurisdictions for the purposes of emergency management. These agreements are often mutual aid agreements, which commit to reciprocal obligations in the event that one or the other jurisdiction experiences an emergency. They are formalized agreements for sharing equipment and supplies, providing personnel, information and other assistance. For instance, Canada's current agreement with the United States on emergency management was entered into in 2009 and includes arrangements for mutual aid (enabled by section 5, *Emergency Management Act*).

Most provincial and territorial legislation also enables municipalities to enter into mutual aid agreements with each other or with regional entities. Saskatchewan's *Emergency Planning Act* allows the Minister to designate "mutual aid areas", the purpose of which is described as:

> (3) The purpose of establishing a mutual aid area is to pool the resources of local authorities, regional park authorities and the Crown in order to improve their emergency response capabilities with respect to regional parks, provincial parks designated pursuant to The Parks Act and municipalities located within the mutual aid area. (section 11)

Researchers have observed the historic and ongoing importance of mutual aid arrangements, which predate their formalized incorporation into emergency management.[53] Others have observed that intergovernmental collaboration is often the strongest between local governments and more developed than vertical

[53] Miriam Belblidia and Chenier Kliebert, "Mutual Aid: A Grassroots Model for Justice and Equity in Emergency Management" (2022) *Community, Environment and Disaster Risk Management,* 25, 11–30.

collaboration between different levels of government.[54] Tripartite emergency management collaboration between the federal government, provincial governments and Indigenous governing bodies are also now emerging and are in their early stages of implementation.[55]

These interjurisdictional agreements thus go hand-in-hand with emergency plans, an essential feature of emergency management. Both require government officials to plan and prepare in advance for emergencies. This means that important details about interjurisdictional coordination are not found in the legislation or regulations, but are rather in the individualized and context-specific arrangements between governments.

## Conclusion

This paper has provided an overview of the inter-jurisdictional landscape of emergency management in Canada. The federal *Emergencies Act* is an important piece of legislation and its use needs to be carefully scrutinized. But the *Emergencies Act* and its use cannot be understood in isolation. The federal role in emergency management is multi-faceted and declarations of emergency under the *Emergencies Act* are unique.

Through the above review of provincial and territorial emergency management legislation, we can see that the *Emergencies Act* is distinctive in how it delegates emergency powers to the executive in a much more constrained fashion than exists at the provincial and territorial level. Accordingly, if one is concerned about the exceptional powers enabled by the *Emergencies Act*, then one should be at least as concerned about exceptional powers enabled at the provincial/territorial level which are broader, have fewer formalized mechanisms for accountability and oversight and are exercised with greater regularity.

At the same time, it is important to recognize that governments interact in a variety of ways outside of 'scalar' declarations of emergency. Emergency plans and intergovernmental agreements *should* specify how governments will coordinate and support one another when faced with a range of foreseeable threats. Moreover, the federal government plays a unique supporting role – as articulated in its *Emergency Management Act* and *National Defence Act* – of providing resources upon request to

[54] Grieve and Turnbull, *supra* at 70-71.
[55] Collaborative Emergency Management Agreement, *supra*.

the provinces and territories. This supporting role does not require the federal government to declare a state of emergency or exercise its emergency powers.

Emergency management in Canada is a decidedly interjurisdictional endeavour with effective and seamless coordination across governments remaining both an enduring goal and persistent challenge. This challenge is reiterated after every major emergency, emergencies which occur with regularity across Canada. Thus, lessons learned from the heightened scrutiny of the *Emergencies Act* should be carried forward to emergency management at all levels of government.

# Appendix 1: Provincial and Territorial States of Emergency 2017-2022

| **Province/Territory** | **Declaration of Emergency** |
|---|---|
| British Columbia | Pacific Northwest Floods – November 2021<br>Wildfires – July 2021<br>COVID-19 – March 2020<br>Wildfires – July 2018<br>Wildfires – July 2017 |
| Alberta | -- |
| Saskatchewan | COVID-19 – March 2020 |
| Manitoba | COVID-19 – March 2020<br>Snowstorm – October 2019 |
| Ontario | Convoy & Blockades – February 2022<br>COVID-19 – March 2020 |
| Quebec | -- |
| New Brunswick | COVID-19 – March 2020 |
| Nova Scotia | COVID-19 – March 2020<br>Hurricane Dorian – September 2019 (province declared a local emergency) |
| Prince Edward Island | -- |
| Newfoundland & Labrador | -- |
| Yukon | COVID-19 – March 2020 |
| Northwest Territories | COVID-19 – March 2020 |
| Nunavut | -- |

## Appendix 2. Comparative Features of Provincial and Territorial Emergency Powers*

*Adapted and updated from online supplement to Craig Forcese and Leah West, *National Security Law,* 2d ed (Irwin Law, 2020).

| **Province** | **Definition of emergency** | **Statutory Decision-Maker** | **Maximum Duration** | **Power of Renewal** | **Accountability/ Oversight of emergency powers** |
|---|---|---|---|---|---|
| Alberta[56] | "[A]n event that requires prompt co-ordination of action or special regulation of persons or property to protect the safety, health or welfare of people or to limit damage to property or the environment" | Lieutenant Governor in Council (LGiC) | 28 days (90 days for a pandemic) | May be continued by legislative resolution | None specified |
| British Columbia[57] | "[A] present or imminent event or circumstance that (a) is caused by accident, fire, explosion, technical failure or the forces of nature, and (b) requires prompt coordination of action or special regulation of persons or property to protect the health, safety or welfare of a person or to limit damage to property" | LGiC or Minister | 14 days | Renewal by LGiC for additional periods of up to 14 days | None specified |
| Manitoba[58] | The minister may declare a state of emergency "[i]n the event of a major | Minister | 30 days | Renewal by LGiC for additional | None specified |

[56] *Emergency Management Act*, RSA 2000, c E-6.8.
[57] *Emergency Program Act*, RSBC 1996, c 111.
[58] *The Emergency Measures Act*, CCSM c E80.

| | | | | | |
|---|---|---|---|---|---|
| | emergency or disaster". A major emergency is defined as "an emergency that is not a routine emergency".<br><br>An emergency is "a present or imminent situation or condition that requires prompt action to prevent or limit (a) the loss of life, or (b) harm or damage to the safety, health or welfare of people, or (c) damage to property or the environment."<br><br>A disaster is "a calamity, however caused, which has resulted in or may result in (a) the loss of life, or (b) serious harm or damage to the safety, health or welfare of people, or (c) wide-spread damage to property or the environment". | | | periods of up to 30 days | |
| New Brunswick [59] | "[A] present or imminent event in respect of which the Minister or municipality, as the case may be, believes prompt coordination of action or regulation of persons or property must be undertaken to protect property, the environment or the health, safety or welfare of the civil population" | Minister | 14 days | Renewal by the minister, with approval of the LGiC, for additional periods of 14 days | None specified |

[59] *Emergency Measures Act*, RSNB 2011, c 147.

| | | | | | |
|---|---|---|---|---|---|
| Newfound-land & Labrador[60] | "[A] real or anticipated event or an unforeseen combination of circumstances which necessitates the immediate action or prompt co-ordination of action as declared or renewed by the lieutenant governor in council, the minister, a regional emergency management committee or a council." | LGiC | Until terminated | N/A | Minister must report to Cabinet on actions taken (while the emergency is ongoing) |
| Nova Scotia[61] | "[A] present or imminent event in respect of which the Minister or a municipality, as the case may be, believes prompt co-ordination of action or regulation of persons or property must be undertaken to protect property or the health, safety or welfare of people in the Province" | Minister | 14 days | Renewal by the minister, with approval of the LGiC, for additional periods of 14 days | None specified |
| Nunavut[62] | "[A] present or imminent situation or event that is seriously affecting or could seriously affect the health, safety or welfare of persons or is substantially damaging or could substantially damage property" | Minister | 14 days | Renewal by the minister for periods of up to 14 days | None specified |

[60] *Emergency Services Act*, SNL 2008, c E-9.1.
[61] *Emergency Management Act*, SNS 1990, c 8
[62] *Emergency Measures Act*, SNu 2007, c.10.

| | | | | | |
|---|---|---|---|---|---|
| Northwest Territories [63] | "[A] current or imminent event that requires prompt coordination of action of special regulation of persons or property in order to protect the safety, health or welfare of people or to limit or prevent damage to property or the environment" | Minister | 14 days | Renewal by the minister | None specified |
| Ontario[64] | "[A] situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise." | LGiC or Premier (in urgent circumstance) | Declaration by the LGiC = in 14 days<br><br>Declaration by Premier = 72 hours to be confirmed by the LGiC | Renewal by the LGiC for one additional period of 14 days. On the Premier's recommendation, the Legislature can extend the emergency by periods of up to 28 days. | Legislature can terminate a declaration of emergency at any time.<br>Premier must table a report in the Legislature within 120 days after the declaration of emergency has been terminated. |
| Prince Edward Island[65] | "[A] present or imminent event in respect of which the Minister or municipality believes prompt co-ordination of action or special regulation of persons or property must be undertaken to protect | Minister | 14 days | Renewal by the minister, with approval of the LGiC | None specified |

[63] *Emergency Management Act*, SNWT 2018, c 17.
[64] *Emergency Management and Civil Protection Act*, RSO 1990, c E.9.
[65] *Emergency Measures Act*, RSPEI 1988, c E-6.1.

| | | | | | |
|---|---|---|---|---|---|
| | the health, safety or welfare of people or to limit damage to property" | | | | |
| Quebec[66] | 'Major disaster': "[A]n event caused by a natural phenomenon, a technological failure or an accident, whether or not resulting from human intervention, that causes serious harm to persons or substantial damage to property and requires unusual action on the part of the affected community, such as a flood, earthquake, ground movement, explosion, toxic emission or pandemic" | Government (where government cannot meet, minister may declare emergency for a maximum of 48 hours) | 10 days | Renewal by the government for additional periods of up to 10 days, or with the consent of the legislature, for maximum periods of up to 30 days | National Assembly can terminate declaration at any time.<br>Provincial ('national') emergency: Minister must provide the National Assembly with a report within 3 months after the emergency has ended. |
| Saskat-chewan[67] | "(i) a calamity caused by (A) accident; (B) act of war or insurrection; (C) terrorist activity as defined in the *Criminal Code*; (D) forces of nature;<br>or (ii) a present or imminent situation or condition, including a threat of terrorist activity as defined in the *Criminal Code*, | LGiC | 14 days | May be renewed by the LGiC for additional periods of 14 days | None specified |

[66] *Civil Protection Act*, CQLR c S-2.3.
[67] *The Emergency Planning Act*, SS 1989-90, c E-8.1.

| | | | | | |
|---|---|---|---|---|---|
| | that requires prompt action to prevent or limit: (A) the loss of life; (B) harm or damage to the safety, health or welfare of people; or (C) damage to property or the environment" | | | | |
| Yukon[68] | An emergency is a "a peacetime disaster or a war emergency".<br>A peacetime disaster is: "a disaster, real or apprehended, resulting from fire, explosion, flood, earthquake, landslide, weather, epidemic, shipping accident, mine accident, transportation accident, electrical power failure, nuclear accident or any other disaster not attributable to enemy attack, sabotage or other hostile action whereby injury or loss is or may be caused to persons or property in the Yukon".<br>A war emergency is "the state existing as a result of a proclamation issued by Her Majesty or under authority of the Governor in Council that war, invasion or insurrection, real or apprehended, exists". | Commissioner of Yukon in Executive Council | 90 days | Commissioner in Executive Council may extend emergency (*does not say for how long) | None specified |

[68] *Civil Emergency Measures Act*, RSY 2002, c 34.

# The Reasonable Grounds to Believe Standard in Canadian Criminal Law

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Section 17 of the *Emergencies Act* provides that the Governor in Council may declare a state of emergency if the Governor in Council "believes, on reasonable grounds" that a state of emergency exists that necessitates the taking of special temporary measures.[1]

The power to declare a state of emergency justifying extraordinary measures is therefore subject to the standard of "reasonable grounds to believe" that such a situation exists. The *reasonable grounds to believe* standard is central to the exercise of several powers in criminal matters, including the powers of justices of the peace to issue judicial authorizations, such as a search warrant[2] or general warrant.[3] This standard also pertains to certain police powers, especially the power to make a warrantless arrest.[4] This expression ("to believe on reasonable grounds") is also used in substantive law, for example as a requirement for certain defences, especially self-defence ("to believe on reasonable grounds" that one is being assaulted)[5] or the defence of necessity ("to believe on reasonable grounds" that there is an imminent danger).[6] This text aims to present and explain the standard of reasonable grounds to believe in the context of criminal law, to distinguish it from similar but separate standards (particularly the standard of "reasonable grounds to suspect" or "reasonable suspicions") and to highlight the factors used to assess it. We will see that the reasonable grounds to believe standard, as interpreted in criminal law, also serves as a guideline for the exercise of certain powers in areas other than criminal law, especially immigration, and that it is interpreted in the same way as in criminal law in these other contexts.

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[1] *Emergencies Act*, RSC (1985), ch. 22 (4nd Supp.). Para. 17 (1) provides that "When the Governor in Council believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council, after such consultation as is required by section 25, may, by proclamation, so declare."

[2] Sec. 487 *Cr.C.*

[3] Sec. 477.01 *Cr.C.*

[4] Sec. 495 *Cr.C.*

[5] Sec. 34 *Cr.C.*

[6] *R. v. Latimer*, 2001 SCC 1, (2001) 1 RCS. 3 (the defence of necessity is a common law defence that is not codified).

# Introduction. "Reasonable grounds to believe" and "probable grounds to believe": two ways of expressing one and the same standard

In criminal matters, there are laws subjecting the exercise of power to the existence of reasonable grounds to believe. Such is the case, for example, with regard to the powers of peace officers to make a warrantless arrest, as provided for in Section 495 of the *Criminal Code*, which uses the same formula as Section 17 of the *Emergencies Act*:

> **495** (1) A peace officer may arrest without a warrant:
>
> 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; (…)

Another example is a search warrant issued by a justice of the peace. Section 487 of the *Criminal Code*, provides:

> **487** (1) A justice who is satisfied by information on oath in Form 1 that *there are reasonable grounds to believe* that there is in a building, receptacle, or place: (…)
>
> may at any time issue a warrant authorizing a peace officer (…) [emphasis added]

To obtain a search warrant, the police officer must demonstrate to the justice of the peace that there are reasonable grounds to believe that there is evidence in a given place.

However, sometimes laws—as in the case with the former Section 450 of the Criminal Code, which preceded the current Section 495 of the Criminal Code[7]—or case law, use the expression "reasonable and probable grounds to believe." This is the case in the *Hunter v. Southam* decision, where the Supreme Court of Canada explained that

[7] Section 450 of the Criminal Code, RSC 1970, ch. C-34 provided: "A peace officer may arrest without a warrant 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... "

the validity of a search under Section 8 of the *Canadian Charter of Rights and Freedoms* was subject to the reasonable and probable grounds to believe standard:

> In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s. 8 of the *Charter,* for authorizing search and seizure.[8]

Naturally, this raised the question of whether the reasonable and probable grounds standard was different, and more stringent, than the reasonable grounds to believe standard. In the *Baron* v. *Canada* case, the Supreme Court of Canada found that these two expressions refer to one and the same standard:

> To my mind, *Hunter, supra,* does not give rise to legitimate controversy on this point. That decision required reasonable "and probable" grounds and simultaneously established that the two words import the same standard. "Reasonableness" comprehends a requirement of probability. As Wilson J. said in *R. v. Debot*, (…) the standard to be met in order to establish reasonable grounds for a search is "reasonable probability." It appears that the normal statutory phrase in Canada is "reasonable grounds," and that some of the remaining exceptions requiring "reasonable and probable grounds" may have been amended in recent years, one imagines for the sake of uniformity, by deleting the words "and probable": (…).[9]

Therefore, the expressions "reasonable grounds to believe" and "reasonable and probable grounds to believe" both refer to same standard, with reasonableness encompassing the criterion of probability.

[8] *Hunter et al. v. Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, p. 168.

[9] *Baron v. Canada*, 1993 CanLII 154 (SCC), [1993] 1 RCS 416, p. 447 (the notes have been omitted).

# 1. Assessment of the reasonable grounds to believe standard

## - The reasonable grounds to believe standard includes a standard of probability (belief in a *possibility* is insufficient)

A person who exercises a power based on reasonable grounds to believe must therefore believe in the *probability* that certain facts or a certain situation exists.

Belief in the mere *possibility* of their existence is therefore insufficient. The belief in a possibility refers to the *reasonable grounds to suspect* standard applicable to certain powers (i.e., the power of police officers to detain someone for investigative purposes[10] or even to engage in some forms of investigation, such as "entrapment,"[11] etc.), which is a less stringent standard than the reasonable grounds to believe standard.

> Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard.[12]

Based on this principle, Judges Moldaver and Wagner in *R. v. MacDonald* concluded that,

> In this case, however, Sgt. Boyd's testimony of his "concern" that Mr. MacDonald "might" have a weapon does not fit with the majority's conclusion that Sgt. Boyd himself believed he had reasonable and probable grounds. Sgt. Boyd believed in a possibility, not a probability. In other words, he subjectively *suspected* that Mr. MacDonald had a weapon, and this suspicion was objectively reasonable.[13]

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[10] *R. v. Mann*, [2004] 3 RCS. 59, 2004 SCC 52, par. 27.
[11] *R. v. Ahmad*, 2020 SCC 11 (CanLII), par. 24 et seq.
[12] *R. v. Chehil*, 2013 SCC 49 (CanLII), [2013] 3 RCS 220, par. 27 and 28.
[13] *R. v. MacDonald*, 2014 SCC 3 (CanLII), [2014] 1 RCS 37, par. 85 (the references have been omitted, emphasis in original).

## - The reasonable grounds to believe standard includes a standard of probability: the belief may be erroneous

The concept of reasonable grounds to believe does not require that the apprehended fact be proved or established, and it can be argued that the decision-maker has made a reasonable error regarding the actual existence of a fact or in their apprehension of the situation. What matters is that the person had, at the time of the action, reasonable grounds to believe that the situation existed.

Regarding arrests, reasonable grounds to believe that an offence has been committed obviously don't require the offence to have actually been committed, much less the commission of the offence to have been proved beyond a reasonable doubt.

> The police are not required to have a *prima facie* case for conviction before making an arrest[14]

In other words, to meet the standard of reasonable grounds to believe that a situation or fact exists, it is not necessary to establish (whether beyond a reasonable doubt or by a preponderance of evidence) that the situation or fact exists. It is the reasonable grounds to believe, at the time the decision was made, that must be established.

Already, in 1975 in the *Jolly* decision, the Federal Court of Appeal explained:

> Section 5 (l) does not prescribe a standard of proof but a test to be applied for determining admissibility of an alien to Canada, and the question to be decided was whether there were reasonable grounds for believing, etc., and not the fact itself of advocating subversion by force, etc. No doubt one way of showing that there are no reasonable grounds for believing a fact is to show that the fact itself does not exist. But even when *prima facie* evidence negativing the fact itself had been given by the respondent there did not arise an onus on the Minister to do more than show that there were reasonable grounds for believing in the existence of the fact. In short, as applied to this case it seems to me that even after *prima facie* evidence negativing the fact had been given it was only necessary for the Minister to lead evidence to show the existence of reasonable grounds for believing the fact and it was not necessary for him to go further and establish the fact itself of the subversive character of the organization.[15]

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[14] *R. v. Tim*, 2022 SCC 12, par. 24.

[15] *Attorney General of Canada* v. *Jolly*, 1975 CanLII 1058 (FCA), [1975] FC 216 (FCA), par. 18.

As the Supreme Court explained in *Mugesera*:

> The first issue raised by s. 19(1)*j*) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minster of Employment and Immigration)*, 1993 CanLII 3012 (FCA), [1994] 1 F.C. 433 (C.A.), p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (FCA), [2001] 2 C.F. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16300 (FC), [2000] A.C.F. no. 1615 (1st inst.).[16]

This means that it is possible for the decision-maker to be mistaken about the existence of a fact or situation. However, this error must be reasonable. For example, a police officer's arrest without a warrant will be valid if the officer has reasonable grounds to believe that an individual has committed an offence, even if the individual hasn't actually committed an offence. The police officer will have acted based on reasonable grounds to believe insofar as the error is reasonable. An error is reasonable if a reasonable police officer placed in the same situation, observing the same facts, would have committed the same error.

The possibility of invoking a reasonable error in assessing the circumstances is also discussed in the context of defences whose requirements refer to reasonable grounds to believe. In the context of self-defence, the Supreme Court explained:

> Pursuant to s. 34(2) of the *Criminal Code*, there are three constituent elements of self-defence where the victim has died: 1) the existence of an unlawful assault; 2) a reasonable apprehension of a risk of death or grievous bodily harm; and 3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary: see *R. v. Pétel*, 1994 CanLII 133 (SCC), [1994] 1 R.C.S. 3. On the first element, a majority of this Court held in *Pétel* that an honest but reasonable mistake as to the existence of an assault is permitted where an accused relies upon self-defence. Accordingly, the jury must be told that the question is not "was the accused unlawfully assaulted?"

[16] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 RCS 100, 2005 SCC 40, par. 114.

> but rather "did the accused reasonably believe, in the circumstances, that she was being unlawfully assaulted?"[17]

Therefore, someone may be found to have acted in self-defence even if they were not actually assaulted. It is the existence of a reasonable belief at the moment the actions were taken that is evaluated, not whether this belief was correct.

## - The reasonable grounds to believe standard is both subjective and objective

The person who exercises a power (such as the power to make an arrest) based on reasonable grounds to believe must subjectively believe that reasonable grounds for their decision exist, and that subjective belief must be reasonable. In the *Storrey* decision, concerning the power to make an arrest, the Supreme Court of Canada explains this clearly:

> It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. (…)
>
> In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probably grounds for the arrest.[18]

[17] *R. v. Malott*, [1998] 1 RCS. 123, p. 132.

[18] *R*. v. *Storrey*, 1990 CanLII 125 (SCC), [1990] 1 RCS 241, pp. 250-251 (the references have been omitted). See also *R*. *v. Tim*, 2022 SCC 12, par. 24.

The following excerpt from *Rhyason* may also be cited here:

> As explained by this Court in *R. v. Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 RCS. 254, the test for reasonable and probable grounds consists of both a subjective and an objective component:
>
> > [Section] 254(3) of the *Code* requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief . . . [para. 48]
> >
> > . . .
> >
> > The decision as to whether a peace officer believes on reasonable and probable grounds that an offence is being committed and, therefore, that a demand is authorized under s. 254(3) of the *Criminal Code*, R.C.S. (1985), Ch. C-46 must be based on the circumstances of the case. It is, therefore, essentially a question of fact and not one of pure law. [para. 46][19]

A purely subjective belief that there are grounds to make an arrest is therefore not sufficient. The belief must be based on verifiable reasonable grounds, which makes the standard more stringent.[20]

Nonetheless, reasonable grounds for arrest are not sufficient if the officer did not personally believe that these reasonable grounds existed. As Judges Moldaver and Wagner explain in *R. v. MacDonald*,

> The law is clear that an officer must *subjectively* believe he has reasonable and probable grounds; it is not enough that he objectively did. [21]

[19] *R*. v. *Rhyason*, 2007 SCC 39 (CanLII), [2007] 3 RCS 108, par. 12

[20] Also see *R*. v. *Ryan*, 2013 SCC 3, [2013] 1 RCS 14, par. 50: On its face, therefore, the section requires a purely subjective belief, a lower standard that made sense when the threat was clearly immediate and the threatener physically present on the scene. Once the immediacy and presence requirements are removed, however, measuring the accused's belief that the threat will be carried out necessarily demands a higher standard of evaluation. In other words, the accused's actual belief must also be reasonable.

[21] *R*. v. *MacDonald*, 2014 SCC 3 (CanLII), [2014] 1 RCS 37, par. 85.

## - Assessing the reasonableness of the grounds to believe

## - The reasonableness of the grounds to believe in making a warrantless arrest is evaluated based on objectively verifiable circumstances known to the officer at the time, taking the officer's experience into account

The officer who makes a warrantless arrest must have reasonable grounds to believe that the person has committed an indictable offence. To put the following excerpts from court decisions into context, note that the validity of the arrest determines the validity of the subsequent detention and the validity of the search incidental to the arrest and, therefore, the admissibility of the evidence gathered during the incidental search. It is therefore through a *voir dire* during the trial that the validity of the arrest and subsequent actions are contested, and the reasonableness of the officer's belief will be at the core of the matter.

> A warrantless arrest requires both subjective and objective grounds. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint. *The objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience [to] the arresting officer.* The police are not required to have a *prima facie* case for conviction before making the arrest.[22]

In the *Clayton* decision concerning police officers' power of detention, the Court explains that:

> Justification for a police officer's decision to detain, as developed in *Dedman* and most recently interpreted in *Mann*, will depend on the "totality of the circumstances" underlying the officer's suspicion that the detention of a particular individual is "reasonably necessary." If, for example, the police have particulars about the individuals said to be endangering the public, their right to further detain will flow accordingly. As explained in *Mann*, searches will be permitted only where the officer believes on reasonable grounds that his or her safety, or that of others, is at risk.

[22] *R*. v. *Tim*, 2022 SCC 12, par. 24 (italics added).

> The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.
>
> In my view, both the initial and the continuing detentions of Clayton and Farmer's car were justified based on the information the police had, the nature of the offence, and the timing and location of the detention.[23]

- Note that all the circumstances known to the police officer *at the time* of the decision to arrest or detain an individual are taken into account, and not what is known after. The reasonableness is prospective, not retrospective.

- When evaluating the reasonableness of the police officer's belief, the reasonable person is attributed knowledge, training, and experience comparable to the police officer's.

- The reasonableness of the grounds to suspect (a related standard based on possibility and not probability) is assessed in the same way:

> Reasonable suspicion must be assessed against the totality of circumstances. The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and grounded in common sense and practical, everyday experience.[24]

[23] *R*. v. *Clayton*, [2007] 2 RSC 725, 2007 SCC 32, par. 30 to 32.
[24] *R*. c. *Chehil*, 2013 SCC 49 (CanLII), [2013] 3 RCS 220, par. 29 (the references have been omitted).

## - The reasonableness of the grounds to believe in the context of the requirements for arguments of defence: taking into account the circumstances as well as the experience and personal characteristics of the accused

The grounds for several defences require the accused to reasonably believe that a fact or situation exists. For example, for a defence of necessity, the accused must have believed on reasonable grounds that they were facing an imminent danger. The question of whether the accused had a reasonable belief in a given situation arises when the judge in a trial asks whether the requirements for the argument of the defence have been met. As in analyzing the reasonableness of the belief of a police officer who has made a warrantless arrest, the question is whether the accused subjectively held a belief in the existence of a situation (in the case of necessity, the existence of an imminent danger) and whether this belief was reasonable under the circumstances. Reasonableness is evaluated in consideration of the facts known to the accused, their experience, and their personal characteristics that influenced their assessment of the situation. In other words, the experiences and personal characteristics of the accused are attributed to the hypothetic reasonable person who serves as a point of reference. To describe the situation, the Court uses the expression “modified objective criterion.” In the *Latimer* decision, which concerns the defense of necessity, the Supreme Court explains:

> The first and second requirements—imminent peril and no reasonable legal alternative—must be evaluated on the modified objective standard described above. As expressed in *Perka*, necessity is rooted in an objective standard: “involuntariness is measured on the basis of society’s expectations of appropriate and normal resistance to pressure” (p. 259). We would add that it is appropriate, in evaluating the accused’s conduct, to take into account personal characteristics that legitimately affect what may be expected of that person. The approach taken in *R. v. Hibbert*, 1995 CanLII 110 (SCC), [1995] 2 R.C.S. 973, is instructive. Speaking for the Court, C.J. Lamer held, at para. 59, that
>
> > . . . it is appropriate to employ an objective standard that takes into account the particular circumstances of the accused, including his or her ability to perceive the existence of alternative courses of action.
>
> While an accused’s perceptions of the surrounding facts may be highly relevant in determining whether his conduct should be excused, those perceptions remain relevant only so long as they are reasonable. *The accused person must,*

> *at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open. There must be a reasonable basis for the accused's beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person's ability to evaluate his situation. The test cannot be a subjective one, and the accused who argues that he perceived imminent peril without an alternative would only succeed with the defence of necessity if his belief was reasonable given his circumstances and attributes.*[25]

The same applies when an accused invokes self-defence. An accused who invokes self-defence must have believed, on reasonable grounds, that he or she was being assaulted and that it was necessary to resort to deadly force. Here, too, an objective criterion is applied that takes into account the characteristics and experience of the accused. In the context of self-defence, case law is especially behind the times with regard to gender and the violence experienced by an accused who has killed a violent spouse.

As the Pétel decision explains,

> The importance of failing to relate the earlier threats to the elements of self-defence cannot be underestimated. The threats made by Edsell throughout his cohabitation with the respondent are very relevant in determining whether the respondent had a reasonable apprehension of danger and a reasonable belief in the need to kill Edsell and Raymond. The threats prior to July 21 form an integral part of the circumstances on which the perception of the accused might have been based. The judge's answer to this question might thus have led the jury to disregard the entire atmosphere of terror which the respondent said pervaded her house. It is clear that the way in which a reasonable person would have acted cannot be assessed without taking into account these crucial circumstances. (…)
>
> By unduly limiting the relevance of previous threats, the judge, in a sense, invited the jury to determine what an outsider would have done in the same situation as the respondent.[26]

[25] *R*. v. *Latimer*, 2001 SCC 1, (2001) 1 R.C.S. 3, par. 33. Also see *R*. v. *Ryan*, 2013 SCC 3 (CanLII), [2013] 1 RCS 14.
[26] *R. v. Pétel*, [1994] 1 R.C.S. 3, pp. 16-17.

In the *Lavallee*[27] decision, the reasonableness of the accused's perception was assessed taking into account both her gender and her experience of her spouse's violence. This is summarized in the *Malott* decision:

> Section 34(2)(*a*) provides that an accused who intentionally causes death or grievous bodily harm in repelling an assault is justified if he or she does so "under reasonable apprehension of death or grievous bodily harm." In addressing this issue, Wilson J., who expressed the majority opinion in the *Lavallee* decision, rejected the requirement that the accused apprehend imminent danger. She also stated at pp. 882–883:
>
> > Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a "reasonable" apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts. Without such testimony I am skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship. After all, the hypothetical "reasonable man" observing only the final incident may have been unlikely to recognize the batterer's threat as potentially lethal. . .
> >
> > The issue is not, however, what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.[28]

Still in *Malott*, Judge L'Heureux-Dubé explains:

> Second, the majority of the Court in *Lavallee* also implicitly accepted women's experiences and perspectives may be different from the experiences and perspectives of men. It accepted that a woman's perception of what is reasonable is influenced by her gender, as well as by her individual experience, and that both are relevant to the legal inquiry. This legal development was significant, because it demonstrated a willingness to look at the whole context of a woman's experience in order to inform the analysis of particular events. But it is wrong to think of this development of the law as merely an example where an objective test -- the requirement that an accused claiming self-defence must <u>reasonably</u> apprehend death or grievous bodily harm – has been modified to admit evidence of the subjective perceptions of a battered

[27] *R*. v. *Lavallee*, [1990] 1 R.C.S. 852.
[28] *R*. v. *Malott*, 1998 CanLII 845 (SCC), [1998] 1 RCS 123, par. 20.

> woman. More important, a majority of the Court accepted that the perspectives of women, which have historically been ignored, must now equally inform the "objective" standard of the reasonable person in relation to in self-defence.[29]

Echoing this case law to a certain extent, the new paragraphs (1) and (2) of Section 34 of the *Criminal Code* read as below. The legislature has drawn up a non-exhaustive list of factors to consider in determining whether the accused has acted reasonably in the circumstances:

> **34** (1) A person is not guilty of an offence if:
>
> a) they believe on reasonable ground that force is being used against them or another person or that a threat of force being made against them or another person;
>
> b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
>
> c) the act is reasonable in the circumstances.
>
> (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties, and the act, including, but not limited to, the following factors:
>
> a) the nature of the force or threat;
>
> b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
>
> c) the person's role in the incident;
>
> d) whether any party to the incident used or threatened to use a weapon;
>
> e) the size, age, gender, and physical capabilities of the parties to the incident;
>
> f) the nature, duration, and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

[29] *R*. v. *Malott*, 1998 CanLII 845 (SCC), [1998] 1 RCS 123, par. 38.

> f.1) the history of interactions or communications between the parties to the incident;
>
> g) the nature and proportionality of the person's reaction to the use or threat of force; and
>
> h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

These factors are relevant for assessing the actions of the accused. They are also relevant, and, by implication, necessary, for assessing a person's belief on reasonable grounds that they were facing a danger.

Even considering the accused's experience and personal characteristics, the criterion of reasonable grounds to believe remains an objective criterion. As explained in the *Ryan* decision, which concerns the defence of moral duress:

> Considering that society's opinion of the accused's actions is an important aspect of the principle, it would be contrary to the very idea of moral involuntariness to simply accept the accused's subjective belief without requiring that certain external factors be present. Citing *R. v. Howe*, [1987] A.C. 417 (H.L.), p. 426, Baker agrees that "[t]he threat must involve such a degree of violence that 'a person of reasonable firmness' with the characteristics and in the situation of the defendant could not have been expected to resist" (pars. 25-015). He specifically mentions that there must have reasonable grounds for the accused's belief that the threat would be carried out (paras. 25-015 and 25-016).[30]

The next excerpt shows that the necessity that the accused's belief be reasonable conveys the existence of social expectations in terms of behaviour.

> The accused must meet society's standard for the reasonable person similarly situated, which includes a capacity to resist the threat to some degree.[31]

[30] *R*. v. *Ryan*, 2013 SCC 3 (CanLII), [2013] 1 RCS 14, par. 52.
[31] *R*. v. *Ryan*, 2013 SCC 3 (CanLII), [2013] 1 RCS 14, para. 60.

- ## The reasonableness of the grounds to believe in the context of the issuance of a search warrant and subsequent judicial review: the reasonable belief founded on reliable grounds and the role of the reviewing judge

A justice of the peace may issue a search warrant when they are convinced there are reasonable grounds to believe that evidence will be found. In this case, the justice of the peace acts on faith in the information submitted by the police in an affidavit. Search warrants are usually reviewed during a trial, where the accused seeks, in the *voir dire*, to have evidence thrown out on the grounds that the search was illegal. In this context, it is the credibility and reliability of the information provided to the justice of the peace who issued the warrant that is most often discussed.

The authorizing justice of the peace must seek to confirm the existence of reasonable grounds to believe that a situation exists:

> But the authorizing judge must look with attention at the affidavit material, with an awareness that constitutional rights are at stake and carefully consider whether the police have met the standard. All this must be performed within a procedural framework where certain actions are authorized on an *ex parte* basis. Thus, the authorizing judge stands as the guardian of the law and of the constitutional principles protecting privacy interests. The judge should not view himself or herself as a mere rubber stamp, but should take a close look at the documents submitted by the applicant. He or she should not be reluctant to ask questions of the applicant, to discuss or to require more information, or to narrow down the authorization requested if it seems too wide or too vague.[32]

The person who draws up an affidavit is required to make a full and honest statement of the facts considered so that the authorizing judge may determine whether it meets the applicable legal criterion, in this case, reasonable grounds to believe, and justify the authorization.[33] Although it is not a legal obligation, it is advisable that the persons with the most direct knowledge of the facts of the case, for example, the police officers who conducted the criminal investigation or who are responsible for the informants, draw up the affidavit. This gives more weight to the documents; the affidavit is deemed

[32] *R*. v. *Araujo*, 2000 SCC 65 (CanLII), [2000] 2 RCS 992, par. 29. This excerpt concerns the issuance of a wiretapping warrant, but the actions expected of a judge who issues a search warrant is the same.
[33] *R*. v. *Araujo*, 2000 SCC 65 (CanLII), [2000] 2 RCS 992, par. 46.

more reliable since the person who drafted it is answerable for the truth of the facts claimed in it.[34]

A review determines whether the facts set forth in the affidavit were sufficient for the justice of the peace to issue the authorization. As explained in the *Morelli* decision,

> In reviewing the sufficiency of a warrant request, however, "the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have [been] issued" (*R. v. Araujo*, 2000 SCC 65, [2000] 2 R.C.S. 992, at para. 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.[35]

As the Supreme Court explains in the *Araujo* decision, the review process is not a proceeding where the reviewing judge substitutes their own judgment for the judgment of the authorizing judge.

> The reviewing judge does not stand in the same place and function as the authorizing judge. He or she does not conduct a rehearing of the application for the wiretap. This is the starting place for any reviewing judge, as our Court stated in *Garofoli*, *supra*, at p. 1452:
>
> > The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge. [Emphasis added]
>
> As I noted as a judge of the Quebec Court of Appeal in *Hiscock, supra*, at p. 366 C.C.C., even a basis that is schematic in nature may suffice. However, as our Court has recognized, it must be a basis founded on reliable information. In *R. v. Bisson*, 1994 CanLII 46 (SCC), [1994] 3 R.C.S. 1097, at p. 1098, the

[34] *R*. v. *Araujo*, 2000 SCC 65 (CanLII), [2000] 2 RCS 992, par. 48, 49.
[35] R. v. Morelli, par. 40

> requirement was described as "sufficient reliable information to support an authorization" (emphasis added). The Court concluded that this requirement had still been met despite the excision of retracted testimony. In looking for reliable information on which the authorizing judge could have granted the authorization, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued.[36]

Although the reviewing judge cannot substitute his or her decision for that of the issuing judge, the reviewing judge will review whether the authorizing judge's decision to issue the warrant was based on reliable evidence. As shown in the above excerpt, exaggerations, lies, and failure to declare information known when the affidavit was drafted will affect the credibility of the information provided to the justice of the peace and, consequently, the validity of the search warrant. One could also say that the information supplied by persons unable to verify the truth of that information is not reliable information.

Judicial review of the justice of the peace's original decision is conducted based on the facts known at the time the warrant was issued and not on the basis of new facts. As already stated, it is a matter of whether the decision to issue the search warrant was based on reliable evidence at the time of its issuance. That being said, the reviewing court may, in exceptional cases, proceed to "amplify" the evidence, that is, to use new information to correct a technical error contained in the affidavit. However, it is not a matter of evaluating the merits of the issuing judge's decision in the light of new facts. Rather, it is a matter of seeing whether the new facts allow minor errors in the affidavit to be corrected to uphold the validity of the search warrant issued. As the Supreme Court explains in the *Morelli* decision (note that the court sometimes speaks of an ITO [information to obtain] rather than of an affidavit):

> The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, "the reviewing court must exclude erroneous information" included in the original ITO (*Araujo*, at para. 58). Furthermore, the review in court may have reference to "amplification" evidence—that is, additional evidence presented at the *voir dire* to correct minor errors in the ITO—so long as this additional evidence corrects good faith errors of the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice.

[36] *R. v. Araujo*, 2000 SCC 65 (CanLII), [2000] 2 RCS 992, par. 51 (emphasis in the original).

It is important to reiterate the limited scope of amplification evidence, a point well articulated by Judge LeBel in *Araujo*. *Amplification evidence is not a means for the police to adduce additional information so as to retroactively authorize a search that was not initially supported by reasonable and probable grounds.* The use of amplification evidence cannot in this way be used as "a means of circumventing a prior authorization requirement" (*Araujo*, at para. 59).

Rather, reviewing courts should resort to amplification evidence of the record before the issuing justice only to correct "some minor, technical error in the drafting of their affidavit material" so as not to "put form above substance in situations where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity, but had, in good faith, made" such errors (para. 59). *In all cases, the focus is on the "information available to the police at the time of the application" rather than the information that the police acquired after the original application was made* (para. 59).[37]

## In brief, the reasonable grounds to believe standard:

- is objective and based on probability

- allows for reasonable error

- relies on objectively verifiable (and reliable) facts

- is assessed in light of the facts and circumstances known at the time the verified decision was made

- is assessed in light of the activity in question and the experience and characteristics of the person who made the decision that may have influenced his or her perception of the situation

- allows an independent judicial review of its implementation.

[37] *R. v. Morelli*, 2010 SCC 8 (CanLII), [2010] 1 RCS 253, para. 41 to 43 (my italics).

# 2. The basis of the reasonable grounds to believe standard and the interests it is meant to protect

## - Establishing a balance between the rights of citizens and the interests of the state

Case law consistently shows that the reasonable grounds to believe standard is a condition for the exercise of certain state powers aimed at establishing a balance between, on the one hand, the rights of citizens—including liberty (in the case of powers of arrest)[38] and the reasonable expectation of privacy (in the case of searches)[39] — and, on the other hand, the protection of society from crime and therefore, the state's right to investigate crime. This balance must be established based on objective grounds that can be evaluated by an independent observer who may find that the state's interests prevail.[40]

In terms of privacy protections, when it comes to determining the degree of justification necessary for the state to infringe on this right, both the impact on the right to privacy and the importance of the law enforcement objective come into play. In the *Hunter* decision, the Court recognizes that this exercise in weighing the interests at stake may justify a search under a less stringent standard than that of reasonable grounds to believe when the right to privacy is reduced or when the public order objectives of the

[38] *R*. v. *Storrey*, 1990 CanLII 125 (SCC), [1990] 1 RCS 241, p.249: "Section 450(1) makes it clear that the police were required to have reasonable and probable grounds [to believe] that the appellant had committed the serious offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest. The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus, the police need not establish more than reasonable and probable grounds for an arrest. "

[39] *Hunter et al. v. Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, pp. 159-160.

[40] *Hunter et al. v. Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, pp. 167-168.

state prevail.[41] This explains that reasonable suspicions are a sufficient threshold in some investigative contexts, and that the legislature has made the authorization of some searches subject to this less stringent standard.

In the case of the *Emergencies Act*, however, the legislature has provided the standard, or threshold, of reasonable grounds to believe to establish the balance between citizens' rights, notably to liberty and privacy, and the state's right to take exceptional measures to deal with emergencies.

- ## The reasonable grounds standard (and the standard of reasonable suspicion) allows an independent judicial examination and protects against arbitrary action by the state

In criminal law, judicial authorization prior to the exercise of certain investigative powers based on reasonable grounds to believe allows for prior examination by an independent evaluator and provides the opportunity to ensure in advance that the criterion of reasonable grounds has been met.[42]

Nonetheless, it is possible, in some cases, for officers of the state to act without prior judicial authorization, and the standard of reasonable grounds (to believe or suspect) guarantees the possibility of an independent review (generally by the trial judge) after the fact. In all cases, the standard of reasonable grounds to act must be such as to allow an independent review of the decision to exercise a power.

The examination by an independent evaluator is both a characteristic and a function of the reasonable ground standard, though has mostly been discussed in the case of reasonable grounds to suspect, as the reasonable grounds to suspect standard has a lower criterion and is more recent than the reasonable grounds to believe standard.

In the case of a warrantless search using sniffer dogs, for example, the Court explained:

> The requirement for objective and ascertainable facts as the basis for reasonable suspicion permits an independent after-the-fact review by the court and protects against arbitrary state action. Under the *Collins* framework, the onus is on the Crown to show that the objective facts rise to the level of

[41] *Hunter et al.* v. *Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, p. 168.
[42] *Hunter et al. v*. *Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, p. 161-162.

> reasonable suspicion, such that a reasonable person, standing in the shoes of the police officer, would have held a reasonable suspicion of criminal activity.[43]

With regard to the existence of reasonable grounds to suspect in the context of police entrapment, the Supreme Court explains:

> In every context, the reasonable suspicion standard ensures courts can conduct *meaningful* judicial review of what the police knew at the time the opportunity was provided (…). This standard requires the police to disclose the basis for their belief and to show that they had legitimate reasons related to criminality for targeting an individual or the people associated with a location (…). An objective standard like reasonable suspicion allows for exacting curial scrutiny of police conduct for conformance to the *Canadian Charter of Rights and Freedoms* and society's sense of decency, justice, and fair play because it requires objectively discernible facts. As is the case with warrantless searches, "the trial judge [must be] [. . .] in a position to ascertain [these objective facts], and not bound by the personal conclusions of the officer who conducted the [investigation]" (…). This is essential to upholding the primacy of law and preventing the state from arbitrarily infringing individuals' privacy interests and personal freedoms. (…).[44]

The Court adds:

> A standard of "bad faith" police conduct in this branch of the entrapment doctrine is no substitute for the objective standard of reasonable suspicion, which is reviewable by an independent assessor. A test of "bad faith" cedes primacy to the police's own assertions. Reasonable suspicion insists on an objective assessment of the information the police actually had. Reasonable suspicion thus shifts the protection of the public against unreasonable intrusions from the shadows of police discretion to the light of curial scrutiny.[45]

If the reasonable grounds to suspect standard allows subsequent examination by an independent evaluator in order to avoid arbitrariness and ensure legal status, the reasonable grounds to believe standard, which is more stringent, pursues the same goals.

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[43] *R*. v. *Chehil*, 2013 SCC 49 (CanLII), [2013] 3 RCS 220, par. 45.
[44] R. v. Ahmad, 2020 SCC 11 (CanLII), par. 24 (the references have been omitted).
[45] *R*. v. *Ahmad*, 2020 SCC 11 (CanLII), par. 29.

The *Emergencies Act* does not provide for an independent judicial examination but provides for a mechanism of examination by an independent evaluator who must assess whether the Governor in Council has acted on the bases of reasonable grounds to believe that there is an emergency situation, which amounts to the same thing, in my opinion.[46] In *Hunter* v. *Southam*, the Supreme Court of Canada further recognizes that it is not necessary for the person exercising the function of independent evaluator to be a judge.[47] In the present case, the independent examination is conducted by the Commission mentioned in Section 63 of the *Emergencies Act* and created by decree C.P. 2022-0392.

## 3. The reasonable grounds to believe standard in areas other than criminal law

The reasonable grounds to believe standard is used in areas other than criminal law. For example, Section 37(1)a) of the Immigration and Refugee Protection Act[48] provides that a person is inadmissible on grounds of organized criminality for:

> being a member of an organization *that is believed on reasonable grounds* to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern.

Moreover, Section 33 of the law provides that “he facts that constitute inadmissibility under Sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring, or may occur.”

In the *Sittampalam* v. *Canada*[49] decision, the Federal Court of Appeal explains the reasonable grounds to believe standard by referring to criminal case law:

[46] Sec. 63 of the *Emergencies Act*, RSC (1985), ch. 22 (4nd supp.).
[47] *Hunter et al. v. Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, p. 162
[48] *Immigration and Refugee Protection Act*, L.C. 2001, ch. 27. (emphasis added)
[49] *Sittampalam* v. *Canada (Citizenship and Immigration)*, 2005 CF 121

The standard that the minister must apply when assessing the facts is that of "reasonable grounds." The Federal Court of Appeal explained this criterion in the *Charkaoui* decision (…). Judge Décary and Judge Létourneau, with the support of Chief Justice Richard, state in paragraphs 102 to 105:

> 102 The "reasonable grounds" criterion is generally the standard used to file proceedings for wrongdoing, as well as to exercise preventive or investigative powers. By way of example, therefore, a police officer's power to arrest an individual, obtain a search warrant, and issuance of the warrant by the justice of the peace are based on reasonable grounds (…). With regard to prevention, the police officer must have reasonable grounds to believe that a person is about to commit an indictable offence or to violate his or her promise to appear so that it is in the public interest to arrest him or her. The same goes for a report accusing an individual of committing a criminal act or offence ( …).
>
> 103 The "reasonable grounds" standard requires more than suspicions. It also requires more than a mere subjective belief on the part of the person relying on them. The existence of reasonable grounds must be established objectively, that is, that a reasonable person in placed in the same circumstances would have believed that reasonable grounds existed, in the case of an arrest, to make the arrest: *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 R.C.S. 241, at page 250. (…).[50]

In this text, I have already cited the decision of the Federal Court of Appeal in the *Jolly*[51] case and that of the Supreme Court of Canada in the *Mugesera*[52] case, two immigration decisions.

As another example, Section 33 of the Public Servants Disclosure Protection Act provides that the Commissioner who has grounds to believe that wrongdoing has been committed and reasonable grounds to believe that the public interest demands

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[50] *Sittampalam* v. *Canada (Citizenship and Immigration)*, 2005 CF 121, par. 11 (the references have been omitted).
[51] *Attorney General of Canada* v. *Jolly*, 1975 CanLII 1058 (FCA), [1975] F.C. 216 (F.C.A.).
[52] *Mugesera v*. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 R.C.S. 100, 2005 SCC 40

it, may investigate wrongdoing.[53] In the *Gordillo* decision, the Federal Court of Appeal explains:

> The "reason to believe" standard the provision sets out is similar to the standard found in other statutes. For example, as the Federal Court observed in *Agnaou v. Canada (Attorney General)*, 2017 FC 338 at para. 8, it is similar to the "reasonable grounds to believe" standard found in paragraph 19(1)(j) of the former *Immigration Act*, RSC 1985, c I2. The Supreme Court held in *Mugesera v. Canada (Minister of Citizenship and Immigration*), 2005 SCC 40 at para. 114, that that standard "requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities" and that "[i]n essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information" (internal citations omitted). [54]

The courts do not distinguish between the use of the reasonable grounds to believe standard in criminal matters and its use in other areas.

[53] *Public Servants Disclosure Protection Act*, LC 2005, c 46, par. 33 (1): « If, … as a result of any information provided to the Commission by a person who is not a public servant, the Commissioner has reason to believe that a wrongdoing … had been committed, he or she may, subject to sections 23 and 24, commence an investigation into the wrongdoing if he or she believes on reasonable grounds that the public interest requires an investigation. The provisions of this Act applicable to investigations commenced as the result of a disclosure apply to investigations commenced under this section."

[54] *Gordillo v. Canada (Attorney General)*, 2022 FCA 23 (CanLII), para. 112

# The Vulnerability of Canada and Ontario to International Supply Chain Disruptions in Light of the Events of February 2022

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## Highlights

- **Canada** is a small, open economy **heavily reliant on trade with the United States.**

- In this regard, **Ontario's** economy is **very similar** to Canada's, but these trends are even more significant.

- As small, open economies heavily reliant on a specific trading partner, **freight transportation** is a major area of vulnerability for Canada and Ontario. **Cross-border supply chains** are especially crucial for Ontario, which has a large **manufacturing sector** that relies in large part on **integrated manufacturing processes** with the United States.

- **Road transportation** is the dominant mode of transportation in Canadian international trade, particularly in **manufacturing** sector industries and especially in **the automotive industry**. Ontario occupies an important place in the automotive industry, which **employs many people in Ontario**, especially in **Windsor and the surrounding area**.

- Trade in Canada and Ontario is very **vulnerable** to supply change disruptions related to road transportation. Exports are even more vulnerable than imports.

- While there is an abundance of **crossing points** along the Canadian border, the vast majority of trade passes through only a **limited number of them**. The most popular crossing point is the **Ambassador Bridge**, between Detroit, Michigan, and Windsor, Ontario.

- The **manufacturing** sector, especially the **transportation** and **electrical equipment and machinery** industries, is highly dependent on **road transportation** and shows a **marked preference for the Ambassador Bridge**.

- The dominance of road transportation in these industries makes **supply chains, imports, and exports vulnerable to disruptions in road transportation**. This, in turn, weakens the **industries** that are most reliant on

ground transportation and specific crossing points, in addition to **putting jobs in these industries at risk.**

- The **Ontario manufacturing sector**, particularly **the automotive industry**, is highly concentrated in the **Windsor** region, which is served by the **Ambassador Bridge.** A significant share of Ontario's **food** supply also passes over the Ambassador Bridge. **This makes it a vulnerable nerve center for the economies of Ontario and Canada, as well as for many jobs in Ontario**.

- If the Ambassador Bridge were to become unusable, the neighboring crossing points **would be unable to absorb** all the trade that normally crosses at the Ambassador Bridge.

- Industries in sectors most reliant on the Ambassador Bridge account for about **1.8% of jobs in Canada** and about **4.4% of jobs in Ontario**, in other words, a total of **339,275 jobs**.

- **Losses** from the **blockade of the Ambassador Bridge** in February 2022 are estimated at between **150 and 400 million dollars** per day, for six days, or equivalent to approximately **0.1% to 0.2% of the Canadian GDP**.

- **Estimated losses** from the occupation of **downtown Ottawa** by the “freedom convoy” from January 29 to February 20, 2022, **are between 150 and 206 million dollars.**

# Introduction

In February 2022, when barricades and occupations throughout the country disrupted the Canadian economy, particularly economic activity in Ontario, the federal government invoked the Emergencies Act to strengthen the ability of provinces and territories to put a stop to these disruptions.

In the wake of these events, on April 25, 2022, the federal government created the Public Order Emergency Commission to make an independent public inquiry following the invocation of the Emergency Act.

As part of the Commission's mandate, this analytical note summarizes the main economic repercussions of these events, concentrating on two specific elements: the blockade of the Ambassador Bridge between Detroit and Windsor during the week of February 2 to 9, 2022, and the paralysis of downtown Ottawa from January 29 to February 20, 2022.

This analytical note first provides an overview of international trade in Canada and Ontario. It then presents an analysis of vulnerability of these economies based on several factors: imports, exports, supply chains, and jobs at risk as a result of disruptions to these supply chains. This analysis then focuses on the role of the Ambassador Bridge as an economic nerve center. Lastly, this note briefly presents the economic impacts of the paralysis of downtown Ottawa.

We conclude that continued suspension of road transportation traffic on the Ambassador Bridge would have put a number of jobs at risk. The same observations apply to downtown Ottawa.

# 1) Canada

Canada is a small, open economy with some distinctive characteristics. In particular, it is heavily reliant on a single large, foreign economy, i.e., the United States. Furthermore, its exchange of other goods (such as manufactured goods) is highly integrated with the United States. In other words, a large share of the networks through which Canada exchanges these goods are located in the United States, and vice versa. The following tables illustrate these characteristics.

Table 1. Canada's exports, imports and trade balance, in thousands of dollars and as a percentage of GDP

| | Canada | | OECD average |
|---|---|---|---|
| | Level | % GDP | % GDP |
| Exports | $631,248,164 | 29.9% | 27.6% |
| Imports | $613,739,580 | 31.0% | 27.3% |
| Trade balance | ($17 508 583) | -1.1% | 0.3% |

*Source: Statistics Canada, Table 12-10-0011-01*

Table 1 shows that about a third of the Canadian GDP in 2021 was the result of international trade, higher than the average for the OECD. This means that Canada internationally trades a large proportion of what it produces, relative to other countries. Canada is considered, in fact, to be **a small, open economy.**

As shown in Table 2, the United States is, by far, Canada's most important trading partner.

Table 2. Total trade[1] with Canada, by trading partner, 2021

| | Total trade | |
|---|---|---|
| | Dollars (x1000) | % |
| **United States** | **774,177,300** | **62.2%** |
| China | 114,043,754 | 9.2% |
| Mexico | 41,683,746 | 3.3% |
| Japan | 29,934,882 | 2.4% |
| Germany | 25,884,178 | 2.1% |
| United Kingdom | 24,144,716 | 1.9% |
| South Korea | 16,651,829 | 1.3% |
| Italy | 13,134,266 | 1.1% |
| Others (less than 1%) | 205,333,073 | 16.5% |

*Source: Statistics Canada, Table 12-10-0130-01*

[1] Total trade = Imports + Exports.

Table 3 shows that the motor vehicle and parts industry represents a large proportion of imports and exports.

Table 3. Canadian imports and exports, by industry, 2019

| Exports | | | Imports | | |
|---|---|---|---|---|---|
| Industry | Dollars (x1,000) | % | Industry | Dollars (x1,000) | % |
| Total | 631,248,164 | 100.0% | Total | 613,739,580.10 | 0.0% |
| Energy products | 143,697,769 | 22.8% | Consumer goods | 135,191,876.90 | 22.0% |
| Consumer goods | 78,781,097 | 12.5% | **Motor vehicles and parts** | **95,211,061.40** | **15.5%** |
| **Metal and non-metallic mineral products** | **72,111,215** | **11.4%** | **Electronic and electrical equipment and parts** | **74,505,156.50** | **12.1%** |
| **Motor vehicles and parts** | **60,917,270** | **9.7%** | Industrial machinery, equipment, and parts | 69,001,662.70 | 11.2% |
| Forestry products and building and packaging materials | 55,959,277 | 8.9% | Metal and non-metallic mineral products | 53,132,990.10 | 8.7% |
| Farm, fishing, and intermediate food products | 47,968,997 | 7.6% | Basic and industrial chemical, plastic, and rubber products | 51,919,571.90 | 8.5% |
| Basic and industrial chemical, plastic, and rubber products | 38,619,552 | 6.1% | Energy products | 31,093,583.20 | 5.1% |
| Industrial machinery, equipment, and parts | 34,438,712 | 5.5% | Other (less than 5%) | 103,683,677.40 | 16.9% |
| Other (less than 5%) | 98,754,274 | 15.6% | | | |

*Source: Statistics Canada, Table 12-10-0130-01*

## 2) Ontario

Like Canada, Ontario is heavily dependent on the international trade of the same goods and services and on the same trading partners.

Table 4. Ontario's exports, imports, and trade balance, in thousands of dollars and as a percentage of GDP

| | Ontario | |
|---|---|---|
| | Level | % of GDP |
| Exports | 197,013,617 $ | 26.4% |
| Imports | 372,485,557 $ | 49.9% |
| Trade balance | ($175,471,940) | -23.5% |

*Source: Statistics Canada, Table 12-10-0119-01*

Table 4 shows that exports represent a significant share of the province's GDP, as is the case for Canada, but Ontario's imports are especially large—accounting for nearly half of its GDP. As we will explain further on, imports play a key role in Ontario's production.

Table 5. Ontario's exports and imports, by industry, 2019

| Imports | | | Exports | | |
|---|---|---|---|---|---|
| Industry | Dollars (x1,000) | % | Industry | Dollars (x1,000) | % |
| Total | 372,485,557 | 100.0% | Total | 197,013,619 | 100.0% |
| Consumer goods | 84,463,846 | 22.7% | **Motor vehicles and parts** | **49,577,960** | **25.2%** |
| **Motor vehicles and parts** | **76,148,872** | **20.4%** | **Metal and non-metallic mineral products** | **40,780,738** | **20.7%** |
| **Electronic and electrical equipment and parts** | **52,629,249** | **14.1%** | Consumer goods | 34,633,526 | 17.6% |
| Industrial machinery, | 37,852,992 | 10.2% | Industrial machinery, | 16,810,520 | 8.5% |

| | | | | | |
|---|---|---|---|---|---|
| equipment, and parts | | | equipment, and parts | | |
| Metal and non-metallic mineral products | 32,283,656 | 8.7% | Basic and industrial chemical, plastic, and rubber products | 14,843,736 | 7.5% |
| Basic and industrial chemical, plastic, and rubber products | 26,602,068 | 7.1% | Forestry products and building and packaging materials | 11,447,387 | 5.8% |
| Other (less than 5%) | 62,504,875 | 16.8% | **Electronic and electrical equipment and parts** | **10,115,581** | **5.1%** |
| | | | Other (less than 5%) | 18,804,171 | 9.5% |

*Source: Statistics Canada, Table 12-10-0133-01*

Table 5 shows that the motor vehicle and parts industry plays an even larger role in Ontario's trade than in Canada's; it represents more than a quarter of the province's exports and more than a fifth of its imports.

Table 6 shows that the United States is Ontario's most important trading partner as well. A particularly large share of the province's imports (77.6%) come from the United States.

Table 6. Ontario's imports, exports and total trade, by trading partner, 2021

| Imports | | | Exports | | | Total trade | | |
|---|---|---|---|---|---|---|---|---|
| | Dollars (x1,000) | % | | Dollars (x1,000) | % | | Dollars (x1,000) | % |
| Total | 372,485,557 $ | 100.0% | Total | 197,013,617 $ | 100% | Total | 569,499,174 $ | 100% |
| United States | 196,034,937 $ | 56.2% | United States | 152,891,800 $ | 77.6% | United States | 348,926,737 $ | 61.3% |
| China | 49,423,315 $ | 13.3% | United Kingdom | 13,051,527 $ | 6.6% | China | 52,241,218 $ | 9.2% |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Mexico | 25,777,804 $ | 6.9% | Other (less than 5%) | 31,070,292 $ | 15.8% | Mexico | 28,567,744 $ | 5.0% |
| Other (less than 5%) | 101,249,504 $ | 23.6% | | | | Other (less than 5%) | 139,763,475 $ | 24.5% |

*Source: Statistics Canada, Table 12-10-0119-01*

One distinctive feature of Ontario's trade is the prevalence of integrated production processes with the United States. In other words, Ontario not only takes part in the exchange of goods and finished products, but some steps of manufacturing processes are performed in the United States while others are performed in Ontario. Thus, Ontario's trade is highly dependent on the fluidity of cross-border supply chains.

Most Ontarian exports to the United States are manufactured goods, a large percentage of which come from the automotive industry and are transported by truck.

In 2010, manufactured goods from the automotive industry represented 37% of these exports, and manufactured goods made up 87% overall. A total of 74% of Ontario's exports were moved across the border via road transportation (Anderson, 2011). Tables 4, 5 and 6 illustrate the continuation of these trends today.

Food trade between Ontario and the United States is also noteworthy: Ontario's producers depend largely on American suppliers for the ingredients and packaging needed to manufacture their products (Edmiston, 2022).

## 3) Freight transportation vulnerability

We now examine which Canadian industries depend on different modes of transportation in their respective value chains, especially with regard to inputs imported for Canadian industries to produce products, as well as how each industry's final products are exported.

In determining the share of Canadian trade dependent on each means of transportation (road, water, air, rail, and other), we can discern which disruptions would have the greatest impact on each industry in Canada.[2]

Canadian merchandise exports are shipped abroad by a variety of modes of transportation, including truck, train, plane, and pipeline.

Canadian industries rely heavily on road transportation for both imports and exports; in fact, road transportation represents nearly 40% of all Canadian merchandise trade transportation (Table 7).

This phenomenon is largely attributable to the sizeable share of trade between Canada and the United-States, as well as the deeply integrated value chains between the two countries.

Table 7. Proportion of Canadian international trade, by mode of transportation, 2020

| Mode of transportation | % |
|---|---|
| **Road** | **39.0%** |
| Water | 28.0% |
| Air | 12.0% |
| Rail | 12.0% |
| Other | 9.0% |

*Source: Global Affairs Canada*

## 4) International trade vulnerability

As an example, let's examine the vulnerability of Canadian value chains in the oil industry.

Although Canada mainly uses pipelines to transport crude oil, businesses must turn to various modes of transportation, including water and road transportation, to obtain the goods necessary for production, such as machines, equipment, and other

[2] We assume that although the supply and demand of a given industry may vary from one country to another, the type of product shipped by each means of transportation is generally similar around the world.

intermediate inputs used in oil production. Any transportation disruption can push businesses to modify their activities, thus disrupting the supply chain of the oil industry, not to mention the additional pressures it puts on the value chains of other industries.

As previously explained, the automotive industry, which makes up a nonnegligible share of the economy near the Ambassador Bridge, is especially vulnerable to this phenomenon, given the high cross-border integration of its value chains.

## a. Import vulnerability

Although importing intermediate inputs from outside Canada makes an industry[3] vulnerable to possible disruptions, this vulnerability also depends on the availability of suppliers for the input in question. If there are a number of suppliers for an input, the disruption of a single supplier will not be as drastic as for an input for which there is only one supplier.

Likewise, when an industry is concentrated around a limited number of suppliers, it is more vulnerable to regional or national disruptions. Here, we will examine the concentration[4] of imports by country for each industry, that is, whether the industry imports from multiple countries.

We can then calculate the concentration of imports for each of these types of industry based on the modes of transportation used by means of the Herfindahl-Hirschman Index (HHI) (Boileau and Sydor, 2021). The HHI is commonly used to measure the concentration of trade. The index ranges from 0 to 1, with 1 representing the maximum degree of concentration. For example, if 100% of the manufacturing industry's imports were shipped exclusively using road transportation, the HHI would be 1. Therefore, a high HHI means that the share of imports for a given mode of transportation is high.

Table 8 illustrates two things. First, manufacturing industries showed on average the highest import concentration, with an HHI of 0.36, because of their high reliance on

[3] The North American Industry Classification System (NAICS) categorizes Canadian industries; we use their categories in our analysis.

[4] Supplier concentration is usually measured on a business scale (how many businesses can supply an input necessary to the industry being studied) rather than the national level. However, a national scale is more pertinent to our analysis, and we have adapted our indicators to it.

road transportation. Manufacturing is followed by agriculture, forestry, fishing, and hunting, and service industries.

Second, we see that almost all of Canada's industries rely heavily on roads and waterways to procure their inputs, but that the manufacturing sector (46.9%) and agriculture and forestry sector (43.2%) are even more reliant on road transportation.

Table 8. Industry import concentration by mode of transportation (HHI) and percentage of imports by mode of transportation, Canada, 2019

| | | Import share of mode | | | | |
|---|---|---|---|---|---|---|
| Type of industry | HHI | Road | Water | Air | Rail | Other |
| **Manufacturing** | **0,36** | **46,9 %** | 35,7 % | 9,4 % | 6,1 % | 2,0 % |
| **Agriculture, forestry, fishing, and hunting** | **0.35** | **43,2 %** | 38,6 % | 7,8 % | 7,9 % | 2,5 % |
| Services | 0.34 | 42,4 % | 37,8 % | 12,1 % | 2,7 % | 5,0 % |
| Construction | 0,34 | 41,4 % | 38,6 % | 8,4 % | 3,3 % | 8,3 % |
| Mining, quarrying, oil and gas extraction | 0,33 | 39,8 % | 40,1 % | 7,6 % | 5,6 % | 6,9 % |
| Utilities | 0,30 | 30,2 % | 42,4 % | 7,4 % | 4,3 % | 15,7 % |
| All industries | 0,35 | 43,8 % | 37,2 % | 10,5 % | 4,4 % | 4,0 % |

*Source: Global Affairs Canada*

This suggests a significant level of global vulnerability. Moreover, industries that primarily use roads to transport imports, especially those in the manufacturing sector and the agriculture, forestry, fishing, and hunting sector, mostly use only this mode of transportation, which could make them particularly vulnerable to land crossing closures.

This applies especially to manufacturing, since roads are the main option for 58 of 82 manufacturing industries for sourcing inputs (71%) (Table 9). In particular, the use rate of roads for transporting imports reaches more than 70% for several automotive manufacturing industries.

Table 9 shows the ten industries in Canada with the highest import concentration by mode of transportation for 2019. All ten industries are the manufacturing sector, and

four of the five largest are in the automotive manufacturing sector. Likewise, eight of these ten industries rely mainly on road transportation.

Table 9. Industry import concentration by mode of transportation (HHI) and the percentage of imports by mode of transportation, Canada, 2019

| Industry | Primary mode | Import share of mode of transportation | HHI |
|---|---|---|---|
| **Manufacturing of steering and suspension components for motor vehicles (except springs)** | **Road** | **71,5 %** | 0,57 |
| **Motor vehicle transmission and power train parts manufacturing** | **Road** | **71,8 %** | 0,57 |
| Petroleum refineries | Water | 70,0 % | 0,56 |
| **Motor vehicle seating and interior trim manufacturing** | **Road** | **70,0 %** | 0,55 |
| Heavy truck manufacturing | **Road** | 69,7 % | 0,55 |
| Meat product manufacturing | **Road** | 69,7 % | 0,54 |
| Fruit and vegetable preserving and specialty food manufacturing | **Road** | 67,3 % | 0,53 |
| Automobile and light-duty vehicle manufacturing | **Road** | 68,3 % | 0,52 |
| Alumina and aluminum production and processing | Water | 67,3 % | 0,52 |
| Soft drink and ice manufacturing | **Road** | 67,1 % | 0,52 |

*Source: Global Affairs Canada*

## b. Export vulnerability

If we compare imports and exports, we notice that the concentration by mode of transportation varies more from one industry to another for exports than for imports (Table 10).

Table 10. Industry export concentration by mode of transportation (HHI) and the percentage of exports by mode of transportation, Canada, 2019

| Type of industry | HHI | Road | Water | Air | Rail | Other |
|---|---|---|---|---|---|---|
| **Manufacturing** | 0,48 | **66,5 %** | 14,1 % | 10,0 % | 9,3 % | 0,1 % |
| Agriculture, forestry, fishing, and hunting | 0,37 | 46,7 % | 36,7 % | 14,7 % | 2,0 % | 0,0 % |
| Construction | 0,37 | 34,0 % | 45,9 % | 0,0 % | 20,1 % | 0,0 % |
| Services | 0,36 | 50,1 % | 11,9 % | 30,5 % | 6,4 % | 1,2 % |
| Mining, quarrying, oil and gas extraction | 0,33 | 21,7 % | 50,4 % | 8,1 % | 8,9 % | 11,0 % |
| Utilities | 0,25 | 30,1 % | 8,5 % | 9,4 % | 18,4 % | 33,6 % |
| **All industries** | **0,384** | **56,8 %** | **19,0 %** | **13,2 %** | **8,7 %** | **2,3 %** |

*Source: Global Affairs Canada*

On average, manufacturing industries had the highest export concentration by mode of transportation with an HHI of 0.48. This is mainly attributable to the heavy reliance of manufacturing industries on road transportation (67%). The agriculture, forestry, fishing, and hunting industry (HHI = 0.37) and construction industry (HHI = 0.37) follow.

If we extend the analysis to specific industries (Table 11), the higher export concentration relative to import concentration becomes evident. The industries with the highest export concentration used their primary mode of transportation for more than 90% of exports of finished products. This percentage contrasts with approximately 70% for imports.

In addition, this list is no longer dominated by road transportation, but rather by water transportation, which occupies three of the top five places for the category, including four mining industries.

Nonetheless, road transportation is by far the primary mode of transportation for industries related to the transportation and automotive sectors, which favour one crossing point between Canada and the United States in particular: the Ambassador Bridge, between Windsor, Ontario, and Detroit, Michigan.

Table 11. Industry export concentration by mode of transportation (HHI) and percentage of exports by mode of transportation, Canada, 2019

| Industry | Primary mode | Export share of mode of transportation | HHI |
|---|---|---|---|
| Iron ore mining | Water | 100,0 % | 1,00 |
| Copper, nickel, lead, and zinc ore mining | Water | 99,0 % | 0,98 |
| Diamond mining | Air | 99,0 % | 0,98 |
| Coal mining | Water | 98,2 % | 0,96 |
| **Heavy truck manufacturing** | **Road** | **98,2 %** | 0,96 |
| Bakeries and tortilla manufacturing | Road | 95,8 % | 0,92 |
| Office furniture manufacturing (including fixtures) | Road | 95,4 % | 0,91 |
| **Motor vehicle transmission and power train parts manufacturing** | **Road** | **94,3 %** | 0,89 |
| Electric power generation, transmission, and distribution | Other | 94,1 % | 0,89 |
| Household and institutional furniture and kitchen cabinet manufacturing | Road | 93,9 % | 0,88 |

*Source: Global Affairs Canada*

Given the prevalence of automotive manufacturing in Ontario, and in the Windsor region specifically, as well as the marked preference of this sector for the Ambassador Bridge (substantiated below), this increases the vulnerability of these regions to disruptions in road transportation at the border stations.

Road transportation also plays an important role in industries where it is not the primary mode of transportation. For example, 46% of construction industry exports depend on water transportation, and 34% on road transportation. Thus, a disruption in road transportation could also have significant repercussions on the supply chain of the construction industry.

All in all, Canadian international trade is highly dependent on road transportation, especially for industries belonging to the transportation and automobile sectors and the electric machinery and equipment sector.

# 5) Supply chain logistics vulnerability

Here we will analyze the vulnerability of Canadian industries to unexpected disruptions in logistics, with a focus on road transportation.

Vulnerability is generally defined as "exposure to serious disturbance arising from risks within the supply chain and external to the supply chain."[5]

By evaluating trade based on mode of transportation, we can understand how Canada imports and exports merchandise.

Thus, even if an alternative nearby crossing point might serve as a substitute for a given route, a particular industry could feel the impact of delays, especially if we take into account the importance of "just-in-time" procurement.[6]

A slowdown or interruption in traffic, especially at the most heavily used crossing points, entails measurable economic costs.

Nguyen and Wigle (2011) measure the impact of a 1% increase in transportation time between Canada and the United States on economic well-being, international trade, and interprovincial trade in Canada. As seen in Table 12, their findings suggest that such an increase would decrease economic well-being by 1.3% of Ontario's GDP and cause Ontario a 5.1% drop in international trade, while for Canada as a whole, economic wellbeing would decrease by 1% of the GDP and international trade by 3.6% (Anderson, 2011).

[5] Nowakowski, T and S. Werbińska-Wojciechowska (2014), "Problems of Logistic Systems Vulnerability and Resilience Assessment." In: Golinska, P. (eds) Logistics Operations, Supply Chain Management and Sustainability. EcoProduction. Springer, Cham. https://doi.org/10.1007/978-3-319-07287-6_12

[6] "Just-in-time" is a method of organizing and managing production that consists of minimizing inventories and work in progress.

Table 12. Effect of a 1% increase in shipping time between Canada and the United States

| | % change in | | |
|---|---|---|---|
| Region | Economic well-being (% GDP) | International trade | Interprovincial trade |
| Atlantic | -0.9 | -5.3 | -1.4 |
| Quebec | -0.9 | -2.0 | -0.2 |
| **Ontario** | **-1.3** | **-5.1** | **-0.2** |
| Prairies | -0.8 | -1.4 | -0.5 |
| British Columbia | -0.6 | -1.6 | -0.5 |
| **Canada** | **-1.0** | **-3.6** | **-0.4** |

*Source: Nguyen, T. and R. Wigle (2009), via B. Anderson, Cross-border transportation centre, University of Windsor (2011).*

Vulnerability can also be evaluated quantitatively based on the intersection of the entry and exit points and the mode of transportation. To do this, each point and mode of transportation combination is considered as one crossing. The intersection of the crossing and mode of transportation is what is we call “logistics.”

It is also necessary to take into account the elements that make up a product. In fact, each small component is essential to the production process. A disruption affecting a single product could have consequences for the entire production process. For example, if just one of the 700 parts needed to manufacture a ventilator is missing, the ventilator cannot be manufactured.

Most entry and exit points handle only a negligeable amount of Canadian trade for both imports and exports (see Tables 14 and 15). Note, however, the prevalence of road transportation.

In fact, though there are more than 400 exit points and 600 entry points along the Canadian border, the vast majority of the country’s trade is concentrated at a small number of crossings.

Table 13. Import distribution by crossing, Canada, 2019

| Type of crossing | Share of imports | Number of crossings | Share of imports at most used crossing |
|---|---|---|---|
| Air | 13,3 % | 123 | 52,0 % |
| Other | 2,5 % | 144 | 32,6 % |
| Rail | 8,7 % | 82 | 36,2 % |
| **Road** | **52,6 %** | **200** | **27,3 %** |
| Water | 22,8 % | 82 | 22,9 % |
| **Total** | **100 %** | **421** | **11,6 %** |

*Source: Global Affairs Canada*

Table 14. Export distribution by crossing, Canada, 2019

| Type of crossing point | Share of exports | Number of crossings made | Share of exports at the most used crossing points |
|---|---|---|---|
| Air | 10.9 % | 83 | 56.9 % |
| Other | 16.8 % | 48 | 69.2 % |
| Rail | 16.0 % | 73 | 25.4 % |
| Road | 36.7 % | 115 | 29.8 % |
| Water | 19.6 % | 102 | 40.0 % |
| **Total** | **100 %** | **421** | **11,6 %** |

*Source: Global Affairs Canada*

To further our analysis, we can add the dimensions of product and industry. Thus, for each type of crossing, Table 15 (imports) and Table 16 (exports) show:

- The number of observations
- The average amount of each product exported by a given mode through a crossing point (i.e., for exports made by air, each airport for a given product processes an average of 6% of this product)
- The average amount of each product for the most used crossing for a given product (e.g., for exports by air, the most used airport for a given product processes an average of 18.3% of the product)
- The average HHI for each product (based on mode of transportation)
- The average vulnerability for all industries and the maximum vulnerability of each industry

The data presented in these tables clearly show the vulnerability of exports and imports to potential disruptions in road transportation and, to a lesser extent, to water transportation (exports). Vulnerability is measured from 0 to 100. Zero means no vulnerability while 100 is maximum vulnerability. It is particularly interesting to compare the averages for different modes of transportation.

### Table 15. Import vulnerability

| Summary statistics on the vulnerability of exports by product and crossing point | | | | | |
|---|---|---|---|---|---|
| Type of crossing point | Comments | Mean share of a product imported at a crossing point | Mean of the most used crossing point | Mean HHI of the product | Mean vulnerability of industries |
| Air | 86,304 | 1.4 % | 8.0 % | 0.029 | 2.6 |
| Other | 97,944 | 0.2 % | 0.8 % | 0.003 | 1.5 |
| Rail | 20,048 | 1.7 % | 5.2 % | 0.019 | 1.4 |
| Road | 253,780 | 2.3 % | 22.7 % | 0.109 | 13.8 |
| Water | 48,166 | 5.1 % | 17.0 % | 0.072 | 5.8 |
| **Total** | **506,242** | **2.0 %** | **30.9 %** | **0.068** | **25.1** |

*Source: Global Affairs Canada*

### Table 16. Export vulnerability

| Summary statistics on the vulnerability of exports by product and crossing point | | | | | |
|---|---|---|---|---|---|
| Type of crossing point | Comments | Mean share of a product exported at a crossing point | Mean of the most used crossing point | Mean HHI of the product | Mean vulnerability of industries |
| Air | 16,987 | 6.0 % | 18.3 % | 0.100 | 4.0 |
| Other | 533 | 2.0 % | 5.7 % | 0.034 | 1.2 |
| Rail | 4,252 | 4.6 % | 13.3 % | 0.063 | 2.7 |
| Road | 37,834 | 7.8 % | 33.0 % | 0.199 | 20.8 |
| Water | 14,796 | 7.7 % | 18.8 % | 0.108 | 9.4 |
| **Total** | **74,402** | **7.1 %** | **43.0 %** | **0.150** | **38.0** |

*Source: Global Affairs Canada*

These results corroborate the assertion that most crossings process a negligible amount of Canadian trade, while a few crossings process most trade. The average share of imports per crossing is only 2% (Table 15) and 7% for exports (Table 16).

However, the statistical averages are somewhat deceptive. On average, 31% of the value of an imported product and 43% of the value of an exported product, respectively, are routed through a single crossing.

Therefore, even though the majority of products enter or exit the country through dozens of crossings, most of the value passes through only a few.

Tables 17 and 18 show the total logistics vulnerability with regard to imports and exports, by industry.

Table 17. Logistics vulnerability of imports (taking modes of transportation into account), by industry

| **Total import vulnerability, by industry** | |
|---|---|
| **Industry** | **Vulnérabilité** |
| Non-ferrous metal (except aluminum) production and processing | 80.4 |
| Seafood product preparation and packaging | 64.1 |
| Other miscellaneous manufacturing | 59.6 |
| Motor vehicle seating and interior trim manufacturing | 54.3 |
| Motor vehicle gasoline engine and engine parts manufacturing | 53.3 |
| Motor vehicle transmission and power train parts manufacturing | 53.3 |
| Resin, synthetic rubber, and synthetic fibres and filaments manufacturing | 51.5 |
| Automobile and light-duty motor vehicle manufacturing | 50.4 |
| Motor vehicle metal stamping | 50.3 |
| Motor vehicle steering and suspension components manufacturing | 50.1 |
| Basic chemical manufacturing | 48.9 |
| Heavy-duty truck manufacturing | 48.7 |
| Iron and steel mills and ferro-allow manufacturing | 47.9 |
| Pharmaceutical and medicine manufacturing | 47.6 |

| | |
|---|---|
| Petroleum and coal product manufacturing (except petroleum refineries) | 44.2 |
| Other electrical equipment and component manufacturing | 44.2 |
| Other transportation equipment manufacturing | 44.0 |
| Steel product manufacturing from purchased steel | 44.0 |
| Other provincial and territorial administration | 43.3 |
| Coal mining | 41.8 |
| Urban transit systems | 41.3 |
| Hardware manufacturing | 41.2 |
| Meat product manufacturing | 40.3 |
| Foundries | 39.1 |
| Forging and stamping | 39.0 |
| Motor vehicle body and trailer manufacturing | 38.6 |
| Postal service | 37.8 |
| Spring and wire product manufacturing | 37.7 |
| Electric power generation, transmission, and distribution | 37.5 |
| Dry cleaning and laundry services | 37.2 |

*Source: Global Affairs Canada*

## Table 18. Logistics vulnerability of exports (taking modes of transportation into account), by industry

| **Total export vulnerability, by industry** | |
|---|---|
| **Industry** | **Vulnérabilité** |
| Coal mining | 100.0 |
| Tobacco manufacturing | 99.1 |
| Oil sands extraction | 90.9 |
| Gold and silver ore mining | 89.6 |
| Non-ferrous metal (except aluminum) production and processing | 79.9 |
| Motor vehicle transmission and power train parts manufacturing | 79.6 |

| | |
|---|---|
| Motor vehicle gasoline engine and engine parts manufacturing | 79.1 |
| Motor vehicle steering and suspension components manufacturing | 78.0 |
| Copper, nickel, lead, and zinc ore mining | 77.5 |
| Motor vehicle seating and interior trim manufacturing | 76.1 |
| Other metal ore mining | 75.6 |
| Greenhouse, nursery, and floriculture production (except cannabis) | 75.5 |
| Motor vehicle metal stamping | 70.1 |
| Metalworking machinery manufacturing | 69.7 |
| Diamond mining | 67.9 |
| Forestry and logging | 67.7 |
| Motor vehicle brake system manufacturing | 64.6 |
| Fishing, hunting, and trapping | 64.4 |
| Aquaculture | 63.8 |
| Wineries and distilleries | 63.4 |
| Meat product manufacturing | 63.0 |
| Agricultural products (except cannabis, greenhouse, nursery, and floriculture production) | 60.6 |
| Seafood product preparation and packaging | 60.6 |
| Iron ore extraction | 59.6 |
| Motor vehicle electrical and electronic equipment manufacturing | 56.6 |
| Heavy-duty truck manufacturing | 56.5 |
| Animal production (except aquaculture) | 55.8 |
| Steel product manufacturing from purchased steel | 54.9 |
| Hardware manufacturing | 54.7 |
| Pharmaceutical and medicine manufacturing | 54.7 |

*Source: Global Affairs Canada*

The average vulnerability is 25.1 for imports and 38.0 for exports. Export vulnerability is much higher than import vulnerability, particularly for mining industries and the automotive sector.

The following table lists the sectors with the highest levels of both types of vulnerability (import and export) for each mode of transportation and by industry. If organized so that imports represent the primary criterion and exports represent the secondary criterion (the figure in parentheses), we see that non-ferrous metal production is significantly vulnerable to air transportation.

Table 18. The most vulnerable industries, by mode of transportation

| The most vulnerable industries, by mode of transportation | | | | |
|---|---|---|---|---|
| **Mode of transportation** | **Imports** | **Logistics vulnerability (based on mode of transportation)** | **Exports** | **Logistics vulnerability (based on mode of transportation)** |
| Air | Non-ferrous metal (except aluminum) production and processing | 80.4 (44.4) | Diamond mining | 67.9 (67.8) |
| | Other miscellaneous manufacturing | 59.6 (41.6) | Non-ferrous metal (except aluminum) production and processing | 79.9 (59.8) |
| Other | Petroleum and coal product manufacturing (except petroleum refineries) | 44.2 (27.8) | Oil sands extraction | 90.9 (90.3) |
| | Coal mining | 41.8 (16.9) | Electric power generation, transmission, and distribution | 34.8 (33.2) |
| Rail | Resin, synthetic rubber, and synthetic fibres and filaments manufacturing | 51.5 (24.8) | Automobile and light-duty motor vehicle manufacturing | 49.0 (33.0) |

| | | | | |
|---|---|---|---|---|
| | Basic chemical manufacturing | 48.9 (11.1) | Resin, synthetic rubber, and synthetic fibres and filaments manufacturing | 39.6 (27.4) |
| Road | Manufacture of seats and interior trim for automobiles | 54.3 (50.1) | Tobacco manufacturing | 99.1 (83.0) |
| | Manufacture of steering and suspension components for automobiles (except springs) | 52.3 (49.2) | Motor vehicle transmission and power train parts manufacturing | 79.6 (79.2) |
| Water | Iron and steel mills and ferro-allow manufacturing | 47.9 (33.1) | Coal mining | 100.0 (99.9) |
| | Oil refineries | 37.1 (29.6) | Gold and silver ore mining | 89.6 (88.6) |

*Source: Global Affairs Canada*

In the context of Ambassador Bridge, the automotive industry is highly dependent on road transportation disruptions.

If exports are used as the primary sorting criterion, we note that the automotive industry (particularly motor vehicle transmission and power train parts manufacturing) is especially exposed to the vicissitudes of road transportation.

# 6) The intersectoral model and multiplier analysis

To measure the vulnerability of production and jobs, there is a methodological tool that allows us to comb through these activities exhaustively: intersectoral models.

This type of model evaluates the final impact of a given shock to each sector of a given economy in terms of production, jobs, and tax revenues. It uses an input-output table illustrating interindustrial transactions, i.e., all purchases made by one sector from all other sectors of an economy. In addition, the businesses studied are classified according to the North American Industry Classification System (NAICS).

Statistics Canada has built such a model for the Canadian economy, which includes a breakdown by province. It's the latter that we used for the quantitative part of this study, with particular attention to Ontario's economy.

This type of model lets us explore hypothetical scenarios at a fairly detailed level, by examining the incidence of exogenous changes in final demand on production while taking into account the interdependence of various industries and economic regions, and leakages to imports and taxes.

For example, we can use these models to look at the following question: if Canadian oil and gas exports doubled, which industries would be the most affected and in which provinces?

The use of an intersectoral model to answer a question of this type would allow us to estimate the indirect effects, and some of the induced effects, of such a demand shock and to calculate the corresponding multipliers.

**Aside: The concept of economic multiplier**

What is an economic multiplier? Applied to a local community, a multiplier measures how the dollars injected into a community (i.e., a village, a city, a province, or even a country) are re-spent, thus leading to additional economic activity. Thus, for one dollar of economic activity, the production multiplier measures the combined effect of a $1 change in sales on the production of all local industries.

In this regard, we can think of the community as a closed economy, with dollars and resources circulating between entities in the community, and between these entities and the outside world.

The concept of a multiplier, therefore, can be envisaged as successive rounds of spending. Thus, when a dollar is introduced into a community based on a good that was sold to the outside world (e.g., soybeans), this same dollar then leads to additional local spending.

**Aside: The concept of economic multiplier (cont.)**

For example, to produce a dollar's worth of soybeans, farmers must buy local inputs, pay themselves, make investments, and, maybe, hire local labor.

Local purchases also lead to further spending in the community, while purchases of inputs from outside the community are called leakages, since the money is not confined to the jurisdiction. Consequently, in the real world, imports represent leakages, as they don't stimulate the local economy.

Let's take a concrete example where the leakage rate is 60%. For each dollar spent, $0.60 is spent on imported goods. Therefore, $0.40 remains, which stimulates the local economy in the first round of spending.

The remaining $0.40 constitutes the point of departure for the second round of spending and, therefore, this time, 40% of $0.40, or $0.16, is spent within the local economy (i.e., 0.4 x $0.40 = $0.16), while the remaining $0.24 ((i.e., 0.6 x $0.40 = $0.24) is spent on inputs from the outside world.

The $0.16, in turn, triggers a third successive round, which reinjects $0.06 into the local economy. This process is repeated until there is no more local money to spend.

By adding all the rounds of spending together, we get a multiplier of $1.66, based on the initial expenditure of $1.00.

The intersectoral model reproduces this same simplified multiplier process, but in much greater detail.

The intersectoral model calculates a certain number of multipliers: GDP, employment income, and employment. Different simulations will produce multipliers with a different scope depending on the size of leakages (e.g., imports). Multipliers provide a summary statistic on the economic impact of a given shock and may be used to predict the economic impacts of expenditure or investments of a similar magnitude.

As with any quantitative exercise, this scientific approach has certain limits, which are well known to experts. However, the tool represents the best way to quantify the economic impacts of an interruption economic activity in a given sector out of all sectors of the Canadian economy. These limits include:

- Input-output models are linear: They assume that a given change in demand for a good or products of a given industry will result in a proportional change in production.
- The change is immediate: Intersectoral models don't take into account the time it takes for changes to actually occur in reality. These models assume that the economic adjustments resulting from a change in demand occur immediately, and not over a period of time.
- No capacity constraints: The hypothesis is that there are no limits on capacity and that an increase in demand for labour will lead to increased jobs (rather than a simple redeployment of workers).

It is important to keep in mind that while this methodology allows us to quantify the direct and indirect effects of an economic shock, specialists generally accept that most of the impacts will be felt within two years. The impacts of changes in the nature of investments over time, which are generally more long-term (over 10 years), cannot be taken into account in this type of model.

A simple example may help clarify the results that follow. Let's imagine that while a 100-million-dollar factory is being built, there is an interruption in the construction sector (a strike, for example). The industry is paralyzed over the year slated for the construction of the factory.

Here are the main impacts of such a scenario:

1. Additional business valued at 100 million dollars will not happen.
2. All of the suppliers of the construction sector will be affected.
3. All of the sectors that depend on the construction sector will also be affected.
4. If the strike continues and the project is permanently canceled, the economic activity, jobs, and tax revenues that would have resulted from the business activity of the factory (not construction) would be lost.

# 7) Job and industry vulnerability

Supply chain vulnerability with regard to road transportation threatens production and jobs in the industries that are most concentrated in terms of suppliers and road transportation. As previously explained, the Canadian manufacturing sector depends significantly on road transportation, and a large share of this sector is in Ontario.

The number of jobs in an industry depends on, among other things, the extent to which the industry is able to meet production demands. Thus, we can measure the job impact of each dollar of output supplied on demand for a given industry.

This gives us a "multiplier" corresponding to the number of jobs[7] added to the industry by millions of dollars of additional output supplied on demand. These multipliers are calculated by Statistics Canada using the Canadian intersectoral model (Statistics Canada, 2021).

For example, in Canada, each time the manufacturing industry produces the equivalent of an additional million dollars, it generates the equivalent of 4.647 jobs. Conversely, if the industry can produce the equivalent of a million dollars less than usual, it will lose the equivalent of 4.647 jobs.

The following table shows the economic impacts on Ontario's automotive industry. In this table, the number of jobs corresponds to the total number of jobs per million dollars of production. The multiplier indicates that there are 2.747 jobs in Ontario for every million dollars of production for the light-duty vehicle industry.

Table 14. Example of multiplier effects on production and jobs

| **Ontario: Multiplier total** | | | | | | |
|---|---|---|---|---|---|---|
| | **GDP at market price** | | | **Jobs** | | |
| Industry | Automobile and light-duty vehicle manufacturing | | | Automobile and light-duty vehicle manufacturing | | |
| | 2016 | 2017 | 2018 | 2016 | 2017 | 2018 |
| | By dollar of production | | | By million dollars of production | | |
| All provinces | 0.420 | 0.434 | 0.422 | 2.905 | 3.123 | 3.146 |
| Within provinces | 0.379 | 0.388 | 0.375 | 2.532 | 2.730 | 2.747 |

*Source: Statistics Canada*

[7] Jobs are measured in "person-year equivalents," i.e., production divided by what a representative full-time worker can accomplish.

The concentration of several Canadian industries around certain suppliers and road transportation, making their production capacity vulnerable to interruptions at these stages of the supply chain, put a certain number of jobs at risk.

According to the most recent data available on the final demand for each industry in the country, the Canadian manufacturing sector accounts for around 17% of Canadian jobs. That is equivalent to 3,165,411 jobs, representing as many people at risk of losing their job as the result of a decrease in production in their sector due to an interruption in road transportation, for example.

These jobs include direct, indirect, and induced jobs. Direct jobs serve the production of the industry. Indirect jobs are associated with the suppliers of the industry. Induced jobs are jobs that are dependent on consumption by the two previous categories of workers. For example, Chrysler assembly-line workers eat in a restaurant near the factory. If they lose their job and stop eating at the restaurant, some servers will lose their jobs because of decrease in the demand for meals. The servers' positions that depend on the consumption of the factory workers are induced jobs.

Of these jobs, more than a third (1,148,833) are based in Ontario, where a production decrease equivalent to a million dollars costs the manufacturing industry the equivalent of 3.588 jobs.

Furthermore, within the manufacturing sector, which is closely integrated with the United States, certain industries display a marked preference for certain crossings between the two countries.

Several industries related to the automotive sector, among other industries, route a significant share of their inputs and output over Ambassador Bridge, between Windsor, Ontario, and Detroit, Michigan.

The multipliers for these industries are relatively high nationally, but are even higher in Ontario. Among other things, a million dollars less in production costs 4.973 jobs in motor vehicle body and trailer manufacturing and 5.000 jobs in motor vehicle brake system manufacturing. In Ontario, these industries account for 5,954 and 3,060 jobs, respectively. Electrical machinery and equipment is another sector heavily dependent on the Ambassador Bridge, and industries in this sector also have a high multiplier in Ontario, especially metalworking machinery manufacturing (5.974 jobs per million dollars) and industrial machinery manufacturing (5.680 jobs per million dollars). These industries account for 25,333 and 14,090 jobs, respectively. Overall, the industries in these two sectors that are highly dependent on the Ambassador Bridge (see Appendix

1) account for 339,275 jobs, i.e., 1.8% of all Canadian jobs and 4.4% of all jobs in Ontario.

## 8) The Ambassador Bridge

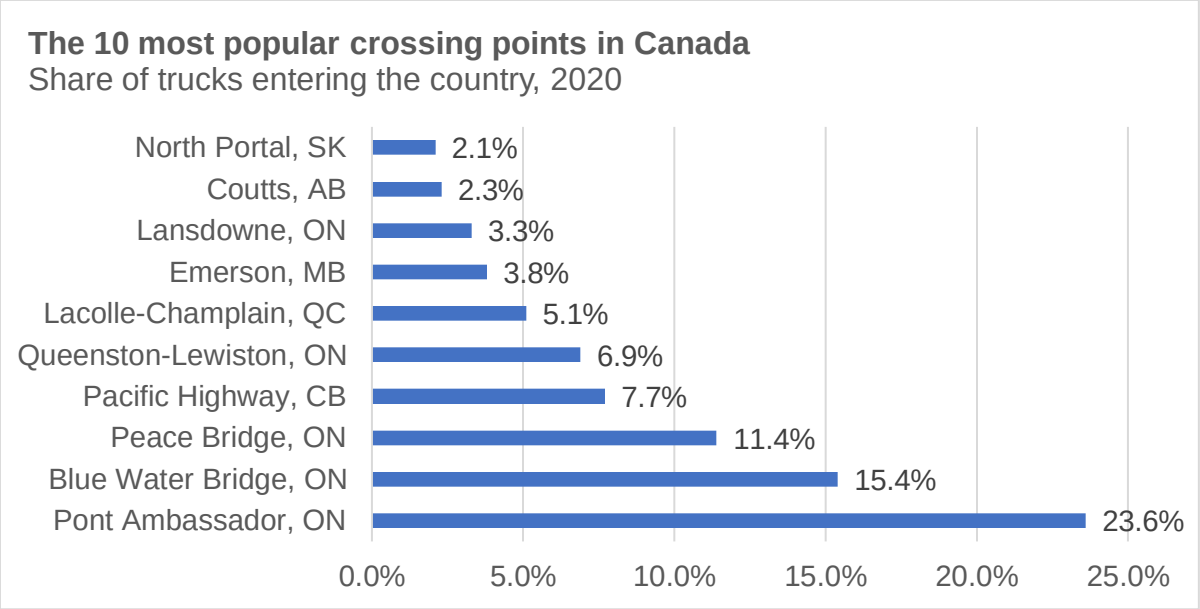
The road part of the Ambassador Bridge at Windsor, Ontario, is the country's biggest port of entry, processing 14.4% of Canada's imports. It is also the road crossing point where the greatest volume of exports passes through customs (Global Affairs Canada, 2019).

A closure of the Ambassador Bridge would cause other major problems since the other customs offices wouldn't be able to deal with the some 30% of total road transportation trade processed at this crossing point. This trade volume translates to approximately 8,000 to 10,000 trucks per day crossing the bridge (Savage, 2015), for a total of approximately 2.3 million crossings per year (Gingerich et al., 2015).

It should be noted that the commercial and industrial machinery and equipment industry and the transportation service industry route extensively through the Ambassador Bridge (Gingerich et al., 2015).

Of the three most important crossing points between Canada and the United States (the Ambassador Bridge and the Blue Water Bridge in Ontario, and the Cascade Gateway in British Columbia), the Ambassador Bridge receives the greatest share of trade and trucking. In fact, the largest share of the total cross-border trucking in the country crosses via the Ambassador Bridge (27%), followed by the Blue Water Bridge with 16%, then by the Cascade Gateway with 10%. The Ambassador Bridge is also first in cross-border trade, receiving 31% of the Canadian volume in 2017, followed again by the Blue Water Bridge with 16%, and the Cascade Gateway with 6%. As for personal vehicle traffic, the Ambassador Bridge receives 15%, after the Blue Water Bridge (18%) and the Cascade Gateway (19%) (Border Policy Research Institute et al., 2019). Even during the pandemic, the Ambassador Bridge retained its status as the most popular crossing point in Canada (Graph 1).

Graph 1. Truck transportation, by crossing point




*Source: Professor Ambarish Chandra, University of Toronto, via Bianca Bharti (Financial Post)*

Of Canadian imports crossing over the Ambassador Bridge in 2017, 37% came from the transportation industry and 27% from the electrical equipment and machinery industry, two key industries in the automotive sector.

Percentages for Canadian exports crossing the Ambassador Bridge were found to be 49% and 13% for these two industries, respectively.

These industries are by far the two most important at this crossing point. By way of comparison, of Canadian imports borne by the nearest major crossing point, the Blue Water Bridge at Sarnia, 20% are associated with the transportation industry and 24% with the electrical machinery and equipment industry. For exports, the percentages are 29% and 12%, respectively.

The marked preference of these industries, and particularly the transportation industry, for the Ambassador Bridge, attests to the prevalence of the automotive industry near the Ambassador Bridge, particularly in Windsor, on the Canadian side of the bridge. In fact, the city has more than 10,000 auto workers, of which the two largest private employers are a Chrysler assembly plant (the world's only producer of several Chrysler models) and a Ford engine plant (Anderson, 2011).

In light of the strong concentration of the Canadian manufacturing sector and the heavy reliance of the country's economy on road transportation, a break in the supply

chain linked to road transportation poses a particular risk to Ontario and the Windsor region.

The daily flow of people traveling across the Ambassador Bridge also reflects the area's economic integration: more than 6,000 Windsor residents cross the bridge to work in the United States (Border Policy Research Institute et al., 2019).

The most popular crossing point into the country in 2020, the Ambassador Bridge welcomed 23.6% of the trucks entering Canada, followed by the Blue Water Bridge with 15.4% (Bharti, 2022).

The president of Food Producers of Canada, Denise Allen, also stresses that, in winter, about half of the consumer food products in the country come from the United States, hence the importance of the fluidity of transportation channels between the two countries.

The Ontario Food Terminal in Toronto, a wholesaler supplying several grocery stores in the province, receives 40% of its products via trucks crossing the Ambassador Bridge (Brend, 2022). The proximity of the city of Leamington, the Canadian capital of greenhouse farming, which exports about 80% of the vegetables it produces to the United States, should also be noted (Edmiston, 2022).

As during the examination of distribution by crossing point, we note that even though the majority of products enter or exit the country through dozens of crossing points, most of the value crosses the border at only a few of these points. The analyses done by Global Affairs Canada tell us that industries related to the automotive sector are twice as vulnerable as the mean of all industries to logistics disruption in international trade.

The director of the Automotive Parts Manufacturers' Association says that during the blockade of the Ambassador Bridge last February, members lost the equivalent of a week of production that they will not be able to make up. In fact, there is a finite number of plannable shifts in a year, as well as a specific possible production volume given the number of shifts, which makes certain losses unrecoverable, he explains. This again illustrates the automotive sector's vulnerability to breaks in the supply chain, of which the Ambassador Bridge is a key element, (Edmiston, 2022).

In addition, the blockade of Ambassador Bridge and the demonstrations in downtown Ottawa raised concerns about Canada's reputation as a stable and attractive country for foreign investment. Nonetheless, Professor Ambarish Chandra at the University of Toronto's Rotman School of Management explains that investment decisions are

ultimately made by private companies. According to him, the blockades wouldn't directly cause American firms to flee. However, he maintains that the longer the blockades were to continue, the more likely it is that American firms would plan to relocate.

## 9) Downtown Ottawa

Our reading of the impact of the occupation of downtown Ottawa by the convoy of truck drivers from January 29 to February 20, 2022, relies largely on the analysis conducted by Barry Nabatian, a retail analyst.

According to his analysis, daily losses for businesses in downtown Ottawa are thought to come to about $900,000 in sales per day, notwithstanding other costs and lost revenue such as rent, insurance, taxes, and employee wage support.

For businesses in the Rideau Centre, these losses are thought to come to approximately 2.3 million dollars per day. Overall, lost sales are thought to equal about 73 million dollars over the 23 days of the occupation.

Counting the lost income of employees in businesses affected by the occupation, Nabatian estimates losses at between 150 and 206 million dollars for the duration of the occupation (Ki Sun Hwang, 2022).

The occupation of downtown Ottawa also led to certain municipal expenses. The work of the Windsor police is thought to have cost the city a total of $5,110,000, including 2.5 million dollars in overtime, $540,000 for lodging, the same amount for meals, $130,000 for assistance from the London police, and an additional $100,000 in “miscellaneous costs” (Bellacicco, 2022).

## Conclusion

This analysis examines the dependence of Canadian industries on different modes of transportation and their vulnerability to the closure of a border crossing.

As a whole, we found that Canadian industries are heavily dependent on road transportation, both for supplies (imports) and to export their merchandise. As Canada is a small, open economy with significant trade with the United States, as is Ontario to an even greater extent, both economies and their trade are vulnerable to disruptions

in road transportation, especially within the context of integrated supply on both sides of the Canada–US border.

While road transportation is dominant across all industries, the auto manufacturing industry is particularly vulnerable to disruptions in this mode of transportation, as it has some of the highest concentrations of imports and exports in road transportation.

This industry also has a high level of economic integration with the United States and follows the trend of Canadian trade in transporting a large share of its merchandise through a single crossing point between the two countries. For the automotive industry, this point is the Ambassador Bridge, which receives the country's largest share of merchandise trade.

The region of Windsor, Ontario, on the Canadian side of the Ambassador bridge, has a significant number of jobs in the automotive industry, which is a major employer for the entire province. Overall, a prolonged disruption in industries with the highest preference for the Ambassador Bridge threatens nearly 420,000 jobs, 400,000 of them in Ontario.

The blockade of the Ambassador Bridge is thought to have resulted in total losses estimated at between 150 and 400 million dollars per day, for a total equivalent to 0.1% and 0.2% of the Canadian GDP.

Losses due the occupation of downtown Ottawa are thought to come to between 150 and 200 million dollars.

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# APPENDIX 1

Table A1: Production, multipliers, and number of jobs for industries belonging to sectors showing a preference for the Ambassador Bridge, Canada.

| Industries | Millions of dollars of output | Multiplier | Number of jobs |
|---|---|---|---|
| Industrial machinery manufacturing | 5208.90 | 5.852 | 30482 |
| Manufacturing of machinery for trade and service industries | 4526.07 | 5.233 | 23685 |
| Metalworking machinery manufacturing | 3988.85 | 6.575 | 26227 |
| Manufacturing of engines, turbines and power transmission equipment | 1584.49 | 5.803 | 9195 |
| Manufacturing of other electronic products | 7723.10 | 4.729 | 36523 |
| Manufacturing of electrical equipment | 4644.23 | 4.828 | 22422 |
| Manufacturing of other electrical equipment and components | 4191.60 | 4.534 | 19005 |
| Automobile and light-duty vehicle manufacturing | 42477.23 | 2.393 | 101648 |
| Heavy truck manufacturing | 2453.19 | 3.296 | 8086 |
| Motor vehicle body and trailer manufacturing | 3330.84 | 5.571 | 18556 |
| Manufacturing of gasoline engines and engine parts for motor vehicles | 4413.30 | 3.306 | 14590 |
| Manufacturing of electrical and electronic equipment for motor vehicles | 1242.77 | 4.507 | 5601 |
| Manufacturing of steering and suspension components for motor vehicles (except springs) | 2927.64 | 3.813 | 11163 |

| | | | |
|---|---|---|---|
| Motor vehicle brake system manufacturing | 205.87 | 5.538 | 1140 |
| Motor vehicle transmission and power train parts manufacturing | 3983.64 | 4.029 | 16050 |
| Manufacturing of seats and interior trim for motor vehicles | 4448.20 | 4.937 | 21961 |
| Metal stamping for motor vehicles | 5987.53 | 4.272 | 25579 |
| Manufacturing of other motor vehicle parts | 5347.53 | 4.716 | 25219 |
| **Total** | **108684.97** | | **417132** |

*Source: Statistics Canada, Table 36-10-0594-01 and Table 31-10-0001-10*

Table A2: Production, multipliers, and number of jobs for industries belonging to sectors showing a preference for the Ambassador Bridge, Ontario.

| Industries | Millions of dollars of production | Multiplier | Number of jobs |
|---|---|---|---|
| Industrial machinery manufacturing | 2,480.66 | 5.68 | 14,090 |
| Manufacturing of machinery for trade and service industries | 2,706.29 | 4.225 | 11,434 |
| Metalworking machinery manufacturing | 4,240.58 | 5.974 | 25,333 |
| Manufacturing of engines, turbines and power transmission equipment | 547.88 | 5.573 | 3,053 |
| Manufacturing of other electronic products | 4,171.11 | 3.926 | 16,376 |
| Manufacturing of electrical equipment | 2,364.73 | 4.451 | 10,525 |
| Manufacturing of other electrical equipment and components | 2,344.03 | 3.701 | 8,675 |
| Automobile and light-duty vehicle manufacturing | 56,725.84 | 2.118 | 120,145 |
| Heavy truck manufacturing | 255.63 | 2.378 | 608 |
| Motor vehicle body and trailer manufacturing | 1,197.24 | 4.973 | 5,954 |
| Manufacturing of gasoline engines and engine parts for motor vehicles | 5,523.40 | 2.716 | 15,002 |
| Manufacturing of electrical and electronic equipment for motor vehicles | 1,333.18 | 3.92 | 5,226 |
| Manufacturing of steering and suspension components for motor vehicles (except springs) | 2,212.17 | 3.453 | 7,639 |

| | | | |
|---|---|---|---|
| Motor vehicle brake system manufacturing | 611.86 | 5.001 | 3,060 |
| Motor vehicle transmission and power train parts manufacturing | 4,716.48 | 3.688 | 17,394 |
| Manufacturing of seats and interior trim for motor vehicles | 5,833.50 | 4.419 | 25,778 |
| Metal stamping for motor vehicles | 7,107.47 | 3.837 | 27,271 |
| Manufacturing of other motor vehicle parts | 5,350.18 | 4.058 | 21,711 |
| Total | 109,722.21 | | 339,275 |

*Source: Statistics Canada, Table 36-10-0595-01 and catalog 15-211-X*

# Mis- Dis- and Mal-Information and the Convoy: An Examination of the Roles and Responsibilities of Social Media

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# Summary

This paper supports the Public Order Emergency Commission in the examination of "the impact, role and sources of misinformation and disinformation, including the use of social media".[1] The term social media is used broadly in this paper to refer to applications that are designed to enable third parties to interact, create and share content, including messaging, video, audio, and images.

This paper does not make factual findings as to online information manipulation and the Convoy. Rather, the purpose of this paper is to deepen understanding of the information environment of mis-, dis- and mal-information, how it is regulated and how this intersects with the Convoy. Social media was the central nervous system of the Convoy, and exploration of its role crosses numerous domains, such as law, psychology, history, sociology, and public policy, to name a few. Even within law, the applicable laws (and significant gaps in law) are too numerous to explore in detail. To the extent that I can provide more detail for interested readers, I do so in the footnotes, and I also encourage readers to peruse the many resources cited in this paper.

The paper is structured as follows. Part I examines the various social media used in the Convoy, the meaning of mis-, dis- and mal-information, how it spreads, the psychology and impact. Parts II and III examine how information manipulation on social media is regulated. There are two angles to regulation that are relevant. First, what laws regulate users and other entities that consume or spread mis-, dis- or mal-information? This is the question of whether an individual, for example, commits a crime or can be civilly liable for spreading false information. A necessary part of this analysis is the right to freedom of expression: its value, application, and limits. This aspect of regulation is examined in Part II. Second, what are social media providers legal and governance responsibilities to address mis-, dis- and mal-information? This is examined in Part III and entails analysis of the laws that regulate social media companies and how they self-regulate through content moderation.[2]

[1] See (a)(ii)(c) https://publicorderemergencycommission.ca/files/documents/Order-in-Council-De%CC%81cret-2022-0392.pdf

[2] I want to thank my research assistants Akinkunmi Akinwunmi and Sylvana Crosby for their excellent work in support of this paper.

# Part I The Convoy and the Online Information Environment

## Social Media and the Convoy

Social media provided the network that gave the Convoy, a movement that was otherwise "loose-knit" and "decentralized",[3] a shape and voice. As Stephanie Carvin comments, online activism was "the lifeblood of the convoy movement."[4] This was a Canadian movement, amplified first by Canadian social media influencers, then amplified by media and US influencers and exploited by other global actors.[5] On social media, leaders and influencers used a variety of social media, including video, audio and messaging applications, to spread their messages and engage with their followers.[6] They include Facebook, Twitter, TikTok, YouTube, Rumble, BitChute, Odysee, Telegram and Zello.

A few things are key about the role of social media in the Convoy. First, the movement started long before January 2022. The initial organization of the Convoy was through a Facebook group Canada Unity, which led a "United We Roll" convoy in 2019.[7] Before the Convoy, the content posted to Canada Unity had themes of anti-

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[3] CBC, "How anger, faith and conspiracy theories fuelled the trucker convoy" (February 24, 2022) *The Fifth Estate*.

[4] Stephanie Carvin, "How the Freedom Convoy was fuelled by online activism" (March 5, 2022) *National Post,* online: https://nationalpost.com/opinion/stephanie-carvin-how-the-freedom-convoy-was-fuelled-by-online-activism.

[5] *Ibid.* Scam and hacked Convoy accounts were created and removed by Facebook: Elizabeth Culliford, "Meta says it removed scammers' Canada convoy Facebook group" (February 7, 2022) Reuters, online: https://www.reuters.com/technology/meta-says-it-removed-scammers-canada-convoy-facebook-groups-2022-02-08/; Anya van Wagtendonk et al, "The hacked account and suspicious donations behind the Canadian trucker protests" (February 8, 2022) Grid, online: https://www.grid.news/story/misinformation/2022/02/08/the-hacked-account-and-suspicious-donations-behind-the-canadian-trucker-protests/.

[6] The list does not cover all social media used by organizers and influencers of the convoy, but it gives an idea of the main services used. See this summary: Maggie Parkhill, "Who is who? A guide to the major players in the trucker convoy protest" (February 22, 2022) *CTV News*, online: https://www.ctvnews.ca/canada/who-is-who-a-guide-to-the-major-players-in-the-trucker-convoy-protest-1.5776441.

[7] Ryan Broderick, "How Facebook Twisted Canada's Trucker Convoy into an International Movement" (February 19, 2022) *The Verge*, online: https://www.theverge.com/2022/2/19/22941291/facebook-canada-trucker-convoy-gofundme-groups-viral-sharing.

vaccination and anti-lockdown.[8] Many of the accounts and influencers of the Convoy are reported to have ties to far right groups such as the Canadian Yellow Vests and conspiracy theories.[9] Second, the movement was built "almost entirely by sharing video links."[10] Video-sharing platforms used include YouTube, and alt-YouTube platforms Rumble, BitChute and Odysee, livestreaming on Facebook and Twitter, and TikTok.[11] As will be explored below under the Psychology and Dangers of Information Manipulation, video and images are particularly powerful vectors to influence users. Third, posts were across various platforms, which has implications for content moderation. For example, videos posted on Facebook crowdsourced fundraising for the Convoy and directed users to GoFundMe. A video uploaded to Rumble, with less restrictive content moderation, was shared on Facebook and on messaging app Telegram. Content moderation by these platforms is explored in Part III.

The Convoy was initially organized through the Facebook group Canada Unity. When the exemption from the vaccine mandate for truck drivers was set to end in January 2022, Canada Unity began posting about truckers. Then a Facebook group "Freedom Convoy 2022" was created. At the time of writing, the Canada Unity Facebook page has 79,877 followers and 34,161 likes.[12] On Twitter, some of the earliest posts date to January 12, 2022.[13] On January 18, 2022, the Convoy's spread across Facebook gained momentum when a video about the protest was posted on Rumble.[14] The

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[8] *Fifth Estate*, *supra* note 3.
[9] Broderick, *supra* note 7.
[10] Broderick expands on some of his research on his substack garbageday: "Freedom Convoy Facebook Content Is Coming From YouTube" (February 9, 2022), online: https://www.garbageday.email/p/boomers-are-weird-and-obsessive-posters
[11] Parkhill, *supra* note 6; Press Progress, "Meet the Extremists and Social Media Influencers at the Centre of the Far-Right Siege of Ottawa" (February 8, 2022), online: https://pressprogress.ca/meet-the-extremists-and-social-media-influencers-at-the-centre-of-the-far-right-siege-of-ottawa/.
[12] Here is the URL for Canada Unity's Facebook group, online: https://www.facebook.com/CanadaUnity/.
[13] See posts on Twitter by Canadian for Freedom (January 12, 2022): https://twitter.com/CanFreedomLover/status/1481340478247346179?s=20&t=j-FIYPbSX217iiw4Z4DKPw, Dr. Ezra Kaxah (January 13, 2022), https://twitter.com/EzraKahan/status/1481760964043325448?s=20&t=j-FIYPbSX217iiw4Z4DKPw and (January 17, 2022) https://twitter.com/EzraKahan/status/1483134186919706626, and Fringe-Juli (January 13, 2022), https://twitter.com/Juliz1lb/status/1481767182577160193?s=20&t=j-FIYPbSX217iiw4Z4DKPw.
[14] Ryan Broderick, *supra* note 7.

video, titled "Freedom Convoy 2022" has garnered 60,588 views on Rumble.[15] It provided links to groups on Facebook, Telegram, GoFundMe and Change.org, and to Canada Unity's website.

In addition to mainstream social media, organizers used messaging app Telegram, walkie-talkie app Zello and video-sharing platforms, Rumble, BitChute and Odysee.[16] Telegram is a messaging app comprised of groups and channels. Groups are spaces for members to chat, while channels enable one-to-many broadcasting of messages. Groups and channels can be public or private. However, even private groups can have up to 200,000 members, and channels can have unlimited subscribers.[17] Telegram supports what it calls "secret chats", which uses end-to-end encryption, meaning that Telegram does not see the content of these groups chats, nor stores it on their servers. Only participants in the group know what is discussed and shared.[18]

The app Zello was used by leaders to coordinate meeting locations.[19] Zello is a walkie-talkie app where users can set up public or private channels for communication. Private channels are end-to-end encrypted. Organizers primarily used public channels, which are capped at 7,000 users.[20] Once in a channel, users can hear and talk to everyone else in the channel. The organizer might set up several channels and can broadcast messages to all channels at once. Users can be connected to multiple channels at the same time.[21] Users can also send texts and images. With Zello, the organizers set up multiple channels for communication. For example, for the Ambassador Bridge blockade, a channel called "Windsor convoy 2" was used. Counter protestors joined some of these channels and disrupted communications.[22] Throughout, organizers communicated with supporters on various social media

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[15] This number is as of August 31, 2022.
[16] TVO Today, "How does Social Medial Fuel Protest?" (February 18, 2022), online: https://www.tvo.org/video/how-does-social-media-fuel-protest>.
[17] Telegram FAQ, online: https://telegram.org/faq#q-what-39s-the-difference-between-groups-and-channels
[18] Telegram Privacy Policy, online: https://telegram.org/privacy.
[19] Demar Grant, "What is Zello? Inside the app that helped organize "freedom convoy" blockades" (February 11, 2022) Toronto Star, online: https://www.thestar.com/news/canada/2022/02/11/what-is-zello-inside-the-app-that-helped-organize-freedom-convoy-blockades.html.
[20] *Ibid.*
[21] Zello Channels, online: https://zello.com/product/features/channels/.
[22] Grant, *supra* note 18.

livestreaming events, posting videos, memes and text, and supporters participated by commenting or sharing posts, or creating their own content.

We cannot point to any one social media that was pivotal to the Convoy. Rather, all social media acted as the nervous system of the Convoy, as it has for many movements in the digital age. As the following paper explores, a variety of factors converged to give the Convoy momentum, in particular amplification and influence. The design of social media, including its recommender, advertising and content moderation systems, amplify certain content, enabling the creation and spread of influencers (individual and media). In the case of the Convoy, influencers primarily posted short videos, which are effective vectors for information manipulation, and used messaging apps, which can be less moderated. The cross-platform nature of communications means that cutting off one arm meant that communication could re-route elsewhere. At the application level, one of the only avenues through this is cross-platform collaboration.[23] At an infrastructure level, this is the open design of the Internet.[24]

[23] But see Evelyn Douek, "The Rise of Content Cartels" (February 11, 2020) *Knight First Amendment Institute*, online: https://knightcolumbia.org/content/the-rise-of-content-cartels.

[24] It is important to value the internet's original architecture and understand the internet stack. There is no one model of the internet stack. Most enduring, and fulsome, would be the OSI model developed by the International Organization for Standardization. There are other intermediaries than those explored thus far that are increasingly targets for content regulation, in particular arising from crisis incidents involving violent and extremist content and information manipulation. At the top of the internet stack is the application or content layer. Most debates about content regulation concern this layer because this is the layer of social media. Those higher up the internet stack rely on technologies deeper in the stack to operate and are impacted by their actions. Moving down the internet stack are technology like web hosting providers (e.g. WordPress) and cloud services (e.g. Amazon Web Services), and beneath them network infrastructure providers (e.g. domain name registries, internet service providers, and cloud delivery networks). The key thing to understand is that the deeper one moves in the stack, the more blunt, imprecise and less visible are their regulatory actions: Georgia Evans, "Down the Stack: Power and Accountability in Internet Intermediaries' Content Moderation Decisions" (July 9, 2021) *Kroeger Policy Review,* online: https://www.kroegerpolicyreview.com/post/down-the-stack-power-and-accountability-in-internet-intermediaries-content-moderation-decisions.

## Defining Mis-, Dis- and Mal-information

Information manipulation, however scoped, is a wide and varied landscape, some of which is "an old story fuelled by new technology".[25] Propaganda, hoaxes and campaigns of social smearing has been around since the earliest records. And to the extent that new technologies can serve to enable and amplify these narratives, they have been used for these purposes, such as Gutenberg's printing press, newspapers, and the radio.[26] The key difference now is the affordability of social networking, the speed, reach and precision with which a message can be communicated and spread, and access to cheap editing and publishing tools.[27]

The global communications space "is a common good of humankind".[28] Within this space, mis-, dis- and mal-information operate as a "complex system", wherein seeds are planted, then amplified to a wider audience and spread into the wider information ecosystem.[29] There is no uniform definition of mis- ,dis- and mal-information. This reflects the complexity of these concepts and the contextual nature of their application.[30] I recommend using UNESCO's definitions:

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[25] Cherilyn Ireton *et al*, "Journalism, Fake News & Disinformation" (2018) *UNESCO* at 15.
[26] *Ibid* at 15-19. See Heidi J.S. Tworek, *News From Germany: The Competition to Control World Communications, 1900-1945* (Harvard University Press, 2019).
[27] Samantha Bradshaw *et al*, "Industrialized Disinformation 2020 Global Inventory of Organized Social Media Manipulation" (2020) *Computational Propaganda Research Project*, online: https://demtech.oii.ox.ac.uk/research/posts/industrialized-disinformation/ at 11; Claire Wardle and Hossein Derakhshan, "Information Disorder: Toward an interdisciplinary framework for research and policy making" (2017) Council of Europe Report DGI(2017)09, online: https://edoc.coe.int/en/media/7495-information-disorder-toward-an-interdisciplinary-framework-for-research-and-policy-making.html at 11-12.
[28] Reporters Without Borders, *Global communication and information space: a common good of humankind*, online: https://rsf.org/en/global-communication-and-information-space-common-good-humankind.
[29] Canadian Security Intelligence Service, "Who Said What? The Security Challenges of Modern Disinformation" (December 5, 2016), online: https://www.canada.ca/content/dam/csis-scrs/documents/publications/disinformation_post-report_eng.pdf at Chapter 1.
[30] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, "Disinformation and freedom of opinion and expression" (April 13, 2021), A/HRC/47/25 at para 9. Ronan Ó Fathaigh *et al*, "The perils of legally defining disinformation" (2021) 10(4) Internet Policy Review at 3.

- Disinformation is information that is false, and the person who is disseminating it knows it is false. It is a deliberate, intentional lie, and points to people being actively disinformed by malicious actors.
- Misinformation is information that is false, but the person who is disseminating it believes that it is true.
- Malinformation is information, that is based on reality, but used to inflict harm on a person, organisation or country.[31]

Broadly, these are types of "information disorder".[32] Other terms include viral deception,[33] information chaos, propaganda,[34] influence operations[35] and computational propaganda, which refers to the mix of platforms, algorithms, big data, and artificial intelligence that shape information flows and manipulate public opinion.[36] Often disinformation is used as the umbrella term, although that is not done in this

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[31] Ireton, *supra* note 25 at 44.

[32] Wardle and Derakhshan, *supra* note 27. See figure at 20. These categories are not mutually exclusive: Dhanaraj Thakur and DeVan L. Hankerson, "Facts and their Discontents: A Research Agenda for Online Disinformation, Race, and Gender" (2021) *Center for Democracy & Technology*, online: https://cdt.org/insights/facts-and-their-discontents-a-research-agenda-for-online-disinformation-race-and-gender/ at 8.

[33] Khan, *supra* note 30 at para 13; Camille Francois, "Actors, Behaviors, Content: A Disinformation ABC" (September 20, 2019), *Transatlantic Working Group,* online: https://science.house.gov/imo/media/doc/Francois%20Addendum%20to%20Testimony%20-%20ABC_Framework_2019_Sept_2019.pdf at 1.

[34] Ireton *et al* said that propaganda is different than disinformation: "[t]he Term propaganda is not synonymous with disinformation, although disinformation can serve the interests of propaganda. But propaganda is usually more overtly manipulative than disinformation, typically because it traffics in emotional rather than informational messaging": *supra*, note 25 at 45. See also Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (Oxford University Press, 2018) which discuss our constant connection as a propaganda rich environment.

[35] This term seems most prevalent in national security literature. See CSIS, *supra* note 29. Wardle and Derakhshan define it as "actions taken by governments or organized non-state actors to distort domestic or foreign political sentiment, most frequently to achieve a strategic and/or geopolitical outcome": *supra* note 27 at 16. The term 'fake news' is not used in this paper, because it is vague and politically loaded and is therefore unhelpful to the analysis: *Ibid* at 15-16; Alice Marwick and Rebecca Lewis, "Media Manipulation and Disinformation Online" (May 15, 2017) *Data & Society Research Institute*, online: https://datasociety.net/library/media-manipulation-and-disinfo-online/ at 44.

[36] See the Oxford Internet Institute, computational propaganda project, online: https://www.oii.ox.ac.uk/research/projects/computational-propaganda/.

paper to avoid confusion. For ease, when using a broad term, I will refer to information manipulation.

Definitions even vary for the terms mis-, dis- and mal- information. For example, the definition of malinformation provided above focuses on information rooted in reality that is intentionally shared to inflict harm.[37] Other definitions do not turn on intention to harm, concerned simply with the sharing of accurate information in a context that is misleading.[38] Still other definitions focus on the intentional sharing of private information.[39] These differences matter. If both disinformation and malinformation entail an intention to inflict harm, what is the line between accurate but misleading and false information? Is malinformation another term for doxing, narrowly concerned with public disclosure of private information? Claire Wardle and Hossein Derakhshan, for example, include hate speech as a form of malinformation, which fits uneasily with any of the above definitions, even if it is logical to include hate speech somewhere in this framework.[40] As Samantha Bradshaw and co-authors identified, harassment is increasingly the tool used to silence the press and political dissent, such as net centers in Guatemala using fake accounts to target individuals and journalists with labels such as terrorist and enemies of the state.[41]

Similarly, definitions of disinformation differ on critical points. For example, definitions of falsity vary, to include "information that is false", "verifiably false",[42] misleading[43] or inaccurate.[44] Further, the harm and intent required vary. Some definitions refer to harm to the public, while others refer to harm to people, social groups, or states. Some

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[37] See Ireton *et al*, *supra* note 25. Kate Jones uses a similar definition, "Online Disinformation
and Political Discourse: Applying a Human Rights Framework" (November 2019) *Chatham House The Royal Institute of International Affairs* at 2.2.

[38] Thakur and Hankerson, *supra* note 32 at 7.

[39] This is the definition referenced in Faithagh *et al*, *supra* note 30 at 4.

[40] Wardle and Derakhshan, *supra* note 27 at 20. No attempt is made to define hate speech here, as there are a wide variety of definitions. See *Criminal Code*, RSC 1985, c C-46, s. 319 and the International Covenant on Civil and Political Rights, 1966, Article 20.

[41] Bradshaw, *supra* note 27 at 13.

[42] Fathaigh *et al*, *supra* note 30 at 4.

[43] Ireton *et al* give the example of cropping photos, or selecting quotes out of context as misleading, what is known as Framing Theory: *supra* note 25 at 47.

[44] Fathaigh *et al*, *supra* note 30 at 5.

definitions include economic gain, meaning that the spread of false information for a commercial purpose would meet the definition of disinformation.[45]

As Fathaigh and co-authors state, these definitions are unfit legal categories although they serve the policy domain.[46] For the purpose of understanding the Convoy and the role of social media I recommend the following three categories. For the terms disinformation and misinformation, the UNESCO definitions above are instructive. Disinformation refers to the intentional spread of false information, and the person or entity spreading it knows the information is false. This is a category for malicious actors, such as a state-sponsored disinformation campaigns or an individual creating a subscriber-based website to intentionally spread false health information for economic gain. Misinformation refers to the intentional spread of false information by a person or entity that believes it to be true. A large swatch of false information shared on social media are misinformation, and there is certainly overlap between mis- and dis-information, especially concerning misleading content.

The third category is what I call the "everything else" bucket. Hate speech, harassment, defamation, violent and extremist content, trolling, and so on, are forms of expression or attack vectors that are fomented by mis- and dis-information, and foundational to it. Consider gamergate, the attack on female games developers. It exemplifies a mix of attacks, including doxing, where private information is obtained about an individual (whether through hacking or otherwise) and shared publicly, brigading, which is coordinated harassment, lies and gendered-based attacks.[47] To the extent malinformation is referred to in this paper, it is in the "everything else" bucket, and I use the UNESCO definition that it refers to information based in reality spread to inflict harm. The best lies are truth adjacent, and malinformation captures that.

[45] *Ibid* at 5-7.
[46] *Ibid.*
[47] Marwick and Lewis, *supra* note 35 at 27.

## The ABC-D of the Information Environment

A useful framework for understanding the environment of information manipulation is the ABC-D Framework:[48]

- A is for manipulative actors who knowingly spread disinformation;
- B is for the behavioural techniques used to spread disinformation;
- C is for harmful content; and
- D is for the digital architectures of social media and how it impacts information distribution.

The authors created this framework to identify where to target solutions, but it is also a useful framework for making sense of the information space.

### A is for manipulative actors

These actors knowingly and covertly launch a disinformation campaign. In this respect, many scholars separate state-backed disinformation from other actors. Research indicates that actors that produce disinformation are motivated by "ideology, money, and/or status and attention."[49] Recall that if the issue is misinformation, the actor does not knowingly spread false information. Indeed, one of the great challenges with information manipulation is that eventually the information seeds to humans, who believe it to be true and amplify it through their networks. In terms of strategy, many disinformation campaigns target key online influencers, who then spread the content to their networks. This was observable in a study of anti-vaccine content, which primarily spread through 12 key online influencers.[50]

Further, media plays a role in the spread of disinformation. Alice Marwick identifies a spectrum of media manipulation. At one end are websites intentionally created to deceive readers. The websites are designed to look like reputable sources and the stories are sensational to draw in readers and make money. In the middle of the spectrum are media, often ideologically driven, that publish a mix of true and false

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[48] Francois, *supra* note 33.
[49] Marwick and Lewis, *supra* note 35 at 7-9, 27-29.
[50] The Center for Countering Digital Hate and Anti-Vax Watch, "Disinformation Dozen: the Sequel – How Big Tech is Failing to Act on Leading Anti-Vaxxers Despite Bipartisan Calls from Congress" (2021), online: https://counterhate.com/research/the-disinformation-dozen/. See also, for example, targeting of influencers in the Latinx community in the lead up to the 2020 election: Thakur & Harkeson, *supra* note 32 at 13-15.

stories. At the other end of the spectrum are mainstream media, which might use clickbait-styled headlines that are sensationalist and misleading to increase readers, and might report on false news stories thus inadvertently amplifying the such stories.[51] Some state-backed media, such as Russia Today (RT), are well known for their role in spreading disinformation. This led major social media platforms to block RT from their services during the Russia-Ukraine war, and prompted the European Union (EU) to direct platforms to block access to RT.[52] However, partisan news also plays a role in spreading mis- and dis-information, with misleading headlines and captions.[53] As Stephanie Carvin explains, American right-wing media had a greater impact on the US election in 2016 than disinformation.[54] As a result, journalists are often a key target of producers of disinformation.[55]

A question for the Commission would be who the key social media actors were who seeded the Convoy movement, both individual and media, and who amplified it. Various news reports identify some of the key actors, here and abroad.[56] A further question is whether there was – or the extent of- any foreign influence via social media, whether state, media or individual.[57] For example, 88% of donated funds through GoFundMe are reported to have originated in Canada.[58] Facebook also

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[51] Marwick and Lewis, *supra* note 35 at 44-45.
[52] Council of EU Press Release, "EU imposes sanctions on state-owned outlets RT/Russia Today and Sputnik's broadcasting in the EU" (March 2, 2022), online: https://www.consilium.europa.eu/en/press/press-releases/2022/03/02/eu-imposes-sanctions-on-state-owned-outlets-rt-russia-today-and-sputnik-s-broadcasting-in-the-eu/. See Wardle and Derakhshan, *supra* note 27 at 13.
[53] See study discussed in Wardle and Derakhshan *supra* note 27 at 36-37.
[54] Stephanie Carvin, *Stand on Guard: Reassessing Threats to Canada's National Security* (University of Toronto Press, 2020) at 223.
[55] Thakur and Hankerson, *supra* note 32 at 8.
[56] See Parkhill, *supra* note 6. For example, one of Russell Brand's videos has 1,252,343 views as of September 9, 2022, "Truckers Convoy: Why The Mainstream Media Blackout?!" (January 27, 2022) *YouTube*, online: https://www.youtube.com/watch?v=itbSIqY4Nnw. Tucker Carlson also drew attention to the Convoy: Tucker Carlson, "Tucker Carlson: What's happening to truckers in Canada reveals the future of the United States" (February 21, 2022) *Fox News*, online: https://www.foxnews.com/opinion/tucker-carlson-truckers-canada-future-united-states.
[57] Carvin, *supra* note 4.
[58] Sarah Turnbull, "GoFundMe head testifies over Freedom Convoy fundraising, says most donors were Canadian" (March 3, 2022) *CTV*, online: https://www.ctvnews.ca/politics/gofundme-head-testifies-over-freedom-convoy-fundraising-says-most-donors-were-canadian-1.5804094.

removed some Convoy groups, pages and accounts, that lured users to off-platforms websites with pay-per-click ads, hate groups and conspiracy groups.[59]

## B is for deceptive behaviour

Behaviour refers to the techniques used by actors to spread information. The techniques include, among others:

- Automated tools, such as bots, which are algorithms that scrape data from the internet and then spread messages through networks and help boost the virality of content.[60] Not all bots are bad. A Vatican bot posts reflections. News organizations use bots to post breaking news, and so on. However, bots can also be sock puppets (false online identities), designed to impersonate another person and manipulate opinion. They are not as easy to detect as one might imagine and are designed to "fly under the radar".[61] Text prediction tools are improving that can produce content at scale. A sample text that reflects the ideological perspective the author wants distributed is used to generate unlimited articles in a similar vein, all appearing to be originals.[62]
- Image deception, such as the creation of deepfakes, which are altered audio, video or images that are hyper realistic.[63] For example, a deepfake video of Ukraine President Zelensky surrendering was circulated early in the conflict with Russia, although was quickly debunked.[64] Most often, image deception is a much simpler tactic of using out-of-context images. For example, old photos

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[59] Culliford, *supra* note 5.

[60] "Bots are automatic posting protocols used to relay content in a programmatic fashion", Marco Bastos and Dan Mercea, "The Accountability of Social Platforms: Lessons from a Study of Bots and Trolls in the Brexit Campaign" (2018) 376(2128) Philosophical Transactions.

[61] Samuel Woolley, "The Business of Computational Propaganda Needs to End" (September 20, 2021) *Centre for International Governance Innovation*, online: https://www.cigionline.org/articles/the-business-of-computational-propaganda-needs-to-end/; Bastos and Mercea, *supra* note 56.

[62] See Sarah Kreps, "The Role of Technology in Online Misinformation" (June 2020) *Foreign Policy at Brookings*, online: https://www.brookings.edu/wp-content/uploads/2020/06/The-role-of-technology-in-online-misinformation.pdf at 4.

[63] Bobby Chesney and Danielle Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019) 107 CLR 1753.

[64] Tom Simonite, "A Zelensky Deepfake Was Quickly Defeated. The Next One Might Not Be" (March 17, 2022), *Wired,* online: https://www.wired.com/story/zelensky-deepfake-facebook-twitter-playbook/.

are presented as evidence of a new event, such as a photo posted after a global warming protest in London to show evidence of trash, but some of the photos were from Mumbai.[65] Memes are powerful tools of deception, because the visual image combined with short, emotional statements, are particularly good at influencing public opinion.[66] Memes are such effective tools of persuasion that the term "memetic warfare" was coined to refer to the key role memes play as a strategy in influence operations.[67]

- Manual trickery wherein humans participate online to shape internet flows. They might be a troll farm, who are paid or otherwise organized.[68] The purpose might be harassment, to shift political opinions or generally sow distrust in institutions and democracy. Some of these have become well-known, such as the Russian troll farms used to interfere with the 2016 US Election.[69] However, private firms are also regularly hired by companies to launch influence campaigns for their products and services, making disinformation for profit an industry.[70] Humans are more effective in the early part of a disinformation campaign in targeting and undermining any skeptics of the truth of the information.[71]
- Hybrids of the above, such as human driven disinformation campaigns using some automated tools. A campaign often uses multiple techniques, such as creation of fake accounts (impersonation or hacked/stolen credentials), use of bots, manual posts, paid advertising to micro-target users and so on.[72] For example, those seeking to disrupt first analyze points of social and political

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[65] Lisa Fazio, "Out-of-context photos are a powerful low-tech form of misinformation" (February 14, 2020) *The Conversation*, online: https://theconversation.com/out-of-context-photos-are-a-powerful-low-tech-form-of-misinformation-129959.

[66] *Ibid.*

[67] See CSIS, *supra* note 29 at 23.

[68] Bradshaw *supra* note 27 refers to cyber troops: "government or political party actors tasked with manipulating public opinion online" at 2.

[69] Report of the Select Committee on Intelligence, United States Senate, on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election.

[70] Bradshaw, *supra* note 27 at 9. Samuel Woolley talks about this as a key part of computational propaganda. One question is the line between this and marketing. Woolley describes these practices as "manufacturing consensus", and although less harmful, includes e.g. fake likes on a client post. More insidious are practices of paying trolls to harass journalists or use bots to boost things like anti-vaccine content or pay influencers to spread political messages: Woolley, *supra* note 61 at 2.

[71] Wardle and Derakhshan, *supra* note 27 at 31-32.

[72] Bradshaw, *supra* note 27 at 2, 11. Wardle and Derakhshan, *supra* note 27 at 38.

division, the groups occupying particular perspectives in those debates and the types of content that would be most polarizing. They then select tools to generate and distribute this polarizing content, often using artificial intelligence (AI) tools that can work at scale.[73]

- Virtual reality. The performance art of short TikTok videos has become an effective vector for the spread of disinformation.[74] The new battleground for information manipulation is virtual reality. Metaverse's immersive world has already been home to harassment, mis- and dis-information and hate speech.[75]

A challenge with mis- and dis-information is that it often entails activities across multiple platforms. For example, the pattern of online behaviour after mass shooting events follows one of seeding, amplifying, and spreading. The theories are planted in less visible forums like Reddit, 4Chan and Discord, then amplified to more mainstream platforms like Twitter and Facebook, and then spread to the wider ecosystem that interacts with these platforms.[76] This same pattern of harnessing influencers is evident in any disinformation campaign, such as finding alignment with groups with similar ideologies to support and amplify a cause,[77] or a message becoming de-contextualized as it is posted across different platforms.[78] Cast widely, extremist content and other online harms are commonly posted across various platforms, creating a challenging environment for regulation. For example, the Buffalo Attacker explored extremist content on 8chan, wrote a diary on a private Discord server which he later invited users to join, posted a manifesto to Google docs and then to 8chan

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[73] Kreps, *supra* note 62 at 4.

[74] It was recently called "WarTok" for the disinformation spread concerning the Russia Ukraine war: Alex Cadier *et al*, "WarTok: TikTok is feeding war disinformation to new users within minutes — even if they don't search for Ukraine-related content" (March 2022) *NewsGuard*, online: https://www.newsguardtech.com/misinformation-monitor/march-2022/.

[75] Jillian Deutsh *et al*, "Misinformation Has Already Made Its Way to the Metaverse" (December 15, 2021) *Bloomberg,* online: https://www.bloomberg.com/news/articles/2021-12-15/misinformation-has-already-made-its-way-to-facebook-s-metaverse. See this study: Adrian Verhulst *et al*, "Impact of Fake News in VR compared to Fake News on Social Media, a pilot study" (May 2020) IEEE *Xplore*, online: https://ieeexplore.ieee.org/document/9090558.

[76] CSIS, *supra* note 29 at 17.

[77] Bradshaw, *supra* note 27 at 9.

[78] Thakur and Hankerson, *supra* note 32 at 9.

"moe" and 4chan, livestreamed the attack on Twitch, which was then copied and posted or linked to on other social media.

The Convoy movement was similarly cross-platform and the campaign human-driven. What is not known is the extent to which any automated tools were used, images or videos manipulated, advertisements purchased and targeted, and any monetization by key influencers who financially benefitted from amplification of their content.

## C is for harmful content

Content is most often the target of regulation, in part, because regulating the actors and deceptive behaviours is more difficult and because harmful content is what is visible. Camille Francois argues that to be effective, regulation should focus more on AB and less on C.[79] It is a strong argument that technical, legal and policy solutions should better target actors, behaviours and distribution. However, one can never escape an analysis of content, because ultimately a post is generated and this implicates the right to freedom of expression. To put it another way, there is always a free expression element to the regulation of any activities on social media. Questions raised include:

- Do users have a right to freedom of expression on social media? This includes the right to seek, receive and impart information and ideas.
- Does social media have a right to freedom of expression that is implicated?
- Is the content posted potentially *illegal* in some form, whether hate propaganda, terrorist propaganda, defamation, or an invasion of privacy, and so on? I use that language loosely as it does not reflect the steps in a legal analysis. Rather, I offer it here to remind the reader that ultimately the content posted might be unlawful, whether criminally and civilly. It may be a different matter to ask who might be liable for the content, particularly if the content is generated by an algorithm.
- If the focus of regulation is on the actors, behaviour, or methods of distribution, does this indirectly regulate expression and what is the legality of this?[80]

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[79] Francois, *supra* note 33.

[80] This has been a focus of my research recently. See also Daphne Keller, "Amplification and its Discontents" (June 8, 2021) *Knights First Amendments Institute at Columbia University*, online: https://knightcolumbia.org/content/amplification-and-its-discontents.

Current law and governance are primarily focused on content regulation and explored in Parts II and III.

## D is for distribution

Alexandre Alaphilippe added D to this framework to refer to distribution. As he explains, the distribution of disinformation depends on the platform's architectural design. Recommender systems and paid advertising play important roles in the spread and monetization of mis- and dis-information.[81] This fits with the concept of computational propaganda discussed above, that if one can game the system of distribution through use of automation and algorithms, it is an effective attack vector to manipulate public opinion.[82] This is also the reason why some argue that the key to addressing disinformation is regulation of business models.[83]

Critical to the spread of disinformation is the design of the platforms, which determine the posts that are recommended and advertised to users, and the content that is thereby amplified.[84] Nathalie Maréchal and her co-authors at the New America Foundation identify two types of algorithms: content-shaping and content-moderating algorithms.[85] Content-shaping algorithms determine the content that users see when they use a company's services. It might be the Newsfeed on Facebook, or recommender system on YouTube or TikTok's ForYou page. It also includes the advertising that micro-targets users. Some law reform proposals have focused on

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[81] Alexandre Alaphilippe, "Adding a D to the ABC disinformation framework" (April 27, 2020) *Brookings Institute*, online: https://www.brookings.edu/techstream/adding-a-d-to-the-abc-disinformation-framework/.

[82] See Bradshaw, *supra* note 27; Woolley, *supra* note 61.

[83] Nathalie Maréchal *et al*, "Getting to the Source of Infodemics: It's the Business Model" (May 2020) *New America Foundation*, online: https://www.newamerica.org/oti/reports/getting-to-the-source-of-infodemics-its-the-business-model/. But see interview with Jonathan Stray by Evelyn Douek and Quinta Jurecic, "What We Talk About When We Talk About Algorithms" *The Lawfare Podcast*, online: https://www.lawfareblog.com/lawfare-podcast-what-we-talk-about-when-we-talk-about-algorithms.

[84] Maréchal *et al*, *supra* note 83: "We cannot clean up downstream pollutants like misinformation or dangerous speech without tackling upstream processes - targeted advertising and algorithmic systems - that make this speech so damaging to our information environment in the first place": at 10.

[85] *Ibid.*

mandating neutrality of content shaping algorithms.[86] Neutrality is a red herring. Content curation is key to manage incident response and demote or remove harmful messages, such as hateful posts or eating disorder content, and to target advertising to user preferences.[87] Rather, algorithmic accountability through transparency reporting, researcher access to data to monitor compliance, mandatory third-party audits, and creation of a regulator, are all better routes to improve conduct, transparency and trust in the systems.[88]

The other type of algorithm is content moderation. As Tarleton Gillespie comments, content moderation is not ancillary to the functioning of platforms, but rather their defining feature.[89] Content moderation algorithms analyse content to determine if a post violates the terms and conditions of that service and decide whether to action that content, with or without human reviewers in the loop.[90] Content moderation will be examined in Part III.

A question concerning the Convoy is how the recommender systems and other design features of social media shaped what users saw, the extent that advertising was purchased on Convoy-related matters, by whom, and the metrics used to micro-target users. While content moderation is explored in Part III, questions frontloaded here include, the extent of automated and human moderation, the number and types of content actioned, how quickly, the number of complaints, and reasons for decisions.

## The Psychology and Dangers of Information Manipulation

The study of the impact of mis- and dis-information, and therefore its dangers, is challenging. Without consensus on definitions or taxonomy, or the specific problem being studied, it is difficult to measure the impact. The datasets tend to be one-offs and small in scale, or the data is diffuse across various locations, or draws from

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[86] For example, the *Protecting Americans from Dangerous Algorithms Act*, H.R. 2154, 117th Cong. (2021-2022) proposes an exception to immunity from liability for social media (see discussion in Part III Legal Overview) if algorithms are used to curate content, unless it is done in a way that is obvious, understandable, and transparent.

[87] See Keller, *supra* note 80. Advertising and marketing are premised on the idea that it wants to get to know consumer preferences and advertise to those preferences: Douek and Jurecic interview, *supra* note 83.

[88] See Part III, Law Reform.

[89] Tarleton Gillespie, *Custodians of the Internet: platforms, content moderation, and the hidden decisions that shape social media* (Yale University Press, 2018) at 21.

[90] Maréchal *et al*, *supra* note 83.

various disciplines for which it is difficult to reconcile.[91] The result is that "disinformation is often linked to broad goals, the impacts may be diffuse and not targeted, making it harder to find evidence of harm."[92]

In studying the impact, it is important to avoid falling into the trap of the hypodermic needle theory, that users are passive receivers of messages injected by the media.[93] This theory has been refuted but still holds sway. Research is ongoing, but studies have found that false information can impact mental health, leading to stress, fatigue, anger and panic.[94] Exposure to disinformation can lead to belief echoes, meaning that a person knows the information is false but their attitudes are nonetheless shaped by it.[95] And users with conservative ideologies are more likely to follow disinformation accounts than liberal users.[96] In extremism research, while no causal or direct link can be found between online radicalisation and real world violence, there is a link, what the scholars call decision-shaping, not decision-making.[97]

Some studies point to the disruptive impact of disinformation in undermining faith in institutions and democracy, sowing cynicism and doubt. In one study commissioned by the European Parliament's Policy Department for Citizens' Rights and

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[91] Eleni Kapantai *et al*, "A systematic literature review on disinformation: Toward a unified taxonomical framework," (2020) 23(5) New Media & Society; Duncan J. Watts *et al*, "Measuring the news and its impact on democracy," (2021) 118(15) PNAS at 2-5.

[92] Thakur and Hankerson, *supra* note 32 at 8.

[93] Ahmed Al-Rawi *et al*, "What the Fake? Assessing the extent of networked political spamming and bots in the propagation of #fakenews on Twitter" (2019) 43(1) Online Information Review at 65.

[94] Yasmin Mendes Rocha *et al*, "The impact of fake news on social media and its influence on health during the COVID-19 pandemic: a systematic review" (2021) 43(2) Journal of Public Health: From Theory to Practice.

[95] Emily Thorson, "Belief Echoes: The Persistent Effects of Corrected Misinformation," (2015) 33(3) Political Communication.

[96] Frederik Hjorth and Rebecca Adler-Nissen, "Ideological Asymmetry in the Reach of Pro-Russian Digital Disinformation to United States Audiences," (2019) 69(2) Journal of Communication, online: https://doi.org/10.1093/joc/jqz006 at 169-170.

[97] Ghayda Hassan *et al,* "Exposure to Extremist Online Content Could Lead to Violent Radicalization: A Systematic Review of Empirical Evidence" (July 2018) 12(7) International Journal of Developmental Sciences 1, online: https://www.researchgate.net/publication/326384034_Exposure_to_Extremist_Online_Content_Could_Lead_to_Violent_Radicalization_A_Systematic_Review_of_Empirical_Evidence. See also Craig Forcese and Kent Roach, "Criminalizing Terrorist Babble: Canada's Dubious New Terrorist Speech Crime" (2015) 53(1) Alberta L Rev 35.

Constitutional Affairs, researchers found that the degree of impact of disinformation depended on the plurality of media and how organized the disinformation campaign was.[98] Another study identified the way that this doubt can be used strategically. Spencer McKay and Chris Tenove studied the 2016 US election and explained that Russian operatives focused on undermining credibility in institutions, in part, through creation of faux institutions and competing narratives.[99] Often the dangers of mis- and dis-information are linked to broader human rights values, and the injury caused to human dignity, autonomy, freedom of expression and opinion, and privacy.[100]

Two psychological biases have been identified as key to believing and spreading false information. First, confirmation bias means that we seek out information that reinforces existing beliefs, and that we interpret information to align with our beliefs. Second, motivated cognition and information processing means that we tend to seek out information that reinforces our cultural outlook. The result is that sources that reinforce our pre-existing world views are interpreted as more credible.[101]

Wardle and Derakhshan identify four characteristics that make messages resonate the most with users: (1) it prompts an emotional response (2) it is visual (3) the narrative is strong and (4) repetition.[102] Social media can tick all these boxes. They enable the sharing of the kind of emotional content that is so appealing to users. It is well documented that engagement with our posts acts like a dopamine hit, encouraging sharing of posts that conform with the majority and will be more likely to be liked and shared.[103] Further, obtaining news through social media feeds the ritualistic act of communication; that we read news not to obtain new information, but because we like the ritual, like "attending a church service". We are not there to obtain

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[98] Judit Bayer *et al*, "Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States" (2019) the *European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs*.

[99] Spencer McKay and Chris Tenove, "Disinformation as a Threat to Deliberative Democracy," (2020) 74(3) Political Research Quarterly, online: https://doi.org/10.1177/1065912920938143.

[100] Bayer *et al* go in this direction, *supra* note 98 at 76, and it is evident in the analysis in Part II on freedom of expression.

[101] Rebecca K Helm and Hitoshi Nasu, "Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation" (February 2021) 21 Human Rights Law Review 302 at 305-306.

[102] Wardle, *supra* note 27 at 38-39

[103] *Ibid* at 13.

new information, but to reinforce our beliefs.[104] Engagement online is relational. One reason that these messages are believed is that stories posted online draw from multiple sources, so the focus of readers is not on the source to assess credibility, but rather on the story itself, and credibility is then determined by their networks endorsing the stories.[105] Further, repetition is easy online and the more repetitive the message, the more likely it is that it will be believed.[106]

Visuals are an effective form of information manipulation. People are more likely to believe a statement is true if it is accompanied by an image because it provokes an emotional response,[107] and it can alter the memory of the news e.g. an event accompanied by a dramatic image will impact the memory of the event.[108] Memes are particularly effective, because in addition to the image and short, easily consumable message, they are often humorous. Humour is the playbook for sharing extremist content online and avoiding the moderator, because it "masquerade[s] as medium-specific parody."[109] For example, the Daily Stormer style guide recommended the use of coded words and humour to spread their message.[110] Memes are a way to create social belonging and to mock outsiders for taking it too seriously. Blyth Crawford explains:

> Thus, these memes profit from the inherent ambiguity of online interactions, as is outlined in Poe's Law, creating what Milner has termed a "Logic of Lulz"

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[104] *Ibid* at 14-15.

[105] *Ibid* at 12. Wardle also later discusses research that people are more likely to believe a message to be true if it is from someone they know: at 50.

[106] See discussion *ibid* at 45-56. The authors discuss six mental shortcuts used to evaluate whether a message is credible: (1) reputation (familiarity); (2) endorsement; (3) consistency (repetition); (4) expectancy violation (whether website looks and acts as expected); (5) self-confirmation (confirmation of beliefs); (6) persuasive intent (intention of the message creator): at 45.

[107] Eryn J Newman *et al*, "Nonprobative photographs (or words) inflate truthiness" (August 2012) 19 Psychonomic Bulletin & Review 969, as discussed in Fazio *supra* note 61.

[108] Fazio, *supra* note 65. The thinking is that visuals are more easily retrieved from memory, make it easier to imagine an event, serve as proof of the event and get our attention.

[109] Blyth Crawford, "The Influence of Memes on Far-Right Radicalisation" (June 9, 2020), Centre for Analysis of the Radical Right, online: https://www.radicalrightanalysis.com/2020/06/09/the-influence-of-memes-on-far-right-radicalisation/.

[110] Andrew Marantz, "Inside the Daily Stormer's Style Guide" (January 15, 2018) *New Yorker*, online: https://www.newyorker.com/magazine/2018/01/15/inside-the-daily-stormers-style-guide.

> where it is never possible to discern the intended tone of an online post with any certainty, thereby rendering all participants of an online space perpetually vulnerable to trolling. This way, extreme views are allowed to thrive as memes, enriched by a surrounding culture of troll sensibility and ambiguity.[111]

The ambiguity is strategic. As Alice Marwick explains, "[a]mbiguity is, itself, a strategy; it allows participants to dissociate themselves with particularly unappetizing elements while still promoting the overall movement."[112] Thus, white supremacy messages are pushed through the lens of irony and meme culture, both by alternative media or in groups online. Meme culture has infiltrated warfare, with discussion of "memetic warfare", referencing the "social media battlefield" over "narratives, ideas and social control."[113] Memes are thus part and parcel of information operations to win a competitive advantage over the adversary. Memes and trolling are essentially the new forms of propaganda in warfare.[114]

A richly explored question is the existence and impact of filter bubbles and echo chambers on users.[115] This is the concept that our online experiences are now personalized and trap us in a chamber where we hear, read, and interact with the same people and views. Our newsfeed on Facebook is personalized. We select the rooms to join on the audio app Clubhouse. We select the individuals and entities we follow on Twitter. We message with individuals and groups of our choosing on Telegram. We thus live in a bubble of our making and our views are never challenged or expanded. However, scholarship on the filter bubble is mixed. Several scholars now

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[111] Crawford, *supra* note 109. And see Ryan M. Milner, "FCJ-156 Hacking the Social: Internet Memes, Identity Antagonism, and the Logic of Lulz" The Fiberculture Journal, online: http://twentytwo.fibreculturejournal.org/fcj-156-hacking-the-social-internet-memes-identity-antagonism-and-the-logic-of-lulz/. Poe's law is that it is impossible to know if something is a joke.

[112] Marwick and Lewis, *supra* note 35 at 11.

[113] Jeff Giesea, "It's Time to Embrace Memetic Warfare" online: https://stratcomcoe.org/pdfjs/?file=/publications/download/jeff_gisea.pdf?zoom=page-fit at 69.

[114] *Ibid:* "Memetic warfare can be useful at the grand narrative level, at the battle level, or in a special circumstance. It can be offensive, defensive, or predictive. It can be deployed independently or in conjunction with cyber, hybrid, or conventional efforts" at 69.

[115] Axel Bruns defines the echo chambers as "when a group of participants choose to preferentially *connect* with each other, to the exclusion of outsiders" and filter bubbles as "when a group of participants choose to preferentially *communicate* with each other, to the exclusion of outsiders": "Filter Bubble" (November 29, 2021) Internet Policy Review, online: https://policyreview.info/concepts/filter-bubble.

argue that the phenomenon has been seriously overstated.[116] Axel Bruns, for example, posits that the filter is not from failing to see content that opposes our worldview, but rather the filter in our head, which leads individuals to take an oppositional stance to information.[117]

While the impact of information manipulation in the Convoy may be difficult to assess, the nature of the content that was influencing supporters can be analyzed. There was an existing audience for many of Convoy influencers discussing themes of anti-vaccination and anti-lockdown.[118] A question is the extent to which false information was shared in these spaces, and if any of it was intentionally shared (disinformation) to audiences that believed and re-shared it (misinformation). Another question is the extent that there was content in the "everything else" bucket of hatred, extremism, doxing, harassment and so on.[119] Some of the accounts and influencers of the Convoy were reported to have ties to far-right groups.[120]

Is there a solution to online information manipulation? Law and governance are complicated, and briefly explored in Parts II and III. There seems to be consensus that the solution is multi-dimensional, involving multiple strategies that, together,

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[116] See e.g. Axel Bruns, *ibid*; Amy Ross Arguedas *et al*, "Echo chambers, filter bubbles, and polarisation: a literature review" (January 19, 2022) Reuters Institute and University of Oxford, online: https://ora.ox.ac.uk/objects/uuid:6e357e97-7b16-450a-a827-a92c93729a08.

[117] Bruns, *supra* note 115. The question, he asks, is "why and how different groups in society come to develop such highly divergent personal readings of the same information."

[118] *Fifth Estate*, *supra* note 3.

[119] Doxing is problematic from a legal, ethical and cybersecurity perspective, and it was used by those for and against Convoy. There was a data breach of GiveSendGo and donors were doxed: Tanya Basu, "Online activists are doxxing Ottawa's anti-vax protesters" (February 11, 2022) *MIT Technology Review,* online: https://www.technologyreview.com/2022/02/11/1045281/ottawa-antivax-protests-doxxing/. See "Letter sent to parliamentarians warning of doxing ahead of trucker convoy: 'Go somewhere safe'" (January 28, 2022) *City News Ottawa*, online: https://ottawa.citynews.ca/local-news/letter-sent-to-parliamentarians-warning-of-doxing-ahead-of-trucker-convoy-go-somewhere-safe-5002917.

[120] Broderick, *supra* note 7.

counteract and manage the risks of harm of information manipulation.[121] For example, education is a key "inoculation"[122] to help the public identify false information, dubious sources, synthetic accounts and so on.[123] Transparency is also important. Social media reports about advertising, content moderation and privacy, for example, enable users to evaluate the veracity of what they consume. Education and transparency only work if there are trusted media sources. Therefore, supporting a diverse and sustainable media is crucial to combatting the effect of disinformation.[124] Technology is also core to combatting information manipulation,[125] such as identifying, flagging, demoting or otherwise limiting the visibility or virality of content, although they are not (nor ever will be) perfect instruments of regulation. Technical solutions are explored in Part III.

## Part II Freedom of Expression and User Rights and Responsibilities

The remainder of this paper will explore three legal and governance angles to the question of regulation of information manipulation. The first concerns the right to freedom of expression. As noted above, policy has shifted from a narrow focus on content regulation, to regulating actors, behaviours, and methods of distribution. This wider scope is important, but free expression is a relevant legal conundrum regardless of the regulatory strategy undertaken. A shift away from content regulation only makes the analysis indirect rather than direct. The second concerns the responsibilities of users for the spread mis-, dis- and mal-information. The third focuses on the legal

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[121] Report of the independent High level Group on fake news and online disinformation, "A multi-dimensional approach to disinformation" (2018) *European Commission*, online: https://coinform.eu/wp-content/uploads/2019/02/EU-High-Level-Group-on-Disinformation-A-multi-dimensionalapproachtodisinformation.pdf at 4. The expert advisory group on online harms, appointed by Heritage Canada, discussed the importance of a multi-dimensional approach to tackling information manipulation: see worksheets online: https://www.canada.ca/en/canadian-heritage/campaigns/harmful-online-content.html.

[122] Helm, *supra* note 101 at 318.

[123] Kreps, *supra* note 62 at 6; European Commission, *supra* note 121 at 25-27.

[124] The European Commission identifies the need for the state to protect freedom of expression, a free press, and media pluralism to address media challenges: *ibid* at 29.

[125] See Kreps, *supra* note 62 at 6-7.

obligations of social media and content moderation. The latter is a space of tremendous legal change, globally and in Canada.

## Freedom of Expression

Central to any discussion of information manipulation is freedom of expression. It is examined here narrowly as it relates to content regulation. Two issues emerge. First, regulating disinformation tasks a court or decision-making body to label a message as disinformation. Courts are fact-finding bodies and so in principle labeling content as true or false is not a hurdle, and many areas of law that intersect with freedom of expression might entail a finding of truth. For example, truth is a defence to a defamation claim and a court would be tasked with determining whether the defendant has met the burden of establishing truth on a balance of probabilities, if pled.

However, the line between truth and falsity can be more complicated in the sphere of information manipulation. Wardle and Derakhshan's taxonomy of information disorder evidences this dilemma. In their taxonomy of types of mis- and dis-information, they list satire or parody, misleading content, imposter content, fabricated content, false connection, false context and manipulated content.[126] Albert Zhang and co-authors give the example of a post by a spokesperson for China's foreign ministry of an Australian soldier holding a knife to a child purportedly as commentary about Australia's war crimes inquiry in 2020. Australia's Foreign Minister denounced the image as disinformation. The image was artwork and not necessarily created to deceive.[127]

This connects to a second issue with labelling content as disinformation. All definitions of disinformation hinge on the intention to harm (in contrast to misinformation). Proving intention to harm (and to harm what?) is a difficult exercise as it requires the motivations of the actors to be discerned, which is particularly challenging in light of the strategic ambiguity of many posts.[128] Further, the road that leads to the creation of a disinformation campaign may be based on true information and honestly held

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[126] Wardle and Derakhshan, *supra* 27 at 17.

[127] Alberta Zhang *et al*, "Submission to the UN Special Rapporteur on disinformation and freedom of opinion and expression", online: https://www.ohchr.org/sites/default/files/Documents/Issues/Expression/disinformation/2-Civil-society-organisations/Australian-Strategic-Policy-Institute.pdf, at 3-4.

[128] See discussion above about memes in Marwick and Lewis, *supra* note 235 a 11.

opinions.[129] Information labelled as false may later be found to have a kernel or possibility of truth, such as the COVID-19 lab leak theory that was initially dismissed by the scientific community, and posts removed by many social media platforms, and later investigated by the U.S. Secret Service at the direction of President Biden.[130]

The second issue is more fundamental to free expression itself: namely what does it mean in law to say that we value and protect freedom of expression and how does this intersect with information manipulation?[131] Under international human rights law, freedom of expression is protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR),[132] to which Canada is a party:[133]

> Article 19
>
> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

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[129] Ryan Calo *et al*, "How do you solve a problem like misinformation?" (2021) 7(5) Science Advances at 1.

[130] See, Stephan Lewandowsky, "The Lab-Leak Hypothesis Made It Harder for Scientists to Seek the Truth" (March 1, 2022) *Scientific American,* online: https://www.scientificamerican.com/article/the-lab-leak-hypothesis-made-it-harder-for-scientists-to-seek-the-truth/.

[131] See Khan, *supra* note 30 at Part B.

[132] *Supra* note 40. The Universal Declaration of Human Rights, 1948 (UDHR) is the anchor of international human rights, and its Article 19 provides: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[133] See Government of Canada, "Reports on United Nations human rights treaties", online: https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/reports-united-nations-treaties.html.

> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.[134]

Freedom of expression is protected in the *Canadian Charter of Rights and Freedoms* (*Charter*)[135] under s. 2(b):

> 2 Everyone has the following fundamental freedoms:
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> ---
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;[136]

Freedom of expression is a fundamental right in a democratic society and central to our search for truth, democracy, and self-discovery and fulfilment.[137] It is a fulsome right, including the right to seek, receive and impart information and ideas regardless of frontiers[138] and it includes the right not to express oneself.[139] The *Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda* (*Joint Declaration*),[140] confirms that the right is not limited to correct statements, and that it

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[134] Article 19, ICCPR, *supra* note 40.
[135] Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 8.
[136] *Ibid* at s. 2(b). Justifiable limits of s. 2(b) are set out in s. 1.
[137] The Supreme Court of Canada commented: "[f]reedom of expression is seen as worth preserving for its own intrinsic value": *R v Keegstra*, [1990] 3 SCR 697 at 881. There is significant debate about the meaning and value of freedom of expression, but they are not explored in this paper.
[138] ICCPR, *supra* note 40, Article 19.
[139] Khan, *supra* note 30 at para 35.
[140] (2017) FOM.GAL/3/17.

includes the right to "shock, offend and disturb".[141] Any limitation on the right to freedom of expression must comply with the test under international law and embedded in s. 1 of the *Charter*, that the restriction is provided by law, services a legitimate aim and is necessary and proportionate to that interest.

A few aspects of Article 19 are notable as it relates to information manipulation. First, the right to freedom of expression is the only human right in the ICCPR that carries with it "special duties and responsibilities".[142] While discussions often centre on limitations to the right, it is significant that the ICCPR emphasizes the unique rights *and responsibilities* that are the building blocks of the right to free expression. Second, the right to hold opinions is an absolute right in the ICCPR.[143] In practice, our thoughts and opinions are influenced by all kinds of people and media. Marketing and advertising, for example, are designed to influence our consumer behaviour. The question is the line between legitimate and unlawful forms of manipulation.[144] Arguably disinformation campaigns unjustifiably interfere with one's autonomy to form an opinion free from manipulation, and social media surveillance and profiling implicate the right not to reveal one's thoughts.[145] Third, the rights of everyone, including individuals that believe and share misinformation, are undermined by disinformation campaigns. As the *Joint Declaration* affirms, disinformation interferes with various

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[141] *Ibid.* They are drawing from oft-quoted *Handyside v UK*, [1976] ECHR 5 *(*and quoted in *Irwin Toy Ltd. v Québec (Attorney General)*, [1989] 1 SCR 927). It is worth noting that in *Handyside,* the Court goes on to state: "[s]uch are the demands of that pluralism, tolerance, and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued." In Canada, the quote is often from *Irwin Toy*: freedom of expression "ensure[s] that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream" at 968.

[142] Article 19, ICCPR, *supra* note 40. Francesca Klug illuminated this point in an address she gave to Intelligence Squared and the London Jewish Cultural Centre public debate Royal Geographical Society "Freedom of Expression Must Include the Licence to Offend" (June 2016) I Religion and Human Rights 225.

[143] Article 19(1), ICCPR, *supra* note 40. Susie Alegre identifies three elements to the right to hold opinions: the right to not reveal one's thoughts or opinion, the right to not have them manipulated, and to not be penalised for one's thoughts: Susie Alegre, "Rethinking Freedom of Thought for the 21st Century" (2017) 3 European Human Rights Law Review 221 at 225; Evelyn Marie Aswad, "Losing the Freedom to be Human" (2020) 52(1) Columbia Human Rights Law Review 306; Khan, *supra* note 24.

[144] Alegre, *supra* note 143 at 227.

[145] Khan, *supra* note 30 at para 34-36. Alegre, *supra* note 143 at 225.

aspect of the right to free expression, including the right to know, to seek, receive and impart information and ideas.[146] Disinformation can cause harm to individual reputations and privacy, and to national security, which can be the basis for legitimate restriction of the right to free expression.[147] It can also advocate hatred that incites violence, discrimination or hostility, prohibited in Article 20 of the ICCPR.[148]

Misinformation as a target of regulation is particularly problematic. Rumours and gossip are part of the rituals of human interaction.[149] For those that are innocent receivers and distributors of such information, they are arguably engaged in the search for truth, one of the philosophical values that underpin the right to free expression.[150] There are many reasons to question the search for truth as sufficient foundation to protect freedom of expression in these circumstances. It is premised on the idea that by leaving it to the marketplace of ideas, the truth will surface.[151] It also fails to account for the unequal burden experienced by marginalized and racialized groups. This theory also assumes that we have equal access to and experiences with free expression, and studies show that women, racialized and LGBTQ+ individuals, in particular intersectional individuals, are the primary targets of abuse, and driven from participation online.[152] In short, the right to freedom of expression is a right that is often only fully enjoyed by privileged groups.

This is not to say that freedom of expression should be undermined to protect individuals from offence. A properly run system of free expression expects us to put up with a lot based on the ideal of free expression. And the free flow of information is central to the right.[153] However, there is more to the analysis than putting up with

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[146] Joint Declaration, *supra* note 140.
[147] See ICCPR, Article 19(2), *supra* note 40.
[148] See Joint Declaration, *supra* note 140. As Jones explores, *supra* note 37, Article 20 shows that disinformation is not new and concerns about its widespread use in World II were addressed in the ICCPR, at 41.
[149] Robert Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 Cali L Rev 691.
[150] The other main theories embraced by the Supreme Court of Canada are self-fulfilment and democracy: see e.g. *Irwin Toy Ltd v Québec (Attorney General),* [1989] 1 SCR 927.
[151] See John Stuart Mills, *On Liberty* (1859) and the dissent of Justice Holmes in *Abrams v US* (1919) 250 U.S. 616: "the best test of truth is the power of the thought to get itself accepted in the competition of the market".
[152] See Jon Penney and Danielle Citron, "When Law Frees Us to Speak" (2019) 87 Fordham Law Review.
[153] Khan, *supra* note 30 at para 38.

offence. Harm facilitated by disinformation and through social media impacts the right to equality, including equality of expression.[154] For example, researchers identified the use of racially targeted disinformation campaigns in the US to suppress voter turnout from communities of colour.[155] Another example is the use of memes to spread extremist ideologies by playing on humour and familiar racist tropes, which then shifts the boundaries of acceptable discourse and normalizes and embraces racism.[156]

It is difficult to design a human rights compliant law that targets the creators of disinformation. Any right must be broadly enjoyed, and exceptions narrowly construed.[157] Several laws in other jurisdictions exemplify the risks in passing broadly scoped laws that prohibit disinformation.[158] They risk incentivizing systems of content filtering or takedown, including internet shutdowns, and enable state control and removal of dissenting voices (sometimes in places where states also sponsor their own disinformation). Even states with a strong commitment to human rights have faced unintended consequences. Of concern are laws that criminalize disinformation and do not have sufficiently precise definitions of false information and/or harm. Broadly framed laws have been used by Governments against civil society, journalists, and political opponents.[159] Civil laws may be legitimate but must be narrowly tailored such as our defamation laws, where the defendant is given a full

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[154] See *Keegstra*, *supra* note 137. Dickson C.J. for the majority reasoned:

> Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided.

See also Cynthia Khoo "Deplatforming Misogyny" (2021) LEAF, online: https://www.leaf.ca/wp-content/uploads/2021/04/Full-Report-Deplatforming-Misogyny.pdf.

[155] Thakur and Hankerson, *supra* note 32 at 10-11, and for further examples.

[156] Crawford, *supra* note 109.

[157] Khan, *supra* note 30 at para 39.

[158] See Ruth Levush, "Government Responses to Disinformation on Social Media Platforms" (2019) Library of Congress, online: https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1180&context=scholcom.

[159] See discussion Joint Declaration, *supra* note 140 at 53-54. The Joint Declaration goes so far as to say that criminal defamations laws should be abolished at para 2(b), which puts Canada out of step with international human rights: *Criminal Code*, *supra* note 40, ss. 297-316; *R v Lucas,* [1998] 1 SCR 439.

suite of defences aimed at protection of freedom of expression, including truth, fair comment, and responsible communication in the public interest.[160]

## Canadian Disinformation Laws

There are a variety of different laws that apply to individuals who communicate false statements. However, there are no laws that directly target individuals who communicate mis- or dis-information as contemplated and explored in this paper.

In 1992, in *R v Zundel*,[161] the Supreme Court of Canada (SCC) struck down the provision in the *Criminal Code* that prohibited the spread of false news. Section 181 of the *Criminal Code* provided:

> 181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.[162]

In a split 4/3 judgment, the majority held that s. 181 infringed the right to freedom of expression in s. 2(b) of the *Charter* and was not justified under s. 1. The majority emphasized the severity of criminal sanctions and the importance of "liberty of speech".[163] They viewed the criteria that the false statement causes or likely caused "injury or mischief to a public interest" as vague and overbroad, posing great danger to minority groups and their full participation in society. A key split between the majority and minority was how to characterize false expression. The majority stated the provision required a court to decide the meaning that was to be judged true or false: "[d]ifferent people may draw from the same statement different meanings at different times."[164] In their view, truth is a matter of perception, and prohibiting the spread of false news would enable dominant groups to impose their perception of truth on the minority. The dissenting judgment framed false information differently, concluding that there are provable facts and that the criminal provision was narrowly concerned with

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[160] *Ibid*. See *WIC Radio v Simpson,* 2008 SCC 40 and *Grant v Torstar*, 2009 SCC 61. For country specific examples, see Daniel Funke and Daniela Flamini, "A guide to anti-misinformation actions around the world" *Poynter*, online: https://www.poynter.org/ifcn/anti-misinformation-actions/

[161] *R v Zundel,* [1992] 2 SCR 731.

[162] *Criminal Code*, *supra* note 40.

[163] *Zundel*, *supra* note 161.

[164] *Ibid*.

deception. In their view, the intention to deceive through the sharing of provably false and harmful information undermines the value of free expression.[165]

Despite *Zundel*, the Supreme Court upheld as constitutional criminal and civil defamation laws[166] because false information obstructs the search for truth and does not enjoy the same level of protection as political speech, although later broadened the civil defence for matters of public interest.[167] These cases wrestle with the spectrum of low-value expression that can be characterized as far from the core rationales for the protection of expression.[168] There are also other *Criminal Code* provisions that criminalize an aspect of falsity, in particular hate propaganda,[169] counselling terrorism[170] and fraud.[171] There are also several civil causes of action that have an element of falsity, in particular defamation and false light.[172] To the extent that malinformation may be captured by a civil provision, intentional infliction of mental suffering and public disclosure of private embarrassing facts may apply.[173]

In 2018, the Government of Canada amended s. 91(1) of the *Canada Elections Act*[174] to remove the word "knowingly" from a provision that prohibited making or publishing

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[165] *Ibid*.
[166] *Lucas*, *supra* note 159.
[167] *Ibid*; *Hill v Church of Scientology*, [1995] 2 SCR 130; *Grant*, *supra* note 160.
[168] The Supreme Court of Canada has consistently held that not all expression is treated equally, rather the justification for infringement of the right is a spectrum from low to high value expression that contribute to the search for truth, democracy, and self-fulfilment. See e.g. *Keegstra*, *supra* note 137; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11; *Lucas*, *supra* note 159 ("the negligible value of defamatory expression"); *Hill*, *supra* note 167 ("defamatory statements are very tenuously related to the core values which underlie s. 2(b). They are inimical to the search for truth" at para 106). But then see *Grant*, *supra* note 160, in which the Supreme Court stated that Hill "must be read in the context of that case" (para 57), and in adopting a new defence of responsible communication in the public interest: "The law of defamation currently accords no protection for statements on matters of public interest published to the world at large if they cannot, for whatever reason, be proven to be true. But such communications advance both free expression rationales mentioned above — democratic discourse and truth-finding — and therefore require some protection within the law of defamation" at para 65.
[169] *Criminal Code*, *supra* note 40 at s 319.
[170] *Ibid* at s 83.221.
[171] *Ibid* at s 320.
[172] *Yenovkian v Gulian,* 2019 ONSC 7279.
[173] See *Jane Doe 72511 v NM,* 2018 ONSC 6607.
[174] SC 2000, c 9, concerning amendment 2018, c 31, s 61.

false statements about a candidate's personal character or conduct during an election period. The constitutional challenge of the provision turned on the removal of the term "knowingly" and whether this meant that intention was no longer a requirement of the offence.[175] The Ontario Superior Court concluded that the amendment prohibited the spread of accidental or unknown false information, as in misinformation, and that this was an unjustifiable limit on the right to freedom of expression. The provision was held to be of no force or effect.[176]

Competition law applies to an aspect of disinformation as advertising. The *Competition Act*[177] prohibits false or misleading representations and deceptive practices to promote a product, service, or business interest.[178] This includes, for example, misleading consumers to obtain their data.[179] To the extent that disinformation is for one of these promotional purposes, this may be investigated by the Competition Bureau. For example, false and misleading claims were made about cures to COVID-19, which were investigated by the Bureau.[180] Influencers must also disclose if their posts are sponsored, whether through payments, discounts, free products, and services, and similar.[181]

As the above brief overview shows, there is currently no law in Canada that directly targets mis- and dis-information. In criminal law post-*Zundel*, the prosecution would be driven by another higher order wrong. For example, a false statement that is hate, terrorism or fraudulent. In civil law, a similar dynamic is observable. The conduct might

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[175] *CCF v Canada (AG)*, 2021 ONSC 1224.
[176] See Eve Gaumond, "Why a Canadian Law Prohibiting False Statements in the Run-Up to an Election Was Found Unconstitutional", (March 16, 2021), online: https://www.lawfareblog.com/why-canadian-law-prohibiting-false-statements-run-election-was-found-unconstitutional.
[177] RSC 1985, c C34. See also the *Elections Modernisation Act*, SC 2018, c 31, which required creation of political ad registries.
[178] *Competition Act*, *supra* note 177 at s 52 and Part 74.01. There are both criminal and civil adjudicative regimes. See explanation: Government of Canada, "False or Misleading Representations and Deceptive Marketing Practices", online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html.
[179] *Ibid*.
[180] Competition Bureau of Canada, "Competition Bureau cracking down on deceptive marketing claims about COVID-19 prevention or treatment" (May 6, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/05/competition-bureau-cracking-down-on-deceptive-marketing-claims-about-covid-19-prevention-or-treatment.html.
[181] Government of Canada, "Influencer Marketing and the *Competition Act*", online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04512.html.

be actionable if the false statement impacts reputation (defamation) or presents an individual in a false light (in Ontario). If malinformation is understood as essentially doxing, then the common law public disclosure of private embarrassing facts may be applicable in some provinces.[182] That there is no law that directly applies to mis- or dis-information may be appropriate. Connecting the conduct to another higher order wrong enables prosecution or a civil action in the most egregious circumstances. However, it is arguable that if *Zundel* were decided today, the result might be different.

## Part III Social Media Law and Governance

The question that follows is what law and governance mechanisms are available to hold social media and other online services accountable for harmful content posted using their services? This is a rich area of study, and a detailed analysis is beyond the scope of this paper, although readers are encouraged to review the resources cited in this paper for more information.[183]

Regulation ultimately is concerned with "how much involvement government actually devolves to private actors."[184] There are three types of regulation at play for social media services. First are the laws that apply to social media in terms of content regulation. The area of law is known as intermediary liability, because of the go-between role of these companies, linking content creators with content consumers. Their role, traditionally, can be understood as facilitative and secondary to that of content creators, and therefore less morally culpable.[185] Often the term 'platform' is now used to refer to intermediaries with particular social or cultural power in the

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[182] *Jones v Tsige*, 2021 ONCA 312. It may also be an invasion of privacy under statute in some provinces.

[183] For a broad overview of Canadian intermediary liability see Emily B. Laidlaw, "Mapping Current and Emerging Models of Intermediary Liability" (2019) prepared for the Broadcasting and Telecommunications Review Panel, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574727. On content moderation see Evelyn Douek, "Content Moderation as Administration" *forthcoming* 136 Harvard Law Review, draft at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4005326.

[184] Chris T. Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (Cambridge University Press, 2011) at 53.

[185] The OECD definition of intermediaries is that they "bring together or facilitate transactions between third parties on the Internet": OECD, "Economic and Social Role of Internet Intermediaries" (April 2010), online: https://www.oecd.org/internet/ieconomy/44949023.pdf at 9.

marketplace.[186] Another area of law that impacts online safety is private sector privacy law. User data is the core of social media functionality and profitability, and these companies have privacy obligations to users to protect their personal information. This area of the law is not helpful to address the legality of individual posts but whether social media design and specific data transactions sufficiently protect user privacy.

The second type of regulation is co-regulation, which is a form of government-backed self-regulation, such as codes of practice and industry bodies.[187] Co-regulation is collaborative and helps fill the gap between legal obligation and voluntariness and has been central to internet governance since the internet's commercialization. This type of regulation is only briefly touched on herein. The third type of regulation is self-regulation, or in the case here, content moderation by social media.[188] The absence of federal intermediary liability laws in Canada means that content moderation was the primary regulatory force with the Convoy.

## Legal Overview

There is no comprehensive federal intermediary liability law in Canada in contrast to Europe[189] and the United States of America.[190] In the US, section 230 of the *Communications Decency Act* (CDA)[191] provides broad immunity from liability to

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[186] There are several more layers to exploring different types of platforms beyond the scope of this paper. See e.g. Tarleton Gillespie, "Platforms are not Intermediaries", (2018) 2 Geo L Tech Rev. 198 209; José van Dijck, Thomas Poell and Martijn De Waal, *The Platform Society* (Oxford University Press, 2019); Robert Gorwa, "What is Platform Governance?" (2019) 22(6) Information, Communication & Society 854.

[187] There is more to regulation than these categories, although these are the three main ones. See Emily B. Laidlaw, "The Challenge Designing Intermediary Liability Laws" in Catherine Easton and David Mangan, *The Philosophical Foundations of Information Technology Law* (Oxford University Press, forthcoming 2023).

[188] As Chris Marsden comments, self-regulation usually does not exist in pure form as government is often in the shadows pressuring companies to act: *supra* note 184 at 48.

[189] *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* (ECD) and *Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, COM(2020) 825 (DSA).

[190] *Communications Decency Act,* 47 USC 230 (CDA). There are, of course, other jurisdictions to consider, but I mention the US and EU as they are similar legal systems and were two of the first jurisdictions to implement broadly scoped intermediary liability laws.

[191] *Ibid*.

intermediaries for the content posted by third parties, except for federal criminal law, intellectual property law or electronic communications privacy, and a recent, widely criticized, amendment to address human trafficking.[192] The result is that intermediaries have a safe harbour from liability for mis- or dis-information that users post that might be illegal, because it is e.g. defamatory or reveals private information. A few things are key to tease out about s. 230. First, the immunity concerns decisions to both leave content up and take it down. Thus, social media are protected to develop content moderation practices that are stricter than the law and align with their values. The problem with s. 230 is that it does not incentivize responsibility and companies can, and have, embraced the protection of s. 230 for leaving illegal content up without corresponding steps to implement moderation practices.[193]

The EU, in contrast, adopted a conditional safe harbour model with the *Electronic Commerce Directive* (ECD).[194] Under this model, an intermediary that hosts third party content is provided with a conditional immunity from liability for unlawful content posted by users. However, the intermediary risks losing the immunity if it obtains knowledge of the unlawful content and fails to act to disable access to it. Thus, it operates as a notice and takedown regime revolving around *knowledge* of the unlawful activity and an obligation to *action* illegal content by removing it.

For clarity, intermediary obligations under the ECD would only be triggered for unlawful content and a significant portion of information manipulation is lawful but awful. Thus, the European Commission led drafting of a voluntary industry *Code of*

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[192] The provision was poorly drafted and backfired. It broadly made vulnerable sex workers, incentivized removal of legal speech and encouraged lack of oversight by platforms of dangerous activities: see Daphne Keller, "SESTA and the Teachings of Intermediary Liability" (November 2, 2017), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3121296 .

[193] Also, the broad legal protection afforded to free expression under the First Amendment means that content that would be considered hate propaganda in Canada is protected speech in the USA and thus would not invite constitutional or section 230 scrutiny. Section 230 has had global impact, with controversy when it conflicts with laws in other jurisdictions: see for example: *Google Inc v Equustek Solutions Inc*: 2017 SCC 34; *Google Inc v Equustek Solutions Inc*, 2017 WL 5000834 (ND Cal Nov 2, 2017). Then see *Equustek Solutions Inc v Jack*, [2018] BCSC 610; Michael Geist, "The *Equustek* Effect: A Canadian Perspective on Global Takedown Orders in the Age of the Internet" in Giancarlo Frosio, ed., *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press, 2020).

[194] As a Directive, there was significant variation in the ways that it was implemented by Member States, one of the reasons for the DSA: *supra* note 189. See also the *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

*Practice on Disinformation*.[195] Content removal is important for unlawful content,[196] but conditional safe harbour models are more problematic to deploy than they appear at first blush. They tend to incentivize removal of content without corresponding protection of lawful content or decisions by companies that are more human rights sensitive.[197]

There is a current trend in law reform to shift to a due diligence model for intermediaries, including in Europe which has supplemented the ECD with the *Digital Services Act* (DSA).[198] These are variously framed as duty of care, risk assessment and due diligence. At its core, these models shift from a binary leave up/takedown model to task intermediaries with managing the risks of harm of their services. These have the advantage that they are not limited to content regulation and can be more focused on actor, behaviour, and distribution. There are significant variations in the way these might be implemented, with risks associated with this being poorly done. I am broadly favourable of a risk management approach to intermediary responsibility, although the devil is in the details. Due diligence models will be explored below in the section on Law Reform.

As explained, Canada does not have any federal intermediary liability law similar to the US or Europe. The *Criminal Code* provides an avenue for content takedown. A court may order online content removal of terrorist or hate propaganda, child pornography, voyeurism, and non-consensual disclosure of intimate images.[199] Québec is the only province that has a broad intermediary liability law, which provides

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[195] See "2018 Code of Practice on Disinformation", online: https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation and "Strengthened Code of Practice on Disinformation" (June 2022), online: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3664.

[196] But see discussion of effectiveness in Part III, Content Moderation.

[197] David Kaye *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/32/38 (2016) at paras 43-44.

[198] DSA, *supra* note 189.

[199] *Criminal Code*, *supra* note 40, ss 320.1(5), 83.223, 164.1(5).

a safe harbour on the condition that if an intermediary becomes aware of illicit activity on their services, they act promptly to block access to the content.[200]

Canadian intermediary liability laws relevant to information manipulation have developed primarily in defamation law.[201] In practice, it operates similarly to the ECD as a notice and takedown regime. If TikTok, for example, obtains knowledge that it is hosting a video with defamatory content, it is obligated to disable access to the video or risk liability for the underlying wrong.[202] Defamatory content only captures a fraction of the forms of information manipulation at issue, specifically false information that lowers the reputation of an individual or entity.[203] Mis and dis-information often relate to broad topics, such as health. Also, the Government of Canada is limited concerning

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[200] *Act to establish a legal framework for information technology*, CQLR c C-1.1. Two differences between the ECD and Québec Act are notable. First, the Québec Act refers to illicit activity, a broader concept that unlawful content. Pierre Trudel explains that while this catches lawful but awful content, constitutional constraints mean that it would be narrowly construed. Second, s. 22 provides that the intermediary "may incur responsibility", which means that the analytical test is whether the intermediary behaved diligently in the circumstances: Pierre Trudel, "Liability of Platforms: The Law of Québec" (on file with author) at 2-3.

[201] For intermediary liability laws in copyright see *Copyright Act*, RSC 1985, c C-42, ss 41.25-41.27.

[202] See e.g. *Weaver v Corcoran*, 2015 BCSC 165. On publication see *Crookes v Newton*, 2011 SCC 47. Further, in defamation the intention need only be to distribute the information, with the result that individuals can be unintentionally defamed: *Hulton v Jones*, [1910] AC 20. Therefore, misinformation could be actionable in defamation (intentional distribution of false information you believe to be true), although note the defences of fair comment and responsible communication in the public interest: *WIC Radio, supra* note 160; *Grant*, *supra* note 160.

[203] *Hill*, *supra* note 167. Various defences are important to broadly protect expression that might nonetheless harm reputation, but this is not explored here. Note that whether an intermediary might be liable under the umbrella of one of the privacy torts is untested in law, although presumably a court would draw from defamation principles.

any intermediary liability laws it can introduce because of its trade commitments in the Canada-US-Mexico Trade Agreement (CUSMA).[204]

Private sector privacy legislation (federally and provincially)[205] are foundational to protection of privacy, and the moral culpability of companies is more direct than the area of intermediary liability. Privacy law requires that organizations are accountable for personal information about an identifiable individual that they collect, use, or disclose in the course of commercial activities.[206] What is complex, given the opacity of many social media business practices, is identifying information flows to nail down precisely what social media collect, use and disclose, and the various third parties with which they transact. This is best exemplified by the *Joint investigation of Facebook, Inc. by the Privacy Commissioner of Canada and the Information and Privacy Commissioner for British Columbia* (Joint Investigation)[207] concerning the Cambridge Analytica scandal. Cambridge Analytica used data from an app *This is*

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[204] See Article 19.17, Canada-US-Mexico Trade Agreement, online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng. Article 19.17 of the CUSMA introduces a broad safe harbour from liability for intermediaries styled on CDA s. 230, although it is a matter of debate whether it goes as far as s. 230. Article 19.17 prohibits treatment as an "information content provider in determining liability", which leaves scope for equitable remedies and the duty of care/risk management models: see Vivek Krishnamurthy *et al*, "CDA 230 Goes North American? Examining the Impacts of the USMCA's Intermediary Liability Provisions in Canada and the United States" (July 7, 2020) CIPPIC, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645462. The Government of Canada's "Canadian Statement on Implementation", online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/implementation-mise_en_oeuvre.aspx?lang=eng, indicates that Article 19.17 means that intermediaries are not to be held civilly liable for user posts nor for actions taken to moderate such posts, which is consistent with s. 230. The CUSMA came into force on July 1, 2020.

[205] Our federal private sector privacy law is the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. Various provincial legislation have been deemed substantially similar, such as Alberta's *Personal Information Protection Act*, SA 2003, c P-6.5.

[206] PIPEDA, *supra* note 205 at s 4(1). The person must be identifiable, but the Office of the Privacy Commissioner interprets that broadly.

[207] Office of the Privacy Commissioner of Canada, *Joint investigation of Facebook, Inc. by the Privacy Commissioner of Canada and the Information and Privacy Commissioner for British Columbia* (April 25, 2019), online: https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2019/pipeda-2019-002/.

*Your Digital Life*, which collected data about Facebook users to build psychological profiles of users, which were then used to send targeted ads to users to influence voters in various elections, most notably the US republican presidential nomination race and subsequent election. The Joint Investigation concluded that Facebook (now Meta) violated privacy law, because it failed to be accountable to give meaningful effect to protection of privacy, did not obtain meaningful consent from users, nor had in place adequate security safeguards.[208]

At the time of writing, the Government of Canada has introduced Bill C-27 to reform PIPEDA and expand privacy protection.[209] Analysis is beyond the scope of this paper, but readers are encouraged to review the Bill through the lens of social media responsibility and protection from online harms. The bedrock of information manipulation is data. Thus, privacy law is a natural framework to address protection of users from general systems of surveillance,[210] to provide oversight of the business models that make users vulnerable,[211] to introduce measures for algorithmic accountability and regulation of artificial intelligence, to complement deceptive marketing laws with data protection specific obligations, and to strengthen the rights and obligations concerning the kinds of data practices that are acceptable in an information environment we cannot realistically argue we can opt out of.

Where does that leave us? Social media are certainly regulated in Canada, but there are significant gaps in our laws concerning intermediary liability for online harms, and specifically for information manipulation. Generally, the most viable route to intermediary liability is a claim in defamation law, but only some forms of information manipulation are defamatory. Outside of intermediary liability, data protection is an important legal tool to address privacy aspects of platform responsibility, but it is one

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[208] The Competition Bureau also investigated Facebook concerning this matter for false or misleading representations. Facebook settled for $9.2 million: Government of Canada, "Facebook to pay $9 million penalty to settle Competition Bureau concerns about misleading privacy claims" (May 19, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/05/facebook-to-pay-9-million-penalty-to-settle-competition-bureau-concerns-about-misleading-privacy-claims.html.

[209] Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts*, 1st Session, 44th Parliament, 2022.

[210] Intermediary laws, such as the ECD, provide that there is no general obligation to monitor: see ECD, *supra* note 189 at Article 15.

[211] This is where competition law might play a key role here, especially to address micro-targeting and its role in information manipulation.

piece of the pie and does not directly regulate information manipulation or online harms more generally.

This turns attention to the governance frameworks that exist beyond traditional law, namely companies content moderation practices. It is notable that even in countries with comprehensive intermediary liability laws, content moderation policies play an important role. There are a variety of reasons for this. Companies are incentivized to moderate content to address even the lawful but awful, although the lack of content moderation is the business model of some of the platforms. These companies are global and policies provide an avenue to create standards of wide application. The other reason is that few cases make it to court. In civil law, litigation is too expensive and slow to be worthwhile for most litigants. In the area of criminal law, online harms are notoriously underreported and under investigated. Vulnerable groups are often wary of complaining to the police, and law enforcement do not all have the resources or special knowledge necessary to investigate some complaints, and there are reports of not taking such complaints seriously.[212]

## Content Moderation by Social Media

The argument is often made that users have 'rights' as against social media companies, that a platform has violated their *Charter* right to free expression because of a content moderation decision. The *Charter* does not apply to the activities of private companies unless these companies undertake a governmental action.[213] This means that, in general, users do not have a right to free expression on social media, because they are privately owned. This does not mean that the right to free expression has no legal significance concerning content moderation by platforms. For example, governments must comply with the *Charter* in the enactment of any laws. Thus,

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[212] Some of this will be explored in a forthcoming report by the Canadian Council of Academics on *Public Safety in the Digital Age*, online: https://cca-reports.ca/reports/public-safety-in-the-digital-age/.

[213] See ss 1 and 32 of the *Charter*, *supra* note 135. The *Charter* applies to the legislative, judicial, and executive government and in instances where government has delegated authority to a private party or that party acts as an agent of the state. There has been some scholarly exploration of this, but not to the extent of analysis of the indirect horizontal application of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950. Online harms legislation will need to be scrutinized to the extent that there is a deliberate delegation of power of the government as that might invite a different type of *Charter* scrutiny to the actions of platforms.

whatever online harms bill is introduced by the Government of Canada will need to be *Charter* compliant.[214]

If there is some unease that rights seem privatized in digital spaces, there is legitimacy to this concern. The way a platform interprets free expression, for example, whether based on corporate values, domestic law (often the First Amendment) or international human rights, is a system of private governance of their design without any of the normal features of accountability we expect of state-run systems.[215] The decision of various social media to deplatform former President Trump, for example, is important from a private governance perspective, invites scrutiny of who sets the terms of moderation and highlights the tremendous power of these platforms. Facebook has a formal appeal mechanism through the Oversight Board, which reviewed the decision to deplatform President Trump and concluded the decision to restrict access was appropriate, but the penalty of indefinite suspension was not.[216]

A similar phenomenon is observable in what Elena Chachko calls "national security by platform".[217] As she explains, platforms are now central to geopolitics and security.[218] Many social media collaborate with governments, employ foreign policy directors, incident response teams, formal content moderation and appeals mechanisms, trust and safety teams and policies directed at national security issues, such as mis- and dis-information, election integrity, terrorism and violent extremism. For most social media, they have taken on this role out of necessity, because of the ways that their platforms have been used and exploited. However, some platforms espouse political ideologies that influence their design and content moderation. A key risk is that since this arrangement is often indirect and informal, a private actor can

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[214] Courts must also develop the common law in line with *Charter* values. For example, the right to privacy and to free expression influenced the development of the torts of defamation and privacy: *Hill*, *supra* note 167; *Jones*, *supra* note 182.

[215] By privatization I mean that a private party performs a function normal the reserve of government. This has been described as tilting, where human rights were initially structured as a relationship between citizens and the state, and with digital technologies, we now exercise and experience our rights as between users and technology companies: see Emily B. Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge University Press, 2015), chapter 6.

[216] Oversight Board, Case decision 2021-001-FB-FBR https://www.oversightboard.com/decision/FB-691QAMHJ.

[217] Elena Chachko, "National Security by Platform" (2021) 25 Stanford Technology Law Review 55.

[218] *Ibid*.

"choose what functions they wish to fulfill."[219] Indeed, platforms can choose whether to engage with it at all.[220] This destabilizes national security protection, because there is minimal oversight by government of what platforms do, a novelty to the issues and tremendous discretion for platforms to decide on a course of action, if any.[221] This is observable with Facebook's response to the spread of violent and extremist content, and mis- and dis-information, in Myanmar, and its contribution to violence against the Rohingya. The *Human Rights Council Report of the independent international fact-finding mission of Myanma*r went so far as to call Facebook's response "slow and ineffective."[222]

Content moderation is not entirely voluntary. Rather, it is an important step to fulfil businesses responsibility to respect human rights per the *United Nations Guiding Principles on Business and Human Rights* ("UN Guiding Principles").[223] The UN Guiding Principles impose due diligence obligations on businesses concerning their human rights impact. Namely, businesses should avoid adversely impacting human rights, monitor their compliance and work to prevent and mitigate harm, and provide access to a remedial mechanism. The Guiding Principles is the blueprint for companies to embed human rights into their operations and to hold them accountable, but it still relies on good faith commitment, and many of the content moderation

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[219] *Ibid* at 125.
[220] *Ibid* at 127. This problem of indirection and informality is observable in technology regulation generally, an issue flagged by technology regulatory scholars for years.
[221] *Ibid.*
[222] Human Rights Council, "Report of the independent international fact-finding mission on Myanmar" (2018) A/HRC39/64, online: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf at para 74.
[223] See Office of the High Commissioner for Human Rights, ""Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (2011), HR/PUB/11/04, online: https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

policies of social media used in the Convoy make no reference to or reflect the Guiding Principles.[224]

Further, company efforts are often collaborative and/or spurred by government, as a form of co-regulation, such as the EU *Code of Practice on Disinformation* discussed above.[225] Another example is The Global Internet Forum to Counter Terrorism (GIFCT), which is a collaboration between various online services to address terrorism and violent extremism. It was created through cooperation among various stakeholders beyond its industry founders to include academia, civil society, and bodies such as the United Nations Counter-Terrorism Executive Directorate and the EU.[226] GIFCT works to develop both preventative and incident response mechanisms.

There are two aspects to content moderation to be examined. First, social media companies usually deploy technology, in some form, to regulate harmful content. While these are often framed as technical solutions, they are systems of governance technically deployed. Second, social media regulate users through their content moderation policies. This will be examined through the lens of the social media used in the Convoy.

## Content Moderation Technology

Technology is key to combatting information manipulation.[227] However, it is not the panacea to harmful content. It can be blunt, lack the finesse necessary to assess ambiguous content accurately and contextually, and is shaped by the mindset (and

[224] The Guiding Principles are rooted in a company's social licence to operate. They were endorsed by the Human Rights Council, which elevated it from guidance to a system of governance. See John Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton, 2013); David Kaye, *Speech Police: The Global Struggle to Govern the Internet* (New York: Columbia Global Reports, 2019). See Meta, "Corporate Human Rights Policy", online: https://about.fb.com/wp-content/uploads/2021/03/Facebooks-Corporate-Human-Rights-Policy.pdf; Google, "Human Rights", online: https://about.google/human-rights/.

[225] Codes of practice, *supra* note 195.

[226] See online: https://gifct.org/; Chachko, *supra* note 217 at 89.

[227] See Kreps, *supra* note 62 at 6-7.

potential bias) of the dataset creator with minimal oversight external to the organization.[228]

There are numerous automated tools used for content moderation to filter, classify, curate, and organize content. Many are driven by artificial intelligence.[229] For example, technology can help identify inauthentic accounts.[230] Perceptual hashing, such as Microsoft's PhotoDNA, is a digital fingerprint used to identify harmful images and videos, such as child sexual abuse, terrorist and violent extremist content, or copyright infringing content.[231] GIFCT spearheaded a shared databased for its members.[232] Project Arachnid uses hashing to identify child sexual abuse material.[233] Other tools include image recognition to prioritize content for human review, and natural language processing techniques to detect hate speech and extremist content.[234]

Technology is also used to nudge behavioural changes in users.[235] Currently, such strategies are necessarily experimental, because the research on their effectiveness

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[228] See Spandana Singh, "Everything in Moderation" (July 22, 2019), *New American Foundation*, online: https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/the-limitations-of-automated-tools-in-content-moderation.

[229] See limits of AI in Alex Feerst, " The Use of AI in Online Content Moderation or, the tech sector invested in automation and all I got was this questionable adjudication" (September 2022) Digital Governance Working Group, https://platforms.aei.org/wp-content/uploads/2022/09/The-Use-of-AI-in-Online-Content-Moderation.pdf.

[230] It is the AI text generator for false information that can also be used to identify it. Kreps discusses Grover, a model which both generates and identifies "fake news", *supra* note 62 at 6-7.

[231] See YouTube Content ID (adapted from PhotoDNA) and Google Drive.

[232] It is limited to terrorist entities on the United Nations designated terrorist groups lists. GIFCT is an NGO founded in 2017 by Facebook (now Meta), Microsoft, Twitter, and YouTube, and has expanded its membership since: *supra* note 226.

[233] See online: https://www.projectarachnid.ca/en/.

[234] Singh, *supra* note 228.

[235] Nudging is the theory by Richard Thaler and Cass Sunstein that indirect, subtle choice architecture are effective to prompt behaviour changes, such as mandating choice for organ donation with driver's license renewal: *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin Book, 2008).

is in the early stages.[236] For example, a common tool used by online services to address information manipulation is information correction. Information correction has appeal, because the interference with the right to freedom of expression is relatively minor.[237] Users still have access to the information, but the content is flagged as false information or a synthetic account. Is information correction effective? The research is mixed. The strongest argument against information correction was set out in a 2010 article by Brendan Nyhan and Jason Reifler, which they labelled "backfire effect", that debunking information as false is ineffective and can have the opposite effect and further entrench readers misperceptions.[238] However, the backfire effect has since been shown to be overstated, and the problem more subtle, and further research is needed to measure the effectiveness of information correction.[239] For example, information correction can have the effect of "belief echoes".[240] And there is an illusion of believability to any information shared, thus there is a risk that debunking information gives the story the illusion of truth.[241] The answer for information correction might be how softly it is delivered, such as Facebook's change from information

[236] One can see platforms make changes in response to new research: Tessa Lyons, "Replacing Disputed Flags With Related Articles" (December 20, 2017) *Meta,* online: https://about.fb.com/news/2017/12/news-feed-fyi-updates-in-our-fight-against-misinformation/.

[237] Helm, *supra* note 101 at 315-318.

[238] Brendan Nyhan and Jason Reifler, "When Corrections Fail: The Persistence of Political Misperceptions" (2010) 32 Political Behaviour 303. Helm discusses, *supra* note 101 at 315-318; Wardle and Derakhshan, *supra* note 27 at 45; Timothy Caulfield, "Does Debunking Work? Correcting COVID-19 Misinformation on Social Media" in Colleen Flood *et al*, *Vulnerable: The Law, Policy and Ethics of COVID-19* (University of Ottawa Press, 2020) at 188-193.

[239] See exploration of literature by Caulfield, *supra* note 238. He concludes "while a backfire effect may occur in some circumstances – this is an area where more research would be helpful – it certainly isn't such a robust and measurable phenomenon that it should stop us from mounting efforts to counter misinformation on social media": at 190.

[240] Thorson, *supra* note 95.

[241] Caulfield, *supra* note 238 at 190-191.

correction to providing a diverse array of news stories on the topic,[242] or timing the correction at the tipping point of public awareness that it is untrue.[243]

Similarly, content removal and blocking are sometimes used. I include it in the discussion of technical solutions, although it is often a mix of automated and human actioning. One question is the effectiveness of content removal. It is not clear that it is effective in changing beliefs, because there is no new information to replace what was taken down.[244] Further, problematic content is shared almost instantaneously after posting, and therefore the content is rarely actually removed from circulation. The livestream of the Buffalo attack was removed by Twitch within two minutes, but the video had already been copied and reposted across various platforms.[245] Removal can also act as a beacon drawing more attention to the post or reinforce beliefs.[246] Deplatforming accounts can have some success disrupting the momentum of a group. They lose followers and fans and struggle to gain news ones, and it disrupts monetization. They may jump to alternative platforms, but it does not return the group to its previous level.[247] Content removal might serve a different function than changing

[242] See Lyons, *supra* note 236.
[243] Caulfield, *supra* note 238 at 191-192. Caulfield lists various principles to maximize the impact of information correction: use facts; communicate clearly and simply; use trusted sources, although trust is a challenge; identify that there is scientific consensus if applicable; be kind and authentic; write in a storytelling style; use rational argument emphasizing gaps in logic etc; frame the debunking to emphasize the facts not the misinformation; audience should be the general public not believers of the misinformation: at 193-198.
[244] See discussion, Helm, *supra* note 101 at 321.
[245] Mia Sato, "How the Buffalo shooting livestream went viral" (May 17, 2022) *Verge*, online: https://www.theverge.com/2022/5/17/23100579/buffalo-shooting-twitch-livestream-viral-content-moderation.
[246] This is known as the Streisand effect. Also discussed in Helm, *supra* note 101 at 321-322.
[247] See literature review discussion by Amarnath Amarasingam: "Does Deplatforming Work? A quick survey of literature in the wake of the Capitol Hill Attack" (January 12, 2021) *Intrepid*, online: https://www.intrepidpodcast.com/blog/2021/1/12/does-deplatforming-work-a-quick-survey-of-literature-in-the-wake-of-the-capitol-hill-attack. See monetization of YouTube vs Rumble vs BitChute vs Odysee. The more generous monetization strategies of some new video-sharing platforms are worth studying for their impact on mainstream video-sharing platforms.

beliefs, serving an expressive role reinforcing what is acceptable conduct, although care must be taken to balancing various rights.[248]

From a law and governance perspective, we are in a period of technical and regulatory experimentation. There is no consensus on the strategies that will work to address information manipulation. Therefore, solutions change and sometimes backfire. Because of the social power of some platforms, the backfire can be monumental. The result in a mixed bag of interventions. For example, the messaging app WhatsApp recently updated technical features to improve user privacy, to enable users to leave groups without notifying channels, hide that they are online and block screenshotting of messages intended to be viewed once.[249] These are positive solutions specific to that app. Twitter embeds nudge theory using technical tools,[250] Twitter uses this technique by prompting users to reconsider posting tweets that contain harmful language and to read articles before sharing them.[251]

In contrast, Facebook's tweak to its algorithm to improve user well-being backfired. Around 2017-18, Facebook changed its engagement ranking algorithm[252] to boost meaningful social interactions (MSI). Popular posts and those by friends and family were amplified and professional news was de-amplified. The Facebook Files leaked by Frances Haugen also revealed that part of the algorithmic tweaks entailed boosting posts that generate strong emotional emoji reactions. Love, laughter, wow, sad, and angry emoji reactions receive five times the value as the like emoji.[253] Internal research showed that posts that elicited angry emoji reactions were

[248] Drawing from the argument that a purpose of the law is to reinforce or change norms. Content removal should be based on human rights principles.
[249] Michelle Toh, "WhatsApp is going to stop letting everyone see when you're online" (August 9, 2022) *CNN,* online: https://www.cnn.com/2022/08/09/tech/whatsapp-privacy-changes-meta-intl-hnk/index.html.
[250] Thaler and Sunstein, *supra* note 235.
[251] Twitter Safety, "How Twitter is nudging users to have healthier conversations" (June 1, 2022), online: https://blog.twitter.com/common-thread/en/topics/stories/2022/how-twitter-is-nudging-users-healthier-conversations.
[252] Engagement ranking is controversial and was the focus of some of Frances Haugen's testimony. Some of the controversy is that increasing engagement is viewed as self-serving in that it keeps users on Facebook: Jeremy B. Merrill and Will Oremus, "Five points for anger, one for a 'like': How Facebook's formula fostered rage and misinformation" (October 26, 2021) Washington Post, online: https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/.
[253] See Facebook files, Wall Street Journal, online: https://www.wsj.com/articles/the-facebook-files-11631713039.

"disproportionately likely to include misinformation, toxicity and low-quality news."[254] As a result, Facebook's algorithm fostered the spread of mis- and dis-information.[255]

## Content Moderation Policy

Turning to the Convoy, the conversations that fueled it started long before January 2022 across various mainstream and alternative social media, in groups discussing vaccine mandates, COVID restrictions and conspiracy theories, and amplified by influencers and alternative news organizations. There was a built-in audience and participants. Key to social media responsibilities is the systemic risks associated with their services. How are the designed? How does the algorithm work? How do they monitor the impact of their services, and do they action their findings? Except for privacy, there is no legal obligation to manage their systemic risk, particularly as much of the content is lawful. The opacity of social media, beyond transparency reports, which have not yet matured and standardized for this industry, means that this aspect of what fueled the Convoy is a question of self-regulation by social media. Further, while the monetization structure of various social media is not explored in depth in this paper, the Commission may consider enquiring further as to the financial drive of some influencers and monetization practices of social media used in the Convoy. For example, under YouTube's Partner Programme, a creator would make money off the ads that surround their videos on YouTube. The content produced by these influencers might then be subject to review under community guidelines and other monetization policies.[256]

The content moderation policies of social media used in the Convoy vary widely. As we explored, Convoy supporters and organizers tended to use Facebook, Twitter, TikTok, YouTube, Rumble, Telegram, Zello, BitChute, Odyssey, GoFundMe and GiveSendGo. Mainstream platforms have relatively developed content moderation policies, although this analysis puts aside the effectiveness or legitimacy of their

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[254] Merrill and Oremus, *supra* note 252.
[255] I reference both mis- and dis-information, because Facebook's algorithm has been exploited for information operations, such as Russian originated ads on Meta, "An Update On Information Operations On Facebook" (September 6, 2017), online: https://about.fb.com/news/2017/09/information-operations-update/.
[256] YouTube, "Monetisation Policies", online: https://www.youtube.com/howyoutubeworks/policies/monetization-policies/.

approaches, including enforcement.[257] By developed, I mean simply that they have a policy or policies that substantively address the risks of harm of their services, a system to action content that infringes these policies, including a mechanism for users to report content, and an appeal mechanism. Some social media might notionally tick these boxes, but moderate minimally. And a key difference across social media used in the Convoy is the extent to which they proactively moderate harmful content.[258]

Facebook and Twitter, for example, have various policies on hate speech, terrorism and violent extremism, violence, manipulated media, synthetic accounts and similar.[259] The subject matters covered are similar, but their policies are not, reflecting the differences in their platforms, but also different ethos about where they land on particular issues.[260] Notably, these policies serve to reflect and reinforce what is illegal (e.g. uttering threats),[261] but they also set rules about acceptable expression above and beyond the law. Therefore content moderation is key to addressing legal but offensive expression. On hate speech, their policies set the bar for acceptable expression higher than criminal or human rights law.[262] For example, Facebook defines hate speech attacks as "violent or dehumanizing speech, harmful stereotypes, statements of inferiority, expressions of contempt, disgust or dismissal, cursing and calls for exclusion or segregation".[263] Facebook treats misinformation as an issue of

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[257] For a thorough analysis of content moderation and human rights law, see Mackenzie Common, *Rule of law and human rights issues in social media content moderation* (2020) PhD thesis, London School of Economics and Political Science; Douek, *supra* note 183.

[258] A significant issue is the need for proactive content moderation, but it is difficult to square that with the equal need not to mandate general systems of monitoring or undermine encryption, which can be an invasion of privacy. The line tends to be found between general and specific monitoring e.g. proactively searching for hashed content that is specifically CSAM, terrorist or violent extremist content, but there is a lot of content in the grey zone that manipulates users.

[259] See Twitter's "The Twitter Rules", online: https://help.twitter.com/en/rules-and-policies/twitter-rules; Meta's "Facebook Community Standards", online: https://transparency.fb.com/policies/community-standards/.

[260] For a long time Twitter was resistant to impose stronger content moderation in faithfulness to a First Amendment approach, but in recent years has begun to develop more comprehensive moderation practices.

[261] *Criminal Code*, *supra* note 40, s 264.1.

[262] *Ibid*, s 319, which prohibits public incitement or wilful promotion of hatred, or wilful promotion of antisemitism; *Keegstra*, *supra* note 137; *Whatcott*, *supra* note 168.

[263] Meta, "Hate Speech", online: https://transparency.fb.com/policies/community-standards/hate-speech/.

integrity and authenticity. It has a misinformation policy, which targets types of misinformation: physical harm and violence, health, voter, and census interference and manipulated media.[264] Twitter introduced a crisis misinformation policy in May 2022.[265] Disinformation is dealt with separately under policies addressing e.g. spam, coordinated accounts or inauthentic behaviour.

Some of the softer mechanisms used by social media are important because they move beyond the leave up/takedown binary. As explored above, information correction or diversity, demotion or limiting visibility, warnings, labels, and invitations to rethink or read before sharing are all forms of strategic friction. For more formal content moderation, Facebook uses a hybrid approach using a mix of algorithmic and human review, and proactive and complaints-based review. When a user submits content to post, it is screened to identify if the content matches hash databases of CSAM and terrorism content. If there is a match, the content is blocked from being posted. Once content is online, Facebook monitors content using algorithms to identify objectionable content based on a variety of metrics, including words, images or behaviours that are viewed as commonly associated with the different types of objectionable content, the poster's identity, the context of the post and comments. If the algorithm determines that the content clearly violates the Community Standards, it is removed, but if the algorithm is unclear, a human moderator reviews the content. Users can also report content as violating the Community Guidelines. Penalties for violations range from warnings, to restricted access to certain Facebook features such as live streaming, to disabling accounts permanently or temporarily. Users can appeal the decision, including to the Facebook Oversight Board.[266] Facebook removed some Convoy-related Facebook groups, pages, and accounts, such as spammers, which capitalized on the Convoy to draw users to off-platforms websites with pay-per-click ads, hate groups and conspiracy groups, such as QAnon.[267]

Twitter uses a variety of friction techniques, but like Facebook it also uses a hybrid approach relying on automation and human review. Users can report content that

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[264] Meta, "Misinformation", online: https://transparency.fb.com/policies/community-standards/misinformation/.
[265] Yoel Roth, "Introducing our crisis misinformation policy" (May 19, 2022), online: https://blog.twitter.com/en_us/topics/company/2022/introducing-our-crisis-misinformation-policy.
[266] Oversight Board, "Appeal to shape the future of Facebook and Instagram", online: https://www.oversightboard.com/appeals-process/. Generally see, online: https://transparency.fb.com/.
[267] Culliford, *supra* note 5.

violates Twitter's Rules. Enforcement is scaled to include specific actioning of tweets (labels, visibility, removal), restricted messaging, or account level enforcement (read-only mode, verification, suspension). Users can appeal a locked or suspended account.[268] Twitter permanently suspended a Convoy account and that of an influencer.[269]

TikTok also uses friction techniques, and a hybrid system of automation and human review, and similar to the above, uses a scalable approach of warnings, temporary and then permanent account suspensions, with the opportunity to appeal. For some content, such as CSAM, it has a zero-tolerance policy.[270] TikTok prohibits harmful disinformation that causes significant harm.[271] Several influencers made regular use of TikTok, but at the time of writing, I am not aware that there has been any actioning of Convoy related accounts.

Content moderation is considerably different for what has been described as alternative social media. This can lead to a whac-a-mole game as users jump to less moderated platforms, whether to avoid moderation rules or because their account has been suspended. This is observable with the suspension by GoFundMe of the Convoy campaign, which then moved to GiveSendGo.[272]

As noted, the Convoy was a movement that thrived off videos. YouTube was used by organizers and supporters of the Convoy, but users also moved to alternative video-

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[268] Twitter, "Our range of enforcement options", online: https://help.twitter.com/en/rules-and-policies/enforcement-options.

[269] Kevin Jiang, "Ontario MPP Randy Hillier 'permanently suspended' from Twitter" (March 8, 2022), *Toronto Star,* online: https://www.thestar.com/politics/provincial/2022/03/08/ontario-mpp-randy-hillier-suspended-from-twitter.html.

[270] TikTok, "Content violations and bans", online: https://support.tiktok.com/en/safety-hc/account-and-user-safety/content-violations-and-bans.

[271] Per TikTok's definition in its "Community Guidelines", significant harm relates to "harm to individuals, our community, or the larger public regardless of intent. Significant harm includes serious physical injury, illness, or death; severe psychological trauma; large-scale property damage, and the undermining of public trust in civic institutions and processes such as governments, elections, and scientific bodies. This does not include simply inaccurate information, myths, or commercial or reputational harm", online: https://www.tiktok.com/community-guidelines#37.

[272] Amanda Connolly, "GoFundMe, GiveSendGo defend handling of convoy blockade fundraising campaigns" (March 3, 2022) *Global News*, online: https://globalnews.ca/news/8656947/gofundme-givesendgo-convoy-blockade-campaigns/.

sharing platforms, primarily BitChute, Rumble and Odysee. Like other mainstream social media, YouTube has community guidelines that broadly prohibit deceptive practices, harassment, hate speech and harmful or dangerous content or similar.[273] They enforce their guidelines using a mix of automated and human review, and flagging by users.[274] In contrast, BitChute has Community Guidelines, and a method for reporting content and appealing decisions.[275] However, moderation is primarily based on user reports and does not seem to include proactive measures. Further, and crucially, the Community Guidelines primarily only prohibit illegal content with the result that BitChute has become a haven for extreme expression. It only restricts hateful content if it is illegal as incitement to hatred. It narrowly prohibits terrorist and extremist content of designated entities under counterterrorism legislation, which is underinclusive of white nationalist groups and the broader harms that concern social media moderation.[276] There is no policy concerning mis- and dis-information or other forms of information manipulation, including manipulated media or synthetic accounts, although it prohibits spamming and brigading.

Rumble, which hosted one of the videos that helped spark momentum for the Convoy,[277] takes a similar approach to content moderation as BitChute and as a result has also become popular for posting extremist content. Rumble's CEO describes the platform as "different from YouTube and Facebook because it uses far fewer

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[273] YouTube, "Community Guidelines", online: https://www.youtube.com/intl/ALL_ca/howyoutubeworks/policies/community-guidelines/?gclid=Cj0KCQjw39uYBhCLARIsAD_SzMT8vv1X75lRt3vTw4in65q_TUDuN1-shNv9PQvP8UFfG2YKBSGTOksaAoKIEALw_wcB, and "Policies Overview", online: https://www.youtube.com/howyoutubeworks/policies/overview/.

[274] YouTube, "How does YouTube enforce its Community Guidelines?", online: https://www.youtube.com/intl/ALL_ca/howyoutubeworks/policies/community-guidelines/?gclid=Cj0KCQjw39uYBhCLARIsAD_SzMT8vv1X75lRt3vTw4in65q_TUDuN1-shNv9PQvP8UFfG2YKBSGTOksaAoKIEALw_wcB#enforcing-community-guidelines.

[275] BitChute, "Content Moderation Policy", online: https://support.bitchute.com/policy/content-moderation#flagging--reporting and "Community Guidelines", online: https://support.bitchute.com/policy/guidelines/.

[276] Terrorist designation has not included alt right groups, although Canada has added e.g. Proud Boys and Blood & Honour in recent years: Public Safety Canada, "Current Listed Entities", online: https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx. Bitchute also keeps its own list of prohibited entities, but there are only two on the list: "Prohibited Entities List", online: https://support.bitchute.com/policy/prohibited-entities-list.

[277] Broderick, *supra* note 7.

algorithms for recommending and reviewing content."[278] Videos are displayed in chronological order to users based upon who they follow on the platform. Rumble does not use algorithms to proactively filter high risk content. While the Terms and Conditions prohibit more than illegal content, the bar set is not much higher.[279] There is no policy on mis- or dis-information.

Odysee's Community Guidelines broadly prohibit incitement of hatred or violence, promotion of terrorism and/or criminal activity and violence that is not newsworthy. Mis- and dis-information, hateful content and extremism is permissible. Users can report content and enforcement includes content removal, blocking comments or filtering a user channel.[280] However, the structure of Odysee is unique. Videos are not stored on a centralized server, but instead decentralized across a network using blockchain technology.[281] This means that the videos cannot be permanently deleted

[278] Fizza Kulvi, "Meet Rumble, Canada's new 'free speech' platform — and its impact on the fight against online misinformation" (July 8, 2021) *The Conversation*, online: https://theconversation.com/meet-rumble-canadas-new-free-speech-platform-and-its-impact-on-the-fight-against-online-misinformation-163343.

[279] Rumble, "Website Terms and Conditions of Use and Agency Agreement", online: https://rumble.com/s/terms. See discussion by Kevin Newman, "Investigating Canadian YouTube rival Rumble and its growing popularity among the world's far right" (February 19, 2022) *CTV News*, online: https://www.ctvnews.ca/w5/investigating-canadian-youtube-rival-rumble-and-its-growing-popularity-among-the-world-s-far-right-1.5787533.

[280] Odysee, "Community Guidelines", online: https://odysee.com/@OdyseeHelp:b/Community-Guidelines:c and "Report content:, online: https://odysee.com/$/report_content?claimId=166ec880e443d4e1bca31dbd142bdf2a4a8aa61f&sunset=lbrytv.

[281] Eviane Leidig, "Odysee: The New YouTube for the Far-Right" (February 17, 2021) Global Network on Extremism and Technology, online: https://gnet-research.org/2021/02/17/odysee-the-new-youtube-for-the-far-right/#:~:text=Odysee's%20community%20guidelines%20state%20that,not%20allowed%20on%20the%20platform

– even by the user that uploaded it, although Odysee can block access to the content via the app.[282]

Telegram was actively used to organize and generate support for the Convoy. Telegram minimally moderates its service. As a messaging app it is different than any of the above social media. Many forms of moderation used by mainstream platforms create significant privacy risks if used to moderate private messaging.[283] However, as examined in Part I, Telegram private groups can have up to 200k members (while Instagram and iMessage cap group chats at 32 people) and their channels allow broadcasting to unlimited subscribers.[284] It is difficult to characterize these as private.[285] Telegram does not moderate its private groups or channels, except reports of spam. Therefore, hate speech, terrorist and violent extremist content, mis- and dis-information, graphic content, CSAM and similar are unmoderated. In public channels and groups, the Terms of Service only prohibit promotion of violence and illegal pornographic content.[286]

The walkie-talkie app Zello was used to organize the blockades. Its Terms of Service and Community Guidelines broadly prohibit harmful behaviour,[287] including anything

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[282] Odysee explains "We cannot remove published content from the blockchain itself, although we can block content accessed via our app or other services on top of the blockchain": "Terms of Service" online: https://odysee.com/$/tos. Blockchain, as an immutable ledger, means that the data on the blockchain cannot be changed: Eileen Brown, "Blockchain-based Odysee keeps your social media content online" (April 8, 2021) *Zdnet*, online: https://www.zdnet.com/finance/blockchain/blockchain-based-odysee-keeps-your-social-media-content-online/.

[283] This paper also does not explore the privacy and security risks of undermining encryption, but it is an important issue when examining what kind of a duty a messaging app should have to regulate content.

[284] Telegram "FAQ", online: https://telegram.org/faq#q-what-39s-the-difference-between-groups-and-channels; Sam Andrey, Alexander Rand and Karim Bardeesy, "Rebuilding Canada's Public Square" (September 2021), online: https://static1.squarespace.com/static/5e9ce713321491043ea045ef/t/615478c6a74009181c27d15e/1632925924146/RebuildingCanada%27sPublicSquare.pdf.

[285] This is a difficult issue. Facebook groups are also private and have no limit in size.

[286] Telegram, "Terms of Service", online: https://telegram.org/tos/terms-of-service-for-telegram-premium.

[287] Zello, "Terms of Service", online: https://zello.com/legal/terms/: "unlawful, harmful, threatening, abusive, harassing, tortious, excessively violent, defamatory, vulgar, obscene, nude, partially nude, or sexually suggestive, pornographic, libelous, invasive of another's privacy, hateful racially, ethnically or otherwise objectionable".

that a Zello representative considers objectionable.[288] It prohibits promotion of violent extremism, but narrowly defines terrorism as related to organizations on sanctions lists.[289] Mis- and dis-information is not specifically addressed. Users can report violations, and there is no other information on the assessment process or whether Zello proactively moderates any content. Penalties for violations include suspensions or termination of accounts.

There is no legal obligation for these companies to go beyond the law in setting the conditions for use of their spaces, and there is reasonable criticism of social media that go too far.[290] The Guiding Principles provide the blueprint for developing content moderation policies, but there is no enforcement mechanism and thus relies on good faith implementation by corporate actors. To the extent social media act, it is driven by market incentives, social responsibility, and public pressure. As we saw, much of the conduct that seeds movements like the Convoy are a slow burn until something sparks it into action, and much of the content the fuels the slow burn is legal or in the grey zone.

## Law Reform

We are in a period of rapid change in law reform to address online harms and intermediary liability.[291] Over the past several years there has been growing awareness about the central role of social media and other intermediaries, and technical and regulatory experimentation beyond the takedown models. Germany's restrictive notice and action regime with the *Network Enforcement Act*[292] seems to be the high-water mark for intermediary liability in western states. More recently, there has been a paradigmatic shift in the approach to law reform proposals evidencing

[288] *Ibid* and "Community Guidelines", online: https://zello.com/community/user-guidelines/.
[289] Zello, *supra* note 287.
[290] It is beyond the scope of this paper to explore how users' rights to free expression does *and should* operate in Canada as to access to social media. This is an area I am currently researching.
[291] Law reform is evident broadly across various areas of technology regulation. I am focused here on specific online harms and intermediary liability frameworks, although law reform in privacy, AI regulation and competition law are also relevant to addressing information manipulation.
[292] Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG) (2017).

creative and promising solutions.[293] While a detailed review is outside the scope of this paper, I will sketch four main themes and flag some of the more problematic areas.

First, the most important development in law reform is the shift from a focus purely on content regulation to managing systemic risk. In Canada, the Commission on Democratic Expression proposed a duty to act responsibly.[294] Heritage Canada is currently exploring a risk management approach to online harms, which was the focus of workshops with the expert advisory group. How to address mis- and dis-information was a matter of debate.[295] In my view, if social media and other online services are tasked with managing their systemic risks, then this would naturally include mis- and dis-information. However, there should not be an obligation to action content that would fall in the category of lawful but awful. Ultimately risk management is not about actioning individual pieces of content, but this would need to be clear in legislation, particularly for lawful content. A model for such an approach is the EU's DSA.[296]

The EU passed the DSA in 2022, which imposes risk management obligations on "very large platforms".[297] These platforms must identify systemic risks related to the dissemination of illegal content, any negative impacts on human rights, and intentional manipulation of their services. In particular, platforms must take into account the impact of the "content moderation systems, recommender systems and systems for selecting and displaying advertisement".[298] Platforms must then mitigate these risks and conduct independent audits for compliance.[299] Other key provisions include user controls of recommender systems, advertising transparency and research access to data to monitor compliance.[300] The threat of mis- and dis-information is discussed throughout the recitals, but it is not specifically referenced in the body of the DSA. Rather, soon after the DSA was passed, a new *Code of Practice on Disinformation*

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[293] To be certain, some misguided proposals have been made, which lack the delicate balancing this paper tries to show is necessary in the area of online harms.
[294] Canadian Commission on Democratic Expression, "How to Make Online Platforms More Transparent and Accountable to Canadian Users" (May 2022) *Public Policy Forum*, online: https://ppforum.ca/wp-content/uploads/2022/05/DemX-2-English-May-4-1.pdf. The duty to act responsibly is like the duty of care proposed in the United Kingdom, but the Commission sought to separate the concept from jurisprudence in negligence law.
[295] See worksheets, *supra* note 121.
[296] DSA, *supra* note 189.
[297] *Ibid* at Articles 25-33.
[298] *Ibid* at Article 26.
[299] *Ibid* at Articles 27-28.
[300] *Ibid* at Articles 29-31

was introduced.[301] A flaw of the DSA is the focus of risk management on very large platforms. While special obligations for these platforms might be appropriate, risk management is equally important for other online services, but the capacity of small and medium sized companies must be considered. The Convoy illustrates that both mainstream and alternative social media, and cross-posting, were used extensively, and risk management by just a few of the major mainstream platforms would not do much in the way of addressing online harms.

The focus on risk management captures the due diligence foundation of the Guiding Principles.[302] A variation would be a duty of care model, which has been proposed in the United Kingdom's *Online Safety Bill* (OSB).[303] It is unclear what the fate will be of the OSB as it is currently on pause, but it exemplifies legislation that got lost in the complexity of online harms regulation.[304] Regulated content, services, and the nature of the obligations varied so widely that if implemented, it will be difficult for most online services to comply. Complexity is a risk for any legislation to address online harms if the goal is to impose human rights sensitive obligations that differentiate between different types of content and online services. Most controversial, the OSB sought to directly regulate lawful but offensive expression and created specific offences related to disinformation.[305]

Second, transparency reporting is a crucial component of monitoring intermediary compliance. Both the DSA and OSB impose transparency reporting obligations.[306] As I have discussed, it is hard to do transparency reporting well and it is new for online services, in particular social media services. We might not have firm knowledge about what it is, the metrics of success or even precisely what we want social media to be

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[301] *Supra* note 195.
[302] *Supra* note 223.
[303] *Online Safety Bill*, 2022-2023, HC Bill 121 (as amended in Public Bill Committee), online: https://publications.parliament.uk/pa/bills/cbill/58-03/0121/220121.pdf.
[304] See visuals by Graham Smith, "Mapping the Online Safety Bill" (March 27, 2022) *Cyberleagle*, online: https://www.cyberleagle.com/2022/03/mapping-online-safety-bill.html.
[305] Caitlin Chin, "The United Kingdom's Online Safety Bill Exposes a Disinformation Divide" (August 11, 2022) *Center for Strategic & International Studies,* online: https://www.csis.org/analysis/united-kingdoms-online-safety-bill-exposes-disinformation-divide.
[306] DSA, *supra* note 189 at Articles 13, 23, 33 OSB, *supra* note 303 at ss 64-65.

transparent about, but it seems clear that transparency is central to the future of online harms regulation.[307]

Third, law reform is consistently focused on the creation of independent regulators for online safety. These are crucial to improve access to justice and to advance the necessary co-regulatory approach to online harms. Australia is the first jurisdiction to create an eSafety Commissioner with a research, education, investigation and enforcement mandate.[308] The remit started as protection of children from bullying and non-consensual sharing of intimate images, and abhorrent violent material, and has expanded to protection of adults, and broader regulatory power.[309] As a regulatory body, it is set up for actioning content, but they work closely with industry and have incorporated safety by design into their work.[310] Mis- and dis-information is not in the remit of the Commissioner. The UK has selected its telecommunications and broadcasting regulator, OFCOM, to be the OSB regulator.[311] The DSA mandates that Members States designate a regulatory body for DSA enforcement.[312] The role and function of a regulator is a point of debate. A useful model is that of privacy commissioners, which have both an educational, research and investigatory role.[313] The powers of the regulator are key, including to issue orders and impose fines.[314] A point of more debate is whether users should have access to a remedial mechanism outside of courts or the intermediary. There seems to be wide agreement that an ombudsperson is important to support users, especially marginalized and racialized

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[307] Daphne Keller, "Some Humility About Transparency" (March 19, 2021) *The Center for Internet and Society*, online: http://cyberlaw.stanford.edu/blog/2021/03/some-humility-about-transparency.

[308] See online: https://www.esafety.gov.au/.

[309] *Online Safety Act 2021*, No. 76, 2021 (OSB). See discussion of their legislative remit, online: https://www.esafety.gov.au/about-us/who-we-are/our-legislative-functions.

[310] See "Safety by Design", online: https://www.esafety.gov.au/industry/safety-by-design.

[311] The Office of Communications. In earlier research I identified OFCOM as a poor fit for digital rights regulation: Laidlaw, *supra* note 183, chapter 6.

[312] See DSA, *supra* note 189 at Chapter IV.

[313] The eSafety Commissioner plays a crucial role educating and supporting the public and collaborating with industry.

[314] Strengthening the power of privacy commissioners has been a focus of law reform and lessons can be learned in creating an online safety regulator.

groups that are often the targets online. However, the extent to which there should be a tribunal, e-court or social media council is debated.[315]

Finally, human rights are central to protection from online harms. The strength of the DSA is that is that it emphasizes fundamental rights not only in the recitals but in the specific ways that obligations are framed in the substance of the Regulation. This can be similarly observed in the OSB. For example, the OSB provides that when deciding on safety measures, the regulated entity must carry out an impact assessment on freedom of expression and privacy.[316] The expert panel on online harms provided feedback that a duty to act responsibly should entail two separate obligations on online services: protection from online harms and protection of human rights. In this way, for example, a decision about use of automation to manage the risks of online harms would also require assessment of the human rights impact of that approach on rights such as privacy and freedom of expression.[317]

## Conclusion

Social media enabled the Convoy to mobilize and network. In many ways, this is precisely what social media was designed to do, and has done, for various movements. The issue is that the attack vector for false information, hatred, violence, extremism, harassment, and other forms of abuse are the same as for posting family photos, promoting your business, sharing cute animal videos, and learning how to repair your iphone screen. To tackle mis-, dis- and mal-information therefore requires the content of manipulative information to be unpacked, and a deeper dive on the actors who spread false information and the techniques they use, the impact on users who consume it, and the design of social media spaces being exploited. There also should be some convergence on what we are talking about when we discuss information manipulation. I suggest simplifying the analysis to disinformation (intentionally shared and knowledge of falsity), misinformation (intentionally shared and believing it is true) and the everything else bucket of harmful content, such as

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[315] I advocated for an e-tribunal for defamation disputes in "Re-Imagining Resolution of Online Defamation Disputes" 56(1) OHLJ 162. Heidi Tworek advocates for a social media council: "Social Media Councils" (October 28, 2019) *CIGI*, https://www.cigionline.org/articles/social-media-councils/. The Commission on Democratic Expression recommends an e-court for disinformation, *supra* note 294.

[316] OSB, *supra* note 309 at s 19.

[317] See *supra* note 121.

terrorist and violent extremist content and hate speech, that intersect with mis- and dis-information.

The Convoy exposed gaps in Canadian law and policy on social media regulation. Any decisions about how to address Convoy content posted to social media was by the social media companies, based on their community guidelines and using various technical solutions. While each platform is different and these companies can devise creative, human rights sensitive solutions, there is an important discussion to be had about how to incentivize these solutions, create industry standards, and hold companies accountable. Law reform in various countries, including Canada, are taking steps to address online harms, and the readers are encouraged to monitor these developments and advocate for a human rights-based regime in Canada.

# On Necessity Under the *Emergencies Act*

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The Public Order Emergency Commission is mandated to assess the appropriateness of the use of the Emergencies Act and of the specific measures used under that Act in the February 2022 convoy crisis, to consider lessons learned, and to suggest possible modernizations of the Act. It serves all these aims to investigate the meaning and functions of the concept of necessity, a key element of the threshold for declaring a Public Order Emergency, and a key test of the justification for specific measures the Governor in Council might undertake in an emergency too. Necessity is inherently ambiguous, and governments may hide from accountability under its cloak. By clarifying – where possible – the sources of this ambiguity, and by suggesting – where possible - tools to limit that ambiguity, this note aims to assist the Commission, Parliament, and the public in assessing the justice of the February 2022 Public Order Emergency, and in navigating key clauses of the legislation going forward, in case of any future use of the Act.

In Part One, I situate the concept of necessity in relationship to emergency. Part Two explains key sources of necessity's inherent ambiguity, and recommends ways of teasing out clarity, so that a government's argument that belief in necessity was reasonable is clear to see. Part Three reviews some pertinent Canadian and international jurisprudence, to develop heuristics and guidelines for assessing those claims of necessity.[1]

With respect to Public Order Emergencies, necessity makes two key appearances in the Emergencies Act, and this note will address both.

| **To declare a public order emergency:** | **To issue emergency measures:** |
|---|---|
| Governor in Council must "believe[ ], on reasonable grounds, that a public order emergency exists and **necessitates** the taking of special temporary measures for dealing with the emergency" (section 17(1)). | "the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are **necessary** for dealing with the emergency" (section 19(1)) |

[1] In developing this note, I benefitted from conversations with Professors Alan Brudner, Geneviève Cartier, David Dyzenhaus, John Ip, Jeff King, and Jocelyn Stacey. I bear sole responsibility for the result.

This note should not be understood to offer a legal standard. That is a task for the courts. Rather, these heuristics serve a broader aim of public accountability in the spirit of a commitment to the rule of law.[2] Public accountability is an ongoing process, encompassing the tabling of the Commission's report with Parliament, and continuing through public debate, into the next election cycle, and for posterity.

## 1.0 Necessity and Emergency

An emergency is an urgent threat to life, limb, property, or a collective way of life. To be emergent, a threat must arise suddenly, or take a sudden turn for the worse. Natural or human forces may bring about emergencies: wildfires, pandemics, and floods, economic collapse, threats of civil violence, political coup, or war. And commonly, natural and human forces combine to intensify the threat. For example, storm damage may lead to disease; a pandemic may lead to civil unrest or economic collapse.

Not all emergencies are *public* emergencies. A fire in the house up the road is a *public* emergency if the fire department has no capacity to stop it spreading. A heart attack reflects a *public* emergency if hospitals are too overrun to provide ordinarily lifesaving treatment. An emergency becomes *public* when it poses a sudden and urgent threat not just to specific individuals, but to the collectivity, to the public good. This characteristic means that a public emergency may result not only from the threat itself, but also from a sudden failure of state capacity to respond. For example, an earthquake may pose a threat, but becomes a public emergency if damage renders roads impassable for ambulances; a riot may pose a threat, but becomes an emergency only if police lack capacity to restore order.

Evidently, then, an emergent threat is a case of *need*: there is a sudden mismatch between what we urgently need and the public resources that normally satisfy it. Perhaps a threat creates a new, higher *level* of need, which outstrips normal public resources, or a threat may damage public resources, such that they can no longer

[2] On emergency and the rule of law, see David Dyzenhaus, "Schmitt v. Dicey*:* Are States of Emergency Inside or Outside the Legal Order*? Cardozo Law Review*, 27:5 (2006): 2005-2040; David Dyzenhaus, "The Compulsion of Legality," in *Emergencies And The Limits Of Legality*, ed. Victor Ramraj (Cambridge: Cambridge University Press, 2009); Oren Gross, "Chaos & Rules: Should Responses to Violent Crises Always be Constitutional?" *Yale Law Journal* 112:5, (2003): 1011-1134; Nomi Clare Lazar, *States of Emergency in Liberal Democracies*. (Cambridge: Cambridge University Press, 2009).

respond to a regular level of need. Impending floods may create a need for additional labour for sandbagging, and may increase demand on public resources for the provision of emergency shelter, etc. In that case, there is a public emergency. But if a city's flood defences – levees etc - are solid, then the flood may present no public emergency at all: existing resources continue to meet *public needs* for safety and security.[3] Thus, one way to understand a public emergency is as a state of collective, urgent need, a *state of necessity*.

Now the concept of necessity has a chequered past in relation to law in constitutional regimes. It was common among the Romans, for example, to cite Publilius Syrus' saying that necessity is a law that justifies itself, or that necessity knows no law.[4] And this saying and its variants have echoed dangerously down the ages, with leaders sometimes seizing upon the ambiguity in necessity to justify criminal acts like invasion or mass execution. Still, such claims have rarely gone unchallenged.[5]

Where claims that necessity is above the law *have* garnered any sympathy, it has been on the grounds that no system of law can be complete. For, laws are general rules that must apply to distinct and particular circumstances. And while law is just when like cases are treated alike, in circumstances of necessity, it may seem that the normal application of the law may result – in that case - in *in*justice.[6] This is what Abraham Lincoln meant when he justified the suspension of habeas corpus, during

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[3] Nomi Claire Lazar, "Political Ethics in the State of Emergency," in *Handbook of Political Ethics*, eds. Edward Hall and Andrew Sabl (Princeton: Princeton University Press, 2022).

[4] Publilius Syrus, *Moral Sayings of Publilius Syrus*, Trans Darius Lyman. (Martino Books (1856 /2014).

[5] See, for example, the discussion of martial law and its aftermath in 1848 Ceylon in Charles Fairman, *The Law of Martial Rule*, 2nd edition. (Chicago: Callaghan & co, 1943), and the discussion of the German Reichstag debate on the 1914 invasion of Belgium in Michael Walzer, *Just and Unjust Wars*. (London: Penguin, 1977), 240.

[6] In the *Nicomachean Ethics*, Aristotle implied that the point of the law's application, the moment when a judge rules, was the appropriate moment for necessity to come into play. The implication is that people ought to go ahead and break the law in an emergency, then expect mercy from a judge: "[W]hen the law states a general rule, and a case arises under this that is exceptional, then it is right, where the [law's]… generality …[does not cover] that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and …aware of the circumstances." [1137b20–24].

the civil war, by asking rhetorically “Are all the laws but one to go unexecuted and the government itself go to pieces lest that one be violated?"[7]

But modern emergency law is designed specifically to bring cases of necessity under the purview of law, and to subject action in the name of necessity to both legal and public forms of accountability. This is reflected in the codification of emergency law from the 19th century forward. And that codification has, over time, become more rigorous. Certainly, the Emergencies Act provides an evidently *legal* framework for necessity.

But while necessity can be framed, and thus governed by, law, it cannot be fully specified by rules (such as legislation) set out in advance. There are two reasons for this: ambiguity in specifying what *ends* are necessary, and ambiguities specifying appropriate means. We can understand the source of the first ambiguity if we begin from Cicero’s saying in *On the Laws*, that the public good is the supreme law (3.3.7). It would seem to follow that whatever public good dictates what is necessary or needful: it is *necessary*, from this vantage, to secure the public good in a crisis in order to serve the highest law, and thus to take whatever action is necessary to that end is, precisely, necessary. But here is the ambiguity: won’t we sometimes disagree on what the public good is, in a crisis, and hence on whether action is necessary?

In normal times, parliamentary democracies deliberate and debate over what conception of the public good to pursue, and which policy means to employ to that end. That is, our form of government normally renders questions of the public good procedural. By means of contestation in the public sphere, by means of the election and appointment of representatives who debate and vote in parliament, by means of investigation through parliamentary committees, and by means of constitutional checks and balances through legislatures and courts, citizens normally decide together, continuously, sometimes ponderously, and always defeasibly, what will constitute the public good. The good in our system of government is, in that sense, the product of right: of right procedure, of the proper functioning of institutions. Those decisions are then set down in law and in our constitution and its case law.

But how is this procedural decision on the public good- and hence what end it is necessary to achieve - to work in cases of urgency? The functioning of parliamentary institutions is notoriously, and sometimes intentionally slow. Our democracies are *deliberative* because they promote the ponderous process of reflection and debate as

[7] Abraham Lincoln, *July 4, 1861 Message to Congress*. https://millercenter.org/the-presidency/presidential-speeches/july-4-1861-july-4th-message-congress.

the best means to make good law. But that same quality, that same feature of slowness that ideally generates thoughtful law and policy on public good and what is necessary to serve it, is no good in a crisis. Slow deliberations on the public good in a situation of public emergency could be catastrophic. This fact prompted the Weimar legal theorist and sometime Nazi apologist Carl Schmitt to cast scorn on parliamentary democracy. This form of government, Schmitt argued can't defend itself against those who want to subvert it. Schmitt famously quipped, in the 4th chapter of *Political Theology*, that liberal democracies were so paralytically reliant on procedure, on right, and on rights that if they were confronted with the question "Christ or Barabbas?" they would "[propose] to adjourn or appoint a commission of investigation" to discuss the matter.[8] Because of this deliberative slowness, this refusal to decisively recognize and defend the good, Schmitt thought liberal democracies would buckle in the face of threats to their system of government and political way of life. Some minority might demand that the freely elected government, whose policies that minority rejects, be overthrown. And Schmitt thought that such a government, if true to itself, would be paralyzed by procedure and an absolutist conception of rights, and would sit helpless, then die.[9] That is: Schmitt thought that deliberation over what is necessary to the public good in a crisis would bring action too late, in a liberal democracy that maintained respect for the rule of law.

But the Emergencies Act, is designed to address this challenge. It does not *eliminate* deliberation, debate, and oversight of what is necessary for the public good. The commission of inquiry is called, but *after* the fact, hanging as warning of future consequences over government in the moment. The Emergencies Act functionally shifts these processes of deliberation forward in time. While deliberation over the public good and what laws, policies and actions might best serve it takes place *in advance* in normal times, the Act allows that sometimes decisions on necessity and the public good must be (defeasibly) made *now*, while remaining subject to deliberation and judgment along the way and after the fact. That is, while the Emergencies Act leaves ambiguous what the public good is, and hence what is necessary to serve that good, it creates a legal framework that allows for a sort of 'evidence-based working hypothesis' that gets examined and reexamined over the course of the emergency (by the Parliamentary Review Committee) and afterward (in the Courts, and by the Commission). In this light, any Schmittian claim that the use of emergency power in Canada is dictatorial or reflects sovereign power reflects ignorance of the nature of public accountability, and its place in this legislation. It is

[8] Carl Schmitt, *Political Theology*, trans. George Schwab. (Cambridge: MIT Press, 1985), 62
[9] Carl Schmitt, *Crisis of Parliamentary Democracy*, trans. Ellen Kennedy. (Cambridge: MIT Press, 1985), 36ff.

for this reason evidently wrong to call the use of the Emergencies Act dictatorial, whether or not, on a given occasion, its use is legal. It is all a question of timing.

In sum, law has always been understood to sometimes require flexibility when its rigid application would be unjust. Urgent necessity is a common ground of calls for flexibility. While some have held necessity *trumps* law, others understand necessity as grounds for distinct legal frameworks, or even legal exceptions, when and only when this would serve the public good. Because the public good is normally worked out through a slow process of deliberation, in our democracies, assessing whether necessity-based flexibility is justified – whether there really *is* a public good need - in urgent situations poses a problem. Contemporary emergency law, like the Emergencies Act, is designed to optimize flexibility and constraint in such situations, by shifting deliberation around conditions of necessity forward in time. Deliberation on a declaration which may have begun in the public sphere and in Cabinet discussions, resumes in Parliament within hours of a declaration and continues at least through the tabling of the Commission's report under Emergencies Act Section 63, and more generally, throughout history. This leaves questions of necessity ambiguous, while keeping them legally reviewable. This is how we maintain the rule of law and a commitment to the rule of law project even in a crisis.

So it is the job of this Commission, of Parliament, and of the public at large to weigh the claim of whether the Public Order Emergency and the measures taken were necessary to the public good. This forms part of the legal threshold for the Emergency, but it is a question of political ethics more broadly, too. Even where the use of emergency powers may be, strictly speaking, legal, the question of whether the working hypothesis of the public good was the right one remains live in a democracy. It is thus important that we consider how claims of necessity actually work.

## 2.0 Necessity's Ambiguities

What does it mean to claim that an action is *necessary*? At the outset, we should note that there are several, interconnected kinds of necessity. These include practical, technical, biological, moral, and legal necessity, in addition to logical necessity. If you want to drive a car, it is (practically) necessary to have access to a car. And it is (technically) necessary that the car have fuel. And it is (biologically) necessary that you have control of your limbs. It is (morally) necessary that you are not, by taking the excursion, neglecting a critical duty – for example, that you are not taking a pleasant country drive in lieu of providing comfort to your pre-operative child in hospital. And it

is (legally) necessary that you have a license to drive, and that everyone in the car is buckled in.

Each of these claims of necessity expresses not so much a substance as a logical relation. To claim that some fact or action is necessary, is to claim that in its absence, some other thing cannot be, or be achieved. Claims of necessity thus express *conditions*, and necessity claims are conditional claims. Thus necessity itself is not a substantive thing but rather expresses this *relationship of conditionality*. Necessity is a relational concept. This is the source of its inherent ambiguity and why it can be governed by, but cannot be fully specified in, law.

Ultimately, states are entitled both morally and legally, under Article 4 of the *International Covenant on Civil and Political* Rights, to which Canada is a state party - to take measures which temporarily limit or derogate rights and freedoms in a crisis. Indeed, states may perhaps be *obliged* to take such measures because a well-functioning state is a necessary condition for protecting any rights and freedoms at all, along with the security of persons and property. To protect other rights, to protect the nation and its people from threats to territorial integrity (hence self-determination), to protect a way of life, and to protect citizens' well-being en masse, a state and its institutions, when threatened, is entitled and possibly morally obligated to defend itself.[10] Of course, no state can perfectly secure public well-being, but we might say that a state is decent to the extent that it does, and that it is entitled to temporarily derogate rights, when necessitated by an emergency, to the extent that it is decent.

But often, the nested terms of necessity conditionals remain opaque, rendering a government's claims of necessity difficult to assess. A government may declare that "Thing X, taking place, poses a terrible threat to the public good, so these special measures are necessary." But there are several in-between-steps, which such a declaration papers over.

First, a measure's necessity is conditional on the necessity of achieving the end it seeks to assure. That is, measures are only necessary if there *really is* a terrible threat and if it *really does* substantially impact a defensible and accepted conception of the public good. A threat to the state is a threat to the public good if and only if the decent (not perfect) state is a necessary condition for the well-being of people, and if that threat impairs the state's capacity to work to secure the people's well-being. Then, the threat becomes an emergency warranting rights derogations – that is, a declaration of emergency and emergency measures only become *necessary* - if and only if the

[10] I work out these arguments in detail in Lazar, *States of Emergency*.

usual mechanisms (which may include everyday rights *limitations*) are insufficient to confront the threat.

For example, if a state claims it is necessary to restore the free flow of goods across the border, evidently, this is not because the free flow of goods across a border is a good-in-itself. Rather that flow is necessary *so that* supply chains will not be interrupted, and *so that* good trade relations can be maintained with trading partners. And supply chains and good trade relations are necessary *so that* factories and businesses can operate, *so that* people can work and the economy can be robust. And these things are important *so that* there is more affluence, with all the good that brings, and less poverty with all poverty's dire consequences, in the service of human well-being. This whole chain of nested conditionals supports the final determination that it is necessary that *something be done* to restore the free flow of goods across the border. Without teasing out each step, it becomes easy to smuggle in a term, in this chain, where the claim of necessity does not hold up. This is especially true where the threat is serious, but not truly existential. There is room between, say, a threat of nuclear annihilation and economic damage. And political judgment will be in play in that space both at the point of decision, and in the aftermath.

Along the teased out chain of conditionals, in an emergency, we would expect to find stronger and weaker links, points at which necessity seemed more or less certain. It would be reasonable to expect a weaker relation of necessity where conditionals depend on:

- assessments of probability and risk,
- relative assessments of appropriate means,
- presence or absence of advance preparation and efforts at prevention, and
- expectations of interjurisdictional cooperation.

With respect to the necessity elements of the emergency, these will be among the points warranting the special attention of the Commission, Parliament, and the public, because each forms a potential weak link in the conditional chain.

## 2.1 Risk and Probability

Certain aspects of emergency are predictable. For example, we know with something approaching certainty that Manitoba's Red River will periodically flood, and that pandemics will recur periodically too. But most emergencies have dynamic aspects. With any given flood, we must learn on the fly where and how serious the flooding might be, how secure flood infrastructure, like levee systems, remains, etc. With any

new pandemic disease, it takes time for scientists to investigate mechanisms of transmission, disease progress, morbidity and mortality, effective mitigation methods and to develop treatments. That is, when we face a threat, we rarely fully understand it initially. That means decision makers are always acting in the face of information gaps, and hence under conditions of uncertainty. Leaders must use judgment, and seek out the best available information, in assessing risk and probability, and any claim to necessity under conditions of uncertainty will thus be itself uncertain.

It may help to consider a parallel, in terms of the uncertainty of necessity claims, with just war theory. The parallel is salient for three reasons: first, the state serves as the moral agent in both scenarios, second, both involve a speech act, (a declaration of war or emergency) that shifts the state's moral position, duties, and obligations. And third, the legitimacy of that shift rests on grounds of a judgment of necessity. As with emergency, both for a war declaration and for specific actions in war, justification rests on criteria that involve probabilistic determinations of necessity. For the purposes of declaring war, just war theorists argue that war must be *the last resort*. That is, war cannot be the *preferred* option, it must be the only and thus *necessary* option to protect the state from threat. But this description conceals many probabilistic determinations. How certain are we of harm, and not just of harm, but of *enough* harm that war is justified? And how certain are we that no other option could work? If there is still a very small chance diplomacy could gain headway, though there are risks to waiting, is a declaration of war justified? We rarely know the future with certainty, and often, urgent decision must be made with inadequate information.

This is why the legal standard in the Emergencies Act requires not necessity itself, but "reasonable grounds for belief" in necessity. And questions around whether those grounds were reasonable will rest on assessments of risk and probability. Hence, pressing on assessments of risk and probability may yield weak links in the chain of conditionals. Conversely, pressing on assessments of risk and probability may yield justifications for conditionals that look weak in the abstract. For example, if there was still a *slight* chance of a negotiated retreat of the convoy, but the information available to the Governor in Council at the time suggested the probability of a successful negotiation within a reasonable timeframe, given the time elapsed, was thin, the public might still judge that the Governor in Council had reasonable grounds for belief that an emergency declaration was necessary. In a nutshell: most judgments of necessity will be probabilistic, and we need to assess claims of necessity in that light. We must closely interrogate how those assessments were made (what risk assessment tools were used, what information sought out, etc.).

## 2.2 The Multiple Means Problem

Even if a declaration of emergency is necessary, or could reasonably be believed to be necessary, the Emergencies Act also specifies that the Governor in Council must hold such a reasonable belief about each measure to be undertaken, and must justify the reasonableness of belief in the necessity of those measures before Parliament and the people. Yet commonly, there are multiple ways to accomplish an end, even in situations of public emergency. So what does it mean to say that a specific measure was necessary? Moreover, while it speaks to the appropriateness of measures used to show they were effective, it is not enough to claim measures *were* effective. In this way, the question Government posed in the Commission's mandate is somewhat misleading. What is effective is not equivalent to what is necessary because to claim that a measure is necessary is to claim that *without it, the end could not have been achieved.* In its absence, the end could not have been brought about. That is, the measure must be a necessary condition of achieving the end. Yet, if there are multiple measures that could bring the end about, any given measure is *not* necessary. The Governor in Council could always have chosen some other means. This may become clearer through an example. Say you want to travel from Ottawa to Winnipeg. The train will get you there (it is *effective* in helping you reach your goal). A car will get you there (also effective). Or perhaps you could fly. These are all effective measures for traveling from Ottawa to Winnipeg. But no single one of these measures is *necessary*, to travel to Winnipeg. If you take the train, *then* you can get to Winnipeg. But it is does not follow from this that *if* you want to go to Winnipeg, it is *necessary* to take the train.

To tease out a justification for why certain measures were deemed necessary, rather than others, it may help to seek clarity regarding *how* Governor in Council wanted to resolve an emergency. That is, those assessing measures may want to **draw out the adverbs** involved. It may be that, if you want to get to Winnipeg from Ottawa *quickly,* then it really is necessary to fly, rather than to drive or take the train.

Claims that some measure is necessary may smuggle in latent considerations in the form of adverbs. That is, a government will not only need to resolve a situation, where it has found that resolution to be necessary. It will want to resolve the situation in a particular way, in a way that has certain characteristics. For example, it might seem important, for various reasons, to resolve an emergency situation:

- Quickly
- Safely
- Fairly
- Cautiously

- Efficiently
- Decisively
- Expeditiously
- Cost-effectively

Such value claims around the outcome will have factored into the perceived necessity (rather than mere desirability) of specific measures. As Professor Jocelyn Stacey has perceptively noted, while the Act technically requires that no other legislation be available for use, before a Government invokes the Emergencies Act, it may be that using other available legislation would be morally worse. For example, the Government did not need the Emergencies Act to call out the military in the convoy crisis. They could have done this under Section 275 of the National Defence Act, and that might have been effective in ending the crisis. But would that have been preferable?[11] Attention to the other values at play, to *how* Government wanted to resolve the crisis, helps to explain why the use of the Emergencies Act *may* be justified when an alternative is available but, for moral or other reasons, more extreme or morally questionable. If it was necessary to not just resolve the crisis but to do so safely and cautiously, then these value carrying adverbs might rule out the option of National Defence Act. Judgments in the moment will always be prudential, and after the fact, we must bear this in mind. Yet it behooves those holding government to account to press on whether the adverbs themselves are the reasonable and right ones. Government must be held to account for its implicit claims and choices here also.

## 2.3 Preparation and Prevention.

A third area where the implicit chain of conditionals may conceal weak argument for emergency measures is preparation and prevention. Recall that a public emergency does not just involve a sudden & urgent threat to the public, but a sudden mismatch between public need and government's capacity to address it. This is why every jurisdiction in Canada has extensive procedures and preventive measures in place for anticipating and addressing the most probable emergencies. For example, cities with frequent blizzards, like Ottawa, have plans, communication protocols, and equipment in place so that, in the *event* of a major snowstorm, there will normally be no call for an emergency declaration or emergency measures. Public emergency results from unmet needs, they are states of *necessity* arising from an interaction between an

[11] Personal communication. Friday, 30 September 2022.

acute event impacting public well-being and the available means of meeting those needs.

This raises the question whether a government could claim an emergency declaration and measures were necessary if, at some earlier juncture, decisions could have been made which may (and here we are back in the realm of probabilities) have averted the emergency. If Ottawa made no contingency plans for snowstorms, could the city reasonably claim that emergency measures – perhaps commandeering snowploughs, were justified, because necessary? On one hand, the measures may in the moment, be necessary, and hence potentially legal. But on the other, might a jurisdiction remain morally or politically culpable because they were negligent in anticipating and preparing for the emergency?

Culpability would vary from case to case because it is not always reasonable to expect a state to be prepared. For one thing, not every emergency is predictable. For another, there are always political, social, and economic trade-offs between the cost of prevention and the cost of response. Prevention responds to, and is evaluated against, counterfactuals, meaning it can be politically difficult to allocate resources to a thing which hasn't happened yet and might not happen. For example, while a purpose-built infectious disease hospital and expandable healthcare capacity might help forestall a health emergency, these are costly and may draw resources away from day-to-day care. Each democratic polity must weigh priorities, costs and relative benefits.

Furthermore, some preventive measures cost rights, not cash. That is, there are circumstances in which a permanent limit on rights and freedoms may prevent an emergent situation, necessitating more severe rights derogations, from arising. For example, the Safe Food for Canadians Act (2012) limits a number of kinds of speech (e.g., in Sections 6, 8, 9, 11), as well as privacy and property rights (Sections 24, 26) in the interests of preventing public harm. For example, Section 6(1) limits speech and expression by making it an offence to label "or advertise a food commodity in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, quality, value, quantity, composition, merit, safety…" While Section 26 allows inspectors, when they have reasonable grounds, to enter and search private premises and even to restrict owners access to their own property. By placing milder, preventative limit on rights at the outset (e.g. around misleading advertising and factory inspections), we may prevent the need for serious derogations on the other side. Another example concerns the right to peaceful assembly. It may be that placing certain minor limits on the right, for example by delineating a distance that must be maintained between protests and certain premises (legislatures, medical facilities, critical infrastructure), or on the kinds of materials allowed at a protest,

freedom of peaceful assembly can be exercised robustly for its intended purposes, without endangering safety and civic life. Sometimes, through minor, preventive but permanent limits, the need for reactive derogations is reduced. But as with fiscally costly prevention and preparation, each polity must weigh priorities and exercise prudence in making such judgments.

The key is to recognize that a polity's claim that some action was *necessary* may conceal, at points along the conditional chain, some action it reasonably ought to have undertaken earlier. This may reveal where, all else being equal a state ought to bear a share of responsibility for having created the conditions of 'necessity' in the first place. Again, while the condition of necessity may be real in the moment, and hence a legal threshold potentially met, public accountability is broader than legal accountability and this means the question of responsibility remains.

This grows more complex in federal states. It may be that one level of government's failure to act, whether by refusal for political or other motives, or through incapacity, creates a situation of necessity which might not otherwise have arisen. This may leave one jurisdiction in a position where the other's decision to act or not act is the thing which makes the declaration of emergency and the measures taken *necessary* at another jurisdictional level. Where the passive jurisdiction failed in its moral but not legal duties, the public can still hold them to account.

In this context it may be worth noting that in the Supreme Court of Canada decision *Perka v. The Queen*, Justices Ritchie, Dickson, Chouinard and Lamer argued that a failure to act reasonably at an earlier juncture to prevent a situation from arising could invalidate a claim to the defence of necessity for a criminal act: "Where it was contemplated or ought to have been contemplated by the accused that his actions would likely give rise to an emergency requiring the breach of the law it may not be open to him to claim his response was involuntary."[12] This underscores the point that moral and political responsibility may follow from earlier inaction.

I have suggested that, to judge a claim of necessity requires a clear view of the full chain of conditionals it represents. Accountability demands we pay especial attention to, on one hand, whether achieving the end really *is* necessary: does it serve a clear and urgent public good? And on the other hand, it demands we consider issues of risk and probability, the multiple means question, and failures of preparation and prevention that may have contributed to the condition of necessity arising in the first place. A clear view of the chain of conditionals all the way back and all the way

[12] Perka v. The Queen, [1984] 2 S.C.R. 233.

forward, makes concealing non-public-good-related motives more challenging, while increasing the ease of assessing whether the conception of the public good which government used in the moment of decision is one that Parliament and the public are willing to accept after the fact.

Having considered how claims of necessity work, I now turn to suggesting some tools and heuristics the Commission, Parliament, and the public might employ to press on those claims.

## 3.0 Necessity's Heuristics

I suggested above that legislation like the Emergencies Act was designed to *make* necessity know law. Specifically, I noted that claims of necessity, to be justified in an emergency context, must be in the service of the public good, the highest law. I also noted that a determination of the public good emerges as a defeasible judgment from procedural engagements such as democratic deliberations of various kinds. That is, through public discourse, elections, parliamentary debate, committee inquiries, etc. we come to an understanding of some always revisable conception of what the public good consists in. Of course, some norms are more foundational than others, particularly norms governing the procedures themselves, such as the rule of law, and norms around fundamental rights, which are entrenched in the Charter of Rights and Freedoms and in the International Covenant on Civil and Political Rights, with both of which, notably, the Emergencies Act must comply.

Now I also suggested above that emergency conditions are such that they tend to pull against the usual procedures, making the process of settling on a (defeasible) conception of what is in the public's interest that much more difficult.

Contemporary emergency laws, like the Emergencies Act, are designed to bring the rule of law to bear in conditions of crisis through novel institutional means. They do so by shifting the temporal horizon around judging necessity. Whereas normally, democratic procedures structure decisions on whether a law or policy furthers the public good *before* these enter into force, in an emergency, governed by a piece of legislation like the Emergencies Act, the time frame shifts so that that democratic discourse take place not just before, but notably in the course of the emergency and after the fact. Shifting the time frame optimizes the balance of flexibility, in meeting the claims of necessity, and accountability, in determining those claims' justification. This is because leaders can act immediately in the face of urgency: they can use a

defeasible, evidence-based, working hypothesis of what is necessary for the public good, while remaining accountable from that point on.

Those bodies who bear responsibility for holding government to account – Parliament, the Commission, the Canadian Public, and, ultimately, historians, – can benefit from some explicit heuristics for thinking about necessity in the context of urgency. The Federal Court, too, bears responsibility for accountability, but they will determine their own future standards, drawing on past caselaw. To make use of these heuristics, we need clarity about the chain of conditionals, which is to say, we need clarity about what the Governor in Council claims is necessary and why. But once we have that clarity, these heuristics can assist in assessing those claims of necessity.

To understand the heuristics and why they make sense, it is helpful to look back to cases that arose in international jurisprudence in the legal aftermath of the September 11th terrorist attacks. At that time, some jurisdictions – sometimes under compulsion from courts – were developing novel institutions to keep the rule of law robust even where there were claims of necessity. Perhaps this thoughtful jurisprudence was possible because of the ephemeral or preventive nature of the threats at this time. After 9/11, there was the fear of, but little immediate presence of, chaos and mass death, and perhaps this provided enough distance to sober the courts. Of the cases from that time that touch on or invoke the concept of necessity, the United Kingdom's *Belmarsh* case is of particular interest and use here, in part because it touches both necessity as a threshold element and necessity as a condition for individual measures, and in part because it points to useful heuristics.

*Belmarsh* concerned the rights of nine men – all British non-nationals. Because of their alleged ties to terrorist groups, these men were detained indefinitely and without trial under the Anti-terrorism, Crime, and Security Act 2001. The UK government had claimed a derogation from Article 5 of the European Convention on Human Rights that provides for the "right to liberty and security of person." Because of that derogation, the United Kingdom Home Secretary was able, under Section 21 of that Act to certify individuals as constituting a threat to national security, and then under Section 23 of the Act, to detain them indefinitely unless they chose to be deported. Because of their alleged connection to terrorist groups, the men faced the risk of torture or death in their home countries, were they to be deported, meaning that to deport them forcibly would violate the principle of non-refoulement under international law. The men appealed to the Appellate Committee of the House of Lords, arguing that their indefinite detention violated their Article 5 rights under the European Convention and that the derogation the Government had made under the emergency provisions of the Convention (Article 15) was unlawful.

On one hand, for the derogation to be lawful, it had to meet Article 15's criterion of necessity. That article reads: "in time of … public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation…" That is to say, the situation must be so urgent and important as to *necessitate* derogations, and the derogations must, each and severally, by strictly necessary to resolve the situation: the threshold question and the measures question.

On the threshold question, i.e., whether the post-9/11 situation warranted the use of derogations, Lord Bingham argued that it was not the place of the Court to say. "I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what … people … might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety…"[13]

Lord Bingham went on: "The more purely political … a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions."[14] This is sometimes thought to be in line with jurisprudence globally, but at least in the US context, courts have, in the midst of serious crisis, taken divergent approaches to policing rights in a crisis.[15]

As with the ECHR Section 5 derogation, under the Emergencies Act, a judgment of necessity must be made first at the point of declaration. Lord Bingham argued that the necessity of the derogation - equivalent in our case to determining the necessity of a

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[13] *A and others v Secretary of State for the Home Department,* [2004] UKHL 56. S. 29.
[14] The dissent of Lord Hoffman is worth noting: he argued that it was not credible to suggest that the life of nation was under threat "there is no doubt that we shall survive Al-Qaeda," he wrote. S. 96
[15] See, for example, the rich discussion of wartime jurisprudence in Lee Epstein et al. "The Supreme Court during Crisis: How War Affects only Non-War Cases," *New York University Law Review* 80,1 (2005): 1-116.

declaration, was a matter for political, not judicial judgment. While courts have historically been reticent to weigh in on matters of political judgment, accountability takes many forms in democracies, and there is more than one check on executive power written into and implied by the Emergencies Act. Though opinions here may diverge, courts may properly choose to evade political questions which Commissions of Public Inquiry, Parliament and the public can properly take up. Even where courts may be reticent to hold the executive branch to account for its political decisions, it is fully appropriate for citizens to do so.

But, regarding judging the necessity of *measures* undertaken in a crisis, the Law Lords were much less reticent. They found that the indefinite detention of foreign nationals suspected of terrorist involvement was, as a measure, disproportionate, not strictly required, not rationally connected to the security threat, and constituted discrimination on the grounds of nationality. On these grounds, the Law Lords found that the Home Secretary's detention of the men was unnecessary, and hence unlawful.

To make this determination, the Lords borrowed reasoning from the Canadian Supreme Court case *R v. Oakes.* The Lords cited Oakes in part because the appellants had referred to a UK case, *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, which itself drew its reasoning from that Canadian case.

While the reasoning in *Oakes* may not be directly appropriate to interpret the specific statutory requirements of the Emergencies Act, particularly with respect to the declaration of emergency, it may serve as a helpful heuristic for clarifying the necessity of measures. *Oakes* pertains to Section 1 of Canada's Charter of Rights and Freedoms, which states that rights in Canada can be "subject only to such reasonable limits… as can be demonstrably justified in a free and democratic society."[16] Many rights in the Charter contain limits in the text itself, but Section 1 allows that there may be occasions when further limits may be justifiable. The Supreme Court of Canada developed the Oakes Test to helps assess the justifiability of a rights limit.

The first part of the test requires that government only limit a right or freedom by law if the aim is important. The Court found a rights limitation must "relate to societal concerns which are pressing and substantial."[17] For our purposes, i.e, as an heuristic for assessing the use of the Emergencies Act, this part of the test may serve as a

[16] R. *v.* Oakes, [1986] 1 S.C.R. 103
[17] Ibid.

reminder that emergency powers are subservient to the public good, as the highest law. Yet the threshold for an emergency declaration is clearly *higher* than the threshold for passing part one of the Oakes test. Pressing and substantial are not enough for an emergency declaration to be *necessary*, in part because measures short of emergency may be sufficient.

The second part of the test has three subsections which, once an emergency declaration is found to be necessary, provide clear guidance to assess the necessity of specific emergency measures. First, Government must show that limiting (in our case, derogating) the right in order to achieve the important aim is "reasonable and…justified." Second, the limit (or derogation) must be a) "fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective." And, b) the right should only be limited (or derogated) "as little as possible" to achieve the end. And c), "there must be proportionality between the effects of the limiting measure and the objective." That means that the more serious the consequences of limiting the right, "the more important the objective must be."[18]

An interesting consequence of drawing on Oakes reasoning is that it lends support to David Dyzenhaus' conjecture that different standards of necessity may be appropriate for judging the necessity of the *declaration* and judging the necessity of the measures.[19] One could elaborate this insight in light of Oakes like this: the necessity standard may be lower for the declaration because the declaration does not itself impact rights. It may be, for instance, that the necessity heuristic for a declaration would evolve from Parts 1 & 2a of the Oakes test only. For example, we might propose that, for a declaration to meet the necessity heuristic, the Governor in Council must believe on reasonable grounds that the such a declaration is pressing and *critical* (with critical understood in light of the Act's definitions), and that such a declaration would be "fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective."[20] This heuristic can work effectively together with the technique of drawing out the chain of conditionals, because it is through that chain that the connections between means and ends and the justifications for ends is more fully revealed.

The necessity heuristic for a declaration might look something like this: if, once fully articulated with the best available information and assessments of risk, a threat critically impairs the state's capacity to work to secure the people's well-being, and, if

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[18] Ibid.

[19] Personal communication, August 8, 2022.

[20] R. *v.* Oakes, [1986] 1 S.C.R. 103.

and only if the usual mechanisms (which may include everyday rights *limitations*, as most government measures do) are insufficient to confront the threat, and, the use of emergency legislation, under existing circumstances, is fair and not arbitrary, and may reasonably be expected to achieve the objective in question, then the necessity condition of the declaration threshold is met.

Notably, this approach draws attention to the political and communicative aspects of an emergency declaration. While an emergency declaration makes it possible to undertake emergency measures, even should it turn out that the *measures* were not strictly necessary, this would not, in and of itself, entail that the *declaration* was unnecessary. This is in part because a declaration may also serve a communicative function. For example, a declaration might serve to warn those who threaten violence or pose an imminent menace to democratic institutions that they cannot act with impunity, while also communicating to citizens that government remains functional and committed to peace and order. This communicative function, when intended, does not of itself put any rights at risk, but might aid in resolving a situation. Indeed, in some ideal case, a declaration might be effective enough to render any specific rights derogations unnecessary. The declaration does work in the service of the end, independent of the measures that may or may not come next.

With respect to the necessity of specific emergency measures, Part 2 of the Oakes Test provides a fine tool to both excavate and assess the soundness of chain of conditionals here too. The necessity heuristic for measures might look something like this: if an emergency has been declared, then measures to resolve the emergency may be deemed necessary if and only if a) those measures are “fair and not arbitrary, carefully designed to achieve the objective in question” where that objective is fully specified (i.e., not just that the situation be resolved, but that it be resolved *quickly* or *fully* or whichever adverbs are justified in the given scenario) and where the measures are “rationally connected to that objective;” and b) any right derogated is impacted “as little as possible;” and c) the derogation is proportional to the objective.

In this way, the Oakes Test, together with a full elaboration of the chain of conditionals, can help guide thinking about necessity in the service of public accountability.

## 4.0 Conclusion

Because it is essentially relational, necessity is a permanently ambiguous concept. This note has aimed to unpack that concept, as it applies in the context of emergency, to the extent possible. The aim has been to provide greater clarity for the Commission,

Parliament, and the public in weighing the necessity of the Public Order Emergency declaration and the emergency measures undertaken. The note has advocated for a full teasing out of the chain of conditionals that describe the necessity in a situation of threat, and has underlined pressure points, such as risk assessments and the multiple means problem, that may warrant extra scrutiny. And finally, the note shows how the Oakes Test, whether or not it comes to serve as the legal standard, can work effectively as an heuristic for assessing claims of necessity for purposes of broader public accountability.

It is important to note that, as of this writing, Canada's courts have not yet ruled on any matter related to the Emergencies Act or the measures undertaken under its authority. Hence, we do not know what legal test the Federal Court will use. But we do know that measures taken under the Emergencies Act must, by law, conform with the Charter and with Canada's obligations under the International Covenant on Civil and Political Rights, and that any such measures must be temporary, strictly necessary, and reviewable in Parliament and the courts. Where a Government's emergency measures meet these criteria, it is possible that emergency limits on rights and freedoms can be consistent with the rule of law and with Canada's constitution.

To uphold the rule of law in these circumstances requires that we keep in mind the holistic character of the Emergencies Act, the intention of which is to allow for emergency action but under the rule of law. It aims to achieve this by incorporating a range of forms of democratic deliberation, but with the temporality of deliberation shifted later, in relation to executive action. These concurrent or after the fact forms of deliberation and accountability include legal accountability, since the Federal Court may review actions taken under the Act. But other forms of deliberation and accountability under the Act are more broadly public and political. And it is right that the public assess whether the use of the Act was appropriate on grounds that incorporate, but go beyond legality. Upholding the rule of law means we must also press on and consider the articulation of the public good which drove the emergency declaration and each of the measures. In this way, the procedures through which we articulate, assess, and reassess our shared conception of the public good, a shared practice that forms the heart of our system of government and public way of life, can continue even under conditions of emergency.

# Police Powers & Public Order Disturbances

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# 1. Executive Summary

This background paper examines the key legal powers available to police and other law enforcement officials in managing public order disturbances. A public order disturbance is a gathering of people who unlawfully interfere (or threaten to unlawfully interfere) with persons or property. These powers fall into three categories: (*i*) criminal law enforcement powers; (*ii*) regulatory law enforcement powers; and (*iii*) military assistance to law enforcement.

The most important tool available to police to combat criminal offending in public order disturbances is the power to arrest. If the suspected crime may be prosecuted by "indictment," police may arrest if they reasonably believe that the individual likely committed it. Police cannot arrest for an offence that must be prosecuted "summarily," in contrast, unless they see someone commit it.

Indictable offences that may be committed during public order disturbances include common nuisance, taking part in a riot, failing to disperse when the "riot act" is read, intimidation, mischief, disobeying a court order, and contempt of court. Relevant summary offences include causing a disturbance and unlawful assembly.

Police may also arrest people for "breaching the peace," which is not in itself an offence. This power may only be used, however, for conduct that is violent or potentially violent—not merely disruptive or annoying.

Police also have powers under provincial regulatory legislation and municipal bylaws to control traffic, close roads, and remove vehicles for various purposes, including controlling public order disturbances. While some provinces have given police broad powers to arrest people committing offences under these laws, most permit arrest for only a few select offences.

Many provinces also have legislation authorizing governments to give police additional powers during a declared emergency. For example, in February 2022, Ontario used its emergency legislation to temporarily prohibit anyone from impeding access to "critical infrastructure," including highways, railways, hospitals, utilities, and airports. Ontario has also given police permanent powers to arrest for offences committed in relation to "critical transportation infrastructure." Alberta has similar legislation, but it applies to many other types of infrastructure beyond transportation.

In addition to their legislated powers, police also have certain "common law" powers to maintain public order that have been recognized by the courts. Courts have been reluctant, however, to use the common law to authorize sweeping preventative security measures, such as geographically extensive "exclusion zones."

Lastly, the Canadian Forces can help police deal with public order disturbances in extreme circumstances. Both provincial governments and the federal government may call on the military to assist with disturbances that are beyond the police's capacity to deal with alone.

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## 2. Introduction

This background paper examines the powers available to police and other law enforcement officials to deal with public order disturbances in Canada. As we use the phrase, "public order disturbances" are events involving individuals who: (*i*) gather in public spaces to pursue a collective goal (such as a protest or demonstration); and (*ii*) engage in conduct that substantially interferes (or threatens to substantially interfere) with persons or property.

Though the impetus for this paper is obviously the unrest arising from the COVID protests that occurred in early 2022, we do not explore how any police powers were applied (or not applied) during these events. Nor do we examine the special powers that the federal government granted to police under the *Emergencies Act*[1] during the nine days that the emergency declaration was in effect.[2]

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* The authors acknowledge the excellent research assistance of Emma Toporowski and Brandon Blenkarn. All views expressed should be attributed exclusively to the authors and do not necessarily represent those of the Public Order Emergency Commission.

[1] RSC 1985, c 22 (4th Supp).

[2] These powers were set out in the *Emergency Measures Regulations*, SOR/2022-21, and were in effect from February 15-23, 2022. For a detailed discussion of these protests and the application of these emergency powers, see Leah West, Michael Nesbitt and Jake Norris, "Invoking the Emergencies Act in Response to the Truckers' 'Freedom Convoy 2022': What the Act Requires, How the Government Justified the Invocation, and Whether it was Lawful" (2022) 70:2 Crim LQ 262. See also Robert Diab, "The Real Lesson of the Freedom Convoy 'Emergency': Canada Needs a Public Order Policing Act" (2022) 70:2 Crim LQ 230.

Our mandate is instead to provide a summary of the many other laws that governments and police can invoke to deal with public order disturbances. The vast majority of these pre-existed the 2022 COVID protests and are applicable to many different kinds of disturbances. While it is not feasible to examine all the powers that police might use, in what follows we canvass what we believe to be the most important. We group these into three categories: (*i*) criminal law enforcement powers; (*ii*) regulatory law enforcement powers; and (*iii*) military assistance to law enforcement.

The state's use of coercive authority to maintain order during public protests presents obvious challenges. Put simply, imposing too much "order" threatens many of the fundamental civil rights that citizens in liberal-democratic societies hold dear.[3] Allowing too much "freedom," in contrast, may compromise public safety, economic stability, and psychological well-being. This background paper does not provide answers as to whether the existing suite of legal tools enables an optimal balance between these poles. We do, however, propose modest changes and suggest that legislatures, rather than courts using the common law, should take the lead in instituting any new powers to deal with public order disturbances.

## 3. Criminal law enforcement powers

The criminal law is designed to address the most serious threats to public order.[4] As being suspected, accused, or convicted of a crime carries grave consequences, it is generally agreed that criminal sanctions should be used only when less intrusive means are insufficient to curb those threats.[5] In this Part, we examine the criminal law enforcement powers most relevant to public order disturbances.

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[3] See *e.g.*, *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*], ss 2(*b*) (freedom of expression), 2(*c*) (freedom of assembly), 8 (security against unreasonable search or seizure), 9 (right not to be arbitrarily detained).

[4] See *Libman v The Queen*, 1985 CanLII 51 at para 72 (SCC), [1985] 2 SCR 178; Law Reform Commission of Canada, Report 3, *Our Criminal Law* (1979) at 7-9.

[5] See Canada (Department of Justice, Criminal Law Review Committee), *The Criminal Law in Canadian Society* (1982) at 5 ("The criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose").

## 3.1 Arrests for offences

Arrest[6] is both an essential law enforcement tool and a profound intrusion on liberty, dignity, and bodily integrity. As the Supreme Court of Canada has stated, "few police actions interfere with an individual's liberty more than arrest — an action which completely restricts the person's ability to move about in society free from state coercion."[7] As elaborated in Part 3.3, arrest also often involves the use of violence by the state against its citizens.

The most important arrest powers are set out in section 495(1) of the *Criminal Code*.[8] This provision allows police to arrest without a warrant in two main circumstances. First, under section 495(1)(*a*), any "peace officer" may arrest when he or she has "reasonable grounds" to believe that a person has or is "about to commit" an "indictable" offence. "Peace officer" is defined in section 2 of the *Code* to include anyone who discharges a public law enforcement function, including a "police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process."

"Reasonable grounds" requires firstly, that the arresting officer subjectively believe the arrestee committed a specific type of offence; and secondly, that this belief be objectively reasonable.[9] While there is no precise, quantitative measurement of the

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[6] The courts have defined arrest as either: (*i*) "actual seizure or touching of a person's body with a view to his detention"; or (*ii*) the pronouncing of "words of arrest" if "the person sought to be arrested submits to the process and goes with the arresting officer": *R v Whitfield*, 1969 CanLII 4 (SCC), [1970] SCR 46 at 48. See also *R v Asante-Mensah*, 2003 SCC 38 at paras 42-45, [2003] 2 SCR 3. The failure to use the word "arrest" is not determinative, however. A *de facto* arrest will occur if suspects reasonably conclude that they are in police custody and are not free to leave: *R v Latimer*, 1997 CanLII 405 (SCC), [1997] 1 SCR 217 at paras 23-25. See also generally Steve Coughlan and Glen Luther, *Detention and Arrest*, 2d ed (Toronto: Irwin Law, 2017) at 234-43.

[7] *Fleming v Ontario*, 2019 SCC 45 at para 65, [2019] 3 SCR 519.

[8] RSC 1985, c C-46 [*Criminal Code* or *Code*].

[9] See *R v Storrey*, 1990 CanLII 125 (SCC), [1990] 1 SCR 241 at 250-51; *R v MacDonald*, 2014 SCC 3 at para 85, [2014] 1 SCR 37.

degree of suspicion required to meet this standard, the Supreme Court has suggested that it connotes something akin to probable guilt.[10]

In addition to authorizing arrests for offences that have been committed or are ongoing, section 495(1)(*a*) also empowers police to arrest for an offence *about* to be committed. This will occur when there are reasonable and probable grounds to believe that the arrestee made "preparatory steps toward committing a crime."[11]

Lastly, for the purposes of arrest, "indictable" offences include both "pure" indictable offences and "hybrid" offences that the Crown may later choose to prosecute either by way of indictment or summary conviction proceedings.[12] Police may consequently arrest under this provision for any offence other than the few "pure" summary conviction offences in the *Code*.

Section 495(1)(*b*) of the *Code*, in contrast, permits a police officer to arrest anyone without warrant that he or she "finds committing" any "criminal offence," which includes

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[10] See *Baron v Canada*, 1993 CanLII 154 (SCC), [1993] 1 SCR 416 at 448; *Nelles v Ontario*, 1989 CanLII 77, [1989] 2 SCR 170 at 193; *Hunter v Southam Inc*, 1984 CanLII 33 (SCC), [1984] 2 SCR 145 at 167; *R v Loewen*, 2011 SCC 21 at para 5, [2011] 2 SCR 167; *R v Buchanan*, 2020 ONCA 245 at para 23. The arresting officer need not, however, witness the commission of the offence; reasonable grounds may be based on information received from others: *R v Collins*, 1987 CanLII 84 at para 26 (SCC), [1987] 1 SCR 265.

[11] See *R v Beaudette*, [1957] OJ No 440, 118 CCC 295 (ONCA).

[12] *Interpretation Act*, RSC 1985 c I-21, s 34(1)(*a*). Broadly speaking, offences prosecuted by way of indictment carry more substantial punishments and involve more complex trial procedures than offences prosecuted summarily. See Steven Penney, Enzo Rondinelli and James Stribopoulos, *Criminal Procedure in Canada*, 3d ed (2022) at paras 1.24-1.34.

pure summary conviction offences as well as indictable and hybrid offences.[13] This requires the arresting officer to personally witness the crime, though he or she need not have observed "each and every constituent action of the offence."[14] Moreover, as long as it reasonably appeared to the officer that the arrestee was committing the offence at the time, the arrest will be considered lawful even if the arrestee is eventually found not guilty.[15]

It follows that police cannot arrest a person for a pure summary offence under these provisions unless they see him or her commit it. Their only option is to obtain an arrest warrant from a court.[16] However, as explained below, police who wish to charge someone with any offence other than murder (and the other grave offences listed in section 469 of the *Code*) have several options short of arrest for compelling the

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[13] For police arrests, this provision largely overlaps with section 494(1)(*a*) of the *Criminal* Code, which permits "any one" to arrest someone "found committing" an "indictable" offence. Though this provision is commonly referred to as a "citizen's arrest" power, it is also available to non-citizens, police, and other law enforcement officials. In addition, police or any other person may arrest when they have reasonable grounds to believe that someone has: (*i*) committed a "criminal offence"; and (*ii*) is "escaping from and freshly pursued by persons who have lawful authority to arrest that person": *Criminal Code*, s 494(1)(*b*). Section 494(2) of the *Criminal Code* also permits an "owner or a person in lawful possession of property, or a person authorized by the owner or by a person in lawful possession of property" to arrest a person whom they find committing a criminal offence "on or in relation to that property." Though this provision is almost always invoked by private actors, it presumably also authorizes arrests by police and other law enforcement officials tasked with securing public or private property. Arrestors who are not peace officers may make the arrest either: (*a*) "at that time"; or (*b*) "within a reasonable time" thereafter if they reasonably believe "that it is not feasible in the circumstances for a peace officer to make the arrest." This power is redundant with respect to police and other "peace officers," however, as persons so designated may arrest persons found committing criminal offences in any context under section 495(1)(*b*) (discussed immediately above).

[14] See *R v McCowan*, 2011 ABPC 79 at para 50 (it is sufficient if the arresting officer sees "enough actions … to reasonably conclude" that the person was committing the offence). See also generally Steve Coughlan and Glen Luther, *Detention and Arrest*, 2d ed (Toronto: Irwin Law, 2017) at 252-57.

[15] *The Queen v Biron*, 1975 CanLII 13 (SCC), [1976] 2 SCR 56 at 72; *R v Roberge*, 1983 CanLII 120 (SCC), [1983] 1 SCR 312 at 324-27.

[16] See Bruce P Archibald, "The Law of Arrest" in Vincent M Del Buono, ed, *Criminal Procedure in Canada: Studies* (1982) 125 at 138; *R v Stevens*, (1976) 33 CCC (2d) 429 at 434 (NS CA).

person's attendance in court. In most situations, these alternatives will be preferable to arresting for a summary offence.

Ostensibly, police may use the arrest powers described above only when it is in the "public interest" to do so.[17] Police who believe that someone has committed an arrestable offence may respond in several ways short of arrest. First, they may choose not to lay charges, perhaps issuing an informal warning.[18] If they decide that charges are warranted, they may give the person an "appearance notice,"[19] require them to enter into an "undertaking,"[20] or obtain a summons from a court.[21] Each of these procedures ultimately obliges the person to appear in court to face the charge; failing to do so constitutes an offence.[22]

Under section 495(2) of the *Code*, police must choose one of these non-custodial options unless they reasonably believe that the public interest requires an arrest to establish identity, secure evidence, prevent offending, or ensure appearance in court.[23] However, section 495(3) deems police to have acted lawfully

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[17] *Criminal Code*, s 495(2)(*d*), 495(2)(*e*).
[18] See *R v Beaudry*, 2007 SCC 5 at paras 35-40, [2007] 1 SCR 190.
[19] *Criminal Code*, ss 497, 489(1)(*b*), 500, Form 9.
[20] *Criminal Code*, ss 498(1)(*c*), 499(b), 501, 503(1.1)(*b*), Form 10.
[21] *Criminal Code*, ss 498(1)(*a*), 507(1)(*b*), 507(4), Form 6.
[22] See *Criminal Code*, ss 500(2), 501(1)(*c*). See also generally Steven Penney, Enzo Rondinelli and James Stribopoulos, *Criminal Procedure in Canada*, 3d ed (2022) at paras 5.13-5.19.
[23] Note, however, that this obligation does not apply to pure indictable offences other than those listed in section 553 of the *Criminal Code*: *Criminal Code*, s 495(2). In effect, this gives police authority to arrest for the most serious offences without the need to consider the listed public interest factors. See also *Criminal Code*, ss 493.1, 493.2 (requiring police to "give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances … giving "particular attention to the circumstances of … Aboriginal accused" and "accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release"). Police may also revisit their initial decision to arrest and decide to release the accused using some other means of compelling appearance in court: *Criminal Code*, ss 498, 499, 503(1.1).

"notwithstanding" this requirement. Most courts have concluded that this precludes claims that "unnecessary" arrests are unlawful.[24]

As mentioned, police cannot arrest people under section 495(1) of the *Criminal Code* unless they either see them commit an offence or have strong grounds to believe they did so. Before making an arrest, police must therefore identify what type of crime has been committed.[25] This raises the question of which criminal offences might justify arrest during a public order disturbance? While an exhaustive catalogue of such offences is beyond the scope of this paper, we canvass some of the most likely candidates immediately below.

*Causing a disturbance* (s. 175(1)) ~ This pure summary conviction offence can be committed in a variety of ways, including by:

- causing a "disturbance in or near a public place … by fighting, screaming, shouting, swearing, singing or using insulting or obscene language … being drunk, or … impeding or molesting other persons";
- loitering "in a public place" and obstructing "persons who are in that place"; or
- disturbing "the peace and quiet" of residents "by discharging firearms or by other disorderly conduct in a public place."

As written, this offence potentially captures a broad range of conduct, including constitutionally protected expression and other activity that is not especially

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[24] See *R v Cayer*, [1988] OJ No 1120 (ON CA); *R v Adams*, 1972 CanLII 867 (SK CA); *R v McKibbon*, [1973] BCJ No 766 (BC CA); *Collins v Brantford Police Services Board*, 2001 CanLII 4190 (ON CA); *Abbey (Guardian ad litem of) v Dallin*, 1991 CanLII 1060 (BC SC) . For an argument that unreasonable and unnecessary arrests may violate the accused's right to be free from arbitrary detention under section 9 of the *Charter*, see Steve Coughlan, *Criminal Procedure,* 4th ed (Toronto: Irwin Law, 2020) at 324.

[25] See *e.g.*, *R v S (WEQ)*, 2018 MBCA 106 at para 28 (police not required to "articulate a specific offence" at time of arrest as long as they "articulate the substance of the offence that they have in mind"). Police also have a duty under section 10(*a*) of the *Charter* to promptly inform arrestees of "of the reasons therefor." This requires them to "convey the general extent of detainees' legal jeopardy": *R v Evans*, 1991 CanLII 98 (SCC), [1991] 1 SCR 869 at 888. See also *R v Smith*, 1991 CanLII 91 (SCC), [1991] 1 SCR 714 at 728-29; *R v Latimer*, 1997 CanLII 405 (SCC), [1997] 1 SCR 217 at para 31.

culpable.[26] Most courts have accordingly construed it narrowly, targeting only the most harmful and blameworthy activities encompassed by the statutory language.

As the Supreme Court held in *R v Lohnes*, to obtain a conviction under section 175(1), the Crown must prove that the accused caused an "overtly manifested disturbance which constitutes an interference with the ordinary and customary use by the public of the place in question."[27] The impugned conduct must also "reasonably be expected" to cause disturbance going beyond "mere mental or emotional annoyance or disruption."[28] Parliament's purpose, the Court reasoned, was not to protect people from "emotional upset," but rather to protect them from "disorder calculated to interfere with … normal activities."[29] According to the Court, this interpretation best accords with the "principal of legality, which affirms the entitlement of every person to know in advance whether their conduct is legal."[30] It also recognizes that the criminal law should be used with restraint. "[S]ome external manifestation of disorder in the sense of interference with the normal use of the affected place should be required," the Court noted, "to transform lawful conduct into an unlawful criminal offence."[31]

Following *Lohnes*, police could arrest people participating in public order disturbances under section 175(1) in limited circumstances. Since it is a pure summary offence, the arresting officer would have to witness the person engaging in one of the listed "triggering" activities, such as "impeding," "molesting," or "obstructing" others or disturbing "peace and quiet" by some form of "disorderly conduct."[32] Preventing

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[26] See generally Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff Criminal Law*, 5th ed (2015) at 822, n 58 ("there is a strong argument to be made that s. 2(*b*) of the Charter demands that these terms be interpreted restrictively in order to withstand constitutional scrutiny"); *R v Lohnes*, 1992 CanLII 112 (SCC), [1992] 1 SCR 167 at 172 ("The individual right of expression must at some point give way to the collective interest in peace and tranquillity, and the collective right in peace and tranquillity must be based on recognition that in a society where people live together some degree of disruption must be tolerated.").

[27] 1992 CanLII 112 (SCC), [1992] 1 SCR 167 at 177.

[28] *Ibid* at 177-78.

[29] *Ibid* at 178-79.

[30] *Ibid* at 180.

[31] *Ibid* at 181. See also *Skoke-Graham v The Queen*, 1985 CanLII 60 at paras 23-43 (SCC), [1985] 1 SCR 106 (similar interpretation of s. 176(2) of the *Criminal Code*, which makes it an offence for a person to disturb or interrupt "an assemblage of persons met for religious worship or for a moral, social or benevolent purpose").

[32] See generally *R v Berry,* 1980 CanLII 2952 (ON CA) (to "impede" a person does not require any proof of an affray, unlawful assembly, or riot).

people from accessing public spaces or facilities or repeatedly honking loud horns, for example, might qualify. It would also have to be reasonably apparent to the arresting officer, however, that this conduct was interfering with normal activities in that place at that time.[33] And even if that standard is met, as discussed above, the officer should generally issue an appearance notice or some other process unless an arrest is warranted under section 495(2) of the *Code*. This might occur, for example, where the person refuses to provide identifying information or cease the offending activity.[34]

*Unlawful assemblies and riots* (ss 63-68) ~ Section 66(1) of the *Code* makes it a summary conviction offence to be "a member of an unlawful assembly."[35] An "unlawful assembly" is defined as a gathering of at least three people with a common purpose who "cause persons in the neighbourhood" to reasonably fear that they will either "disturb the peace tumultuously" or "needlessly and without reasonable cause provoke

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[33] See *R v Lohnes*, 1992 CanLII 112 (SCC), [1992] 1 SCR 167 at 175 ("The lawful jangling of the street musician at an urban intersection at noon may become criminal if conducted outside a citizen's bedroom window at three o'clock in the morning."); *R v Greene*, 2000 ABPC 201 at para 24 ("the act of the accused must be evaluated not only in the context of where he was, but also in the context of what was occurring at the time"); *R v Kukemueller*, 2014 ONCA 295 at para 25 ("Contributing to raising the tension at the scene of an interaction between the police and the public does not amount to the kind of disturbance that is required for this offence to be made out."); *R v (VB) JG,* 2002 NSCA 65 (no disturbance where fistfight witnessed only by persons who voluntarily attended); *R v Gardner,* [1999] NBJ No 627 at paras 47-48 (Prov Ct) (no disturbance where violence not reasonably foreseeable outcome of accused's shouting and swearing); *R v Gyimah*, 2011 ONSC 419 at para 26, application for leave dismissed, 2014 ONCA 592 (conviction for disturbance warranted where, among other things, accused shouted at "a place and time where and when it can reasonably be expected that occupants of the street are either sleeping or trying to sleep").

[34] See *e.g.*, *Green v Klassen et al*, 2015 MBQB 123 at paras 40-42, affirmed 2016 MBCA 22, leave application dismissed, 2016 CanLII 51053 (SCC) (officer "reasonably determined" that plaintiff's impedance of motorists interfered "with the ordinary and customary use of a roadway by the public" and arrest justified by refusal to provide identity and evidence that he would continue to offend).

[35] Under section 66(2), a person who commits this offence while "wearing a mask or other disguise to conceal their identity without lawful excuse" may be prosecuted either by indictment or by way of summary conviction.

other persons to disturb the peace tumultuously."[36] Section 65 creates the hybrid offence of taking part in a "riot," which is defined as "an unlawful assembly that has begun to disturb the peace tumultuously."[37]

These offences could justify arrests during public order disturbances only in very limited circumstances. Unlike causing a disturbance under section 175, sections 65 and 66 both require the apprehended or actual disturbance to be "tumultuous." Courts have interpreted this as involving something beyond mere "disorder, confusion or uproar"; it requires "an atmosphere of force or violence, either actual or constructive."[38] No matter how disruptive or raucous, peaceful protests would not meet this standard.

Where twelve[39] or more people are "unlawfully and riotously assembled" and fail to disperse after being read the "riot act" by a designated authority, they may also be arrested for committing an offence under section 68 of the *Code*. This is a serious indictable offence carrying a maximum sentence of life in prison. However, the

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[36] *Criminal Code*, s 63(1). See *R c Lecompte*, 2000 CanLII 8782 (QC CA), leave dismissed, [2000] SCCA No 498 (rejecting challenges to provision under ss. 2 and 7 of the *Charter*). Under section 63(2), "persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose." Section 63(3) exempts from liability individuals "assembled to protect the dwelling-house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein."

[37] *Criminal Code*, s 64. See *R v Berntt*, 1997 CanLII 12528 (BC CA) (rejecting claim that provision is unconstitutionally vague under s. 7 of the *Charter*); *R v Brien*, 1993 CanLII 2842 (NWT SC) (rejecting claim that provision violates ss. 7 or 11(*d*) of the *Charter)*; *R v Drury,* 2004 BCPC 188 at para 43 ("What differentiates a riot from an unlawful assembly is that a riot entails an actual, tumultuous disturbance of the peace, whereas an unlawful assembly requires only the reasonable fear that such a disturbance will erupt.").

[38] *R v Lockhart*, [1976] NSJ No 387 at para 35 (CA). See also *R v Berntt*, 1997 CanLII 12528 at paras 19-26 (BC CA); *R v Brien*, 1993 CanLII 2842 at para 28 (NWT SC). Further, while an arrest for being part of an unlawful assembly under section 66 can be based on passive acquiescence, an arrest for "taking part" in a riot under section 65 requires more active participation. See *R v Paulger and Les,* 1982 CanLII 3848 at 80-81 (BC SC), citing *R v Thomas* (1971), 2 CCC (2d) 514 (BC Co Ct); *R v Brien*, 1993 CanLII 2842 at paras 26, 31 (NWT SC).

[39] The rationale for reading the riot act is presumably to provide police with a tool to disperse a riot that it cannot control. As police are now greater in numbers and possess better law enforcement tools than in 1892, we recommend that the threshold for reading the riot act should be increased if this power is preserved.

requirements for reading the proclamation ordering the dispersal seem both antiquated and poorly suited to most contemporary public order disturbances. Outside the context of prisons, it must be read by a "justice, mayor or sheriff, or the lawful deputy of a mayor or sheriff."[40]

*Common nuisance* (s. 180) ~ This hybrid offence arises where a person either "endangers the lives, safety or health of the public," or "causes physical injury to any person" by committing a "nuisance."[41] "Nuisance" is defined as either an unlawful act or a failure to discharge a legal duty[42] that has the effect of either endangering the "the lives, safety, health, property or comfort of the public" or obstructing the public "in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada."[43]

The language of this awkwardly and redundantly phrased offence must be read very carefully.[44] While a "nuisance" may arise from conduct threatening people's "comfort" or "obstructing" the exercise of public activity, no offence is committed unless it endangers public safety or causes injury. However, where the gravity of the potential harm is great, even a slight risk will be sufficient to qualify as endangering the public.[45]

In the context of public order disturbances, an arrest for nuisance is most likely to occur where a specific person commits an unlawful act (such as obstructing traffic or illegal parking under provincial or municipal legislation) that prevents or significantly

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[40] *Criminal Code*, s 67(*a*). The recommended wording in the *Criminal Code* is as follows: "Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business on the pain of being guilty of an offence for which, on conviction, they may be sentenced to imprisonment for life. GOD SAVE THE QUEEN": *Criminal Code*, s 67.

[41] *Criminal Code*, s 180(1).

[42] An unlawful act has been defined as conduct specifically prohibited by legislation. See *R v Thornton* 1991 CanLII 7212 (ON CA), affirmed 1993 CanLII 95 (SCC), [1993] 2 SCR 445. The failure to discharge a legal duty may be based on duties imposed by federal or provincial legislation (or possibly the common law). See Kent Roach, *Criminal Law*, 7th ed (2018) at 130.

[43] *Criminal Code*, s 180(2).

[44] See generally Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff Criminal Law*, 5th ed (2015) at 1016 ("Nuisance is one of the oldest unrevised crimes in the *Criminal Code* and consequently, the legislative drafting is archaic by modern standards.").

[45] *R v Thornton*, 1991 CanLII 7212 (ON CA), affirmed 1993 CanLII 95 (SCC), [1993] 2 SCR 445.

delays access to essential medical services such as hospitals.[46] Refusing to move a vehicle blocking the only entrance to an emergency ward or fire station, for example, could endanger public safety under section 180(1). It is not as clear, however, whether someone could be arrested for this offence who participates in a blockade that significantly impedes traffic flow but is not proximately connected to essential services or infrastructure.

*Intimidation* (s. 423) ~ This hybrid offence, originally enacted to deal with labour disputes, encompasses a broad range of activity.[47] Most pertinent to public order disturbances is the prohibition on wrongfully blocking or obstructing a "highway" to compel someone "to abstain from doing anything that he has a lawful right to do …".[48] Any road that permits public access constitutes a "highway" for the purposes of this provision.[49]

Police might have grounds to arrest participants in public order disturbances for this offence in some cases. But the provision requires the obstruction to be done "for the purpose" of compelling a person to abstain from doing something they are entitled to do. While the language of the offence is ambiguous on this point, Manning and Sankoff suggest that its purpose is to "prevent people from doing a particular act to compel or prevent some *separate* action."[50] If this is correct, then blockading a road to pressure governments to make policy changes, rather than to coerce specific action or inaction by the people impeded by the obstruction, may not justify an arrest for intimidation.

*Mischief* (s. 430(1)) ~ This offence is made out when an individual wilfully damages property, renders property "dangerous, useless or ineffective," "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

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[46] See also *Criminal Code*, s 423.2(1) (making it an offence to intentionally obstruct or interfere with "another person's lawful access to a place at which health services are provided by a health professional").
[47] See generally Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff*, *Criminal Law*, 5th ed (2015) at 1021-22.
[48] *Criminal Code*, s 423(1)(*g*).
[49] See *e.g.*, *R v Stockley* (1977), 36 CCC (2d) 387 (NL CA).
[50] Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff*, *Criminal Law*, 5th ed (2015) at 1022, n 252.

property."[51] The offence is indictable if the mischief causes "actual danger to life" and hybrid if it only affects property.[52]

While mischief is often regarded as an offence against property, its scope is broad enough to capture conduct akin to causing a disturbance.[53] Causing any degree of permanent damage to property would obviously suffice to make out the offence.[54] But as the provision also captures interferences with the "enjoyment" of property, some courts have found that people can be liable for making loud noises or blocking access to property.[55]

As Manning and Sankoff point out, this interpretation could capture relatively innocuous conduct that is "not obviously criminal," including otherwise lawful political expression.[56] A minority of courts have accordingly interpreted "enjoyment … of property" more narrowly, holding that it refers only to the "right to possess it without legal challenge."[57] On this view, conduct that merely makes the use of property less pleasurable is not prohibited. However, most courts have rejected this reading and given "enjoyment" its ordinary, non-legal meaning.[58]

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[51] Section 428 of the *Criminal Code* defines property as "real or personal corporeal property."
[52] *Criminal Code*, ss 430(2)-(4.1).
[53] See Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff Criminal Law*, 5th ed (2015) at 1277.
[54] See *R c Quickfall*, 1993 CanLII 3509 (QC CA) (even where removal costly, no liability where posters did not cause permanent damage to lampposts); *R v Jeffers*, 2012 ONCA 1 at para 19 ("damage must be more than negligible, more than a minor inconvenience").
[55] See *e.g.*, *R v Mammolita*, 1983 CanLII 3563 (ON CA); *R v WT*, [1993] BCJ No 2031 (Sup Ct).
[56] Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff Criminal Law*, 5th ed (2015) at 1281.
[57] *R v Phoenix*, [1991] BCJ No 4013 at para 14 (PC). See also *R c Drapeau*, 1995 CanLII 5099, Fish JA (QC CA) (adopting the approach in *Phoenix*); *R v Hnatiuk,* 2000 ABQB 314 at para 46 (no liability unless conduct alleged to constitute nuisance otherwise unlawful).
[58] See *e.g.*, *R v Maddeaux*, 1997 CanLII 1934 (ON CA); *R v Bird*, 2003 SKPC 16; *R v T(W)*, [1993] BCJ No 2031 (Prov Ct); *R v Nicol*, 2002 MBCA 151 at para 18; *R v WT* (1993), 21 WCB (2d) 194 (BC Sup Ct); *R v Day*, 2002 CanLII 11222 (NL PC). See also generally Leah West, Michael Nesbitt and Jake Norris, "Invoking the Emergencies Act in Response to the Truckers' 'Freedom Convoy 2022': What the Act Requires, How the Government Justified the Invocation, and Whether it was Lawful" (2022) 70:2 Crim LQ 262 (suggesting that mischief charges would have been appropriate in dealing with elements of the Ottawa protest).

Section 430(7) of the *Code* states that a person does not commit mischief "by reason only that he attends at or near or approaches a … place for the purpose only of obtaining or communicating information." This would seem to give some immunity to protestors or other people engaging in boisterous or disruptive expression. Courts have found, however, that the mere fact that the impugned conduct involved expressive activity does not preclude a conviction under section 430.[59] On this interpretation, section 430(7) only provides a defence when the communicative aspect of the conduct substantially outweighs its detrimental effect on the use or enjoyment of property.[60]

Given the difficulty that courts have had in drawing a bright line between the legitimate, constitutionally protected communication contemplated by section 430(7) and the intolerably antisocial intrusions targeted by section 430(1), police are left with considerable discretion in deciding whether to arrest protestors engaging in non-violent, non-destructive, yet potentially disruptive conduct.

*Disobey court order and criminal contempt* (s. 127(1) and common law) ~ where an injunction or other court order has been obtained in relation to a public order disturbance, individuals who defy the order may be arrested for committing either: (*i*) the offence of disobeying a court order under section 127(1) of the *Criminal Code*; or (*ii*) the common law offence of criminal contempt, which is preserved under section 9 of the *Code*.[61]

Section 127(1) makes it an indictable offence to disobey "a lawful order made by a court …." An arrest under this provision may therefore be justified where police reasonably believe that a person knowingly breached the terms of that order without a "lawful excuse" (such as a reasonable but unsuccessful attempt to comply).[62] Criminal contempt is similar, except for the added requirement that the defiance be displayed in a "public way" with an awareness that it "will tend to depreciate the

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[59] See *R v Mammolita*, 1983 CanLII 3563 (ON CA). See also Kent Roach, "The February Emergency: Intelligence, Policing and Governance Failures and the Future of *Charter*-Proofed Emergencies" (2022) 70:2 Crim LQ 196 at 228.

[60] See *R v Tremblay*, 2010 ONCA 469; *R c Bertrand*, 2011 QCCA 1412; *R v Dooling*, 1994 CanLII 10215 (NL CA); *R v Osborne*, 2007 NBPC 3.

[61] Section 9 of the *Criminal Code* bars conviction for common law offences, not including "the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court."

[62] See Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff Criminal Law*, 5th ed (2015) at 16.175-178

authority of the court."[63] As criminal contempt may be prosecuted summarily or by indictment,[64] police may arrest if they either see someone defying an order or have reasonable grounds to believe that the person is doing so. In addition, judges have sometimes included enforcement provisions in their orders authorizing (but not requiring) police to arrest people who violate them.[65]

*Secondary liability* (ss. 21-22, 434) ~ Under sections 21 and 22 of the *Code*, each of the criminal offences described above may be committed by a "principal," *i.e.*, a person who commits each of the elements of the offence,[66] or by a person who

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[63] *United Nurses of Alberta v Alberta (Attorney General)*, 1992 CanLII 99 (SCC), [1992] 1 SCR 901 at 933. See also *Trans Mountain Pipeline ULC v Mivasair*, 2019 BCCA 156 at para 33 (conviction for criminal contempt does not require "actual knowledge of the potential sentence for a contemplated contemptuous act").

[64] *R v Vermette*, 1987 CanLII 51 at para 9 (SCC), [1987] 1 SCR 577 (though almost always dealt with summarily, criminal contempt may be prosecuted by indictment). Note, however, that the rules and procedures for determining liability for criminal contempt are not the same as for *Criminal Code* offences, whether tried summarily or by indictment. For example, while summary conviction trials for *Criminal Code* offences almost always take place in provincial court, only the superior courts have jurisdiction to find someone in contempt for conduct outside the court's presence, such as a protestor defying an injunction requiring dispersal. See *Vermette*, *ibid* at paras 6, 11-12.

[65] See *e.g.*, *Hayes Forest Services Limited v Krawczyk*, 2006 BCCA 156 at para 22, leave application dismissed, 2006 CanLII 39431 (SCC); *Chris Development v Quock*, 2006 BCSC 1472. See also generally Rick Williams et al, "The New Normal? Natural Resource Development, Civil Disobedience, and Injunctive Relief" (2017) 55:2 Alta L Rev 285 at 288, 306-13 (noting that many police agencies will not arrest for violations of court orders obtained by private parties in relation to non-violent protests without an enforcement clause); *MacMillan Bloedel Ltd v Simpson*, *MacMillan Bloedel Ltd v Simpson*, 1996 CanLII 165 at para 41 (SCC), [1996] 2 SCR 1048 (noting that enforcement provisions do "no harm and may make the order fairer" because they "spell out the consequences of non-compliance").

[66] *Criminal Code*, s 21(1)(*a*) ("Every one is a party to an offence who … actually commits it …").

"aids,"[67] "abets,"[68] or "counsels" the commission of that offence.[69] Simply stated, these provisions make anyone who helps or encourages someone to commit a crime liable for the same offence as the person who actually commits it.[70] Police accordingly have the same authority to arrest alleged aiders, abetters, or counsellors as they do principals. In addition, section 464 of the *Code* creates a separate, hybrid offence of counselling an offence that is not committed. Police thus have the power to arrest a person that they either see counselling or have reasonable grounds to believe was counselling, even if no one is ever arrested, charged, or convicted of committing that offence.

## 3.2 Arrest for breaching the peace

In addition to giving police powers to arrest people for committing offences, section 31(1) the *Criminal Code* also authorizes an officer to arrest anyone "he finds committing [a] breach of the peace or who, on reasonable grounds, he believes is about to join in or renew [a] breach of the peace."[71] Although breaching the peace is

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[67] *Criminal Code*, s 21(1)(*b*) ("Every one is a party to an offence who … does or omits to do anything for the purpose of aiding any person to commit it …").
[68] *Criminal Code*, s 21(1)(*c*) ("Every one is a party to an offence who … abets any person in committing it.").
[69] Section 21(2) also makes a person a party to an offence who forms a common intention with another to commit an offence and who "in carrying out the common purpose, commits an offence" that he or she "knew or ought to have known … would be a probable consequence of carrying out the common purpose is a party to that offence."
[70] See generally Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 161-78.
[71] If there is no ongoing or recent breach of the peace, however, section 31(1) does not permit police to arrest a person for an anticipated breach: *Fleming v Ontario*, 2019 SCC 45 at paras 60-61, [2019] 3 SCR 519. As mentioned in this Part below, the Supreme Court in *Fleming* also expressed scepticism that such a power exists at common law. Note as well that under section 30 of the *Criminal Code*, anyone "who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace, for the purpose of giving him into the custody of a peace officer, if he uses no more force than is reasonably necessary to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace."

not an offence,[72] courts have permitted police to arrest under this provision for conduct that "result[s] in actual or threatened harm to someone."[73] As the Supreme Court has stressed, a breach of the peace involves "some level of violence and a risk of harm" and excludes "[b]ehaviour that is merely disruptive, annoying or unruly."[74]

The existence of a power to arrest for conduct that does not constitute an offence is troubling and may be vulnerable to a successful constitutional challenge. Despite judicial efforts to define it, the meaning of a "breach of the peace" remains "exceedingly vague,"[75] which increases the risk that police will deploy the power abusively. A review of the police's conduct during the 2010 G20 summit in Toronto, for example, found many instances where they used this arrest power in dubious circumstances.[76]

It is also unclear what police may do with people arrested for breaching the peace. As explained in Part 3.3, when someone is arrested for allegedly committing an offence, police may generally hold them in custody for up to 24 hours before presenting them before a justice for their first court appearance and bail hearing.[77] But it is not known whether this rule applies to persons arrested only for breaching the peace because they have not committed any offence. While some courts have suggested that police

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[72] Although breaching the peace was an offence at common law, as discussed in Part 3.1, section 9 of the *Criminal Code* prohibits conviction for common law offences except contempt of court. See *Frey v Fedoruk et al*, 1950 CanLII 24 (SCC), [1950] SCR 517; Bruce Archibald, "*Hayes v Thompson*: Annotation" (1985) 44 CR (3d) 316.

[73] *Brown v Durham (Regional Municipality) Police Force*, 1998 CanLII 7198 at para 73 (ON CA). See also *R v Khatchadorian*, 1998 CanLII 6115 at para 8 (BC CA); *R v Lefevbre* 1982 CanLII 3852 (BC SC), affirmed 1984 CanLII (BC CA); *R v Januska*, 1996 CanLII 8288 (ON CA).

[74] See *Fleming v Ontario,* 2019 SCC 45 at para 59, [2019] 3 SCR 519.

[75] See Canada (Law Reform Commission), *Arrest, Working Paper 41* (1985) at 62.

[76] See John W Morden, *Independent Civilian Review into Matters Relating to the G20 Summit, Report* (June 2012) at 257-59; Ontario (Office of the Independent Police Review Director), *Policing the Right to Protest: G20 Systemic Review Report* (2012) at viii, 136-39.

[77] *Criminal Code*, s 503(1). As discussed in Part 3.1, while police have considerable discretion in deciding whether to arrest and keep someone in custody, several *Criminal Code* provisions direct them to either not arrest or release them soon afterwards unless there are concrete public interest factors warranting continued detention. See *Criminal Code*, ss 493.1, 493.1, 495(2), 498, 499, 503(1.1).

must release such persons as soon as the danger to the peace has subsided,[78] others have concluded that they may be held for the full 24-hour period.[79]

In our view, if the power to arrest for breaching the peace is retained, police should not be able to hold arrestees any longer than necessary to preserve public safety. Since no offence has been committed, there is no reason to keep them in custody to further the investigation, collect evidence, or ensure their appearance in court.[80] Keeping a person arrested for any longer than necessary to prevent a further breach of the peace would therefore be unlawful and constitute an arbitrary detention under section 9 of the *Charter*.[81]

That said, we agree with Professor (now Justice) Stribopoulos and the Law Reform Commission of Canada that Parliament should seriously consider repealing section 31.[82] As detailed in Part 3.1, police have ample powers to arrest people who have

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[78] See *Ward v City of Vancouver*, 2007 BCSC 3 at para 68, affirmed 2010 SCC 27, [2010] 2 SCR 28 (arrestee's detention after security threat had passed could not be justified); *R v Grosso*, [1995] BCJ No 1802 at para 55 (Prov Ct) ("If a person who has been arrested for a breach of the peace is not to be dealt with under s. 810 of the *Criminal Code* and it is not intended to charge him with an offence then … he must be released as soon as the risk of his committing a further breach of the peace has passed."). See also *Criminal Code*, s 503(4) (requiring release of person arrested who is "about to commit" an indictable offence under section 495(1)(*a*) "as soon as practicable after the officer is satisfied that the continued detention of that person is no longer necessary in order to prevent that person from committing an indictable offence").

[79] See *Diallo v Benson*, 2006 CanLII 529 at para 32 (ON SC); *R v Lefebvre,* 1982 CanLII 3852, [1982] BCJ No 1038 at 244, affirmed 1984 CanLII 473 (BC CA).

[80] See James Stribopoulos, "The Rule of Law on Trial: Police Powers, Public Protest, and the G20" in Margaret E Beare, Nathalie Des Rosiers and Abigail C Deshman, eds, *Putting the State on Trial: The Policing of Protest During the G20 Summit* (Vancouver: UBC Press, 2015) 105 at 117. Some courts have suggested that where police intend to apply for a peace bond under section 810 of the *Criminal Code*, police would be justified in maintaining custody of an arrestee where there is a reasonable fear that they will abscond. See *e.g.*, *R v Grosso*, [1995] BCJ No 1802 at para 55 (Prov Ct).

[81] See *Ward v City of Vancouver*, 2007 BCSC 3 at para 71, affirmed 2010 SCC 27, [2010] 2 SCR 28; *R v Grosso*, [1995] BCJ No 1802 at para 58 (PC).

[82] James Stribopoulos, "The Rule of Law on Trial: Police Powers, Public Protest, and the G20" in Margaret E Beare, Nathalie Des Rosiers and Abigail C Deshman, eds, *Putting the State on Trial: The Policing of Protest During the G20 Summit* (Vancouver: UBC Press, 2015) 105 at 116-18; Canada (Law Reform Commission), *Arrest, Working Paper 41* (1985) at 62. For the same reasons, we would recommend that Parliament consider repealing section 30, mentioned in footnote 75 above.

committed or are "about to commit" offences involving dangerous or violent conduct. There is accordingly little if any need for an arrest power unattached to offending. Permitting police to arrest for non-criminal conduct sits uncomfortably with the rule of law, fails to give people fair notice of the possibility of arrest, and is largely immune from judicial review.[83]

While the power to arrest originated at common law, there do not appear to be any common law arrest powers today. While some courts had recognized a common law power to arrest for an apprehended breach of the peace,[84] in *Fleming v Ontario* the Supreme Court of Canada strongly suggested that this was mistaken.[85] "While it is not necessary to decide this in the instant case," Justice Côté wrote for a unanimous Court, "I seriously question whether a common law power of this nature would still be necessary in Canada today."[86] Police "already have extensive powers to arrest," she reasoned, when they reasonably believe someone "is about to commit an act which would amount to a breach of the peace."[87]

The Court in *Fleming* also definitively rejected the claim that police have a common law power to arrest a person to prevent *someone else* from breaching the peace.[88] The proposed power was not "reasonably necessary" under the ancillary powers

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[83] See James Stribopoulos, "The Rule of Law on Trial: Police Powers, Public Protest, and the G20" in Margaret E Beare, Nathalie Des Rosiers and Abigail C Deshman, eds, *Putting the State on Trial: The Policing of Protest During the G20 Summit* (Vancouver: UBC Press, 2015) 105 at 116-18. See also generally *Ontario v Fleming*, 2019 SCC 45 at para 84, [2019] 3 SCR 519 (noting that where an arrest power "would generally not result in the laying of charges, the affected individuals would often have no forum to challenge the legality of the arrest outside of a costly civil suit" and would thus be "evasive of review").
Mass arrests of protestors for breaching the peace during the G20 summit in Toronto in 2010 also led to considerable confusion during processing as the usual procedures for dealing with persons arrested for offences did not apply. This likely contributed to many constitutional violations, including arbitrary detentions, denials of access to counsel, and unwarranted strip searches. See Ontario (Office of the Independent Police Review Director), *Policing the Right to Protest: G20 Systemic Review Report* (2012) at 211-38.
[84] See *Brown v Durham (Regional Municipality) Police Force*, 1998 CanLII 7198 (ON CA); *Hayes v Thompson,* 1985 CanLII 151 (BC CA); *R v Khatchadorian*, 1998 CanLII 6115 at para 8 (BC CA).
[85] 2019 SCC 45 at paras 60-61, [2019] 3 SCR 519.
[86] *Ibid* at para 60.
[87] *Ibid* at para 61.
[88] *Ibid* at paras 62-100.

doctrine,[89] Justice Côté concluded, because it would allow police to take away the liberty of a person "who is acting lawfully and who they do not suspect or believe is about to commit any offence."[90]

As discussed in Part 3.2, it is open to police and prosecutors to ask courts to recognize new common law police powers. But after *Fleming v Ontario*, it seems very unlikely that the Supreme Court would grant such a request. In our view, this is a welcome development. Arrest is an exceptionally intrusive law enforcement tool that has been subject to extensive statutory regulation for well over a century. If police truly need additional arrest powers to deal with public order disturbances, legislatures should supply them, not the courts.

## 3.3 Derivative arrest powers

Police may also exercise several coercive powers that derive from lawful arrests. Section 25(1) of the *Criminal Code* authorizes them to use "as much force as is necessary" to arrest a person if they act on "reasonable grounds."[91] Even lethal force may be justified if they reasonably believe it is necessary to protect them (or a "person under their protection") from "death or grievous bodily harm."[92]

Police making lawful arrests may also invoke their common law power to conduct "incidental" searches. This permits them to search the arrestee and the immediate

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[89] We discuss this doctrine more extensively in Part 3.3.

[90] *Fleming v Ontario*, 2019 SCC 45 at para 78, [2019] 3 SCR 519.

[91] See *R v Nasogaluak*, 2010 SCC 6 at para 34, [2010] 1 SCR 206 (to be protected by s. 25, officer must believe that degree of force used is necessary and that belief must be objectively reasonable). In addition, under section 27 of the *Criminal Code*, anyone "is justified in using as much force as is reasonably necessary" to prevent an arrestable offence from being committed "that would be likely to cause immediate and serious injury to the person or property of anyone."

[92] *Criminal Code*, s 25(3). Because police must often respond quickly (and with limited information) to potentially dangerous situations, courts do not measure the degree of force they use with exactitude. See *R v Nasogaluak*, 2010 SCC 6 at paras 34-35, [2010] 1 SCR 206; *R v Power,* 2016 SKCA 29 at para 28. Under section 25(4) of the *Criminal Code,* police may only use lethal force against a suspect fleeing a lawful arrest when it is reasonably necessary to prevent death or grievous harm and the flight could not have been "prevented by reasonable means in a less violent manner."

vicinity to ensure public safety and discover evidence.[93] While police do not need specific grounds to believe that public safety is at risk or evidence will be found, they must reasonably believe that searching will serve one of these purposes.[94]

Lastly, as mentioned in Part 3.1, police may keep the people they arrest in custody for up to 24 hours to identify, interrogate, or obtain other evidence from them; prevent them from committing additional offences; or ensure that they attend court.[95] While police must tell the people they arrest of their right to talk to a lawyer and facilitate a telephone consultation with one if requested, arrestees are not entitled to communicate with anyone else during this period.[96] Before the expiry of the 24-hour period, police must present persons held in custody to a justice in provincial court.[97] While arrestees may apply for pretrial release at this time, these "bail" hearings are

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[93] See *R v Stairs*, 2022 SCC 11 at paras 34-38; *Cloutier v Langlois*, 1990 CanLII 122 (SCC), [1990] 1 SCR 158 at 180-81; *R v Caslake*, 1998 CanLII 838 (SCC), [1998] 1 SCR 51 at para 19; *R v Stillman*, 1997 CanLII 384 (SCC), [1997] 1 SCR 607 at paras 27-50. See generally Steven Penney, Enzo Rondinelli and James Stribopoulos, *Criminal Procedure in Canada*, 3d ed (2022) at paras 3.350-3.386.

[94] See *R v Stairs*, 2022 SCC 11 at paras 35-39. See also *R v Caslake*, 1998 CanLII 838 (SCC), [1998] 1 SCR 51 at para 15; *R v Fearon*, 2014 SCC 77 at para 27, [2014] 3 SCR 621; *R v Saeed*, 2016 SCC 24 at para 37, [2016] 1 SCR 518. Police may also require individuals arrested for indictable and hybrid offences to be fingerprinted and photographed. See *Identification of Criminals Act*, RSC 1985, c I-1, s 2(1).

[95] *Criminal Code*, ss 493.1, 495(2), 498(1), 498(1.1), 499, 503(1.1)), 503(4); *R v Storrey*, 1990 CanLII 125 (SCC), [1990] 1 SCR 241; *R v Fayant,* 1983 CanLII 3546 (MB CA); *R v Precourt,* (1976) 39 CCC (2d) 311 (ON CA). This rule does not apply to persons arrested for murder or any of the other offences listed in section 469 of the *Criminal Code*. Police must hold such persons in custody until their first court appearance, which must take place within 24 hours of arrest (assuming a justice is available). At that appearance, the justice must remand them into custody. They may thereafter make an application for release in the superior court. See *Criminal Code*, ss 495(2), 498(1), 498(1.01), 503(1.1), 515(11), 522(1); Steven Penney, Enzo Rondinelli and James Stribopoulos, *Criminal Procedure in Canada*, 3d ed (2022) at paras 6.68-6.72.

[96] See *Charter*, s 10(*b*); Steven Penney, Enzo Rondinelli and James Stribopoulos, *Criminal Procedure in Canada*, 3d ed (2022) at paras 4.78-4.130.

[97] *Criminal Code*, s 503(1). As discussed in Part 3.1, while police have considerable discretion in deciding whether to arrest and keep people in custody, several *Criminal Code* provisions direct them to either not arrest or release soon afterwards unless concrete public interest considerations justify continued detention. See *Criminal Code*, ss 493.1, 493.1, 495(2), 498, 499, 503(1.1).

often adjourned for several days.[98] If the hearing is adjourned or bail denied, the individual will be transferred from police custody to a provincial correctional ("remand") facility.[99]

## 3.4 Detention and search powers

In addition to their arrest powers, police also have numerous statutory and common law powers to detain and search people when they are investigating crime and maintaining public order.[100] Perhaps the most important of these is the common law investigative detention power. This allows police who do not have grounds for (or do not wish to) arrest to briefly detain and question people reasonably suspected of committing a recent crime.[101] The "reasonable suspicion" standard is lower than the reasonable and probable grounds required for arrest, requiring only the "reasonable possibility, rather than probability, of crime."[102] The decision to detain, however, must be made on "objectively discernible facts, which can then be subjected to independent judicial scrutiny."[103]

Individuals subject to investigative detention or any other lawful interaction with police may also be required to submit to a protective safety search. This common law power authorizes police to "pat-down" or "frisk" the person and any accessible belongings to ensure public safety.[104] To exercise this power, an officer must reasonably believe that "his or her own safety, or the safety of others, is at risk."[105] Unlike the power to search incident to arrest, police cannot use this power to search for evidence. If the

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[98] See Steven Penney, Enzo Rondinelli and James Stribopoulos, *Criminal Procedure in Canada*, 3d ed (2022) at paras 5.42-5.47, 6.56-6.63.
[99] *Criminal Code*, s 516(1); *R v Precourt*, (1976) 39 CCC (2d) 311 at 318-19 (ON CA).
[100] We examined the common law power to search incident to arrest in Part 3.3.
[101] *R v Mann*, 2004 SCC 52, [2004] 3 SCR 59. See generally Steven Penney, Enzo Rondinelli and James Stribopoulos, *Criminal Procedure in Canada*, 3d ed (2022) at paras 2.144-2.183.
[102] *R v Chehil*, 2013 SCC 49, [2013] 3 SCR 220.
[103] *Ibid* at para 26.
[104] *R v MacDonald*, 2014 SCC 3, [2014] 1 SCR 37. See generally Steven Penney, Enzo Rondinelli and James Stribopoulos, *Criminal Procedure in Canada*, 3d ed (2022) at paras 3.387-3.402.
[105] *R v Mann,* 2004 SCC 52 at para 40, [2004] 3 SCR 59.

frisk does not provide reasonable grounds to believe the suspect is concealing a weapon, police can intrude no further.[106]

## 3.5 Use of force to suppress a riot

In addition to the power to arrest people for the offence of taking part in a riot (discussed in Part 3.1), section 32(1) of the *Criminal Code* allows police to use force to "suppress" a riot, as long as they honestly and reasonably believe that the degree of force used is "necessary" and "not excessive, having regard to the danger to be apprehended from the continuance of the riot.[107] Section 33(1) also gives police and people lawfully required to assist them the power to "disperse" persons who do not comply with the proclamation or interfere with its issuance.

Section 33(2) further purports to insulate any peace officer, or a person lawfully required to assist a peace officer, from civil or criminal liability "in respect of any death or injury that by reason of resistance is caused as a result of the performance by the peace officer or that person of a duty that is imposed by subsection (1)." Unlike police and others who act under section 32 to suppress a riot without a proclamation, this appears to provide a blanket immunity against liability for the use of excessive force after the "riot act" is read.[108] If this interpretation is correct, it would be of questionable constitutional validity as it would permit the state to use unnecessary and disproportionate violence.[109]

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[106] *Ibid* at para 49 (police exceeded scope of safety search power by removing soft object from suspect's pocket).

[107] See generally *Berntt v Vancouver (City)*, 1999 BCCA 345 at paras 17-18. Section 32(3) also empowers persons so ordered by a peace officer to use force to suppress a riot if they act "in good faith" and the "order is not manifestly unlawful." And section 32(4) gives people who reasonably believe that "serious mischief will result from a riot before it is possible to secure the attendance of a peace officer" the power to use as much force as they reasonably believe "is necessary to suppress the riot" and is "not excessive, having regard to the danger to be apprehended from the continuance of the riot."

[108] See *Berntt v Vancouver (City)*, 1999 BCCA 345 at paras 10-11.

[109] See generally *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 112-13, 120-22 [2013] 3 SCR 1101 (outlining framework for assessing claims of overbreadth and gross disproportionality under s. 7 of the *Charter*); *R v Boudreault*, 2018 SCC 58, [2018] 3 SCR 599 (describing constitutional protection against cruel and unusual treatment or punishment under s. 12 of the *Charter*).

# 4. Regulatory law enforcement powers

In addition to enforcing the criminal law, police and other law enforcement officials are also charged with enforcing myriad provincial and federal regulatory laws as well as ensuring general order and public safety.[110] In the sections below, we canvass the main statutory and common law powers available to fulfill these mandates in the context of public order disturbances.

## 4.1 Traffic safety

Provincial traffic safety statutes grant police extensive powers to direct the movement of vehicles and control access to roads, including during public order disturbances. Section 134 of Ontario *Highway Traffic Act*, for example, authorizes police to direct traffic or close roads when "reasonably necessary" to "ensure orderly movement of traffic … prevent injury or damage to persons or property … or permit proper action in an emergency."[111] The statute also permits the "reasonably necessary" removal of vehicles "to ensure orderly movement of traffic … or prevent injury or damage to persons or property."[112] And it empowers a police officer engaged in "the lawful

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[110] See *e.g.*, *Police Services Act*, RSO 1990, c P.15, ss 1, 4(2) (declaring that police services must be carried out in accordance with several principles, including the "need to ensure the safety and security of all persons and property" and that "adequate and effective police services" must include "[c]rime prevention," "[l]aw enforcement," "[a]ssistance to victims of crime," "[p]ublic order maintenance," and "[e]mergency response"); *Police Act*, RSA 2000, c P-17, s 38(1) (police officers have the "authority," "responsibility" and "duty" to "encourage and assist the community in preventing crime"); *Police Act*, RSBC 1996, c 367, s 26(2) (police are "to maintain law and order in the municipality" and "prevent crime"); *The Police Services* Act, CCSM, c P94.5, preamble ("police services play a critical role in protecting the safety and security of Manitobans").

[111] RSO 1990, c H.8, s 1. While the provision refers to the closing of a "highway," that term is defined as including a "common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof": *ibid*.

[112] *Highway Traffic Act*, RSO 1990, c H.8, s 134.1. See also *ibid*, s 170(7) (authorizing removal of improperly parked vehicles outside municipalities); *ibid*, s 170(15) (authorizing removal of parked vehicles interfering with movement of traffic or in contravention municipal bylaws); *ibid*, s 185(3) (authorizing removal of pedestrians unlawfully present on highway); *ibid*, s 221(1) (authorizing removal of "vehicle apparently abandoned on or near a highway").

execution of his or her duties" to direct drivers to stop[113] and produce relevant driving documents.[114] Similar provisions are contained in other provinces' statutes.[115]

Municipalities also have extensive powers to direct traffic, close roads, prohibit parking, and control access to public areas.[116] The city of Toronto, for example, has the authority to "prohibit or regulate traffic in an emergency … or as authorized by the Chief of Police to ensure orderly movement of traffic, to prevent injury or damage to persons or property, or to permit action in any emergency."[117] It has also enacted

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[113] *Ibid*, s 216.

[114] *Ibid*, s 7(5) (requirement to keep and produce registration permit); *ibid,* s 16(4) (requirement to keep and produce commercial driving documents); *ibid,* s 23(3) (requirement to keep and produce proof of insurance for commercial drivers*)*; *ibid,* s 33(1) (requirement to keep and produce driver's licence). See also *Compulsory Automobile Insurance Act*, RSO 1990, c C.25, s 3(1) (requirement to keep and produce proof of insurance).

[115] See *e.g.*, *Traffic Safety Act*, RSA 2000, c T-6, s 77(1) (authorizing removal of vehicles that obstruct traffic, constitute a hazard, have been abandoned, or contravene the Act or a by-law); *ibid*, ss 166(1), 167(1) (peace officer may stop vehicle and require the driver or the person in care or control of the vehicle to produce their operator's license and certificate of registration); *Motor Vehicle Act*, RSBC 1996, c 318, s 123 (peace officer may direct traffic to "ensure orderly movement of traffic," "prevent injury or damage to persons or property" and "permit proper action in an emergency"); *ibid*, s 188 (authorizing removal of vehicles interfering with traffic, abandoned vehicles, unsafe vehicles, and vehicles contravening by-laws); *ibid,* s 33(1) (on demand by a police officer, a driver must produce their driver's license, driver's certificate and a "motor vehicle liability insurance card or financial responsibility card, issued for the motor vehicle he or she is driving or operating"); *The Highway Traffic Act*, CCSM c H60, ss 66(1), 100(4) (authorizing removal of unsafe vehicles and vehicles driving so slowly as to impede traffic); *ibid*, s 76 (peace officer may direct traffic where "reasonably necessary" to "ensure the orderly movement of vehicles and other traffic," "prevent injury or damage to persons or property" or "permit proper action in an emergency"; *ibid*, ss 76.1(1), 76.1(4) (peace officer may stop a vehicle and require driver to "produce his or her license, and the vehicle's insurance certificate and registration card and any other document respecting the vehicle that the peace officer considers necessary").

[116] Municipal by-laws are binding and enforceable insofar as they are lawfully enacted under the auspices of (and do not conflict with) provincial legislation. See generally *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 11-15, [2012] 1 SCR 5; *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19, [2004] 1 SCR 485.

[117] City of Toronto, Municipal Code Chapter 950, *Traffic and Parking Code* (2 March 2001), s 102 B. See also City of Ottawa, By-law No. 2002-264, *Emergency Planning and Responses* (26 June 2002), ss 9, 10(9); City of Ottawa, By-law No. 2017-301, *Traffic and Parking* (27 September 2017), s 65.

extensive rules regulating parking,[118] limiting pedestrian access to roadways,[119] prohibiting excessive noise,[120] and permitting the removal of unlawfully parked vehicles.[121]

Both the provincial traffic statutes and municipal bylaws typically create offences or impose administrative penalties for failing to abide by these rules.[122] In either case, law enforcement officials are typically authorized to serve a form of process on the individual giving them notice of the charge or penalty. For example, people who violate Toronto traffic bylaws may be charged with offences[123] or issued administrative

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[118] City of Toronto, Municipal Code Chapter 950, *Traffic and Parking Code* (2 March 2001), ss 400, 407. See also City of Ottawa, By-law No. 2017-301, *Traffic and Parking* (27 September 2017), ss 5-28, 64(3), 93-110, 115, 118-40.

[119] City of Toronto, Municipal Code Chapter 950, *Traffic and Parking Code* (2 March 2001), s 301. See also City of Ottawa, By-law No. 2017-301, *Traffic and Parking* (27 September 2017), ss 51, 73-77.

[120] See City of Toronto, Municipal Code Chapter 591, *Noise* (1 January 2001), ss 2.1, 2.5, 2.9. See also City of Ottawa, By-law N0. 2017-255, *Noise* (12 July 2017), ss 2, 3, 4, 15, 16, 17, 26, 27.

[121] City of Toronto, Municipal Code Chapter 950, *Traffic and Parking Code* (2 March 2001), s 1200 C. See also City of Ottawa, By-law No. 2017-301, *Traffic and Parking* (27 September 2017), s 86; City of Ottawa, By-law N0. 2003-499, *Fire Routes* (8 October 2003), ss 5, 6 (authorizing removal of vehicle stopped or parked on a designated fire route where prohibited by a sign); City of Ottawa, By-law No. 2003-498, *Use and Care of Roads* (8 October 2003), ss 3(1)(*d*), 9 (authorizing removal of "item, structure or material" that encumbers or damages a highway).

[122] See *e.g.*, *Highway Traffic Act*, RSO 1990, c H.8, s 170(14) (creating offence for various forms of unlawful parking and impeding traffic). A person "charged with an offence," including a municipal by-law offence, has the right to be tried in court where the prosecution is obliged to prove their liability beyond a reasonable doubt. See *Charter*, s 11(*b*); *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at paras 40-44, [2015] 3 SCR 250. An administrative penalty, in contrast, is imposed automatically. If it is not paid, the government can pursue various legislatively specified remedies, including denying access to services or initiating civil enforcement proceedings. Individuals who wish to contest an administrative penalty must follow any statutory appeal procedures or seek judicial review: *Goodwin*, *ibid* at paras 9-13.

[123] See *e.g.*, City of Toronto, Municipal Code Chapter 591, *Noise* (1 January 2001), s 41 (noise offences); City of Toronto, Municipal Code Chapter 950, *Traffic and Parking Code* (2 March 2001), s 1201 (traffic and parking offences). In Ontario, the prosecution of municipal bylaw offences is governed by the *Provincial Offences Act*, RSO 1990, c P.33, ss 5-11.

penalties.[124] These bylaws may be enforced by both municipal officers and city police,[125] each of whom is empowered to issue either a "penalty notice" (in the case of an administrative penalty violation)[126] or an "offence notice" or "summons" (in the case of an offence violation).[127]

People who commit provincial or municipal traffic offences, however, are not necessarily liable to arrest. In most provinces, police are authorized to arrest only for violations of specific prohibitions. Ontario's *Highway Traffic Act*, for example, gives police the power to arrest drivers who fail to stop when directed or produce driving documentation or identification.[128] Alberta's legislation is similar, but limits the power to arrest to cases where police reasonably believe that the individual: (*i*) will continue to offend; or (*ii*) failed to provide proper identification.[129] British Columbia's statute

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[124] City of Toronto, Municipal Code Chapter 950, *Traffic and Parking Code* (1 January 2001), ss 1200 B – B.1 (administrative penalties for unlawful traffic and parking); City of Toronto, Municipal Code Chapter 610, *Penalties, Administration of* (1 January 2001), ss 610-2.1 – 610-2.4, 610-5.1 – 610-5.9 (procedures for imposing and review of administrative penalties).

[125] City of Toronto, Municipal Code Chapter 610, *Penalties, Administration of* (1 January 2001), ss 1.1 E (definition of "enforcement officer"); City of Toronto, Municipal Code Chapter 150, *Municipal Law Enforcement Officers* (1 January 2001) ss 1, 17 (specifying enforcement jurisdiction of municipal law enforcement officials and city police).

[126] City of Toronto, Municipal Code Chapter 610, *Penalties, Administration of* (1 January 2001), s 2.1.

[127] *Provincial Offences Act*, RSO 1990, c P.33, s 1(1) (definitions of "offence" and "provincial offences officer"; *ibid*, ss 3-4, 21-26 (procedures for filing and serving charges).

[128] *Highway Traffic Act*, RSO 1990, c H.8 , ss 217. See also *R v Black*, 2020 ONSC 495 at para 16, n 4.

[129] See *e.g.*, *Traffic Safety Act*, RSA 2000, c T-6, s 169. See also *ibid*, s 166 (power to arrest drivers for failing to stop or produce identification extends to investigations of municipal bylaw infractions); *R v Maradin*, 2018 ABCA 274 at para 42 (application for leave). Several provinces also allow for an arrest where a person is found trespassing, including when committed by means of a motor vehicle. See *e.g.*, *Trespass to Premises Act*, RSA 2000, c T-7, ss 4-5; *Trespass Act*, RSBC 2018, c 3, ss 2, 4, 7.

permits arrest only for the offences of driving while prohibited or lacking insurance or failing to remain at the scene of an accident.[130]

Manitoba employs a broader approach, permitting police to arrest a person committing *any* provincial offence when "necessary to establish the person's identity, secure or preserve evidence relating to the offence or prevent the continuation or repetition of the offence."[131] While this power cannot be used for bylaw infractions,[132] the city of Winnipeg empowers officers to arrest pedestrians who contravene traffic safety

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[130] *Motor Vehicle Act*, RSBC 1996, c 318, s 79. The Alberta and British Columbia provincial offence procedure statutes incorporate by reference the *Criminal Code*'s provisions relating to offences punishable on summary conviction: *Provincial Offences Procedure Act*, RSA 2000, c P-34, ss 2, 3; *Offence Act*, RSBC 1996, c 338, ss 2, 133. These provisions could accordingly be interpreted as giving police the power to arrest anyone they find committing *any* provincial offence (see the discussion of section 495(1)(*b*) of the *Criminal Code* in Part 3.1). The better position, in our view, is that this cannot authorize an arrest for an offence contained in a statute that does not contain any power to arrest for that offence but permits arrest for other offences. See generally *R v Sevigny*, 2019 ABCA 245 at para 9 (application for leave to intervene). See also *The Provincial Offences Act and Municipal By-law Enforcement Act*, CCSM c P160, ss 47, 113 (making s 495(1)(*b*) inapplicable because the act provides for its own powers of arrest); *Provincial Offences Act*, RSO 1990, c P.33, s 2(1) (replacing the summary conviction procedure for the prosecution of provincial offences and rendering s 495(1)(*b*) inapplicable).

[131] *The Provincial Offences and Municipal By-law Act*, CCSM, c P160, s 47. Quebec has adopted an even more comprehensive approach, permitting police to arrest a person who commits any provincial or municipal offence, but only under limited circumstances. See generally *McGowan c City of Montréal*, 2018 QCCS 1740 at paras 17-18. Specifically, an officer is empowered to arrest a person for any offence if he or she "fails or refuses to give him his name and address or further information to confirm their accuracy" or if arrest is the only "reasonable means available to him to put an end to the commission of the offence": *Code of Penal Procedure*, RSQ, c C-25.1, ss 74-75. Such a person, however, "must be released from custody by the person detaining him once the latter person has reasonable grounds to believe that detention is no longer necessary to prevent, for the time being, the repetition or continuation of the offence": *Code of Penal Procedure*, *ibid*. See also *Code of Penal Procedure*, *ibid*, s 74 (permitting arrest where individual informed of offence "fails or refuses to give … his name and address or further information to confirm their accuracy" but requiring release "once he gives his name and address or once their accuracy is confirmed").

[132] *The Provincial Offences and Municipal By-law Act*, CCSM, c P160, s 47(3).

bylaws and "refuse or fail to stop and correctly state (their) name and address or … prove (their) identity when so required."[133]

In some circumstances, police may also be able to arrest and charge people contravening a regulatory prohibition for obstruction under section 129(*a*) of the *Criminal Code*.[134] That provision states that a person commits a hybrid offence who "resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer."[135] In *R v Moore*,[136] a pre-*Charter* decision of the Supreme Court, a police officer witnessed a cyclist committing a provincial traffic safety offence by failing to stop at a red light. Though the legislation did not grant a specific power to arrest in these circumstances, it did incorporate by reference *Criminal Code* provisions dealing with summary offences, including the section 495(1)(*b*) arrest power.[137] As police are authorized to arrest when they witness the commission of a summary offence when "necessary to establish" the accused's identity, the Court reasoned, the officer was entitled to arrest him for the regulatory offence and charge him with criminal obstruction when he refused to provide his identification.[138]

Most courts have held, however, that a person cannot be arrested or charged with obstruction under the *Code* when the applicable regulatory legislation contains an

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[133] City of Winnipeg, by-law no 153/77, *Traffic* (6 April 1997) ss 7, 8. See also City of Vancouver, by-law no 2849, *Street and Traffic* (30 October 1944), s 16(2).
[134] RSC 1985, c C-46.
[135] *Ibid.*
[136] 1978 CanLII 160 (SCC); [1979] 1 SCR 195**.**
[137] *Ibid* at 203.
[138] *Moore v The Queen*, 1978 CanLII 160 (SCC) at 203-04, [1979] 1 SCR 195.

adequate means to enforce the regulatory infraction.[139] On this view, an arrest for criminal obstruction is only possible when there is either no regulatory enforcement mechanism[140] or the failure to comply with a legal duty prevents such enforcement.[141]

For example, in *R v Yussuf*, police saw the accused unlawfully talking on his phone while driving.[142] Intending to give him a warning, an officer asked for his driving documents. The accused declined to provide either his documents or his name, even after being told it was an offence to refuse. After the accused ignored the officer's direction to step out of his vehicle, the officer opened the door and told him he was under arrest for obstruction.

Though the court found that the accused's conduct would ordinarily have constituted obstruction, the issue was complicated by the fact that the police could have arrested him under the *Highway Traffic Act* for refusing to identifying himself.[143] As Justice Paciocco (then of the Ontario Court of Justice) explained:

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[139] See *R v Hayes*, 2003 CanLII 3052 (ON CA) at para 42 (unlawful refusal to submit vehicle and equipment for inspection does not constitute criminal obstruction where refusal subject to notice and fine under regulatory provision); *R v Yussuf*, 2014 ONCJ 143 at paras 61-65 (refusal to provide identification during lawful traffic stop not obstruction where conduct constituted arrestable regulatory offence); *R v L'Huillier*, 2019 ABPC 237 at paras 25-36 (refusal to stop and provide identification during lawful bylaw traffic stop not obstruction where conduct constituted arrestable regulatory offence); *R v Hadi*, 2018 ABQB 35 at paras 12-40 (same); *R v Chanyi*, 2016 ABPC 7 at para 105. See also generally *R v Sharma*, 1993 CanLII 165 (SCC), [1993] 1 SCR 650 at 672-73 (where no regulatory arrest power, police "cannot circumvent the lack of an arrest power for a violation of the by-law by ordering someone to desist from the violation and then charging them with obstruction"). For decisions finding that criminal obstruction can be committed despite the existence of a regulatory enforcement mechanism, see *R v Maradin*, 2018 ABCA 274 at paras 38-44 (application for leave); *R v Hanoski*, 2016 ABPC 76; *Virani v HMTQ*, 2011 BCSC 1032.

[140] See *R v Waugh*, 2010 ONCA 100 at paras 39-42. In that case, the defendant repeatedly drove without insurance. The court recognized a common-law duty to impound an uninsured vehicle using the ancillary powers doctrine. Since the regulatory framework did not address non-compliance with this common-law duty, the defendant, who tried to prevent police from impounding his vehicle, could be arrested for obstruction.

[141] See *R v Hayes*, 2003 CanLII 3052 at para 42 (ON CA) ("If the appellant had interfered with the officer's attempt to use written notice for a vehicle inspection, the offence of obstruct police could have been made out"). See also *R v Sevigny*, 2019 ABPC 81, Appendix 1.

[142] *R v Yussuf*, 2014 ONCJ 143 at paras 21-38.

[143] *Ibid* at para 61.

> …[I]if an accused person is being processed under regulatory legislation and that regulatory legislation provides an enforcement mechanism for the impugned act of obstruction, a criminal charge of obstructing a peace officer in the course of their duties is inappropriate. The officer must use the regulatory means he was given.
>
> … Mr. Yussuf's refusal to identify himself was to be remedied by charging him and arresting him contrary to the *Highway Traffic Act*, not the *Criminal Code of Canada*.[144]

We agree with this interpretation. Giving police a power to arrest and charge people with the criminal offence of obstruction for failing to cooperate during the investigation of a minor regulatory infraction is inconsistent with the principle of restraint. Instead, it may be advisable for provinces to follow Manitoba and Quebec in giving police a general power of arrest for committing any provincial offence (and perhaps certain municipal bylaws), but only when detention is necessary (and remains necessary) to establish the person's identity or prevent the continuation or repetition of the offence.

## 4.2 Emergencies and critical infrastructure

Several provinces give police coercive powers to respond to government-declared emergencies or secure critical infrastructure. Our discussion will focus on legislation in Alberta, British Columbia, Manitoba, and Ontario.

*Alberta* ~ Under the *Emergency Management Act*, the government may declare a state of emergency if it is satisfied that an emergency "exists or may exist."[145] An "emergency" is defined as any "event that requires prompt co-ordination of action or special regulation of persons or property to protect the safety, health or welfare of people or to limit damage to property or the environment."[146] This broad definition could encompass certain kinds of public order disturbances.

During the emergency, the relevant minister may "do all acts and take all necessary proceedings" to thwart it.[147] While the Act does not grant specific powers to police, it authorizes many different kinds of intrusions into legally and constitutionally-protected

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[144] *Ibid* at paras 64-65.
[145] RSA 2000, c E-6.8, s 18. Specifically, the power to declare an emergency is made by the Lieutenant Governor in Council (*i.e.*, the cabinet). Local authorities have similar powers to declare an emergency in their areas of jurisdiction: *ibid*, ss 21-24.
[146] *Ibid*, s 1.
[147] *Ibid*, ss 19(1)- (1.1). See also *ibid*, s 18(4) (setting out duration of emergency in various circumstances).

rights, including "entry into any building or on any land, without warrant, by any person in the course of implementing an emergency plan or program" and requiring "any qualified person to render aid of a type the person is qualified to provide."[148]

Another Alberta statute, the recently-enacted *Critical Infrastructure Defence Act*, permits police to arrest without a warrant anyone who commits a designated offence with respect to "essential infrastructure."[149] These offences consist of wilfully: (*i*) entering such infrastructure; (*ii*) damaging or destroying it; or (*iii*) obstructing, interrupting or interfering with its "construction, maintenance, use or operation" in a manner that renders it "dangerous, useless, inoperative or ineffective."[150] "Essential infrastructure" encompasses many different kinds of facilities, including pipelines, industrial plants, mines, telecommunications and electrical transmission lines, railways, highways, and "any building, structure or device" prescribed by regulation.[151] Under this latter authority, specified health care facilities have also been included.[152]

*British Columbia* ~ Under the *Emergency Program Act*, the government may declare an emergency if it is "satisfied that an emergency exists or is imminent."[153] The Act defines an emergency much more narrowly, however, than the analogous legislation in the other provinces discussed in this paper. It consists of "a present or imminent event or circumstance" that is "caused by accident, fire, explosion, technical failure or the forces of nature" and "requires prompt coordination of action or special regulation of persons or property to protect the health, safety or welfare of a person or to limit

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[148] *Ibid*, ss 19(1)(*d*), (*h*). It is also an offence to fail to comply with any obligation or order imposed: *ibid*, s 17.

[149] SA 2020, c C-32.7, s 4. See also *Alberta Union of Public Employees v Her Majesty the Queen (Alberta)*, 2021 ABCA 416 at paras 82-85 (striking constitutional challenge of legislation based on lack of standing and inadequate pleadings).

[150] *Critical Infrastructure Defence Act*, SA 2020, c C-32.7, ss 2(1)-(3). Section 2(5) of the Act further stipulates that "[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)." Aiding, counselling, or directing any of the proscribed conduct also constitutes an offence but does not trigger a right to arrest: *ibid*, ss 2(4), 4. All of the offences are defined to exclude anyone who has a "lawful right, justification or excuse" to engage in the prohibited activity.

[151] *Ibid*, s 1(1)(*a*).

[152] AR 169/2021.

[153] RSBC 1996, c 111, ss 9(1), 12(1). Specifically, this power may be exercised by the relevant minister, Lieutenant Governor in Council, or local authority.

damage to property."[154] In all but rare and extreme circumstances, the types of public disturbances considered in this paper would be unlikely to meet this definition.[155]

Like Alberta, British Columbia has also enacted legislation ensuring access to critical infrastructure. But unlike the Alberta statute, the *Access to Services (Covid-19) Act* contains a sunset clause causing it to be repealed on July 1, 2023.[156] The Act prohibits certain conduct in relation to a "designated facility," including Covid-19 testing and vaccination sites as well as select hospitals, schools, and other facilities prescribed by regulation.[157] The proscribed conduct consists of: (*i*) impeding "access to or egress from the facility"; (*ii*) physically interfering with or disrupting "the provision of services at the facility"; or (*iii*) intimidating or attempting to intimidate an individual "or otherwise do or say anything that could reasonably be expected to cause an individual concern for the individual's physical or mental safety." The Act also prohibits "wilfully" participating "in a gathering" whose participants are engaging in this activity.[158]

Police are permitted to conduct warrantless arrests of anyone believed on reasonable and probable grounds to be violating these rules.[159] The Act does not, however, make it an offence to do so.[160] Instead, it empowers superior court judges to issue injunctions against people reasonably believed to have contravened or who are likely to contravene the Act.[161] As discussed in Part 3.1, police may arrest people who defy

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[154] *Ibid*, s 1.

[155] Once an emergency is declared, the minister may "do all acts and implement all procedures … necessary to prevent, respond to or alleviate the effects of an emergency or a disaster." *Ibid*, s 10(1). For similar powers relating to local emergencies and local authorities, see *ibid*, s 13. See also *ibid*, s 9(4) (specifying renewable, 14-day duration of emergency); *Covid-19 Related Measures Act*, SBC 2020, c 8, s 3 (permitting cabinet to extend ordinary emergency powers).

[156] SBC 2021, c 23, s 7.

[157] *Ibid*, ss 3, 6(2). The prohibitions do not apply to "anything done or said in the course of a person's work" or an "educational program or extracurricular school activity"; lawful labour action; or activities prescribed by regulation: *ibid*, ss 2(3)-(4).

[158] *Ibid*, s 2(2).

[159] *Ibid*, s 4.

[160] As discussed in Part 3.2, giving police a power to arrest for conduct that is not an offence is problematic. However, we see no reason why these prohibited activities should not constitute offences. Conditioning conviction and punishment on the issuance of an injunction injects undue subjectivity and arbitrariness in the enforcement of the law.

[161] *Ibid*, s 5. An application for an injunction may be made by the "Attorney General or any other person" and may be made "without notice to any person": *ibid*, ss 5(1)-(2).

such injunctions either for violating section 127(1) of the *Criminal Code* or for contempt of court.

In our view, the *Access to Services (Covid-19) Act* is constitutionally suspect in at least two ways. First, prohibiting conduct that may compromise others' "mental safety" is inordinately vague and arguably encompasses protected expression under section 2(*b*) of the *Charter*. Second, prohibiting the mere participation "in a gathering" where *others* are engaging in prohibited conduct appears to penalize inherently non-culpable conduct and intrude unduly on the section 2(*c*) *Charter* right of free assembly.

*Manitoba* ~ Under *The Emergency Measures Act*, the government may declare a state of "major emergency" and "issue an order to any party to do everything necessary to prevent or limit loss of life and damage to property or the environment".[162] The Act defines an "emergency" as "a present or imminent situation or condition that requires prompt action to prevent or limit the loss of life … harm or damage to the safety, health or welfare of people, or damage to property or the environment."[163] But a "major emergency" is defined to exclude "routine" emergencies, which are those that "can be effectively resolved" by local responders without substantial outside assistance, do not require evacuation outside the local jurisdiction, and do "not require the declaration of a state of emergency or a state of local emergency."[164] While these definitions are somewhat circular, they would appear to preclude the Act's application to public order disturbances that can be effectively addressed by local authorities exercising their usual powers.

Like the Alberta act, the Manitoba statute provides an extensive, non-exhaustive list of intrusive emergency powers, including powers to "control, permit or prohibit travel to or from any area or on any road, street or highway"[165] and "authorize the entry into any building, or upon any land without warrant".[166] The government may also require "a critical service provider, or any other person, organization or entity that provides a critical service" to undertake measures to prevent "danger to life, health or safety …

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[162] CCSM c E80, ss 10, 12. "Minister" is defined as **"**the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act": *ibid*, s 1. Once an emergency is declared, local authorities have the power to make the same orders: *ibid*, s 12(1).
[163] *Ibid*, s 1. The emergency period lasts for 30 days unless cabinet designates a shorter period or renews the emergency for any additional 30-day period: *ibid*, s 10(4).
[164] *Ibid*, ss 1, 10(1).
[165] *Ibid*, s 12(1)(*d*).
[166] *Ibid*, s 12(1)(*g*).

the destruction or serious deterioration of infrastructure or other property required for the economic well-being of Manitoba or the effective functioning of the government … or … serious damage to the environment."[167]

The Act also creates several offences, including failing to comply with orders made under its authority; interfering with or damaging "emergency infrastructure"; interfering with a person exercising a power or performing a duty under the Act or its regulations; or otherwise contravening the statute.[168] Police may arrest without warrant anyone "apparently committing" any of these offences, but only when it is "necessary to establish the person's identity … secure or preserve evidence relating to the offence … or … prevent the continuation or repetition of the offence or the commission of another offence."[169]

*Ontario* ~ Under the *Emergency Management and Civil Protection Act*, the government may declare an emergency when there is "a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise."[170] An emergency may not be declared, however, unless one of the following circumstances exists:

i. The resources normally available to a ministry of the Government of Ontario or an agency, board or commission or other branch of the government, including existing legislation, cannot be relied upon without the risk of serious delay;

ii. The resources referred to in subparagraph i may be insufficiently effective to address the emergency; or

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[167] *Ibid*, s 12(4)(*b*).
[168] *Ibid*, s 20(1). "Emergency infrastructure" is defined as "works, infrastructure or thing … that is or may be needed to … prevent an emergency or disaster from occurring or reduce the likelihood of such an occurrence; or reduce the effects of an emergency or disaster": *ibid*, s 20(1.1). Individuals cannot be convicted of failing to comply with an order, however, if they took reasonable steps to do so: *ibid*, s 20(7).
[169] *Ibid*, s 20(1.2).
[170] RSO 1990, c E9, ss 1, 7.0.1(1) (power to declare emergency given to cabinet, but Premier may make declaration if "the urgency of the situation requires that an order be made immediately"). See also *ibid*, s 7.0.7-7.0.8 (setting out duration of emergency declaration and orders, normally 14 days).

iii. It is not possible, without the risk of serious delay, to ascertain whether the resources referred to in subparagraph i can be relied upon.[171]

The reference to an "act" causing substantial harm to persons or property means that the statute could apply to public order disturbances, but only if they are of sufficient magnitude.

If an emergency is declared, the government may make orders that are "necessary and essential" to mitigate serious harms to persons or property if it reasonably believes that the order will be effective and constitutes a "reasonable alternative to other measures that might be taken to address the emergency."[172] Like other provinces, the Ontario emergencies Act sets out an extensive but non-exhaustive list of orders that may be issued, including regulating and prohibiting travel, closing public and private facilities, removing property, and authorizing (but not requiring) qualified individuals to provide necessary services.[173] When implementing orders, police and other actors must act in a minimally intrusive manner, only within designated areas, and only for as long as reasonably necessary.[174]

It is an offence under the Act to fail to comply with an order or to interfere or obstruct "any person in the exercise of a power or the performance of a duty conferred by an order."[175] The Act does not confer any arrest powers, but as in British Columbia, a superior court judge may on application issue an injunction restraining any contravening conduct.[176]

On February 14, 2022, the Ontario government issued the *Critical Infrastructure and Highways Regulations*[177] under the *Emergency Management and Civil Protection Act*'s order-making authority. This regulation was repealed on April 15, 2022.[178] While in force, it prohibited anyone from impeding access (or helping to impede access) to "critical infrastructure."[179] Critical infrastructure was defined to encompass a broad

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[171] *Ibid*, s 7.0.1(3).
[172] *Ibid*, s 7.0.2(2).
[173] *Ibid*, s 7.0.2(4).
[174] *Ibid*, s 7.0.2(3).
[175] *Ibid*, s 7.0.11.
[176] *Ibid*, s 7.0.5. The application may be made, without notice, by "the Crown in right of Ontario, a member of the Executive Council or the Commissioner of Emergency Management: *ibid*.
[177] Ont Reg 71/22.
[178] Ont Reg 25/21, Sched 1, s 2.
[179] Ont Reg 71/22, s 2(1).

range of facilities, including highways, railways, hospitals, utilities, and airports.[180] The regulation also contained a more specific provision relating to highways, walkways, and bridges, which forbade any significant impediment "preventing the delivery of essential goods or services … severely disrupting ordinary economic activity … or causing a serious interference with the safety, health or well-being of members of the public."[181]

The regulation empowered police and other law enforcement officials with reasonable grounds to believe that someone had violated any of the above prohibitions to order that person to cease the conduct, order people acting in concert to disperse, or order persons to "remove any object … used in the contravention."[182] It also required individuals to remove any vehicles used, and if they refused, empowered police to do so.[183] It did not, however, give police the power to arrest persons in violation.

When this regulation was repealed, the Ontario government immediately enacted the *Keeping Ontario Open for Business Act, 2022*, which is still in force.[184] The Act forbids significant interferences with "protected transportation infrastructure" reasonably expected to either disrupt "ordinary economic activity" or threaten public safety.[185] "Protected transportation infrastructure" includes international border crossings, international airports, and "any other transportation infrastructure that is of significance to international trade and that is prescribed by the regulations."[186]

As under the repealed regulation, the Act authorizes police to direct compliance and remove items and vehicles.[187] But unlike the regulation, it also creates offences for non-compliance[188] and empowers police to arrest when they have reasonable grounds to believe that someone has contravened the Act.[189] Police with such grounds may also require any person to identify themselves for the purposes of laying

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[180] *Ibid*, s 1.
[181] *Ibid*, s 3.
[182] *Ibid*, s 4(1).
[183] *Ibid*, s 5. The Registrar of Motor Vehicles could also suspend individuals' driver's licences if he or she reasonably believed they contravened the regulations: *ibid*, s 6.
[184] SO 2022, c 10.
[185] *Ibid*, s 2. The Act also prohibits assisting someone to do one of these things: *ibid*, s 2(4).
[186] *Ibid*, s 1.
[187] *Ibid*, ss 3-4. Note that under the Act these powers are given only to a "police officer" and not other provincial law enforcement officials as was the case under the regulation: *ibid*.
[188] *Ibid*, ss 10 (creating offences for failing to comply with orders or obstructing anyone performing a power or duty under the Act).
[189] *Ibid*, s 13.

charges.[190] Failing to comply with this obligation is also an offence.[191] Further, if police have reasonable grounds to believe individuals used a vehicle to contravene the Act, they may direct them to surrender their licence, which is thereafter subject to a 14-day suspension.[192] Lastly, the government may apply to a superior court for an order restraining persons unlawfully interfering with protected transportation infrastructure.[193]

## 4.3 Common law

As mentioned in Parts 2.3 and 2.4 above, in recent decades courts have used the common law "ancillary powers" doctrine to give police several criminal investigative powers. This doctrine is not limited to criminal law enforcement, however. Courts have also recognized common law powers to preserve public order and safety.[194] While the

[190] *Ibid*, s 12.
[191] *Ibid*, s 12(3).
[192] *Ibid*, s 7.
[193] *Ibid*, s 14.
[194] There is, of course, considerable overlap between the police's mandates to investigate potential criminal offences and ensure public order and safety. See *e.g.*, *Dedman v The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2 (power to stop drivers without suspicion to investigate driving offences); *R v Godoy*, 1999 CanLII 709, [1999] 1 SCR 311 (power to enter premises to ensure public safety); *R v Clayton*, 2007 SCC 32, [2007] 2 SCR 725 (power to set up roadblock to investigate serious, recently committed offence); *R v MacDonald*, 2014 SCC 3, [2014] 1 SCR 37 (power to conduct pat-down search during any lawful interaction with person where reasonable grounds to believe public safety at risk).

ancillary powers jurisprudence has been criticized,[195] some limited police responses to public order disturbances would likely be authorized under this doctrine.[196]

It is very difficult, however, to delineate the scope of common law public order police powers with precision. The test for recognizing an ancillary power is pitched at a high level of generality. To convince a court to authorize the power, the Crown must demonstrate that it was "necessary for the carrying out of the particular police duty

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[195] See *e.g.*, James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's LJ 1; Steven Penney, Enzo Rondinelli and James Stribopoulos, *Criminal Procedure in Canada*, 3d ed (2022) at paras 1.219-1.231; Don Stuart, "*R. v. Dedman*: Annotation" (1985) 46 CR (3d) 193; Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can Bar Rev 481; Patrick Healy, "Investigative Detention in Canada" (2005) Crim L Rev 98; Steve Coughlan, "Common Law Police Powers and the Rule of Law" (2007) 47 CR (6th) 266; Richard Jochelson, "Ancillary Issues with *Oakes*: The Development of the *Waterfield* Test and the Problem of Fundamental Constitutional Theory" (2013) 43 Ottawa L Rev 355; John Burchill, "A Horse Gallops Down a Street… Policing and the Resilience of the Common Law" (2018) 41 Man LJ 161. See also *Dedman v The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2 at 10-19, Dickson J, dissenting.

[196] See *e.g.*, *Figueiras v Toronto (Police Services Board)*, 2015 ONCA 208 at para 60 ("As the case law demonstrates, even in the absence of statutory authority, the police must be taken to have the power to limit access to certain areas, even when those areas are normally open to the public."); *Teal Cedar Products Ltd v Rainforest Flying Squad,* 2021 BCSC 1554 at para 33 (police lawfully arresting protestors have a common law power to "establish a local perimeter around persons being arrested" and "control vehicle traffic while the arrest and removal is taking place"); *Tremblay c Québec (Procureur général)*, 2001 CanLII 25403 (QC CS) (recognizing common law power to erect security exclusion zone for intergovernmental conference).

As mentioned in Part 3.2, this likely does not include any common law arrest powers, whether in the criminal or regulatory context. See *R v Sharma*, 1993 CanLII 165 (SCC), [1993] 1 SCR 650 at 672-73 (no authority at common law to arrest for contravening municipal bylaw); *R c Boodoo*, 2018 QCCM 183 at paras 320-21 ("there is no common law power to arrest for a provincial offence") [emphasis removed].

and ... reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference."[197]

In most cases, the test turns on the second question, *i.e.*, whether the "police action is reasonably necessary for the fulfillment of the duty."[198] In answering this question, courts must consider the following factors:

1. the importance of the performance of the duty to the public good;
2. the necessity of the interference with individual liberty for the performance of the duty; and
3. the extent of the interference with individual liberty.[199]

As the Court stressed in *Ontario v Fleming*, throughout this analysis "the onus is always on the state to justify the existence of common law police powers that involve interference with liberty."[200]

In its 1973 decision in *Knowlton v R*,[201] the Supreme Court of Canada interpreted the ancillary powers doctrine expansively in the context of a security blockade. The accused was charged with obstruction after he tried to push his way past police manning a barricade in front of a hotel hosting the Soviet Premier. The trial judge had dismissed the charge on the basis that the police were not exercising any statutory power to block access to the area. But the Supreme Court disagreed, finding that:

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[197] *Dedman v The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2 at 35. See also *R v Mann*, 2004 SCC 52 at paras 24-26, [2004] 3 SCR 59; *R v MacDonald*, 2014 SCC 3 at paras 33-40, [2014] 1 SCR 37. This test was adopted from the English case of *R v Waterfield*, [1963] 3 All ER 659 (Ct Crim App). As the Supreme Court of Canada has noted, in England the "*Waterfield*" is used exclusively to decide whether police were acting within the scope of their duties—not to generate novel police powers. See *Fleming v Ontario*, 2019 SCC 45 at para 43, [2019] 3 SCR 519; *R v Clayton*, 2007 SCC 32 at para 75, Binnie J, [2007] 2 SCR 725. See also *Morris v Beardmore*, [1981] AC 446 at 463 (HL) ("it is not the task of judges, exercising their ingenuity in the field of implication, to go further in the invasion of fundamental private rights and liberties than Parliament has expressly authorised").

[198] *Fleming v Ontario*, 2019 SCC 45 at para 47, [2019] 3 SCR 519. See also *R v MacDonald*, 2014 SCC 3 at para 36, [2014] 1 SCR 37; *Dedman v The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2 at 35.

[199] *R v MacDonald*, 2014 SCC 3 at para 37, [2014] 1 SCR 37; *Fleming v* Ontario, 2019 SCC 45 at para 47, [2019] 3 SCR 519.

[200] *Fleming v Ontario*, 2019 SCC 45 at para 48, [2019] 3 SCR 519.

[201] 1973 CanLII 148 (SCC), [1974] SCR 443.

(*i*) police were acting within the scope of their duties to preserve the peace and prevent crime (the Premier had been assaulted in Ottawa a few days earlier); and (*ii*) restricting access to unaccredited members of the public was "not an unjustifiable use of the powers associated with the duty imposed on them."[202]

By contemporary standards, the Court's analysis of the competing interests at stake in the ancillary powers analysis was cursory. *Knowlton* was also decided long before the enactment of the *Charter* spurred the courts to adopt a much more vigorous approach to protecting civil liberties against law enforcement overreach.[203] In recent years, courts have been more reluctant to recognize ancillary police powers in public disturbance cases. As discussed in Part 3.2, in *Fleming v Ontario*,[204] the Supreme Court refused to recognize a common law power to arrest a person to prevent others from breaching the peace and suggested that there is no power to arrest someone who they anticipate will breach the peace.[205] It also stressed that action taken to *prevent* offending should be scrutinized more strictly than that directed at investigating offences already committed.[206]

Lower courts have also been cautious in assessing claims that the common law gives police broad powers to ensure security during public disturbances. In *Figueiras v Toronto (Police Services Board)*,[207] the Ontario Court of Appeal considered whether Toronto police acted lawfully in preventing suspected protestors from accessing a street unless they submitted to a search. As police did not rely on any statutory

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[202] *Ibid* at 447-48.

[203] See James Stribopoulos, "The Rule of Law on Trial: Police Powers, Public Protest, and the G20" in Margaret E Beare, Nathalie Des Rosiers and Abigail C Deshman, eds, *Putting the State on Trial: The Policing of Protest During the G20 Summit* (Vancouver: UBC Press, 2015) 105 at 113. See also *Figueiras v Toronto (Police Services Board)*, 2015 ONCA 208 at para 50 ("Over time, the Supreme Court has modified the *Waterfield* test to emphasize the importance of *Charter*-protected rights).

[204] 2019 SCC 45, [2019] 3 SCR 519

[205] As discussed in Part 3.2, while the *Criminal Code* does not permit police to arrest to prevent a breach of the peace that has not yet occurred, section 31 authorizes arrest when a breach of peace has already occurred and the person to be arrested "is about to join in or renew" it.

[206] *Fleming v Ontario*, 2019 SCC 45 at para 83, [2019] 3 SCR 519 ("As a general rule, it will be more difficult for the state to justify invasive police powers that are preventative in nature than those that are exercised in responding to or investigating a past or ongoing crime"). See also *Figueiras v Toronto (Police Services Board*), 2015 ONCA 208 at para 45; *Brown v Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ONCA).

[207] 2015 ONCA 208.

authority for this action, the Crown asserted that it was necessary to prevent violence and other unlawful activity during the 2010 G20 summit. The court rejected this argument, finding that the effects of the police conduct on the applicant's liberty and freedom of expression were not justifiable.[208] Given the widespread nature of the unrest, the court reasoned, these measures were unlikely to have suppressed much unlawful activity.[209] Nor was it evident that they were "temporally, geographically and logistically responsive" to the threat posed by the protests.[210]

The British Columbia Superior Court came to a similar conclusion in *Teal Cedar Products Ltd v Rainforest Flying Squad*.[211] There, police established an exclusion zone around a remote area of Vancouver Island subject to an injunction prohibiting protestors from interfering with logging activity.[212] While police could lawfully arrest protestors for violating the injunction, they had no legislative power to exclude people whom they feared *might* do so. Nor was the court convinced that exclusion was reasonably necessary for police to safely perform their duty to arrest and remove protestors violating the injunction.[213] While the exclusion zone may have facilitated lawful enforcement, the court reasoned, its duration and geographic scope were too great to justify the intrusion on individual liberty.[214]

Despite views to the contrary,[215] we think the courts should remain reluctant to use the common law to authorize the coercive police responses to public order disturbances. As mentioned in Part 3.1, the principle of legality dictates that individuals should be able to know the law's boundaries, including whether the state is justified in restricting *Charter*-protected liberties.[216] Ideally, this should require such restrictions to be expressly demarcated in advance in legislation. Enabling courts to

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[208] *Ibid* at paras 92-139.
[209] *Ibid* at paras 101-03.
[210] *Ibid* at para 107, citing *R v Clayton*, 2007 SCC 32 at para 41, [2007] 2 SCR 725.
[211] 2021 BCSC 1554.
[212] Specifically, the police blocked all public vehicle access to the protest site, blocked access to all pedestrians unless they submitted to a search, and required journalists to be accompanied by police escorts: *ibid* at para 55.
[213] *Ibid* at para 50.
[214] *Ibid* at paras 62-63.
[215] See *e.g.*, Hon. Justice Roy McMurtry, "Report of the Review of the *Public Works Protections Act*" (April 2011) at 37 (maintaining that the common law ought to play a robust role in creating police powers because it is "impractical and unnecessary to legislate an extensive code of police powers").
[216] See James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's LJ 1 at 6-13.

retrospectively authorize intrusive police conduct at common law, even when it appears to have been necessary and reasonable, is difficult to square with the rule of law. The indeterminacy of the ancillary powers test may also facilitate abusive and discriminatory policing.[217] And as the Supreme Court stressed in *Fleming v Ontario*, police powers unconnected to the investigation of past or ongoing offending are evasive of judicial review.[218] This suggests that any such powers "would have to be clear and highly protective of liberty."[219]

As discussed throughout this paper, police already have extensive legislative authority to mitigate the threat that protests and other public order disturbances pose to public safety. To the extent there are significant gaps, these can be addressed through legislation.[220] At a minimum, courts should insist any purported exercise of common law police power be strictly proportionate to the nature and magnitude of the threat to public order.[221]

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[217] See Lesley A McCoy, "Some Answers from the Supreme Court on Investigative Detention ... and Some More Questions" (2004) 49 Crim LQ 268; Joseph R Marin, "*R. v. Mann*: Further Down the Slippery Slope" (2005) 42 Alta L Rev 1123; James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*" (2007) 52 Crim LQ 299; James Stribopoulos, "The Rule of Law on Trial: Police Powers, Public Protest, and the G20" in Margaret E Beare, Nathalie Des Rosiers and Abigail C Deshman, eds, *Putting the State on Trial: The Policing of Protest During the G20 Summit* (Vancouver: UBC Press, 2015) 105 at 114-16.

[218] *Fleming v Ontario*, 2019 SCC 45 at para 84, [2019] 3 SCR 519.

[219] *Ibid*.

[220] See generally Robert Diab, "The Real Lesson of the Freedom Convoy 'Emergency': Canada Needs a Public Order Policing Act" (2022) 70:2 Crim LQ 230.

[221] See Canada (Civilian Review and Complaints Commission for the RCMP), *Chairperson-initiated Complaint & Public Interest Investigation Into The Rcmp's Response to Anti-shale Gas Protests in Kent County, New Brunswick: Final Report* (November 2020) at para 176 ("decisions to restrict access to public roadways or other public sites must be made only with specific, objectively reasonable rationales for doing so, and should be done in a way that interferes with the rights of persons in as minimal a fashion as possible, for example, a buffer zone that is as limited in size as possible and an exclusion that is as short in duration as possible"); W Wesley Pue, Robert Diab and Grace Jackson, "The Policing of Major Events in Canada: Lessons from Toronto's G20 and Vancouver's Olympics" (2015) 32 Windsor YB Access Just 181 at 192 ("Closure of large public spaces for extended periods of time is quite unlike anything that has been upheld under the ancillary powers doctrine.").

# 5. Military assistance to law enforcement

The *National Defence Act* contains two mechanisms permitting the Canadian Forces to become involved in civilian law enforcement.[222] Part VI of the Act contains the "Aid of the Civil Power" provisions, which permit provincial attorneys general to requisition the military to suppress a current or anticipated "riot or disturbance of the peace" that is "beyond the powers of the civil authorities to suppress, prevent or deal with."[223] If such a requisition is made, the Chief of Defence Staff must "call out such part of the Canadian Forces" as he or she considers necessary to suppress or prevent the riot or disturbance.[224] Forces personnel who are called on to perform this role are automatically designated "constables" and may accordingly exercise the powers of "peace officers" under the *Criminal Code* and other statutes.[225]

While the aid to civil power has existed in some form since Confederation, it has been used only sparingly since World War II.[226] And during the few occasions it has been invoked, such as the 1970 October Crisis and the 1990 Oka Crisis, Canadian Forces performed little in the way of direct law enforcement—they served mostly to provide security and logistical support to local police forces.[227] This is in accordance with policy dictating that military called out in aid of the civil power do "not replace the civil authorities" but rather "assists them in the maintenance of law and order."[228]

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[222] RSC 1985, c N-5.
[223] *Ibid*, ss 275. See also ss 274, 276-85.
[224] *Ibid*, s 278. The provision states that in performing this role, the Chief is "subject to such directions as the Minister considers appropriate in the circumstances" and must consult with both the requisitioning attorney general and that of "any other province that may be affected."
[225] *Ibid*, s 282; *Criminal Code*, s 2 (para (*g*) of definition of "peace officer"). Forces personnel acting in this capacity remain subject, however, to the military chain of command: *National Defence Act*, RSC 1985, c N-5, s 282.
[226] See Tyler Wentzell, "'Not in the Cards': The Non-Use of the Canadian Armed Forces in the 2022 Public Order Emergency" (2022) 70 Crim LQ 310; Timothy C Winegard, "The Forgotten Front of the Oka Crisis: Operation Feather/Akwesasne" (2008-2009) 11 J Miliary & Strategic Studies 1.
[227] See Tyler Wentzell, "'Not in the Cards': The Non-Use of the Canadian Armed Forces in the 2022 Public Order Emergency" (2022) 70 Crim LQ 310; Timothy C Winegard, "The Forgotten Front of the Oka Crisis: Operation Feather/Akwesasne" (2008-2009) 11 J Miliary & Strategic Studies 1.
[228] *Queen's Regulations and Orders (QR&O) Volume 1*, c 23, art 23.03 (1).

The *National Defence Act* also gives the federal government the power to authorize the Canadian Forces to "provide assistance in respect of any law enforcement matter" when it "considers that: (*a*) the assistance is in the national interest; and (*b*) the matter cannot be effectively dealt with except with the assistance of the Canadian Forces."[229] Curiously, this provision does not give soldiers peace officer status, so it is unclear whether they would be permitted to exercise any coercive investigative powers in performing this role.[230]

The federal government may also direct the military to assist the police under its royal prerogative powers.[231] This authority, which largely parallels the assistance power in section 273.6 of the *National Defence Act*, has been codified in two orders-in-council, one applying to provincial police forces[232] and the other to the RCMP.[233]

## 6. Summary and conclusion

Police have many different tools available to deal with public order disturbances, including coercive law enforcement powers under the *Criminal Code*, provincial regulatory legislation, and municipal bylaws. They may also be able to invoke common law powers when there is no legislative source of necessary authority and the interference with liberty is proportional to the magnitude of the threat to public order. And on the rare occasions where police and other law enforcement agencies cannot assure adequate security, governments may call on the Canadian Forces for assistance.

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[229] RSC 1985, c N-5, s 273.6(2). See also Canada, Canadian Forces, *Canadian Forces Joint Publication, CFJP 3.0 Operation*, B-GJ-005-300/FP-001 (2010) at 6-9-6-10 (describing different categories of support and coordination with various types of law enforcement agencies). Section 273.6(3) specifies that this regime does not apply "in respect of assistance that is of a minor nature and limited to logistical, technical or administrative support."

[230] See Kent Roach, "Calling out the Troops" (2003) 48:2 Crim LQ 141.

[231] See generally Philippe Lagassé, "Parliamentary and judicial ambivalence toward executive prerogative powers in Canada" (2012) 55:2 Can Pub Admin 15; Alexander Bolt and Phillipe Lagassé, "Beyond Dicey: Executive Authorities in Canada" (2021) 3 J Commonwealth Law 1 at 42; Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (2008) at 168-69.

[232] *Canadian Forces Assistance to Provincial Police Forces Directions*, PC 1996-833.

[233] *Canadian Forces Armed Assistance Directive*, PC 1993-624.

This is not to suggest that Canadian law provides an optimal suite of measures for dealing with public disorder, or that existing tools cannot be used inappropriately. We have pointed in this paper to several laws that are arguably in need of reform or repeal. We are also skeptical about the courts' use of the common law to craft novel police powers. In our view, this approach is difficult to square with the principle of legality and the rule of law and may also facilitate abusive policing. Our main purpose, however, has been to summarize the existing legal architecture so that governments, legislators, policy advisors, and ordinary Canadians have a better understanding of the police powers currently available to manage public order disturbances.

# Social Cleavages Series: Alberta Separatism and the Freedom Convoy: A New Brand of Western Alienation

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Professor, University of Alberta

# Introduction[1]

The Freedom Convoy movement has deep roots in Western Canada. Many of its key organizers reside in the region, having coordinated several large protest events in the past five years.[2] Public opinion polls illustrate that sympathy for the movement is also strongest in the West, especially on the prairies and specifically in Alberta.[3]

The rise of the Freedom Convoy has coincided with a rise in Western separatism. Alberta has been the epicentre of both movements, with up to one-third of the provincial population supporting the Convoy or provincial independence.

This explanatory note explores the acceptance, intersections, root causes, and implications of these two movements when it comes to the future of Canadian democracy. It traces the sudden rise and sustained popularity of separatism and the Freedom Convoy to a common source: a new form of western alienation that ties together feelings of status loss, political tribalism, and the death of deference to traditional forms of authority. These forces have combined to pose one of the largest threats to national unity today.

# Public Opinion in Alberta, 2020-2022

## Separatism

Support for separatism spiked following the federal election in November 2019. The Liberal Party of Canada had won a second consecutive majority government under leader Justin Trudeau. The son of the chief architect of the notorious National Energy

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[1] This paper benefits greatly from ongoing collaborations with Dr. Feodor Snagovsky (University of Alberta), Dr. Lisa Young (University of Calgary), and the entire Common Ground initiative team. The author thanks Samuel Clark, Enni Leponiemi, Runo Obewho, Denzel Sibanda, and Abel Zeleke for valuable research assistance in the preparation of this paper. Errors and omissions remain the responsibility of the author.

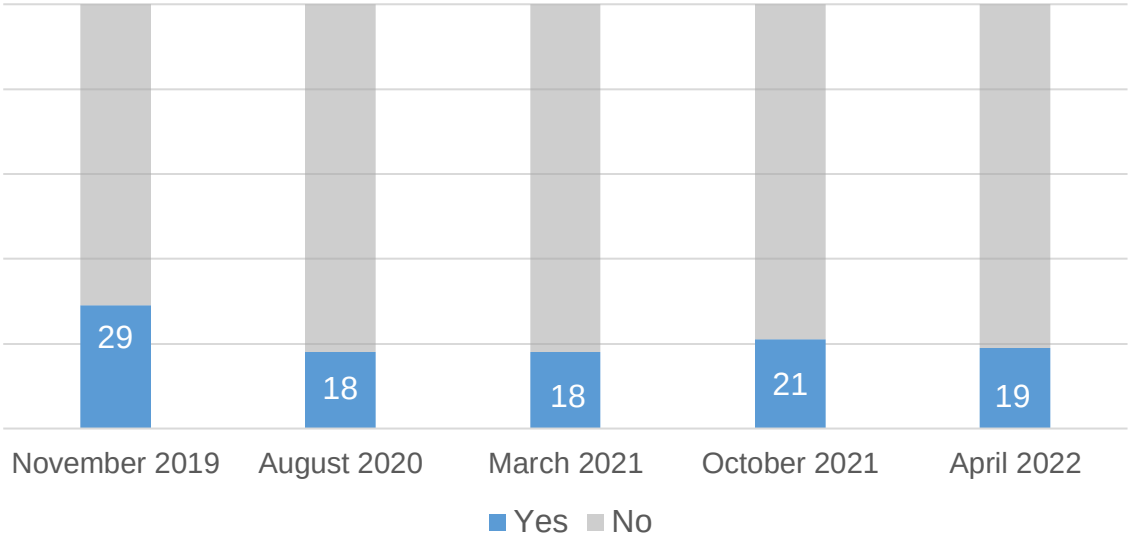
[2] Nia Williams and Anna Mehler Paperny. 2022. “In protests and politics, Canada’s ‘Freedom Convoy’ reverberates.” *Reuters*, August 4.

[3] Darrell Briker. 2022. “Nearly Half (46%) of Canadians Say they “May Not Agree with Everything” Trucker Convoy Says or Does, But …” *Ipsos Factum.* February 11.

Program, Trudeau's pro-environmental policies and political pedigree made him a lightning rod for western discontent.[4] The Liberal victory came despite the fact that 69 percent of Alberta voters had cast ballots for Conservative Party of Canada (CPC) candidates, electing Conservatives to 33 of the province's 34 seats in the House of Commons.

Support for separatism reached nearly one-in-three Albertans (29 percent) according to our Viewpoint Alberta survey following the 2019 federal election. This figure dropped over the first two waves of the pandemic, settling at around one-in-five Albertans; it rests at about 19 percent at the time of writing (Figure 1).[5]

Figure 1. Support for Separatism among Albertans, 2019 to 2022




*Source: Viewpoint Alberta Survey 2019 (n=820), Viewpoint Alberta Survey 2020 (n=824); Viewpoint Alberta Survey March 2021 (n=802); Viewpoint Alberta Survey October 2021 (n=877); Viewpoint Alberta Survey April 2022 (n=2151). Weighted data. Numbers represent proportions of respondents who answered "yes" to the following question: "Should Alberta separate from Canada and form an independent country?"*

[4] Andrew McDougall. 2020. "Stuck in the Middle with You: Is the Trudeau Government Really Representative of a Central Canadian 'Laurentian Elite?'" *Canadian Studies* 89: 11-39.

[5] Jared Wesley and Lisa Young. 2022. "What the spectre of Alberta separatism means for Canada." *National Post* July 15.

Unless otherwise noted, in the remainder of this paper, findings are drawn from our most recent Viewpoint Alberta survey in April 2022.[6]

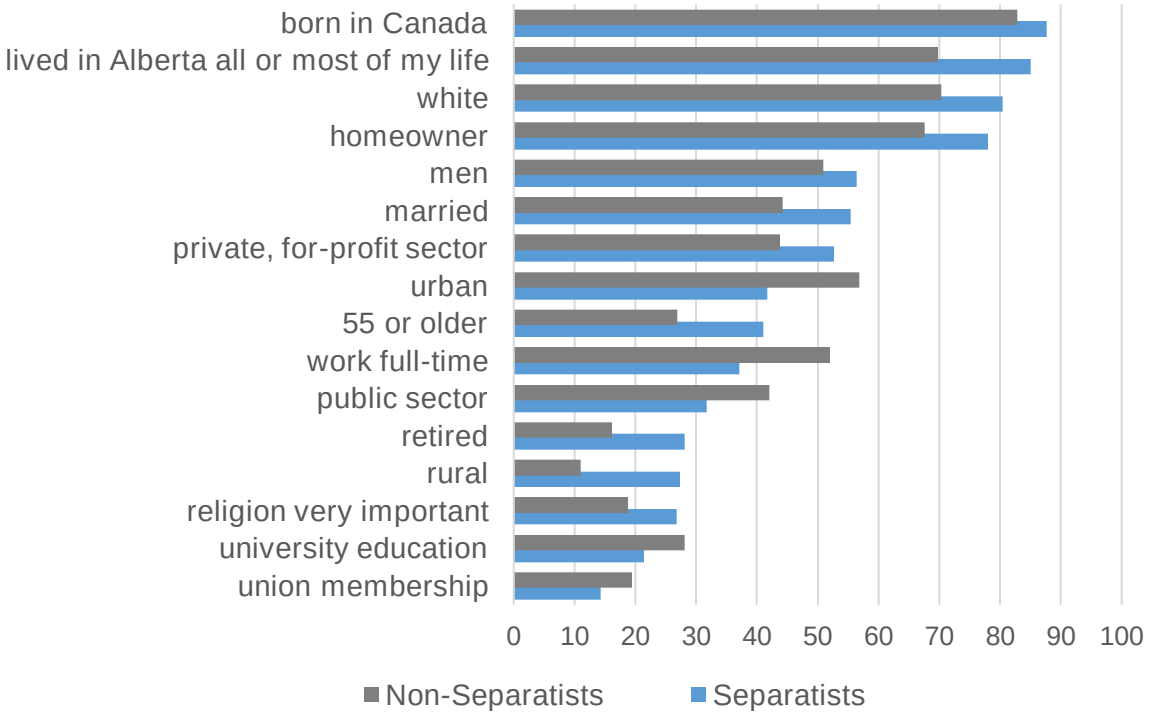
Compared to other Albertans, separatists are more likely to:

- have been born in Canada and lived in Alberta all their lives;
- live in rural areas;
- be white, male, married, over 55 years old, and own their homes; and
- work in the private, for-profit sector or to be retired.

Separatists are less likely to live in urban areas, work full-time, work in the public sector, have a university education, or be union members compared to the rest of the Alberta population (Figure 2).

[6] The Viewpoint Alberta Survey was conducted between April 8 and May 4, 2022. The survey was deployed online by Pollara. A copy of the survey questions can be found here: https://bit.ly/3LelxQi. Pollara co-ordinates the survey with an online panel system that targets registered panelists that meet the demographic criteria for the survey. Survey data is based on 2151 responses with a 15-minute average completion time. Split samples were employed for certain survey questions. The Viewpoint Alberta Survey was led by co-principal investigators Michelle Maroto, Feodor Snagovsky, Jared Wesley, and Lisa Young. It was funded in part by a grant from the Kule Institute for Advanced Study (KIAS) at the University of Alberta.

Figure 2. Demographic Characteristics of Separatists and Non-Separatists, 2022




According to our surveys, Alberta separatists are motivated primarily by economic factors. When asked why they feel Alberta "should separate from Canada and form an independent country", an overwhelming majority of separatists cited economic policy (74 pecent), tax policy (82), and the desire to exit the equalization system (88). About two-thirds support separatism to set Alberta's own social (67 percent) and environmental policy (70 percent). By comparison, only about half of separatists seek to set their own cultural (54 percent) or immigration policy (58). This aligns with the fact that only 54 percent of separatists consider Alberta to be "a culturally distinct society."

Unsurprisingly, separatists tend to have a higher level of attachment to the provincial rather than the national community. Two important caveats are necessary, however. First, the level of attachment to Alberta is a matter of degree rather than kind. While 86 percent of separatists report feeling somewhat or very attached to Alberta, the same figure is 80 percent among the rest of the provincial population. Second, a majority of separatists (62 percent) report feeling somewhat or very attached to Canada. While that proportion is lower than among non-separatists (88 percent), it is still considerably higher than one would expect among people genuinely committed to separating from the rest of the country.

Indeed, separatists retain a surprising level of affinity for national institutions. While 84 percent of separatists support removing the equalization principle from the constitution, fewer than two-thirds (65 percent) indicate they want to withdraw from the Canada Pension Plan (CPP) in favour of a new made-in-Alberta program. An even smaller proportion (56 percent) want to abandon the RCMP in favour of a new Alberta provincial police force. To be certain: a majority of separatists want to cut ties with federal institutions; but not all of them do.

This apparent contradiction might be explained in several ways. For one, respondents who say they want Alberta to form an independent country may view that position as a tactical expression of grievance -- as a means of gaining the attention of the rest of Canada and exerting leverage to better the province's standing in Confederation.[7] National and provincial conservative leaders have referred to this strategy as part of "the Quebec Playbook," in reference to their view that threatening separation has helped boost that province's standing in Confederation.[8] Compared to Quebec, few Alberta separatists are optimistic when assessing the likelihood that their own province will become an independent country. Only nine percent of separatists think that independence is very likely or will happen, compared to 47 percent who feel it is unlikely or will never happen. This low level of optimism suggests that, for some Albertans, separatism is less a realistic objective than a means to other ends.

Support for Alberta separatism may also reflect deep dissatisfaction with the current face of the federal government, rather than a wholesale rejection of Confederation. Separatists demonstrate an exceptionally high level of antipathy towards Ottawa, in general, and Prime Minister Trudeau, in particular. When asked how much faith they had in the federal government, for instance, a full 97 percent of separatists say they have not much or no confidence at all in Ottawa to "do the right thing." This is double the share among Albertans who want to remain part of Canada. Nearly all separatists feel that Alberta receives less than its fair share of federal transfers (97 percent), that the province is not treated with the respect it deserves (91), and that the federal government treats Alberta worse than other provinces (90). These figures are over 30 percentage-points lower among non-separatists. When asked to rate Prime Minister Trudeau on a scale of 0 (really dislike) to 10 (really like), four-in-five separatists assigned him a zero. Trudeau's mean score among separatists was less than 1 (0.7), compared to 3.6 among other Albertans.

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[7] Wesley and Young.

[8] Peter McKenna. 2021. "Alberta steals page from Quebec's playbook." *Winnipeg Free Press,* August 2.

Taken together, these findings suggest that -- outside a vocal but very small core of committed separatists -- outright independence is neither a desired nor a realistic goal for the vast majority of Albertans. Discussed later, this is not to diminish the influence of the separatist movement on provincial and national politics.

## Convoy Support

Given widespread criticism of it as a "fringe movement," it is easy to dismiss the popularity, reach, and impact of the Freedom Convoy. Our April 2022 Viewpoint Alberta survey offers one of the most comprehensive examinations of the movement, including the perspectives of over 2000 Alberta respondents.

A majority of Albertans opposed the Freedom Convoy, according to our study. Only 18 percent of Albertans said they felt positive emotions about the protest (e.g., pride, excitement, happiness, inspiration), compared to 40 percent who felt anger, anxiety, frustration, or other negative emotions.

Nearly half of Albertans (48 percent) "strongly opposed this protest and how it was done," for instance, with an additional 15 percent indicating they "somewhat opposed it." Sizeable majorities of Albertans felt the Freedom Convoy took its protest measures too far. Smaller pluralities felt the prime minister was right when he chose not to meet with the protesters (41 percent) and that the government did the right thing by invoking the Emergencies Act (47 percent).

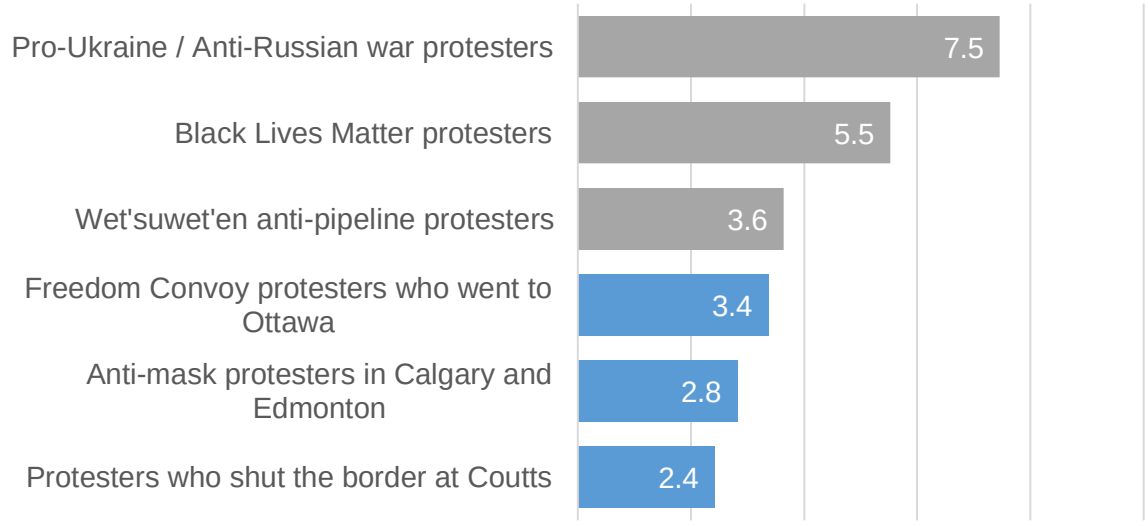
Very few Albertans took overt steps in support of the Freedom Convoy. Only 4 percent indicated they participated in a protest or rally or flew a Canadian flag in support; 2 percent indicated they donated money to the organizers. Only 16 percent reported speaking out in support of the movement with family, friends, or coworkers; this compared with 30 percent of Albertans who spoke out *against* the Convoy with people they knew.

Overall, most Albertans hold a negative view of the outcomes of the Convoy (see Table 1). We asked respondents to rate various elements of the Freedom Convoy protests, comparing them with those of other movements. Using a scale of 0 (strongly oppose) to 10 (strongly support), Albertans were more likely to oppose the protests in Coutts (average of 2.4) and Ottawa (3.4), as well as anti-mask protests in Calgary and Edmonton (2.8). All three protests were less popular than the Wet'suwet'en (3.6), Black Lives Matter (5.5), and pro-Ukraine movements (Figure 3).

Table 1. Albertans' Opinions on the Outcomes of the Freedom Convoy, 2022

| | % | | % |
|---|---|---|---|
| Convoy was a success. | 23 | Convoy was a failure. | 58 |
| Convoy revealed strengths of Canadian democracy. | 25 | Convoy revealed weaknesses of Canadian democracy. | 47 |
| Protests made most Canadians' lives better. | 18 | Protests made Canadians' lives worse. | 55 |
| The protesters are right and worthy of our sympathy. | 27 | The protesters are wrong and do not deserve our sympathy. | 57 |
| The protests made me prouder to be a Canadian. | 23 | The protests made me less proud to be a Canadian. | 59 |

Figure 3. Albertans' Support for Various Protester Groups




*Figures represent averages based on the question: "On a scale from 0 to 10, where 0 is strongly oppose and 10 is strongly support, how do you feel about the following groups?"*

Our Viewpoint data allows us to divide the Alberta public into three groups:

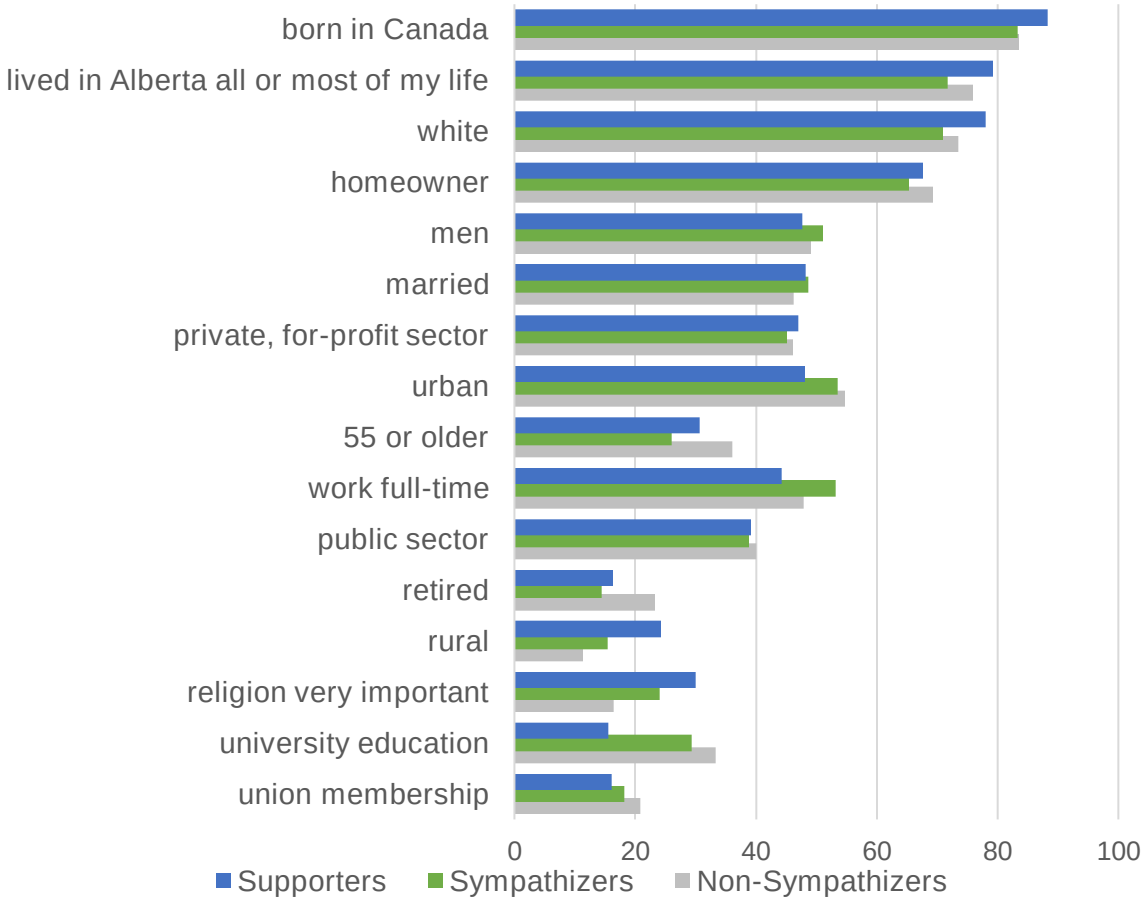
- *supporters* who both sympathize with and share the views of the Freedom Convoy protesters (24 percent of the population);
- *sympathizers* who appreciate but do not share their views (18 percent); and
- *non-sympathizers* who neither sympathize with nor share their views (51 percent).[9]

As with separatists, Convoy supporters in Alberta are more likely to be white, to live in rural areas, to be born in Canada, and to have lived in Alberta most of their lives. Religion is also more likely to be very important in their lives. By comparison, non-sympathizers are more likely to live in urban areas, to be 55 years or older, to work in the public sector, to be a union member, to be retired, and to have a university education (Figure 4).

Two-thirds of Convoy supporters deemed the protests a success, compared with 21 percent of sympathizers and 4 percent of non-sympathizers. Convoy supporters were also more likely to see the protests as improving the lives of most Canadians (57 percent) and showing the strengths of Canadian democracy (45 percent).

[9] An additional 7 percent of Albertans aren't sure about the Freedom Convoy, and 1 percent have never heard of it. These respondents are excluded from the following analysis. Proportions reflect the share of respondents responding to the following question: "In January-February 2022, a protest started by a convoy of truck drivers and supporters occupied Ottawa for several weeks and blockaded border crossings. Thinking about this, which of the following best represents your view of the trucker convoy protest? I sympathize with the challenges/issues raised by the protesters and I share their views. I sympathize with the protesters, but I do not share their views. I do not sympathize with the protesters and do not share their views. I don't know / unsure."

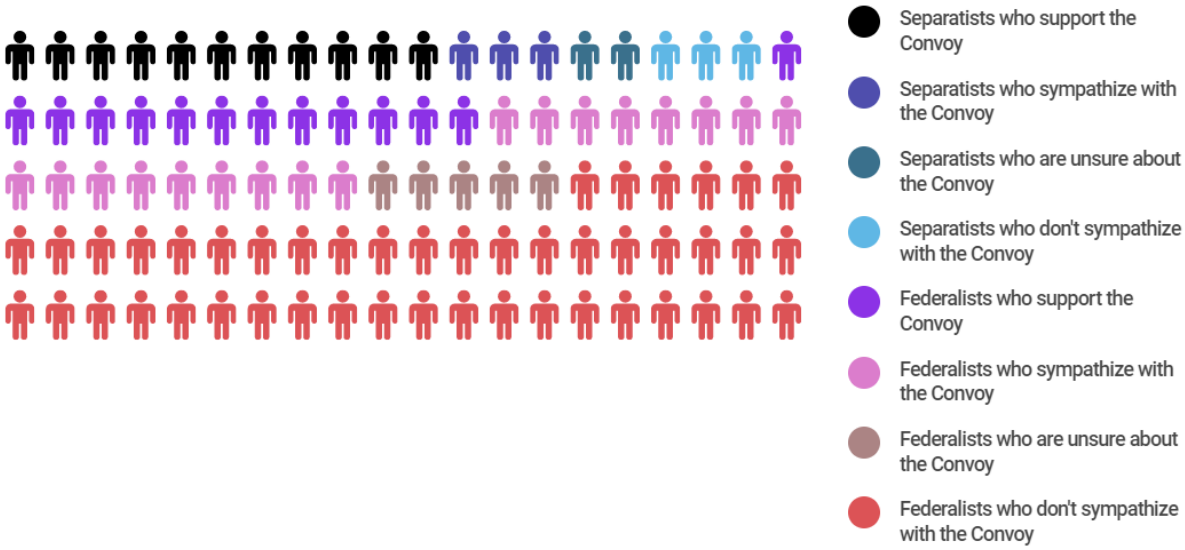
Figure 4. Demographic Characteristics of Convoy Attitude Groups, 2022




## The Confluence of the Separatist and Convoy Movements

Given they look so similar demographically and both promote animosity towards the federal government, it is tempting to assume that the separatist and Convoy movements share a common pool of followers. This is not entirely the case. Only 11 percent of the Alberta population supports both movements. Nearly half (46 percent) are neither separatists nor Convoy sympathizers (see Figure 5).

Figure 5. Shares of the Alberta Population who Support the Separatist and Convoy Movements, 2022




*Icons represent 1 percent of the adult Alberta population.*

While nearly two-thirds of all separatists either support (58 percent) or sympathize with (15) the Convoy, only 46 percent of all Convoy supporters are separatists. Separatist support drops to 15 percent among Convoy sympathizers.

These findings reveal an odd tension between anti-government sentiment, on one hand, and allegiance to the broader Canadian community, on the other. This is demonstrated by Convoy protesters waving Canadian flags during their rallies, and Convoy organizers branding their core organizing group “Canada Unity.”

Indeed, many Convoy supporters felt a deep sense of patriotism in their cause. Seven-in-ten Convoy supporters feel “very” (36 percent) or “somewhat attached to Canada” (34). While this sense of connection to country is lower than among Convoy sympathizers (44 / 38) and non-sympathizers (63 / 26), most Convoy supporters retain a certain allegiance to Canada.

Nearly three-quarters (72 percent) of Convoy supporters reported that the protests made them feel prouder to be Canadian, compared with just 18 percent of sympathizers and 2 percent of non-sympathizers. Some separatists also viewed the Convoy movement as a symbol of Canadian pride; 48 percent of them said the protests made them feel prouder to be Canadian.

These differences aside, the separatist and Convoy movements share common roots in conservative populism. This is evident when supporters and sympathizers array themselves on a left-right spectrum (Figures 6 and 7). Three-quarters of separatists consider themselves to be to the right of centre, as do 65 percent of Convoy supporters and 50 percent of Convoy sympathizers. This suggests that allegiance to both movements may be embedded, to an extent, in conservative identity in Alberta.

Figure 6. Position on the Left-Right Spectrum, Separatists and Non-Separatists, 2022

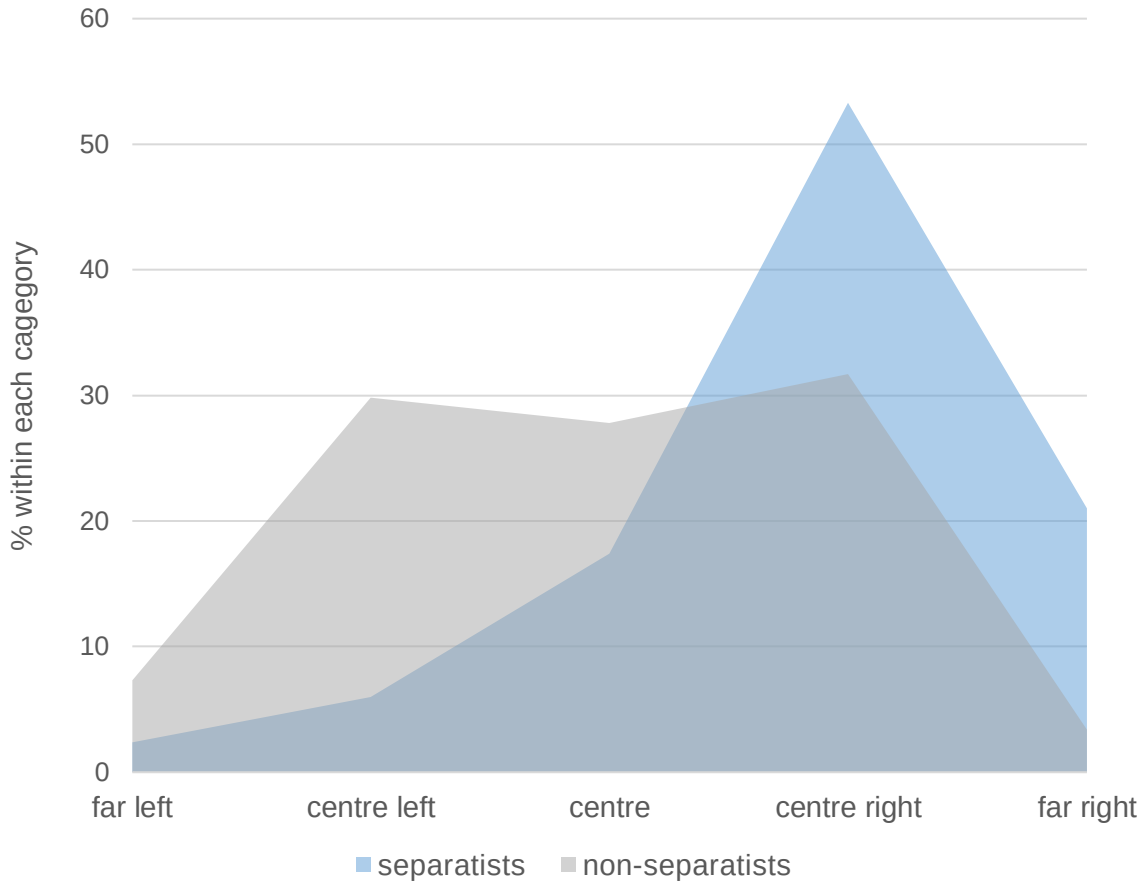
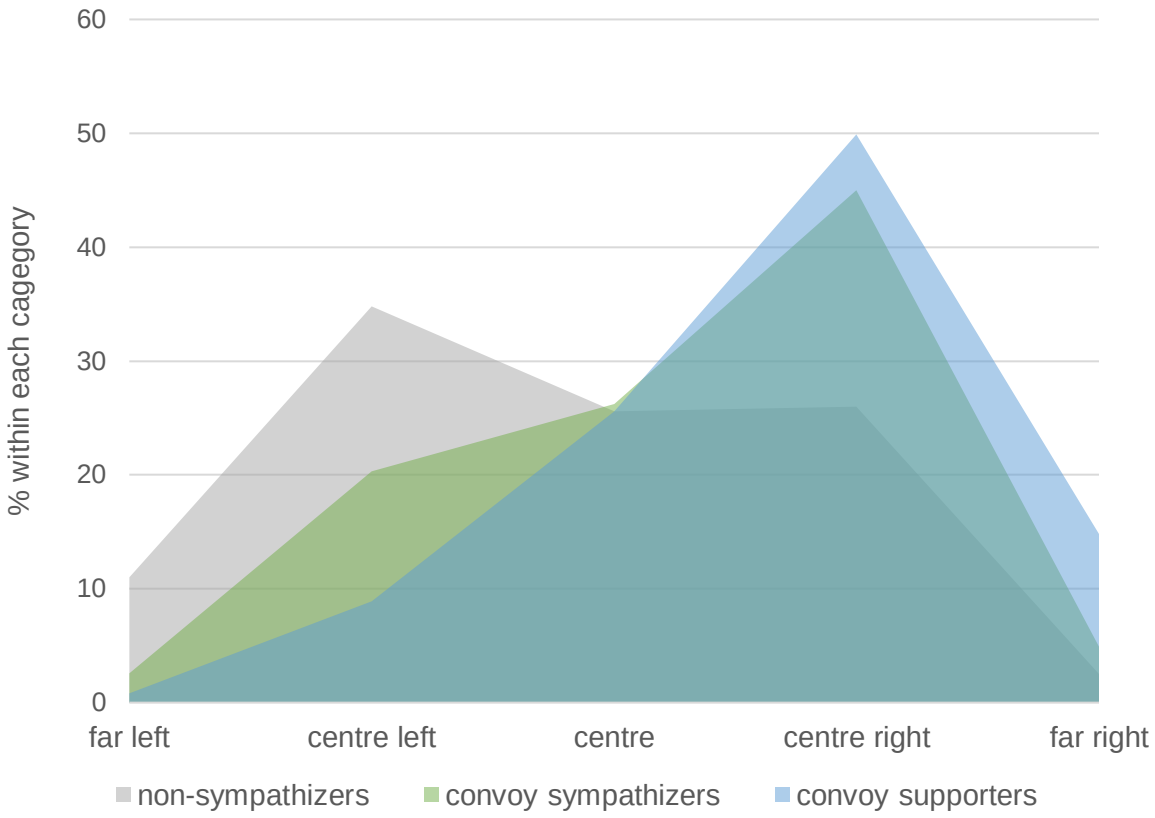


Figure 7. Position on the Left-Right Spectrum, Convoy Attitude Groups, 2022




*Self-placement based on the question: "In politics, people sometimes talk of left and right. Where would you place yourself on a scale from 0 to 10, where 0 means very left-wing, and 10 means very right-wing?" Groups were coded: far left (0 to 2), centre left (3 to 4), centre (5), centre right (6 to 7), far right 8 to 10.*

These patterns correspond to voting behaviour, as well. Three-quarters of Alberta separatists cast ballots for the UCP (76 percent) and CPC (75) candidates in the 2019 provincial and federal elections. Separatists made up over one-third of each party's voting base in those campaigns (36 percent of UCP voters, 33 percent of CPC voters).

Likewise, two-thirds of Convoy supporters (67 percent) and 62 percent of sympathizers voted for CPC candidates in the 2019 federal election. In that campaign, Convoy supporters made up 34 percent of CPC voters, with sympathizers making up another 24 percent. These numbers were somewhat lower in the 2019 provincial election, with 64 percent of Convoy supporters and 50 percent of sympathizers voting for the UCP. The United Conservative voting base consisted of 38 percent Convoy supporters and 23 percent sympathizers.

The fact that politicians, including high-profile leadership contestants, have made overtures to Alberta "independence," "autonomy," and "sovereignty" while pushing back against vaccine mandates is a testament to the movements' combined influence within mainstream conservative parties.

Looking beyond ideology and partisanship, we find other ties binding the separatist and Convoy movements. Separatists and Convoy supporters are far more negative about Alberta's prospects over the next 10 years. Nearly half (49 percent) of separatists and 40 percent of Convoy supporters feel "angry" when they think about Alberta's future. This compares with 31 percent of non-separatists and 35 percent of non-sympathizers. Fewer than half of separatists and Convoy supporters feel that "Alberta is headed in the right direction, and sizeable shares feel that "Alberta's best days are behind it" (Figure 8).

Separatists and Convoy supporters are even more pessimistic about Canada's future. Nearly three-quarters of each group feel that "Canada's best days are behind it," and less than a quarter feel that "Canada is headed in the right direction."

These levels of pessimism are magnified at the individual level (Figure 9). Significant majorities of separatists (76 percent) and Convoy supporters (70) feel that "people like me are falling behind in society" -- compared to less than half of non-separatists and non-sympathizers. Majorities of separatists and Convoy supporters are also more likely to feel that it "is harder to move up the income ladder compared to [their] parents," that their household situation has worsened compared to a year ago, and that it difficult to meet monthly expenses. Compared to other Albertans, separatists and Convoy supporters are also more likely to predict that their "household financial situation will be worse one year from now."

Figure 8. Attitudes about the Future of Alberta and Canada, by Group, 2022

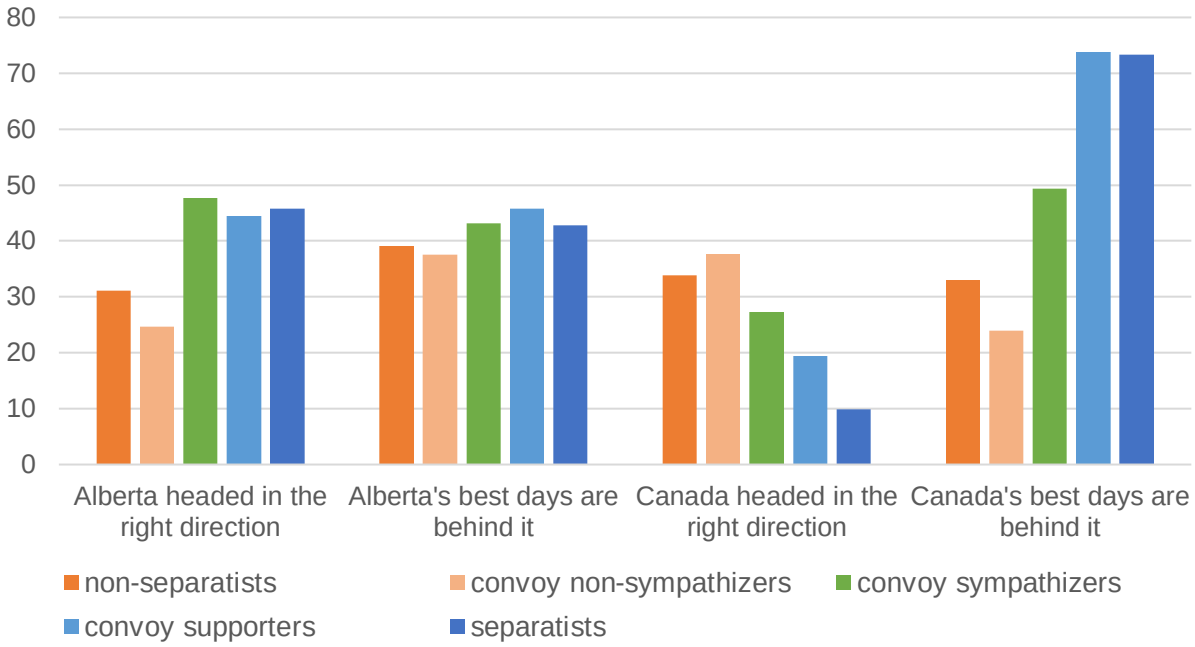
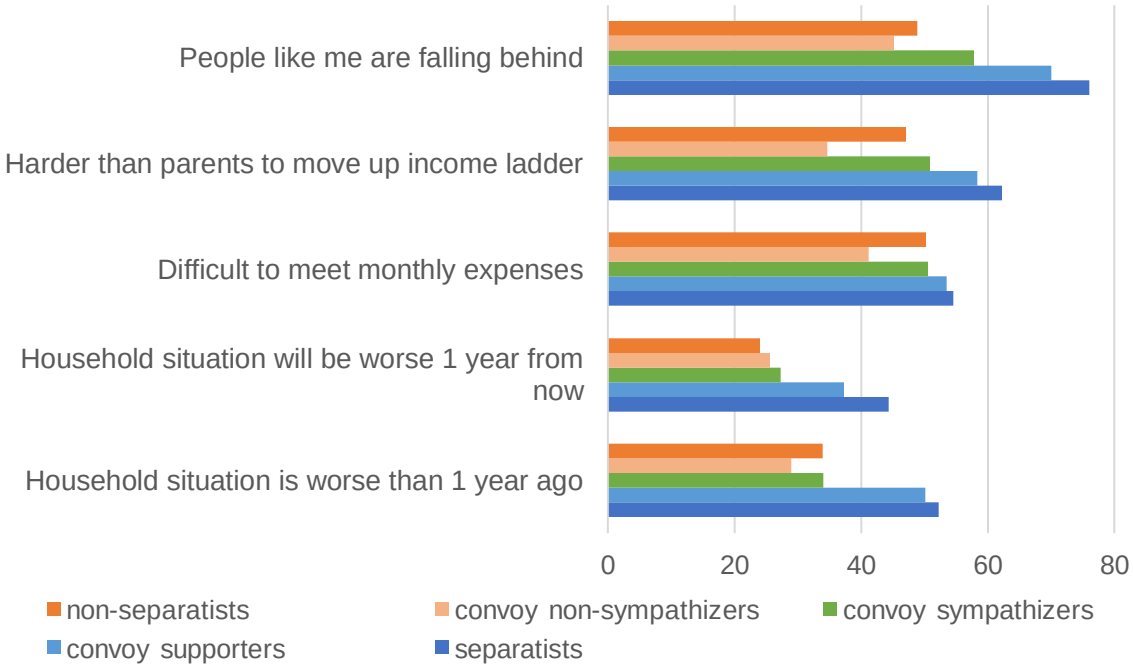



Figure 9. Personal Economic Attitudes by Group, 2022



# Explaining the Rise of Separatism and the Freedom Convoy in Alberta

Three inter-related forces appear to be driving support for both separatism and the Convoy movement in Alberta:

1. A significant minority of the Alberta population is experiencing a sense of *status loss*. Felt at the provincial and individual level, they feel like they are falling behind -- and in some cases, being left behind -- the rest of society.

2. Supporters of the separatist and Convoy movements are animated by *tribalism*: an insular form of community solidarity that treats outsiders as threats and opponents as enemies.

3. Supporters of the separatist and Convoy movements have very low levels of trust in mainstream sources of authority and democratic institutions. This *death of deference* threatens the legitimacy of governments and the outcomes of elections.

These three forces have combined to produce a new form of western alienation that poses one of the biggest threats to national unity in Canada today.

## Status Loss

Many separatists and Convoy supporters feel that their place in society is being threatened or diminished. This may be due to the sense that other groups are getting ahead, or forging ahead more quickly; that their lives are not markedly improved compared to their parents'; or that their livelihoods and way of life are being denigrated due to shifting economies or cultural norms. This status loss provides a sort of emotive trigger. Political entrepreneurs may cultivate in-group affinities and outgroup animosities by appealing to reconstructed notions of the past, promising to "make their countries great again" by returning a sense of pride and honour to those who feel like they are "falling behind" in today's economy and society.[10] This perceived loss of status has been connected to the rise of populist movements throughout the world,

[10] Moran Mandelbaum. 2020. "'Making Our Country Great Again': The Politics of Subjectivity in an Age of National-Populism." *International Journal for the Semiotics of Law* 33: 451–476.

contributing in part to the emergence of the Yellow Vests in France,[11] Brexit in the United Kingdom,[12] and Trumpism in the United States.[13]

In the case of Alberta, this perceived loss of status is felt on multiple levels. As individuals, separatists and Convoy supporters are more likely than others to feel that they are falling behind in society and that their economic prospects are grim. At the provincial level, they are more likely to think Alberta's best days are behind it, that the province is being treated unfairly at the hands of the federal government, and that other Canadians fail to give Alberta the respect it deserves.

At a time when the oil and gas industry was under duress (from a decline in commodity prices and opposition from a strengthened global environmental movement), activist leaders in the separatist and Freedom Convoy movements were able to tap into these sentiments, particularly among blue-collar workers in the energy industry. But the reach was much greater than one sector. As the health of the oil and gas sector has become embedded in Alberta's political culture, threats to the industry are felt as attacks on the province as a whole; this means even Albertans with an indirect connection to oil and gas nonetheless feel their province's status is being diminished.[14] Survey results above demonstrate that most Albertans feel their province is not given the respect or resources it deserves. Separatist and Convoy leaders targeted the federal government in general, and Prime Minister Trudeau in particular, as the villains who had robbed Albertans of their status in society and Confederation.

This combination of status loss at the individual and collective levels has contributed to a new form of western alienation in Alberta. For generations, many Albertans have felt that the province was being *held back* by the federal government and the rest of Canada.[15] But, for the most part, Albertans still felt that they were ahead of other

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[11] Doron Shultziner and Irit S. Kornblit. 2020. "French Yellow Vests (Gilets Jaunes): Similarities and Differences With Occupy Movements." *Sociological Forum* 35(2): 535-542.
[12] Lindsay Richards, Anthony Heath and Noah Carl. "Not just 'the left behind'? Exploring the effects of subjective social status on Brexit-related preferences." *Contemporary Social Science* 16(3): 400-415.
[13] Diana C. Mutz. 2018. "Status threat, not economic hardship, explains the 2016 presidential vote." *Proceedings of the National Academy of Science* (PNAS), 115(19): 1-10.
[14] Jared Wesley. 2021. "Who is 'Average Joe' Albertan?" *Common Ground Research Brief.* https://www.commongroundpolitics.ca/joe-albertan
[15] Loleen Berdahl and Roger Gibbins. 2014. *Looking West: regional Transformation and the Future of Canada.* Toronto: University of Toronto Press.

provinces, thanks to the "Alberta Advantage."[16] In the last decade, an increasing number of Albertans now feel that the province is being *left behind* others in Canada. This sentiment provides fuel for reactionary, "backlash politics," as separatist and Convoy leaders promise to restore Alberta's autonomy prestige on the national and global stage, and Albertans' rights and freedoms at the individual level.[17]

## Tribalism

A second new element has emerged to distinguish today's form of western alienation from years' past. Long labeled "tribalism"[18] by political scientists, this deep-seated feeling involves a "self-identity of a group or society with a common territory, common traditions, and common values and interests."[19]

More recent research has focused on the out-group animosity embedded in tribalism.[20] While individuals' attraction to others like themselves may foster in-group unity, a propensity for "reactance" tends to wall-off social worlds and make opinions more extreme and exclusionary.[21] The advent of social media has only exacerbated these trends,[22] contributing to even more "sectarian bitterness" in countries like the United States.[23]

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[16] Geoff Salomons and Daniel Béland. "The Presence of an Absence: The Politics of Provincial Sales Tax in Alberta." *American Review of Canadian Studies* 50(4): 418-435.
[17] Satnam Virdee and Brendan McGeever. 2018. "Racism, Crisis, Brexit." *Ethnic and Racial Studies,* 41(10): 1802-1819.
[18] Some scientists avoid the term due to its perceived pejorative connotations for people in Indigenous and Black communities. As a Black scholar, I use the term conscientiously as a means of reclaiming its original definition, which comes from the Latin term "tribus". For the debate over the term, see: James Fallows. 2017. "A Nation of Tribes, and Members of the Tribe." in *The Atlantic*, November 4.
[19] David Landy. 1958. "Tuscarona Tribalism and National Identity." *Ethnohistory* 5(3): 250-284. See also: Stevan E. Hobfoll. 2019. *Tribalism: The Evolutionary Origins of Fear Politics*. London: Palgrave Macmillan.
[20] Daniel Balliet, Wu Junhui and Carsten K. W. De Dreu. 2014. "Ingroup Favoritism in Cooperation: A Meta-Analysis." *Psychological Bulletin,* 140(6): 1556.
[21] Miller McPherson, Lynn Smith-Lovin and James M. Cook. 2002. "Birds of a Feather: Homophily in Social Networks." *Annual Review of Sociology,* 27(1): 415-444.
[22] Chris Bail. 2021. "Breaking the Social Media Prism: How to Make Our Platforms Less Polarizing." New Jersey: Princeton University Press.
[23] Robert Putnam. 2021. "The Upswing: How America Came Together a Century Ago and How We Can Do It Again." New York: Simon and Schuster, Inc: pp. 72.

A growing number of scholars have engaged tribalism within this framework of inter-group difference, describing a "politics of resentment"[24] concentrated not on constructive compromise, but on "binary, ideological groupthink."[25] Most often, these discussions centre around partisanship and the related concept of "affective polarization".[26] As Krekó and Juhász summarize, more broadly "tribalism means the triumph of moral relativism and particularism over moral universalism; in other words, it adopts an 'our tribe can do it, yours cannot' type of approach."[27] In this way, regional forms of tribalism -- like Alberta separatism -- pose threats to national unity.

Michael Ignatieff warned about the perils of tribalism during the rise of the Tea Party movement in the United States. "For democracies to work," he wrote in 2013, "politicians need to respect the difference between an enemy and an adversary. An adversary is someone you want to defeat. An enemy is someone you have to destroy".[28] Among adversaries, Ignatieff argued, compromise is honourable, trust is mutual, dialogue is respectful, and debate is within the bounds of well-respected rules and norms. Among enemies, negotiation is traiterous, the democratic system is viewed as "rigged," conflicts surround identity, and victory is the product of conviction instead of persuasion or consensus. While it is often associated with right-wing populism, factionalism is not theoretically confined to one particular side of the political spectrum.[29] [30]

The separatist and Convoy movements are grounded in a series of reinforcing partisan and regional cleavages that have helped foster this sort of tribalism in Alberta.

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[24] Katherine J. Cramer. 2016. "The Politics of Resentment." Chicago and London: The University of Chicago Press.
[25] Bradley Jersak. 2018. "Transcending the tribalism of the culture wars spectrum." *An Interdisciplinary Journal of Current Affairs and Applied Contemporary Thought,* 8(4): 685-704, pp. 685.
[26] Elisabeth Gidengil, Dietlind Stolle, and Olivier BergeronBoutin. 2021. "The partisan nature of support for democratic backsliding: A comparative perspective." *European Journal of Political Research*.
[27] Péter Krekó & Attila Juhász. 2019. "Beyond Populism: Political Tribalism in Poland and Hungary." Turkish Policy Quarterly, 18(3): 69-81, pp. 71.
[28] Michael Ignatieff. 2013, October 13. "Enemies vs. Adversaries." Retrieved from The New York Times: https://www.nytimes.com/2013/10/17/opinion/enemies-vs-adversaries.html
[29] Justin E. Lane, Kevin McCaffree and F. LeRon Shults. 2021. "The moral foundations of left-wing authoritarianism: On the character, cohesion, and clout of tribal equalitarian discourse." *arXiv:2102.11009*: 1-33.
[30] Robert J. Antonio. 2019. "Reactionary tribalism redux: Right-wing populism and de-Democratization." *The Sociological Quarterly,* 60(2): 201-209.

The demise of Canada's regional brokerage parties has coincided with the rise of province-first parties in several jurisdictions, including Alberta. Whereas federal parties like the Liberals and Progressive Conservatives may have once drawn support from all regions of the country, and had closer connections with their provincial cousins, the realignment of Canadian party politics along regional lines has made bridge-building among provinces, and between provinces and the federal government, even more challenging. In this atmosphere, "inter-regional conflict spills outside the confines of internal party politics and becomes the subject of intense partisan and intergovernmental debate."[31] Partisan fights become regional, and vice versa. This transforms intergovernmental relations into a partisan arena, and party conflict into matters of national unity.

This atmosphere has helped nurture an "us versus them" mentality in parts of the country, particularly in Alberta where the United Conservative Party has been pursuing a fair deal agenda meant to build a firewall around the province. The separatist and Freedom Convoy movements have drawn on these ideas and the momentum generated by them.

As political scientists Steven Levitsky and Daniel Zibblatt argue, "When societies divide into partisan camps with profoundly different worldviews, and when those differences are viewed as existential and irreconcilable, political rivalry can devolve into partisan hatred. Parties come to view each other not as legitimate rivals, but as dangerous enemies. Losing ceases to be an accepted part of the political process and instead becomes a catastrophe."[32]

Such tribalistic sentiments align well with the objectives of the separatist and Freedom Convoy movements, and with the attitudes of their supporters. Albertans in these camps tend to denigrate the Liberal Party of Canada and the prime minister, for instance, using charged language to label Trudeau a "traitor,[33]" chanting "lock him

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[31] Jared Wesley. 2020. "Building Bridges: Toward a Reform of Canadian Intergovernmental Relations." *IRPP Centre of Excellence on the Canadian Federation Essay Series,* Paper No. 7.

[32] Steven Levitsky and Daniel Zibblatt. 2018. "How Democracies Die". New York: Crown.

[33] Arthur C. Green. 2022. "'Trudeau you're a traitor' Calgary Stampede crowd heckles PM." *Western Standard,* July 11.

up"[34] during protests, throwing gravel at him at campaign stops,[35] and even carrying nooses to rallies.[36] This imagery draws parallels to events surrounding the insurrection at the US Capitol in January 2021.

## Death of Deference

When directed at a governing group by people who remain alienated from power, tribalism can lead to the third element of today's western alienation: the death of deference to traditional sources of authority. Among separatists and Convoy supporters, trust in government, political actors, and experts is extremely low. This, plus their libertarian outlook, makes it exceptionally difficult to involve them in collective action.[37] This becomes particularly problematic in times of crisis, as trust in public institutions is key to fostering community mobilization and repressing the spread of misinformation and authoritarianism.[38]

Separatists, Convoy organizers, and sympathetic party leaders have explicitly challenged the legitimacy of experts and democratic actors during the COVID-19 pandemic. Examples include UCP leadership candidate Danielle Smith[39] and People's Party of Canada leader Maxime Bernier[40] repeating commitments to "never again" go back to "lockdowns," despite considerable scientific consensus around the importance of social distancing to controlling the spread of the disease.

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[34] Elizabeth Racz. 2021. "Ontario Protesters Chant 'Lock Him Up' at Justin Trudeau, Throw Gravel". *Storyful*, September 7.
[35] Nathan Denette. 2021. "Trudeau hit by gravel as protesters surround campaign bus in London, Ont." *CBC News*, September 6.
[36] Tonda MacCharles. 2022. "Justin Trudeau cancels B.C. appearance after protesters gather carrying noose" *Toronto Star,* May 25.
[37] Timothy C. Earle and Michael Siegrist. 2008. "Trust, Confidence and Cooperation model: A framework for understanding the relation between trust and Risk Perception." *International Journal of Global Environmental Issues,* 8(1): 17-29.
[38] K. U. Menon and K. T. Goh. 2005. "Transparency and trust: risk communications and the Singapore experience in managing SARS." *Journal of Communication Management,* 9(1): 375-383.
[39] Anthony Murdoch. 2022, June 25. "Alberta Premier hopeful pledges to 'never' allow COVID lockdowns, mandates to 'happen again'". Retrieved from *USSA News:* https://ussanews.com/2022/06/25/alberta-premier-hopeful-pledges-to-never-allow-covid-lockdowns-mandates-to-happen-again/
[40] Kraig Krause. 2021. "Coronavirus: Sloan, Bernier, Hillier among 'end the lockdown caucus'" *Global News*, February 9.

This politicization of COVID-19 has threatened cross-partisan consensus on Canadians' trust in science and the democratic system. This has been amplified by Convoy demands for "freedom" from restrictions deriving from science-informed, democratically-imposed policies, such as mask mandates and vaccine requirements. Hence, while at the start of the pandemic Canadians' responses to the pandemic were "not structured by partisanship," this common ground has shrunk considerably.[41] Many people have become weary, and some outright angry, at adhering to measures recommended by scientists and imposed by governments, and the literature suggests the trend of rising distrust seen in large parts of the US seems to be seeping into Canada.[42]

This sort of decline of trust in authority is not confined to the separatist and Convoy movements, nor is it particularly new. Late last century, political scientist Neil Nevitte published a seminal work on the shifting values of Canadians away from respectful obedience to authority toward a more libertarian mindset. He called this shift *The Decline of Deference*, and he attributed it to a combination of forces including rising levels of education and the emergence of new, emancipitory political ideologies.[43]

At the time he wrote nearly three decades ago, Nevitte noted that the decline of deference was found at both ends of the political spectrum. In recent years, people on the political right have been more likely to lose faith in mainstream democratic institutions, however. This has coincided with their deep sense of political alienation and resentment, particularly those who work blue collar jobs and live rural areas.[44]

In other words, those most likely to experience status loss have become tribalistically motivated to challenge government, experts, and other forms of traditional authority. The separatist and Convoy movements have led this type of activation. And it has produced some worrying results.

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[41] Erik Merkley, Aengus Bridgman, Peter John Loewen, Taylor Owen, Derek Ruths and Oleg Zhilin. 2020. "A rare moment of cross-partisan consensus: Elite and public response to the COVID-19 pandemic in Canada." *Canadian Journal of Political Science,* 53(2): 311-318, pp. 316.

[42] Cary Wu, Alex Bierman and Scott Schieman. 2022, June 28. "Canada's trust divide is growing, and that could spell bad news for the future." Retrieved from Canadian Manufacturing: https://www.canadianmanufacturing.com/features/canadas-trust-divide-is-growing-and-that-could-spell-bad-news-for-the-future/

[43] Neil Nevitte. 1996. *The Decline of Deference*. Peterborough, ON: Broadview Press.

[44] Arlie Russell Hochschild. 2016. *Strangers in their Own Land: Anger and Mourning on the American Right.* New York: The New Press.

This includes a loss of faith in the legitimacy of elections. According to our April 2022 Viewpoint Alberta survey, over half of all separatists (60 percent) and Convoy supporters (56) thought that the 2021 federal election was conducted unfairly.[45] This is over double the proportion of the general population, and it threatens the principle of "losers' consent" that underpins our democratic system.[46] Put simply, when members of certain political "tribes" no longer view their opponents as legitimate political actors, and/or they no longer feel they have the opportunity to win power -- they refuse to acknowledge election victories or the authority to be governed.

As Rissa Reist and I have written elsewhere, "This lack of losers' consent has been at the forefront of the Convoy movement from the beginning. Some convoy leaders raised money and collected more than 300,000 signatures based on their explicit intent to overthrow a democratically elected government — a position they withdrew only as the protests entered their third week."[47] This is a fundamental rejection of the rule of law, which once again draws parallels to the January 6, 2021, insurrection in the United States.

Similarly, UCP leadership contender Danielle Smith has framed her campaign around promising to ignore federal laws that she feels go against Alberta's interests.[48] Her proposed *Alberta Sovereignty Act* is a reflection of her refusal to provide losers' consent to a democratically elected federal government. Should she win the UCP leadership and become premier, the introduction of that legislation could spark one of the deepest constitutional crises we've seen in decades.[49] This is intentional. According to the "Free Alberta Strategy" on which Smith's strategy is based, initial moves like the *Alberta Soveriegnty Act*, the usurping of banking and judicial appointment powers from the federal government, and more conventional and

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[45] Recall that conservative parties in Alberta had combined to receive more votes than the victorious NDP in the 2015 provincial election; and the Conservative Party of Canada had garnered all but 3 of Alberta's seats a larger proportion of the popular vote then the victorious Liberals in the 2021 federal election.

[46] Christopher J. Anderson, André Blais, Shaun Bowler, Todd Donovan, and Ola Listhaug. 2005. *Losers' Consent: Elections and Democratic Legitimacy.* Oxford: Oxford University Press.

[47] Jared Wesley and Rissa Reist. 2022. "Three deep-seated drivers of the convoy, and what we can do about them." *Policy Options*, February 18.

[48] Dean Bennett. 2022. "Alberta UCP leadership candidate Danielle Smith promises immediate sovereignty act." *Canadian Press*, June 23.

[49] Andrew Coyne. 2022. "Alberta is on the verge of the constitutional abyss." *Globe and Mail*. August 16.

constitutional firewall measures (pensions, policing, tax collection) are meant to provoke the rest of Canada and set the stage for "the final resort: national independence" for Alberta.[50]

## Next Steps

Several outstanding questions surround the future of the separatist and Convoy movements in Alberta. Primary among them: Will the movements lose momentum if public health protections are lifted and/or new conservative governments assume power in Ottawa and Edmonton? And what steps, if any, should be taken to address the underlying grievances and forces that animate these movements?

Our Common Ground team has been researching Alberta public opinion and political culture for the past three years.[51] We intend to continue to conduct surveys and convene focus groups over the next four years. This will include experimental research into the activation of tribal identities and extremism.

At present, two of our working papers are under development for publication. The first focuses on the role of white identity in western alienation.[52] The second explores the role of gender in Canadian regionalism.[53]

We are in the process of combining six of our Viewpoint Alberta surveys into a single dataset. This will allow us to conduct more rigorous multivariate analyses of western alienation in Alberta.

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[50] Rob Anderson, Barry Cooper, Derek From. *Free Alberta Strategy*. freealbertastrategy.com/the_strategy

[51] For more information, please visit our website: commongroundpolitics.ca.

[52] Feodor Snagovsky, Michelle Maroto, and Jared Wesley. 2022. "White Identity and Western Alienation in Alberta." Paper for presentation at the Annual Meeting of the Prairie Political Science Association. Banff, AB. September 17.

[53] Jared Wesley, Lisa Young, Loleen Berdahl, and Lauren Hill. 2022. "Western Alienation and Gender." Paper for presentation a the C-Dem Forum on Election Democracy. Toronto, May 13.

# Social Cleavages Series: Shifting Cleavages in Canada

Nomi Claire Lazar

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Part of the Commission's mandate is "to examine and report on the circumstances that led to the declaration of a public order emergency" including "the evolution and goals of the convoy and blockades, their leadership, organization and participants." To this end, the Commission has solicited research from specialists who study shifting cleavages in Canada from different angles. All the specialists agree that members in the Convoy held a wide range of general and specific motivations for their participation, and represented a wide range of political views also.

The first three specialists prepared research notes for the Commission examining shifts in mainstream Canadian politics leading up to the Convoy. Because these notes are posted on the website together with this memo, they are summarizing briefly. The fourth specialist was asked to address the role of extremism in the Convoy. In the interests of efficiency, she directed the Commission toward existing co-authored work, and replied to follow up questions. Because this work is linked but not attached here, since the copyright lies elsewhere, we provide, for the ease of the public, a more detailed summary of the fourth scholar's work.

Professor Frédéric Boily, of the University of Alberta provides a paper analysing a range of populist currents leading up to the Convoy, including economic and identity threats experienced by some convoy supporters. He notes the possible role of a shift in climate policy under the Trudeau government. Notably, Professor Boily remarks that vaccine mandates may not have been the core concern of many Convoy members, but served instead as an "ideological accelerant".

Frank Graves, President of Ekos Research, provides a paper describing broad trends in Canadian public opinion pertinent to the rise of the Convoy movement. He notes that Canadians have shifted toward an Open/Ordered polarization, with about 2/3 of the population growing more open, while the last third retrenches. Graves provides a range of data on shifting levels of trust in government, the level of convoy support in Canada, and correlates including vaccination status, attitudes to visible minorities, support for Russia's invasion of the Ukraine, etc.

Because some leaders of the Convoy were also supporters of Alberta separatism, in his paper, Professor Jared Wesley, of the University of Alberta, provides an analysis of the development of Western alienation over the past decade, and its diverse expressions in support for Alberta separatism and for the Convoy. Notably, while Professor Wesley finds that supporters of the two movements strongly overlap in terms of their demographic characteristics, and overlap in terms of leadership of the movements, support for *both* movements is less common.

While the first three papers examine shifts in mainstream politics leading up to the Convoy, a final paper addresses the role of extremism. In the interests of efficiency, Professor Stephanie Carvin of Carleton University directed the Commission toward research she had recently co-authored with Kurt Philips and Amarnath Amarasingam on extremist, anti-immigrant, and anti-government elements within the Convoy.[1] For the ease of the public, we summarize this work in more detail here, since, due to copyright, the paper is not attached. Like the other specialists, these scholars emphasize the diverse ideological and political origins of Convoy membership. But they note that some convoy leaders have strong extremist ties. And the Convoy, they note, presented opportunities for right wing extremist recruitment. This is because conspiracy narratives provide novel opportunities for frame alignment, for example, tying anti-vaccine positions together with anti-climate action positions.

Carvin, Amarasingam, and Philips note that public health measures directly motivated some protesters' participation, including long established anti-vaccine activist groups such as Vaccine Choice Canada. These groups brought on side many Canadians whose lives or livelihoods were negatively impacted by COVID-19 public health measures.

But other leaders and participants in the Convoy had strong, pre-existing ties to extremist movements, including far right, anti-immigration and anti-government organizations. Writing just as the Convoy began, these scholars warned that even if a minority, the presence of extremist elements warranted vigilance around the possibility of violence. Some leaders present at the Convoy had explicitly advocated violence, both toward individual Canadians and against Canadian democratic institutions. For example, media recorded the presence among the Convoy protesters, of Romana Didulo, a QAnon inspired conspiracy theorist, who maintains a sizable social media following. Didulo has proclaimed herself to be the Queen of Canada.[2] And, in December 2021, issued orders to her followers that they should "shoot to kill"

[1] https://policyoptions.irpp.org/magazines/january-2022/anti-lockdown-mobilization-far-right-canada/ Unless otherwise noted, claims in this section are drawn either from the above article, or from comments Professor Carvin provided in response to queries on 7th July, 2022.

[2] Leyland Cecco, "'Queen of Canada': the rapid rise of a fringe QAnon figure sounds alarm," *The Guardian*. August 23, 2022. https://www.theguardian.com/world/2022/aug/23/queen-of-canada-qanon-rise-conspiracy-alarm;

any medical professional who vaccinates a child.[3] Since being questioned by the RCMP, Didulo has backed away from direct calls to violence. She was one of several QAnon and other conspiracy oriented Convoy participants.[4]

Carvin and her co-authors argue that while it is false to describe all convoy supporters as driven by racist or extremist sympathies, the Convoy presented an opportunity for those extremists present to recruit new members. This is because extremist conspiracy theories connect diverse concerns of convoy participants in a single master narrative, enabling frame alignment for diverse worldviews. As Professor Carvin noted in response to questions: "extremists see an opportunity to mingle and recruit among a group that is already mistrustful of the government and science. [And] the anti-vaccination group has spent years being primed with conspiracy theories, both from abroad and domestic. It then makes sense for [extremists to recruit new followers by building] on some of these beliefs."

Carvin, Amarasingam, and Philips also noted that extremist groups may be expected to move together with new recruits from the anti-vaccine issue, to new issues. For example, as Carvin noted in response to later questions that Convoy members' protests, in July of 2022, in support of Dutch farmers who reject environmental measures, show how this frame alignment works to move followers to new grievances, by means of the conspiracy master narrative: A common extremist master narrative involves the conspiracy theory that the World Economic Forum is a "global cabal of actors controlling events or seeking to undermine the populations of the West." According to this conspiracy theory, both climate change action and vaccination are tools these elites use to "control the world and undermine our way of life." For this reason, many convoy supporters who may have begun as anti-vaccine activists may have come to see "The climate change agenda …with both suspicion and outright hostility."

Together, these papers illuminate key aspects of the social and political context in which diverse streams of the Convoy emerged. The first three experts address shifts and novel cleavages in mainstream politics. The final expert addresses the role of

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[3] Brett Popplewell, "What Happened in Ottawa? Separating the Discontent from the Darker Elements," *The Walrus*, March 3, 2022. https://thewalrus.ca/ottawa-convoy/

[4] Justin Ling, "5G and QAnon: how conspiracy theorists steered Canada's anti-vaccine trucker protest," *The Guardian*. February 8, 2022. https://www.theguardian.com/world/2022/feb/08/canada-ottawa-trucker-protest-extremist-qanon-neo-nazi

extremism in the Convoy. The papers suggest points of convergence and frame alignment between groups who might have originally joined the Convoy with diverse purposes, but may have found their frames aligning. Understanding the role of general and specific democratic discontent, as well as the role of extremist elements in the convoy movement, is important for the Commission to fulfil its mandate, which requires that we examine “the circumstances that led to the declaration of a public order emergency” including “the evolution and goals of the convoy and blockades, their leadership, organization and participants.” More generally, the papers suggest a variety of ways that Canada’s politics may be moving away from traditional left-right politics, toward cleavages aligned for-against openness and for-against our current, federal, democratic system.

# Social Cleavages Series: Understanding the Freedom Movement: Causes, Consequences, and Potential Responses

Frank Graves

EKOS Research Associates

# Introduction

For some time, we have been studying the expressions of what we have called "ordered populism."[1] While many were skeptical of the claim that Canada's political landscape was being shaped by the same populist forces which had explained the election of Donald Trump and the Brexit referendum, the empirical evidence was compelling. An index designed to measure authoritarian (or what we preferred to call "ordered" outlook) was very predictive of Canada's last two federal elections. In this paper, we will demonstrate that understanding ordered populism is critical to understanding the emergence of the so-called "Freedom Movement," but this also has to be understood in terms of the impacts of the debates around vaccines and mandates and the growing role of disinformation in shaping these forces.

In this brief paper, we will examine both the longer-term forces which have produced this new sorting of the population into a much more polarized state. We will also demonstrate how the arrival of the pandemic affected these forces. In the incipient stages, Canada saw a diminution of polarization and a highly significant jump in trust in government. As the pandemic wore on, polarization re-emerged, perhaps more intensely than before the pandemic. The ephemeral rise in trust at the outset of the pandemic had largely disappeared. These and other forces – particularly the rising role of disinformation – set the table for the 'Freedom" movement to emerge.

Notably, at the outset of the pandemic in March 2020, the majority of Canadians thought the pandemic would be over within six months. Today, two and a half years later, the majority of the public think a return to normal will not occur for at least two years – if ever.[2] This vanishing horizon for an end to the pandemic, coupled with associated and unprecedented levels of stress,[3] is also an important factor to consider.

The skepticism about the thesis that there was indeed "Northern Populism" akin to that propelling Trump in the United States was abandoned by many as we saw a

[1] Frank Graves, "*Northern Populism: Causes and Consequences of the New Ordered Outlook*", University of Calgary School of Public Policy SPP Research Papers, Vol. 13:15 (June 2020), University of Calgary. Available online at: https://bit.ly/3fgG5HR
[2] EKOS Research Associates, "Risk Monitor – Wave 35," August 2022.
[3] EKOS Research Associates, "Risk Monitor – Wave 35," August 2022.

series of blockades and protests, the most serious one being the over three-week occupation of the nation's capital.

We will review shifting public response to the so-called Freedom Movement and show how it links strongly to populism, polarization, and politics. Notably when Canadians were asked in our poll to identify the salient "costs" of the pandemic, deep polarization about the vaccine topped a formidable potential list of costs. Second was the erosion of institutional trust.

Our analysis will also look at the role of mis- and disinformation (MIDI). This is an extremely powerful new force which is deepening polarization and mistrust in ways that could not have been imagined even a decade ago. While the impacts of MIDI can be clearly documented, effective policy responses have proven elusive. This is complicated by the interconnections between these phenomena and the new political landscape. The essay will conclude with some thoughts on the range of shorter, medium, and longer term responses to these threats.

## 1.0 The Broader Historical Context

In *Northern Populism*,[4] we demonstrated that ordered populism is a critical new force shaping the Canadian political landscape. Despite significant skepticism of this analysis at the time, the Freedom Movement vividly illustrates this force in Canada.

Let's begin with what we mean by populism. Despite the intensity of interest in the topic, it really doesn't have a clear social scientific meaning. Key experts seem to agree that populism has two main ingredients: 1) The idea that there is a corrupt elite which invokes deep suspicion of the current establishment, and 2) a belief that power should be more properly restored to the people (who, more often than not, become 'my people', not 'others'). Other common features of populism, which some also describe as a strategy for governing or gaining power, are tendencies to nativism, skepticism toward established authorities such as the media and science, an aversion to foreigners, and an affinity to the local 'somewhere' rather than the global 'anywhere'.[5]

[4] Frank Graves, "*Northern Populism: Causes and Consequences of the New Ordered Outlook*", University of Calgary School of Public Policy SPP Research Papers, Vol. 13:15 (June 2020), University of Calgary. Available online at: https://bit.ly/3fgG5HR

[5] Goodhart, David, "*The Road to Somewhere: The Populist Revolt and the Future of Politics,*" 2017, Oxford University Press.

Populism is typically ideologically thin and can be expressed across the ideological spectrum. We are interested in a particular form of populism: authoritarian – or ordered – populism.[6] The key conditions for the rise of authoritarian or 'ordered' populism include:

- Declining middle class, wage stagnation and hyper-concentration of wealth at the very top of the system;
- Major value shifts which see more progressive values displacing traditional social conservative values which, in concert with economic despair, produce a cultural backlash by those seeing loss of identity and privilege;
- A growing sense of external threat expressed in both a sharp long-term rise in the belief that the world has become overwhelmingly more dangerous and rising normative threat which sees the country and its public institutions moving in the wrong direction; and
- Declining trust and ideological polarization.

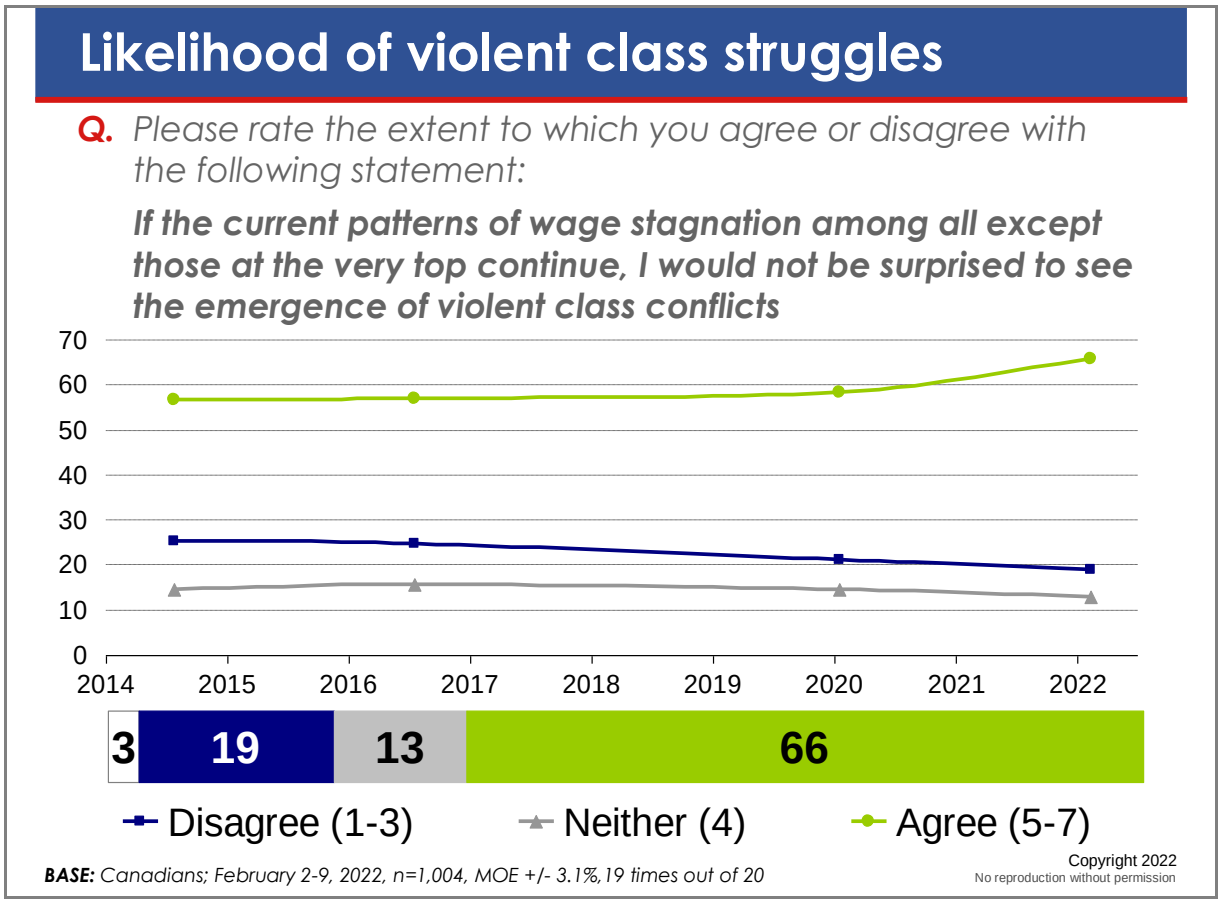
In thinking about the evolving political landscape, it is important to recognize that the traditional left-right spectrum has morphed more into an open-ordered axis. While there are some continuities in the open-ordered and left-right axes, there are also some profound differences, as evident in the simplified table below. The following table gives a stylized summary of what we think are some of the key differences between the traditional left-right axis and the newer open-ordered axis. The exact lineage and evolution of left-right and open-ordered is unclear and demands further research.

[6] Kristin Nelson, "*Who's drawn to fascism? Postwar study of authoritarianism makes a comeback*", Ideas, CBC Radio, April 4, 2021. Available online: https://bit.ly/3PxajIH

| **Table 1: Left-Right vs. Open-Ordered** | |
|---|---|
| *How is the new ordered outlook different from the traditional right?* | |
| **Left** | **Right** |
| -Collectivism<br>-Active government<br>-Social ills societally produced<br>-Rehabilitation | -Individualism<br>-Minimal government<br>-Individuals are authors of social problems<br>-Punishment |
| **Open** | **Ordered** |
| -Cosmopolitan<br>-Anywhere<br>-Pro-diversity and immigration<br>-Optimistic about the future<br>-Reason and evidence<br>-Creativity | -Parochial altruism[7]<br>-Somewhere<br>-Deep reservations about diversity/anti-immigrant<br>-Deeply pessimistic about future/public institutions<br>-Moral certainty<br>-Good behaviour |

Two-thirds of Canadians (66%) agree that if present trends vis-à-vis the concentration of wealth at the very top continue, we may well see "violent class conflicts" (up from 58% in 2020). This number is considerably higher amongst those sympathetic to the 'freedom' movement which is strongest amongst economically vulnerable males lacking university educations.

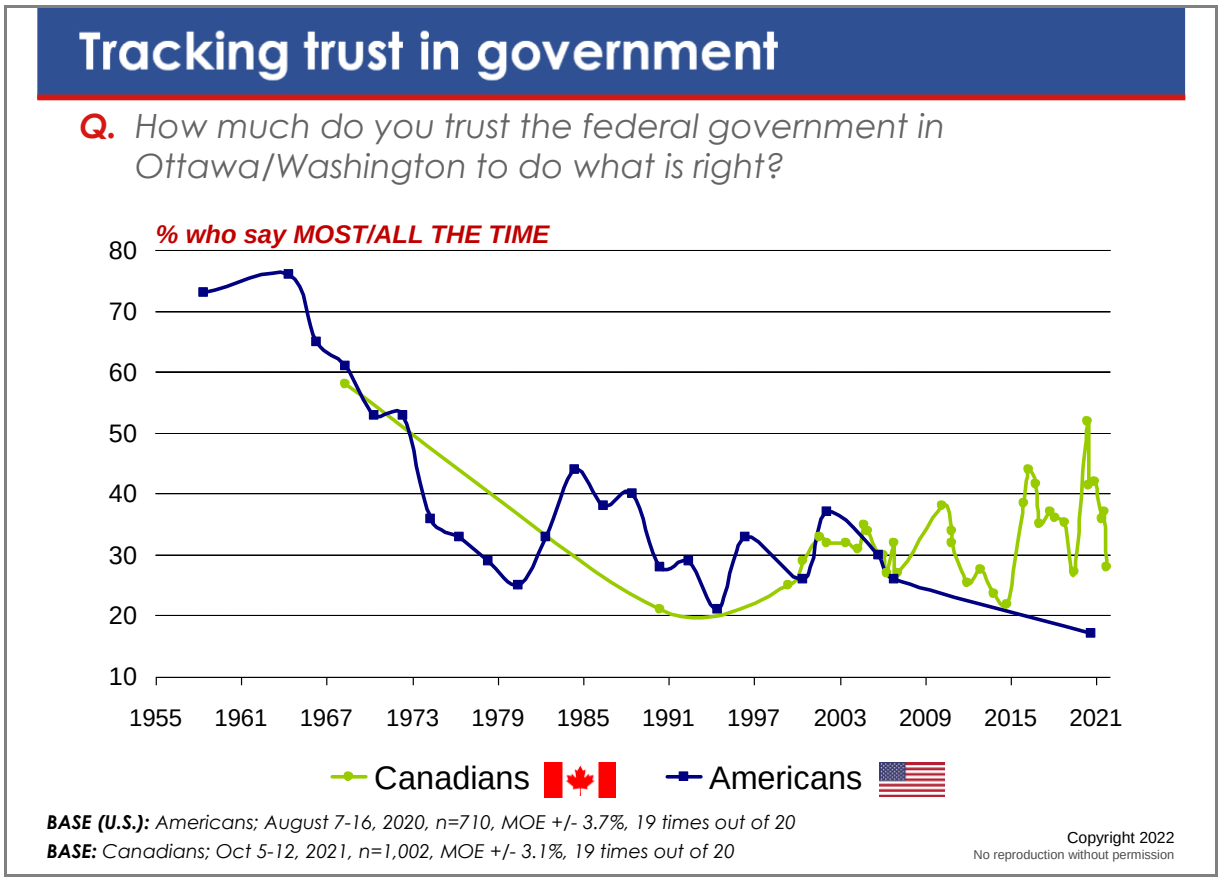
[7] Haidt, Jonathan, "*The Righteous Mind: Why Good People are Divided by Politics and Religion*," 2002, New York: Pantheon Books.




## 2.0 The Impacts of the Pandemic on this New Polarization

The pandemic initially produced a dramatic diminution of polarized views on government and country and there was a huge jump in trust in the federal government and approval of the federal government. Trust in professionals and institutions (and perhaps social cohesion) also rose fairly dramatically. Indeed, trust in government, politicians, and public servants reached a 25-year high. Interestingly, there was no such rise in the United States, which may explain the country's comparatively poorer vaccine uptake, as trust in government, in science, and in public health are all interrelated.[8]

[8] Doyle McManus, "*Canada just surpassed us on vaccinations. Good for them, and shame on us*," Los Angeles Times. August 1, 2021. Available online at: https://lat.ms/3PI9eOn

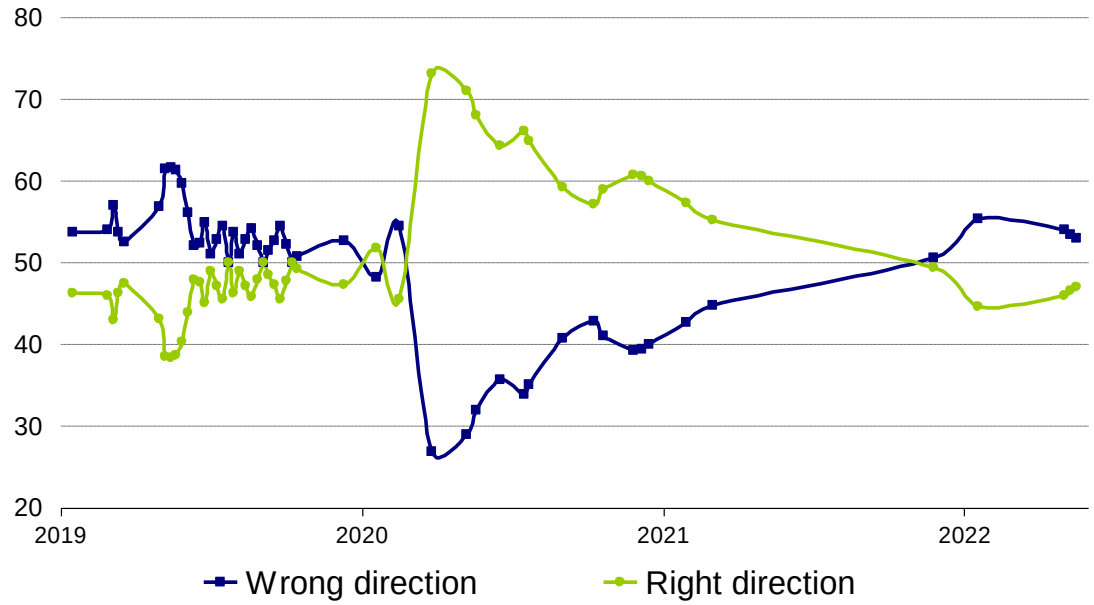



As time went on, however, polarization began to creep back in. In terms of confidence in national direction, the 73 per cent of Canadians who felt the country was headed in the right direction in the spring of 2020 has recently plummeted to just 47 per cent. Confidence in national direction was particularly low among men under 50 years of age, residents of Alberta and Saskatchewan, working-class Canadians, and the non-university educated. These are some the groups which show the highest levels of identification with the freedom and anti-mandate movements.

In particular, stark divisions are emerging on the open-ordered fault line. Not only does this produce different responses to safe behaviour challenges, but it will also manifest itself in alternate versions of what post-COVID-19 Canada is going to look like. For example, those sympathetic to the freedom and anti-mandate movements are also much more likely to see climate change as a trivial of false issue.

## Direction of country

**Q.** *All things considered, would you say the country is moving in the right direction or the wrong direction?*




*Note: Figures adjusted to exclude those who skipped the question.*

***BASE:*** *Canadians (half-sample); May 13-17, 2022, n=604, MOE +/- 4.0%, 19 times out of 20*

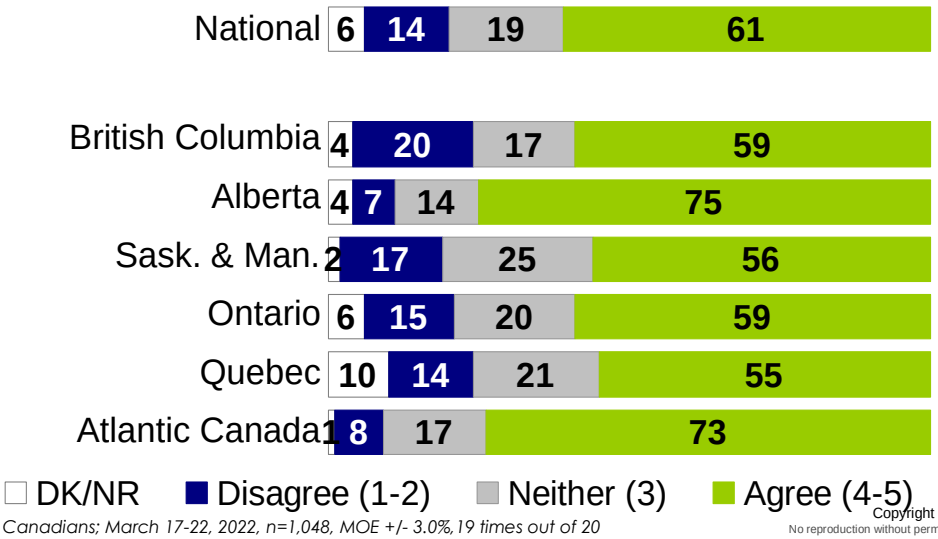


There is a growing consensus that the country has never been so polarized. Polarization around vaccines ranks as a leading source of anxiety and a record high number of Canadians worry about "violent" class conflicts if trends in wealth concentration continue.

## Views on polarization

**Q.** *Please rate the extent to which you agree or disagree with the following statements:*

***I don't think Canada has ever been as polarized as it is today***

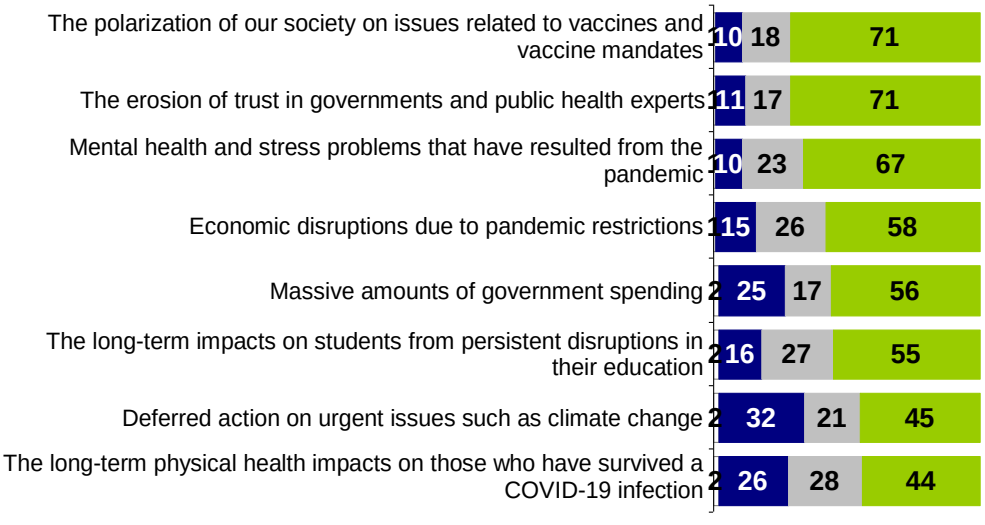



**BASE:** *Canadians; March 17-22, 2022, n=1,048, MOE +/- 3.0%,19 times out of 20*



## Preliminary accounting of pandemic costs

**Q.** *In your view, how serious are the following costs of the COVID-19 pandemic?*




**BASE:** *Canadians; February 25 – March 3, 2022, n=1,097, MOE +/- 3.0%, 19 times out of 20*

## 3.0 The Freedom Convoy and the Emergencies Act

So-called "freedom" protests vividly captured public attention and saw the country roughly divided into two groups: 1.) those who were sympathetic to and "identified" with the movement; and 2.) those who did not. Most Canadians agree the country has never been so polarized and this view is stronger among supporters of the convoy.

We have intense polarization, but it is not splitting the country into two equally sized groups. Public support for the protests varied depending on the phrasing of the question, but opposition to the protests consistently outweighed support by a wide margin. For instance, the Freedom Convoy's "memorandum of understanding" – a document published on the protesters' website that demanded the Governor General and the Senate either override all pandemic restrictions across the country or resign – elicited the support of 22 per cent of Canadians,[9] which offers us a lower limit of support for the movement. Similarly, 22 per cent of Canadians "identified" with the protesters.[10] In contrast, the protesters may have had some sympathy as the underdogs; strikingly, 38 per cent of Canadians believe they have genuine issues versus 58 per cent who see them as a minority fringe.

As time went on, sympathy for the convoy protests appeared to recede somewhat, but a residual segment of supporters remain intensely emotionally engaged. We would conclude sympathy with Freedom Movement captures somewhere between a quarter and a third of Canadians; the movement represents a minority, but not a fringe.

[9] EKOS Research Associates, "Risk Monitor – Wave 28," February 2022.
[10] EKOS Research Associates, "Risk Monitor – Wave 29," February 2022.

## Support for convoy protests

**Q.** *As you may know, the convoy protests are an ongoing protest movement made up of truckers and other demonstrators who, among other things, blockaded several Canadian cities and border crossings with the United States in February 2022. The protest was sparked by vaccine mandates for cross-border truck drivers, but later grew to a push for an end to all pandemic restrictions. To what extent do you support or oppose this movement?*

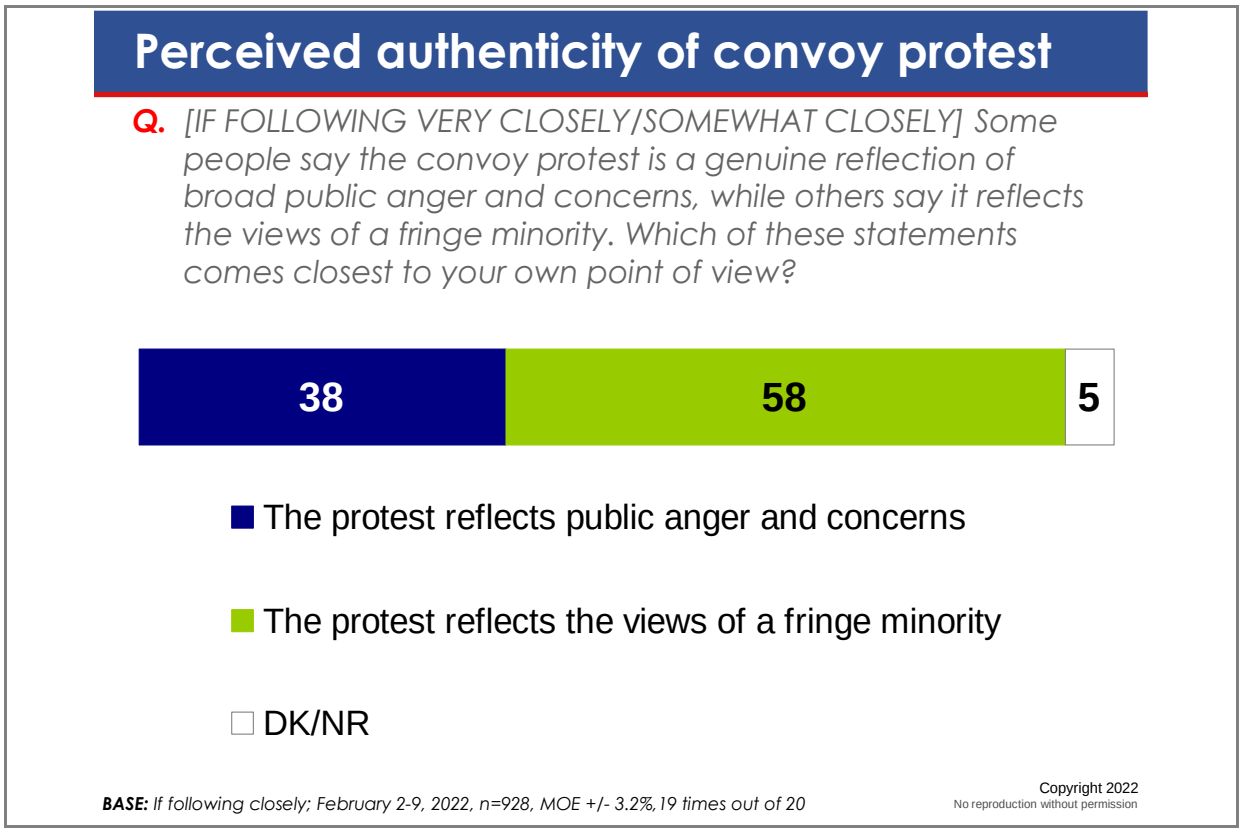
### May 2-6, 2022


***BASE:*** *Canadians; May 2-6, 2022, n=1,559, MOE +/- 2.5%,19 times out of 20*

### February 16-21, 2022


***BASE:*** *Canadians; February 16-21, 2022, n=1,003, MOE +/- 3.1%,19 times out of 20*

DK/NR  Oppose (1-2)  Neither (3)  Support (4-5)




The protests were not reflective of overall public outlook on issues such as masks and vaccine passports but, at the same time, were not merely expressions of a fringe minority. This is by no means a random quarter of the public, but has clear demographic, attitudinal, and behavioural factors.[11]

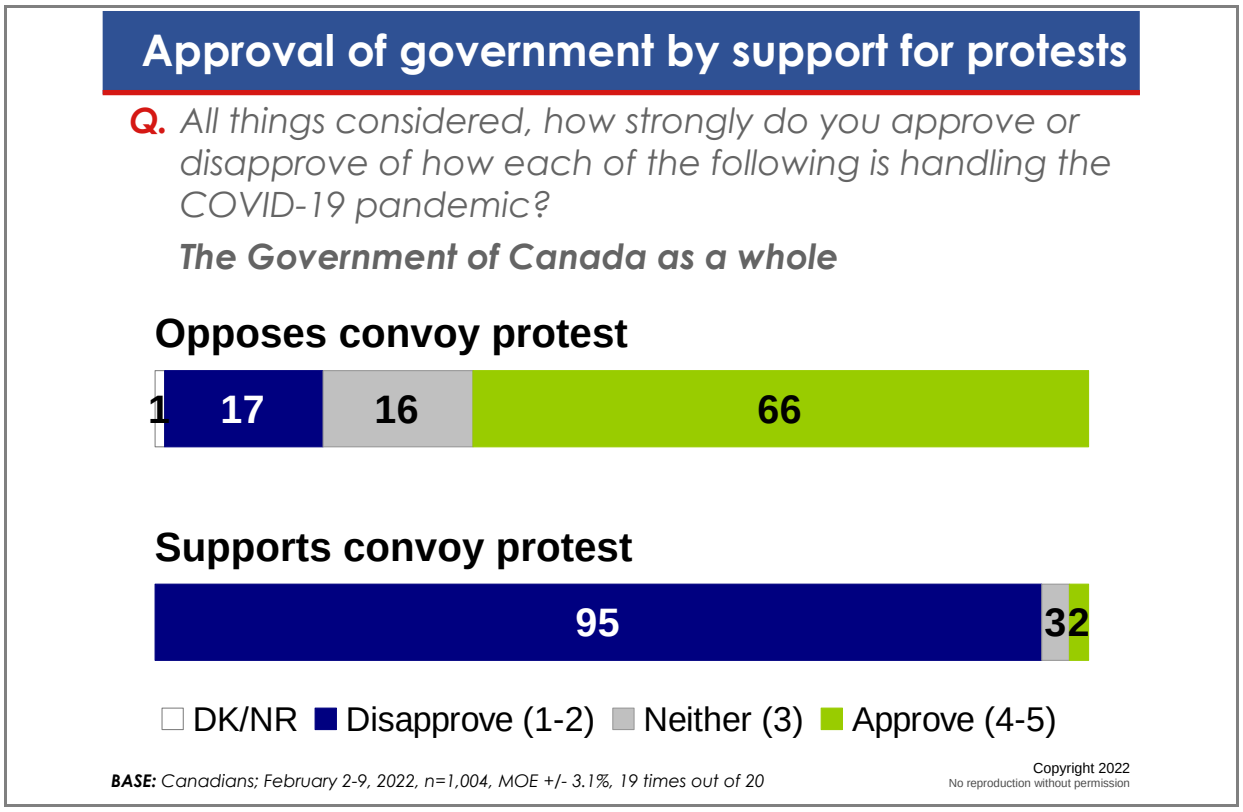
One important driver of sympathy toward the convoy protest was generational. Under-50 Canada (particularly men under 50) was much more sympathetic to the protests and their cause and the balance of support and opposition was pretty evenly divided in these younger cohorts. For over-50 Canada, there was broad opposition to this movement. Other key drivers include education (with the college educated more sympathetic and university educated more opposed) and household size (with support for the protests correlated with number of children). Unsurprisingly , support was strongly correlated with vaccine acceptance; 97% of vaccine refusers supported the protest, compared to just 12% of those who have received three or more doses.

Supporters of the freedom movement are much more disinformed and economically anxious and their support is underpinned by intergenerational resentment and class

[11] Michael Valpy and Frank Graves, "*Who supports the 'freedom' protesters and why*," Toronto Star, February 16, 2022. Available online at: https://bit.ly/3QxksGy

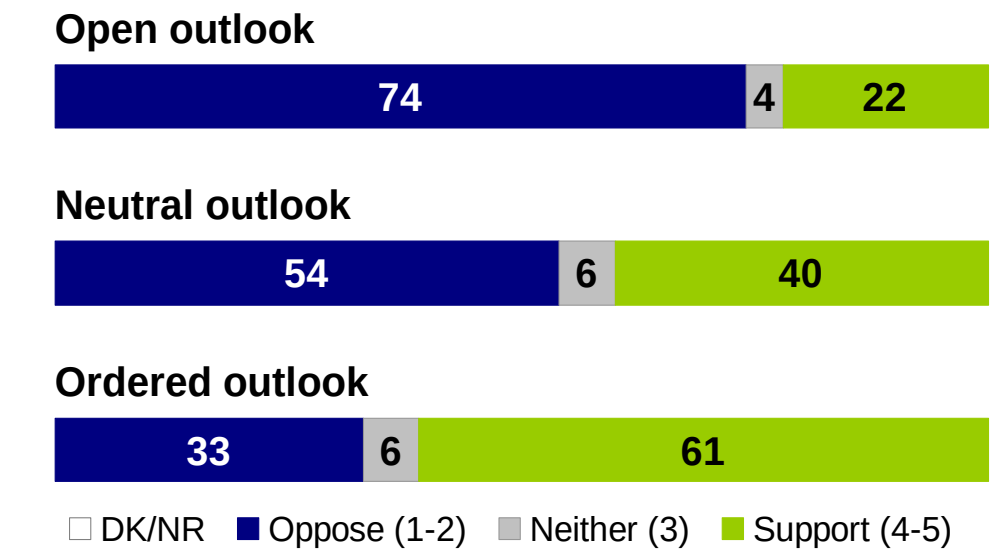
conflicts. Supporters are extremely distrustful of government and almost entirely reject any further restrictions.

A key feature of supporters of the convoy protest is that they score much higher on the ordered (authoritarian) outlook index and are much more hostile to outgroups. This is connected to a sense of status and identity threat, and a values backlash which echoes themes found in so-called "great replacement" conspiracy thinking, common in the United States. Indeed, they are three times as likely to say there is too much immigration and too many immigrants are members of visible minorities.

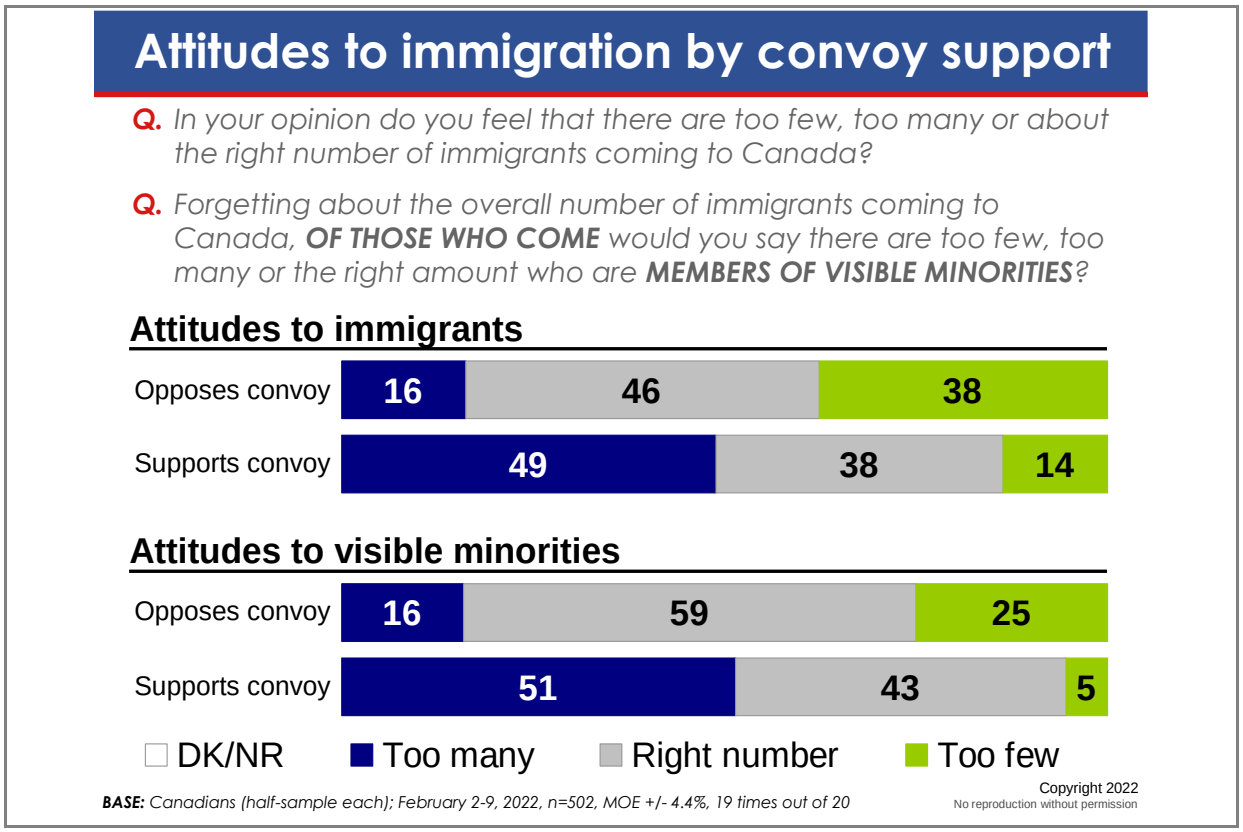


## Support for convoy protest by open-ordered index

**Q.** *Based on what you know, to what extent do you support or oppose this protest?*




***BASE:*** *Following protests; February 2-9, 2022, n=1,004, MOE +/- 3.1%,19 times out of 20*




It is possible that economic anxieties are driving the protest as much as issues around vaccines and masks. Those most adamantly opposed to masks and mandates have (by far) the bleakest economic outlook. The 'cultural' expressions (e.g. greater antipathy to immigration) may be even more concerning but they are not what set these forces in motion.

## 4.0 The Role of Disinformation

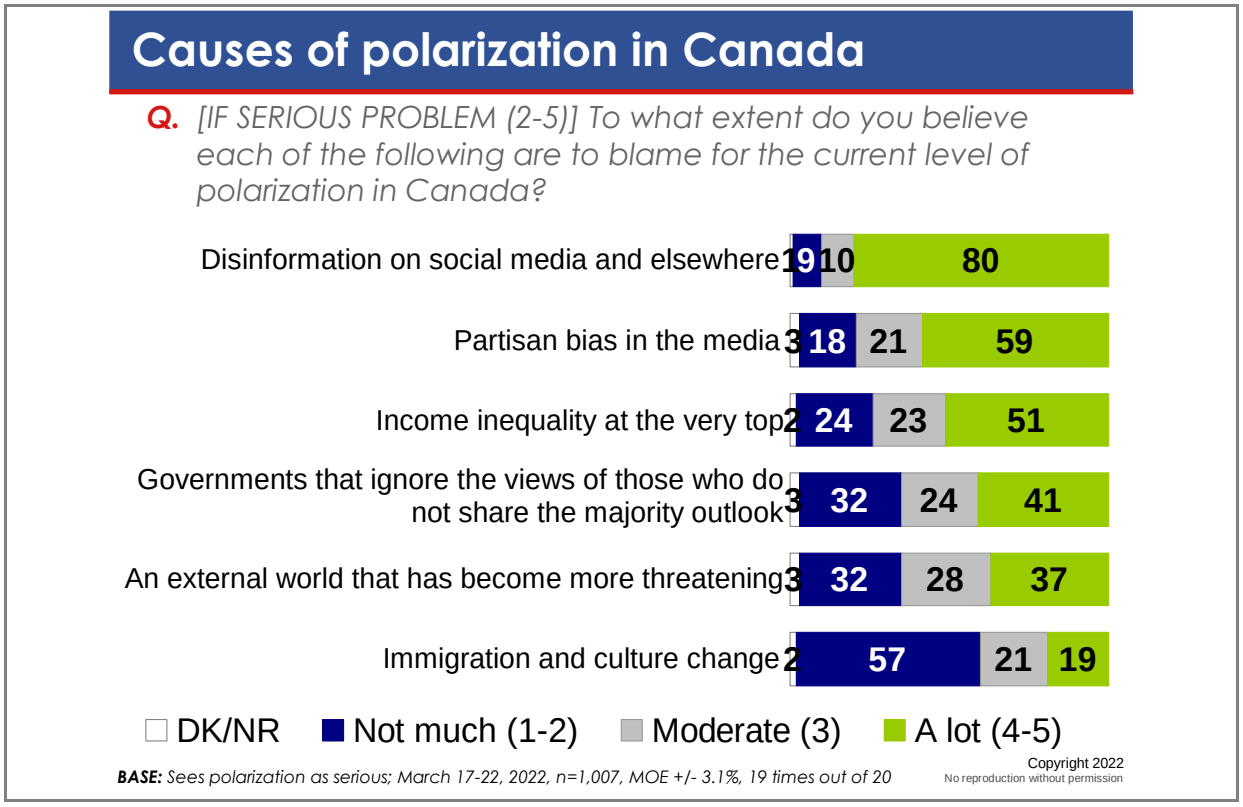
Disinformation is proliferating at an alarming pace and is having an extremely corrosive impact on public interest (e.g., vaccine uptake) and democracy. Disinformation, coupled with other structural changes, is radicalizing much of the Canadian right.

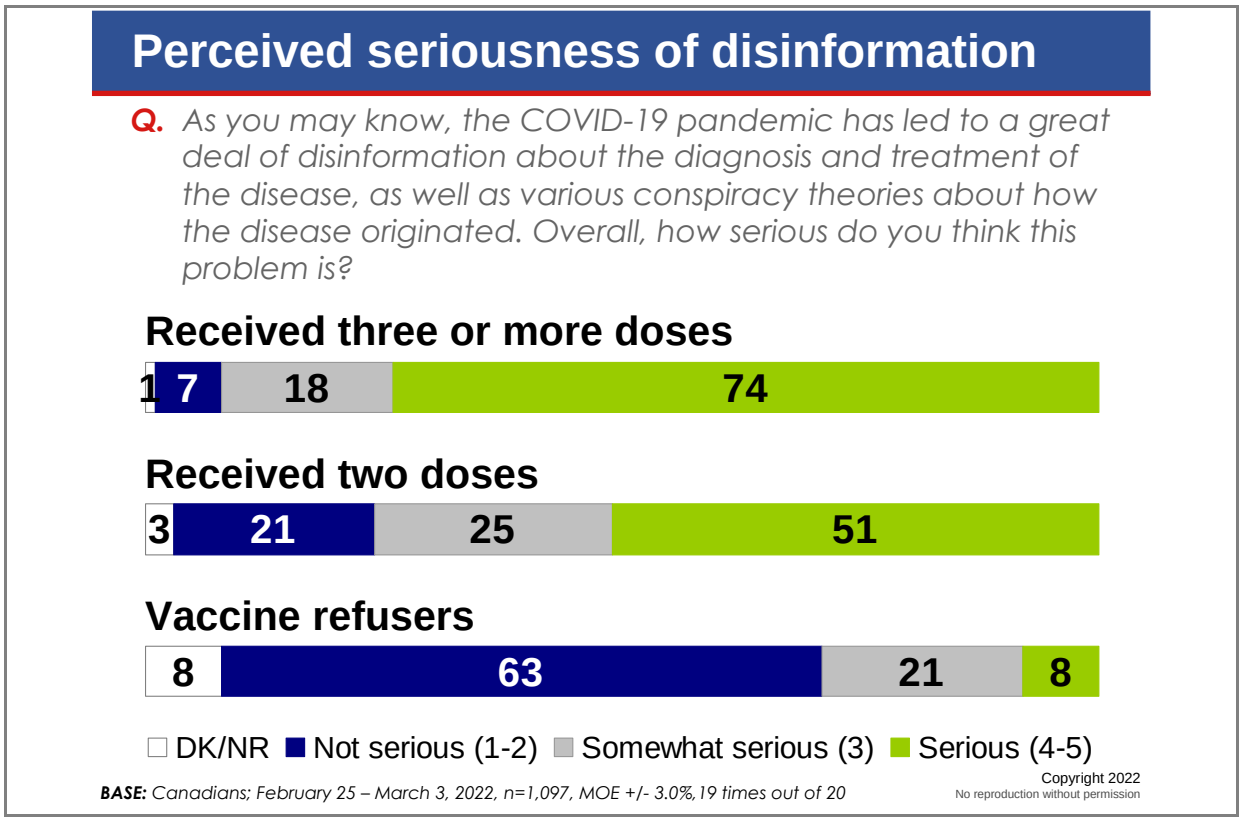
It is clear that disinformation is linked to mistrust, polarization, and, in particular, vaccine refusal. Similarly, opposition to vaccine passports shows a linear correlation with disinformation. Disinformation has polarized the debate around vaccines and

passports and will shift to debates about foreign policy, the climate emergency, and many other issues.

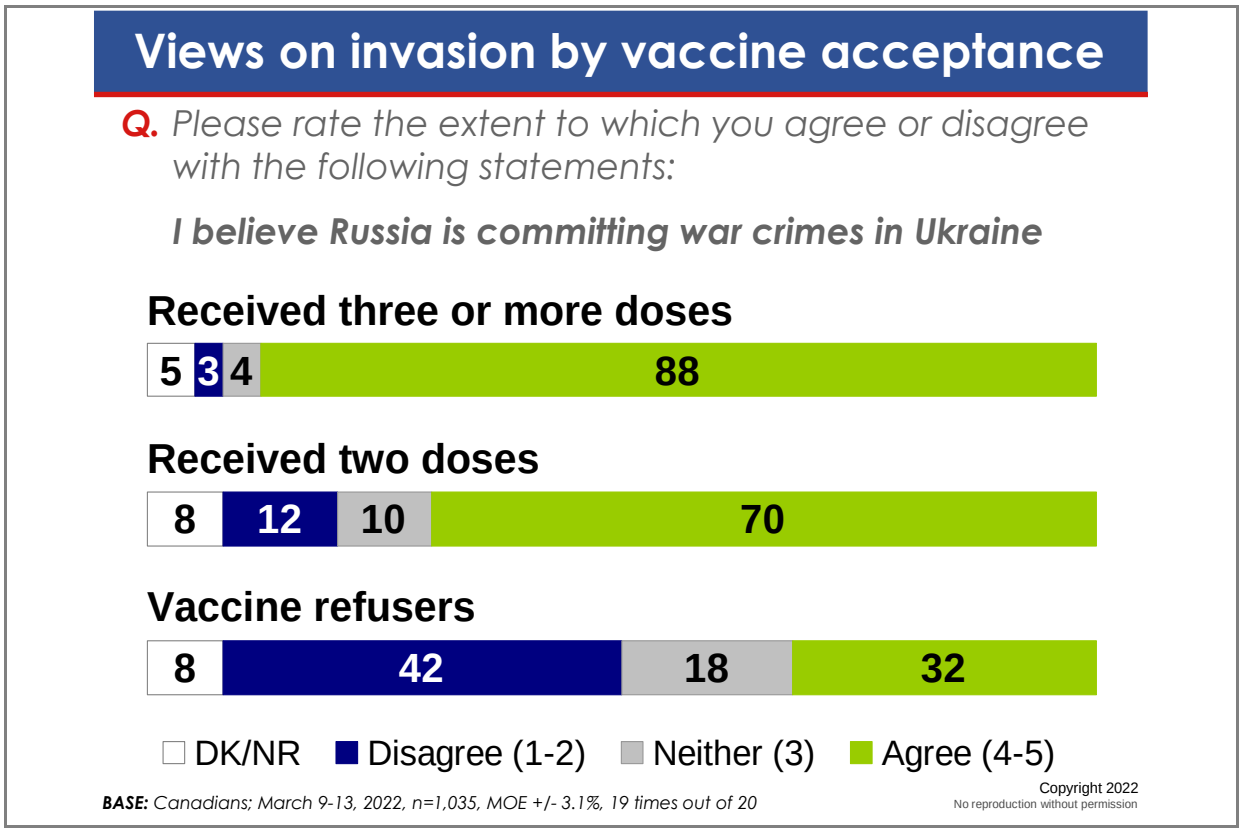
Disinformation is strongly correlated with distrust in the medical and scientific communities. Notably, distrust in journalism is also linked to disinformation. These finding suggests that the disinformed are turning to alternative media sources – such as social media – for what is often spurious information and advice.

By a wide margin, Canadians see disinformation as a leading driver of polarization, a problem that is denied in the world of vaccine refusers and convoy supporters. A clear majority of Canadians see social media as the primary culprit in the rise of disinformation.

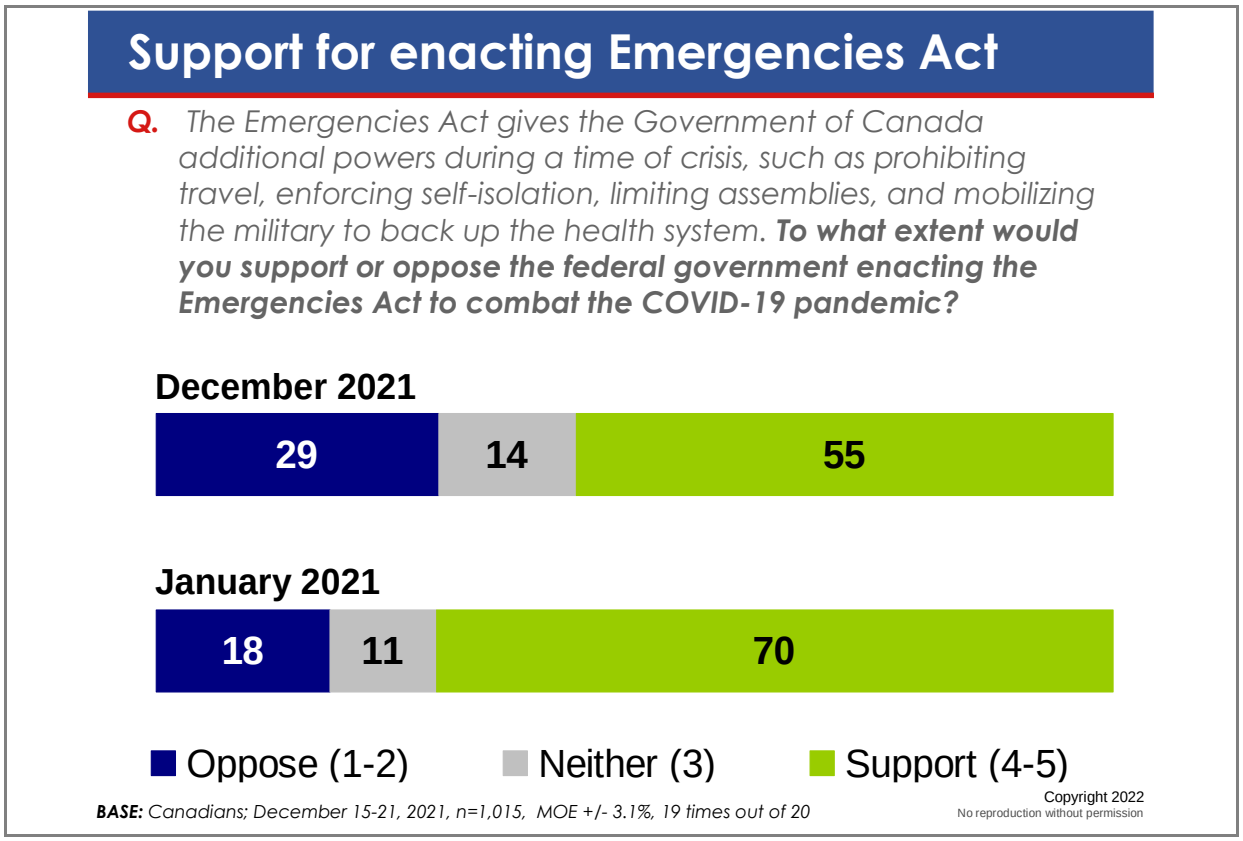





Disinformation is rapidly slipping over into other areas of debate. For instance, the perceived importance of issues such as racial equality, reconciliation, and climate change is strongly correlated to levels of disinformation. Most notably, the near-universal condemnation of Russian invasion of Ukraine has a key offside group – the disinformed anti-vaccine, anti-restrictions segment. The same disinformation underpinning vaccine refusal is also fuelling dramatically higher levels of sympathy with the Russian invasion. The fact that vaccine refusers are 14 times more likely to disagree Russia is committing war crimes, and 26 times more likely to say Canada should do nothing, provides a vivid illustration of the agility and power of disinformation.




In December 2021, just over a month before the convoy protests arrived in Ottawa, more than half of Canadians (55%) supported enacting the Emergencies Act to combat the COVID-19 pandemic (however, support for the Act may have been more a measure of public anxiety than a measure of support for a particular government action). Although this question precedes the actual invocation of the Act it does show that a majority of the public supported its theoretical use.



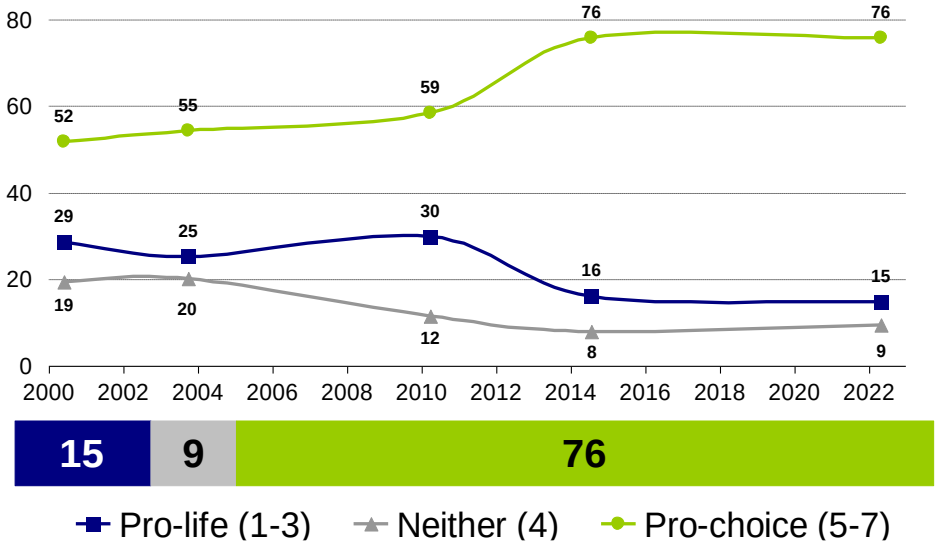

## 5.0 The Open Paradox

Overall, polarization continues (and is perhaps intensifying) but the fulcrum dividing open-ordered has shifted to the open side (see Table 1 for a description of the open-ordered spectrum). Attitudes to abortion, guns, trade, convoy protests, etc. all suggest shift to a more open outlook. This 'open paradox' is occluded by the intensity of opponents. For example, even today a clear majority of the public support the abandoned vaccine passport concept.

Canada has remained uniquely "open" in key areas such as immigration, trade, and diversity, and human rights. Notably, opposition to immigration is reaching historical lows (inversely linked to education, social class). But as Canada shifts emphatically open, this may ironically be intensifying the polarization and threat felt by the ordered minority (e.g., a dialectical response to perceived threat?).

## Views on abortion rights

**Q.** *Thinking about your general views on abortion, would you say you are more pro-life or pro-choice?*



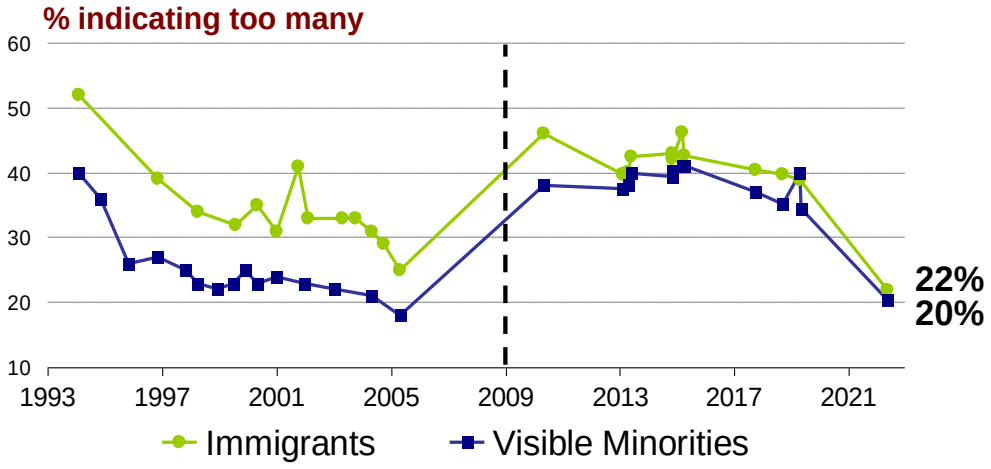

***BASE:*** *Canadians; May 2-5, 2022, n=1,268, MOE +/- 2.8%,19 times out of 20*



## Attitudes to immigration/visible minorities

**Q.** *In your opinion do you feel that there are too few, too many or about the right number of immigrants coming to Canada?*

**Q.** *Forgetting about the overall number of immigrants coming to Canada,* ***OF THOSE WHO COME*** *would you say there are too few, too many or the right amount who are* ***MEMBERS OF VISIBLE MINORITIES****?*




***BASE:*** *Canadians (half-sample each); April 27-May 4, 2022, n=915-921, MOE +/- 3.2%, 19 times out of 20*

# 6.0 Conclusions

Understanding the forces which have produced the Freedom Movement is critical to repairing the polarization going on in the country. Fuller understanding of the causes and consequences of the Freedom Movement requires understanding the rise of populism and the factors that contributed to that. We have sketched out some key elements noting these have been percolating for some time across the Western World (including Canada). There are, however, unique expressions in Canada.

In terms of moving forward, we offer several suggestions. First, we note that depictions of those drawn to populism outlook as "deplorables" or a "radical fringe" are not helpful; instead, they give more emotional intensity to these groups. There are legitimate reasons for their grievances, even if they are disinformed and their solutions do not make sense. There is evidence that providing safe listening spaces produces some softening of polarization.[12] We would suggest using tools of public engagement where representative samples can offer informed, reflective, and representative advice to decision makers.

Next, we are losing the war on disinformation and we need to make immediate progress on developing practical solutions to dealing with MIDI. We have already seen how disinformation and polarization have created problems in helping us get past COVID-19. In the future, disinformation can further impact public safety and national security. Disinformation and polarization can stoke the flames of racial hatred and white supremacy – both of which we find are on the rise over the last few years. We also have research suggesting that disinformation is extending to climate change denial.

We would also note that polarization is too deeply entrenched to solve in the short-term through simply education. It is likely that approaches such as vaccine passports, which, although anathema to the Freedom Movement, may be necessary to resolve the pandemic. The idea of returning to a defined period where passports would be used to stimulate higher levels of take-up of a new bivalent vaccine is supported by a nearly three to one majority.

Finally, although the expressions of this movement are probably more acute in the cultural realm, the forces that set them in motion are rooted in economic factors and

[12] EKOS Research Associates, "Risk Monitor – Wave 32," March 2022.

changes in the class structure. If we really want to make progress in the long run, we need to recreate the economic narrative of hope and shared prosperity.

## For Further Reading

Frank Graves, "*Northern Populism: Causes and Consequences of the New Ordered Outlook*", University of Calgary School of Public Policy SPP Research Papers, Vol. 13:15 (June 2020), University of Calgary. Available online at: https://bit.ly/3fgG5HR

Frank Graves, "*Polarization, Populism, and Pandemic: Implications for Canadian Outlook on the World*," in Canada Among Nations 2020: Political Turmoil in a Tumultuous World, New York: Palgrave Macmillan, 2021. Print.

Frank Graves, "*Pandemic, Polarization, and Expectations for Government: Rising Optimism about vaccine meets rising pessimism about second wave*," December 2, 2022. Available online at: https://bit.ly/3R4fGQT

Kristin Nelson, "*Who's drawn to fascism? Postwar study of authoritarianism makes a comeback*", Ideas, CBC Radio, April 4, 2021. Available online: https://bit.ly/3PxajIH

Michael Valpy and Frank Graves, "*Who supports the 'freedom' protesters and why*," Toronto Star, February 16, 2022. Available online at: https://bit.ly/3QxksGy

# Social Cleavages Series: The Trucker Convoys (2019 – 2022)

Frédéric Boily

Professor, University of Alberta

Interpreting the ideological and political nature of the February 2022 trucker convoy poses a challenge. As the protests came only a year after those that rocked the Capitol in January 2021, a parallel was quickly drawn between the two events, and concerns were raised that a similar kind of protest could occur in Canada. This research note essentially concentrates on the political cleavages that have occurred in Canada since 2015 and that provide insight on the trucker convoy's political origins. This paper has three objectives:

1) We will first see why it is important to examine the February 2022 trucker convoy in relation to a series of protests that began in 2018 in Western Canada against the federal government's environmental measures and energy policies.
2) We will then return to the larger context that led to the protests by providing a snapshot of how the Canadian right has evolved since the last federal elections (in 2019 and 2021), highlighting political cleavages that have existed since the 2015 federal election but that intensified in 2019 and 2021.
3) Finally, we will discuss the very nature of the protests and the convoy, which have been described as products of the far right[1] and populism. We will then pursue a few avenues to understand the nature of the convoy.

## 1) The pre-pandemic oil sands protests 2018–2020

The February 2022 trucker convoy represented a response to the pandemic, specifically the health measures put in place by the federal and provincial governments. When the convoy arrived in Ottawa, a parallel was quickly drawn with the January 2021 events in the US Capitol. However, the parallel between the two uprisings obscures (a) the political context that existed prior to the pandemic, which we will cover in further depth, and (b) the fact that similar trucker convoys have been organized since late 2018.

> - December 16, 2018: A convoy of around 600 trucks snaked through Grand Prairie, Alberta. According to the participants, the convoy was drawing attention to the challenges faced by truckers in the energy industry. One protester stated, "It's finally really good to see everybody starting to see the trickle-down effect

[1] "L'extrême-droite au volant du convoi des camionneurs?" *Le Journal de Montréal*, February 11, 2022, https://www.journaldemontreal.com/2022/02/11/lextreme-droite-au-volant-du-convoi-des-camionneurs-1.

in a country that got a large part of its economy from natural resources. Everyone is affected, from the top down."[2]

- December 19, 2018: A trucker convoy estimated to be 22 kilometres long drove along the highway leading to Edmonton's airport and Nisku, where a number of companies working in the energy sector are located.[3]

- December 22, 2018: A convoy of over 400 trucks was organized in Estevan, Saskatchewan. The participants were protesting the Trudeau government's energy sector policies (carbon tax and slow pipeline construction), equalization, and the UN Global Compact for Migration.[4]

- January 5, 2019: Canadian supporters of the "Yellow Vest" movement protested at the Alberta legislature and other locations with varying demands: "These were positioned as 'yellow vest' protests and, while small in numbers (e.g., 60 in Toronto, 120 in Edmonton, 'dozens' in Fort McMurray), the messaging was consistent with a focus on the UN Global Compact for Migration, carbon tax opposition, and a general anti-Trudeau stance."[5]

- February 19, 2019: Calling itself "United We Roll," a trucker convoy was formed in Alberta. A group of around 170 trucks departed from Red Deer and drove to Ottawa over the course of a week. The organizers wanted to spread the message that "Pipelines need to be built. Bill C-69 and 48 are obviously a problem. And (so is), the carbon tax."[6]

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[2] Brian Zinchuk, "'We've got nothing to lose': Inside Grande Prairie's truck convoy supporting oil and gas," *Alaska Highway News*, December 19, 2018, https://www.alaskahighwaynews.ca/bc-news/weve-got-nothing-to-lose-inside-grande-prairies-truck-convoy-supporting-oil-and-gas-3502190.

[3]Karen Bartko, "Nisku truck convoy and pro-pipeline rally 'way bigger than expected': organizer," *Global News*, December 19, 2018.

[4]Brian Zinchuk and David Willberg, "Our winter of discontent: Estevan truck convoy protest attracts 427 units, 15 kilometres long," *SaskToday.ca*, December 22, 2018, https://www.sasktoday.ca/south/local-news/our-winter-of-discontent-estevan-truck-convoy-protest-attracts-427-units-15-kilometres-long-4128059.

[5]Brooks de Cillia and Patrick McCurdy, "No Surrender. No Challenge. No Protest Paradigm: A Content Analysis of the Canadian News Media Coverage of the 'Yellow Vest Movement' and the 'United We Roll Convoy,'" *The Canadian Review of Sociology,* 57, 4, 2002, p. 659.

[6]Taylor Blewett, "United We Roll protest: Truck convoy ends Hill rally, gears up for Day 2," *Ottawa Citizen*, February 20, 2020, https://ottawacitizen.com/news/local-news/united-we-roll-protest-what-to-expect-downtown-this-week/.

- June 2019: In the United States, there was also the Timber Unity rally, a convoy of truckers in Salem, Oregon, protesting the Democrats' proposed environmental policies.[7] The protesters came together from a number of sectors (truckers, farmers and forestry workers) at Salem's Capitol to oppose the Democrats' environmental policies to limit GHG emissions causing climate change. A convoy was also formed in February 2020.[8]

The February 2022 trucker convoy thus came in the wake of similar convoys supporting the idea that measures such as the carbon tax and bills C-48 and C-69[9] were disproportionately affecting Alberta's energy sector. They also strongly denounced the lack of new pipelines.

The ideological nature of these protests was also a subject of debate. It is possible to draw a certain parallel between the "United We Roll" movement and that of the Yellow Vests (*Gilets jaunes*) in France (2018) insofar as carbon tax issues triggered both protests. Although the issues are not the same (we will return to the regional aspect), the idea behind them remains that climate-related policies are being imposed and are detrimental to the interests of a certain class of the population.[10] However, some people have criticized the United We Roll movement as extremist for its xenophobic rhetoric, especially in the case of Yellow Vests Canada, whose tone was more identitarian in denouncing immigration, globalization, and the liberal government.[11]

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[7]David Davis, "Log trucks arriving in Salem for demonstration creating traffic backups," *Statesman Journal*, June 27, 2019, https://www.statesmanjournal.com/story/news/2019/06/27/log-trucks-arriving-salem-demonstration-creating-traffic-backups/1583244001/.

[8]Whitney Woodworth, David Davis and Connor Radnovich, "Timber Unity returns to Salem: 1,000-truck convoy, rally target carbon cap-and-trade bill," *Salem Statesman Journal*, February 6, 2020, https://www.statesmanjournal.com/story/news/2020/02/06/timber-unity-returns-cap-and-trade-protest-salem-traffic/4668677002/

[9]C-48 (2019) is an act to more strictly regulate crude oil transport along British Columbia's north coast while C-69 modified the Impact Assessment Act and the Canadian Energy Regulator Act.

[10]"Face à la flambée des prix du carburant, assistera-t-on au retour des gilets jaunes?", *L'Express*, October 16, 2021, https://www.lexpress.fr/actualite/societe/face-a-la-flambee-des-prix-du-carburant-assistera-t-on-au-retour-des-gilets-jaunes_2160611.html.

[11]Elizabeth Hames, "Don't dismiss them as 'crackpots': Who are Canada's yellow vest protesters?", *CBC News*, January 11, 2019, https://www.cbc.ca/news/canada/edmonton/yellow-vests-canada-alberta-1.4974721.

In sum, numerous warning shots were fired but were not taken seriously, particularly in the case of the February 2019 convoy that represented a sort of prelude to what might happen, despite nothing yet being set in motion.

## 2) The ideological evolution of the Canadian right

The protests have been described in various ways. Many have insisted on the importance of radicalization and even disinformation from the protesters and other political actors for understanding what happened.[12] For a clear idea of the nature of the event, one has to look back prior to the pandemic to understand the ideological and political context in which the trucker convoy developed, which is part of a larger backdrop extending beyond the pandemic.

Here I refer to some analyses from my book *Droitisation et populisme* on the post-Harper (post-2015) evolution of the Canadian right and the upsurge in new political cleavages that, over the last three elections, have revived the East/West divide.[13] The victory of Justin Trudeau's Liberal Party of Canada in 2015 brought new directions in environmental policy that created great resistance, especially the introduction of a carbon tax. The environmental policies and delays in (and cancellation of) pipeline construction also contributed to the new political dynamic in which some groups and political parties opposed all forms of carbon taxation. In this context we saw a rise of western alienation starting in 2019.

This idea that the federal government treats the West unfairly is nothing new and has always been somewhat present in the political space of the West, particularly Alberta. It became, however, less of an issue when Stephen Harper was in power. The 2015 election of the Liberal Party of Canada and a policy program heavily oriented toward environmental policies saw its progressive return, especially in Alberta where regional dissatisfaction is stronger than elsewhere in the Prairies.[14] This dissatisfaction also

[12]Pierre Saint-Arnaud, "Le juge Richard Wagner s'inquiète de la stabilité de nos institutions," *La Presse*, June 9, 2022, https://www.lapresse.ca/actualites/national/2022-06-09/le-juge-richard-wagner-s-inquiete-de-la-stabilite-de-nos-institutions.php.

[13]Frédéric Boily, *Droitisation et populisme, Canada-Québec-États-Unis*, Quebec City, Les Presses de l'Université Laval, 2020.

[14]Evelyn Brie and Félix Mathieu, *Un pays divisé. Identité, fédéralisme et régionalisme au Canada*. Quebec City, Les Presses de l'Université Laval, p. 135.

translated to strong conservative support among Western Canada's electorate in 2019.[15]

Yet, the "return" of regionalism has led some intellectuals and political actors to want the region to retreat politically (autonomism and separatism). The proponents of this view believe that any change in power is permanently blocked by the "Laurentian Elite" who live in the centre of the country along the Toronto-Montreal corridor. Some have concluded that the western provinces need to be protected against the liberal "assault" on the energy sector with its environmental policies, in addition to the equalization-related concerns that led to a referendum (October 2021). This opposition to Liberal climate policies is not limited to marginalized groups; it also broadly exists in the Albertan political space, especially among the Liberal government's opposition.[16] It should be remembered that other Conservative provincial governments have unsuccessfully contested the constitutionality of the carbon tax in the Supreme Court (March 2021). Finally, this political agitation arose while the energy sector was undergoing major changes due to the decline in oil prices, especially since 2015. Economic anxiety was therefore high from 2016 onwards, with 45% of Albertans concerned for their financial future, the highest rate in Canada.[17]

The Wexit movement emerged in this context of economic and regional dissatisfaction. Now known as the Maverick Party, it garnered low electoral scores in 2021. This should not, however, be interpreted as a sign that regionalist dissatisfaction is waning, especially since a portion of the dissatisfied electorate's vote was taken up by Maxime Bernier's People's Party of Canada, which achieved greater electoral success in Western Canada, pulling in 7.4% of the vote in Alberta, 7.6% in Manitoba, 6.6% in Saskatchewan, and 4.9% in British Columbia.

When the pandemic broke out in March 2020, the situation was already conducive to dissent, and economic dissatisfaction and criticism of the health measures could converge, as both were seen as imposed by Liberal elites wanting to control individual liberty and halt the region's economic development. The pandemic acted as an

[15]Frédéric Boily and Timothy van Den Brink, "Le retour du régionalisme en Alberta et dans l'Ouest," *Études canadiennes/Canadian Studies*, no. 92, June 2022, p. 1-24.
[16]Timothy van Den Brink and Frédéric Boily, "Retour sur le populisme en Alberta. La campagne électorale de 2019," *Les droites provinciales en évolution. 2015-2020. Conservatisme, populisme et radicalisme*, Ed. Frédéric Boily, Quebec City, Les Presses de l'Université Laval, 2021, p. 83-103.
[17]Angus Reid, February 23, 2016, http://angusreid.org/wp-content/uploads/2016/02/2016.02.23-Fed-Issues.pdf.

"ideological accelerant" in a political climate where significant criticism of the federal and even provincial governments already existed.

Over the pandemic's waves, the climate became more heated in a number of Canadian provinces such as Alberta and Saskatchewan. Initially, the vast majority of the western world's population, including Canada, accepted the necessity of government-implemented health measures; in the face of an unfamiliar event, the burden of decision-making was suspended and became the responsibility of governments.[18] Later, loud COVID-19 protest movements made themselves heard and the early acceptance progressively made room for an increasingly large turnaround, affecting a larger part of the population.[19]

The health measures implemented to fight COVID-19 therefore brought new momentum to movements already opposed to federal government policies. Conspiracy theorists also multiplied, with the pandemic as a rallying point.[20] The protests in turn became platforms uniting individuals with differing objectives but who converge on their shared opposition of health policies implemented by the federal government.

## 3) Nature of the protests and explanatory factors

It is difficult to describe the ideological nature of the trucker convoy. Should the movement be viewed as an attempt to overthrow the Canadian government by appealing to the Governor General? Or as a radical far-right movement willing to use violence to achieve its aims? Or strictly as a loud, strong protest against mandatory vaccine passports for truckers crossing the Canada-United States border and an expression of the population's profound pandemic fatigue?

[18]Jean-Claude Kaufman, *C'est fatigant, la liberté…,* Paris Éditions de l'Observatoire, 2021.
[19]A survey by EKOS (December 2, 2020) demonstrated that people in the four western provinces were more likely to refuse to wear a mask (13% in Saskatchewan vs. 5% in Quebec) and that vaccine hesitancy was higher in Alberta than in Quebec. "Pandemic, Polarization, and Expectations for Government," *EKOS Politics*, December 2, 2020. https://www.ekospolitics.com/index.php/2020/12/pandemic-polarization-and-expectations-for-government/.
[20]Martin Geoffroy, Frédéric Boily, and Frédérick Nadeau, "Typologie des discours conspirationnistes au Québec pendant la pandémie," CEFIR, CEGEP Edouard-Montpetit, January 2022. p. 48.

The initial demand was narrow—the elimination of mandates to cross borders—but then widened, as is common, as recriminations were added to the cause. This type of movement eventually amalgamates a set of concerns of different types because “dans la rue, on ne marche pas comme un seul homme” [in the streets, you walk as more than just one man].[21]

Nonetheless, we believe that one way of presenting the facts is to describe the convoy through the concept of populism. The populist wave of the 2010s must be understood in three major spheres: economic, cultural, and political.[22] The first consists of the economic difficulties that began with the 2008 financial crisis and created fertile ground for the rise of movements like the Tea Party in the United States. As we have mentioned, some parts of Canada were subjected to economic hardships from 2015 onwards, providing impetus for populist discourse. Cultural factors include issues essentially revolving around immigration, which is perceived as “massive.” Immigration is viewed as a factor that weakens host societies and threatens the cultural integrity of their language, culture, and religion. A part of the host populations oppose the arrival of immigrants, creating a cultural backlash. When seen this way, immigration is not a source of enrichment but rather a source of social destabilization for those with a fear of invasion or “the great replacement.” Finally, political factors refer to various elements, particularly loss of confidence in the political system and in the political parties who are no longer seen as effective instruments for defending voters’ interests. Since 1945, this strong trend has arisen in western democracies undergoing major transformations due to various causes (influx of refugees, terrorism, financial and environmental crises) that have put enormous pressure on current representative systems.[23]

To avoid generalizing, we can identify two types of populism: protest populism and identity populism. The protest form of populism involves discourse denouncing the elite who are believed to not listen to the people and to impose constraints on the them for the sole benefit of themselves, without taking the people’s will into consideration.[24] In this type of discourse, political leaders are accused of implementing policies that run counter to the interests of ordinary people, as the elite

[21]*Dictionnaire des mouvements sociaux*, Eds. Olivier Fillieule, Lilan Mathieu, and Cécile Péchu, Paris, Sciences Po Les Presses, 2009, p. 343.
[22]Gilles Ivaldi. *De Le Pen à Trump : le défi populiste*, Brussels, Éditions de l’Université de Bruxelles, 2019, p.16-17.
[23]Pierre Martin, *Crise mondiale et systèmes partisans*, Paris, Les Presses de Sciences Po, 2018, p. 13.
[24]Gilles Ivaldi. *De Le Pen à Trump : le défi populiste*, *op*. *cit*., p. 45.

think only of serving their own interests and quenching their insatiable thirst for power and control.

The other form of populism, national or identity populism, targets immigrants who are seen as alien to the "true" people, defined by ethnocultural characteristics like language, culture, or even religion. This type of populism can be found in European movements like the National Front, now known as the National Rally. This populism strongly opposes immigration, perceived to be flooding European societies, and translates to anti-migration policies and even a policy for immigrants to "go home."

In the case of the February 22 protests, the protest form of populism—criticizing the elite for not listening to the people, the populism of ordinary citizens and workers—appeared to be dominant. This was apparent in some politicians' support for the truckers, who presented the truckers as representatives of the people on the bottom expressing their dissatisfaction with the politics of the elites at the top, as did Maxime Bernier, who criticized the health policies of all levels of government as tyrannical during his 2021 electoral campaign.[25]

It is also important to keep in mind that the people protesting and revolting are not necessarily from the poorest social groups. Rather, they are the people who expect to receive a certain due in a given context and are disappointed in what they actually receive, which can be referred to as relative deprivation.[26] It is therefore not the absolute difference between the two that is important, but the difference between what people expect from political players and what they receive. In the context of Western Canada, with a real increase in unemployment and growing economic hardship, many people feel that they are not receiving their fair share from the federal government. They see themselves as not just contributors, but contributors who are being prevented from properly carrying out their work through barriers to Albertan and Saskatchewan energy sector operations.

Using this framework that presents all of the protests as a period of oppositional populist expression—brought together by "the uniting slogan"[27] of liberty—it seems possible to identify three major types of protesters.

1) For some, the trucker convoy symbolized something of a turning point. From this perspective, the protests were a period of cultural and generational

[25]Louis Gagné, "Maxime Bernier fera campagne contre la 'tyrannie" sanitaire," *Radio-Canada*, August 20, 2021, https://ici.radio-canada.ca/nouvelle/1818100/maxime-bernier-chef-parti-populaire-canada-candidat-retour-normale-tyrannie-sanitaire.
[26]*Dictionnaire des mouvements sociaux*, *op*. *cit*., p. 242-243.
[27]Jean-Claude Kaufman, *C'est fatigant, la liberté…, op*. *cit*., p. 201.

revolution, similar to Woodstock, as expressed by a resident of Valleyview in northern Alberta.[28] It is also important to consider the many individuals and families who attended the protests not to reverse the constitutional order of Canada, as prescribed by the Memorandum of Understanding that called for the end of the health measures to fight COVID-19 and denounced supposed human rights violations, but to express their dissatisfaction with the health policies.

2) For other protesters, their impetus preceded the pandemic and was driven by regionalism and exacerbated by policies affecting the energy sector. In this respect, it is important to not confuse regionalism with the far right. The Maverick Party advocates autonomist policies and aspires to separatism, but its policies could not be termed extremist.[29] The Party does not advocate violence, instead following the separatist legacy of the early 1980s. Tamara Lich, who left the Maverick Party and was one of the figureheads of the convoy, belongs to this regionalist movement. In 2020, she stated that the outcome of the federal election was not decided by western voters, and that due to different "lifestyles," what worked in the East didn't work in the West (firearms, for example). She added that the system was broken and that either constitutional reform or independence was needed.[30] Lastly, she brought up Liberal government bills that are widely criticized by the Western Canadian right (and sometimes even beyond the right).
3) Some protesters were motivated by the far right and conspiracy theorists. This nebulous, identity-based far right condemns "communism," the UN Global Compact for Migration signed in Marrakesh, and "illegal immigration." They also combine conspiracy theory rhetoric with discourse on the defence of

[28]"What would ever cause my level-headed wife to seriously consider loading our four young children into a van for a spontaneous 4,000-kilometre road trip from northern Alberta? Her answer made me rethink the significance of this protest: 'This is Woodstock,' she said." Nathan Steinke, "Opinion: Truckers' convoy the Woodstock of our time," *Edmonton Journal*, January 28, 2022, https://edmontonjournal.com/opinion/columnists/opinion-truckers-convoy-the-woodstock-of-our-time.

[29]The party had a change of leadership when founder Peter Downing was replaced by current party leader Jay Hill. The Maverick Party made it to the polls and their program made little mention of immigration. The party's stances are essentially based around defending the region, meaning Alberta. The party can, however, be described as radical; western discontent with Ottawa is widespread but not to the point of sharing the Maverick Party's objective of separatism.

[30]Blair Crawford, "Who is the Freedom Convoy's Tamara Lich — the 'spark that lit the fire,'" *Vancouver Sun*, February 4, 2022, https://vancouversun.com/news/local-news/who-is-tamara-lich-the-spark-that-lit-the-fire/wcm/166d4824-d440-4710-ade8-5b84c2203f88.

liberty, which is supposedly threatened by liberticidal politicians. Organizer Patrick King belongs to this movement, as do those who brandished confederate flags. As sociologist and director of CEFIR Martin Geoffroy states, the protests were also a social arena for conspiracy theorists to both be heard and find elective affinities.[31] A real hint of identity populism can be observed within this group.

The boundaries between the three groups are porous; conspiracy theorists can be found everywhere, and militant regionalists can share anti-immigration rhetoric. It is, however, important to conceptually differentiate them to avoid lumping together all the different people who walked with the truckers in cities across the country, much like it is important to not automatically group far-right militants with those defending a western regionalist and autonomist agenda. They do, however, converge on the opinion that Canada's political system is no longer working and is harming ordinary citizens, while the elite promote policies that are detrimental to certain regions (prior to the pandemic) and all citizens (during the pandemic). From this perspective, the pandemic provided a point of convergence that made it possible for complaints and recriminations to be heard.

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In this research note, we have developed the idea that the trucker convoys are not solely an effect of the pandemic. They are also the product of policies, particularly environmental policies, that were implemented by the federal government prior to March 2020 and the difficult context in some Canadian provinces, like Alberta, that have been affected by the economic slowdown of 2015 on. Despite strong election results in the West, the conservatives were unable to return to power in 2019 and 2021. Their inability to be re-elected led a minority of citizens to believe that the situation was deadlocked and the only way to be heard would be to move the battle from the House of Commons to Wellington Street, and, in the case of certain actors, to turn to radicalism.

[31]Maëlane Loaëc, "Canada : qui sont ces camionneurs du 'Convoi de la Liberté' qui assiègent Ottawa?" *TF1 info*, February 8, 2022, https://www.tf1info.fr/societe/canada-qui-participe-au-convoi-de-la-liberte-qui-assiege-ottawa-2210300.html.

In any event, we need qualitative studies[32] to provide a clearer idea of the protesters' motivations for a more detailed portrait of the issues at play. Although we could not predict exactly what would happen, we could nonetheless anticipate, following the 2019 and 2021 elections, that Canada has been fractured and that our political parties are no longer necessarily able to play their traditional role as vehicles of social and regional demands in a context of mistrust in the political elite, hence the appeal of other avenues.

[32]Frédérick-Guillaume Dufour, *Entre peuple et élite, le populisme de droite*, Montreal, Les Presses de l'Université de Montréal, 2021, p. 39.

# The Developing Role of Private Security in Public Order Policing

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# Executive Summary

This Expert Report provides a summary of the relationship between private security and public order policing in the Anglo-American context from the 1700s through to the present-day. Both historically and contemporaneously the deployment, interrelationship, and functions of public and private policing often overlap.

The most profound shifts in the organization of public safety have come on the heels of public order debacles following widespread and destructive rioting. There is considerable discussion in the archives of political theory and governance about the correct response to these uprisings in both the European and later North American context.

Whereas the English policing system had all but abandoned its private roots by the end of the 19th century with the advent of a professional constabulary, in North America the political and economic context was far less developed. Industrialists took it upon themselves to use henchmen and deputized private police to put down labour unrest, sometimes rather brutally, in contradistinction to established public policing in Europe. This posed significant challenges to state legitimacy, particularly in the United States.

By the end of WW2 the dominant form of policing for maintaining public order was public. Nonetheless, there were ample signs that the private security sector was about to undergo an important resurgence in the latter 20th century. Alongside the re-emergence of private security was an apparent re-evaluation of public order approaches. The terrorist attacks on the United States on 9/11 significantly accelerated the ramping up of the security-industrial complex. Private security had witnessed an expansion in both size and responsibility since the 1960s. Private guards were now patrolling large swaths of urban and commercial settings, while also undertaking security for key infrastructure and mega-events. Over the last half-century, the private sector has become not only more important in the everyday policing of citizens but its relations with the public police have become far more entwined with the rise of neoliberalism and the war on terror.

During the Toronto G20, private security was enmeshed with both the military, provincial, federal, and Canadian security establishment. The groundwork for such a relationship had already been laid through formalized public/private partnerships such

the Toronto Association of Police and Private Security and the Canadian Bankers Association.

It appears that in contradistinction to the G20 and after decades of increased integration between security services, the military, and intelligence including the private sector, the Ottawa convoy protest did not trigger an intelligence-led nor integrated approach that would have involved the private security sector. The limited available secondary information indicates that the general lack of preparedness by the Ottawa Police Service and its lack of communication and coordination with other intelligence and policing services until the very late stages of the occupation similarly estranged Ottawa's private security sector.

The development of ready-made public-private policing networks have the potential to spontaneously expand the intrusiveness and intent of emergency security measures, affecting citizen privacy, liberty, and freedom from surveillance and coercion.

## Introduction

This paper will review the historical development of public order policing in relation to private security. The binary of "public versus private" in the context of policing can often be distracting, sometimes hiding more than it reveals (Rigakos, 2005). Both historically and contemporaneously the deployment, interrelationship, and functions of public and private policing often overlap (Button, 2003; Jones and Newburn, 1998; Klare, 1975; Shearing and Stenning, 1983; South, 1984). Nonetheless, the public-private distinction can also be revealing as it conditions the intent and context for public order policing. Indeed, the state's historical response to emergencies and it's understanding of the role, function, and legitimacy of police throughout the western world has been hardened by the juxtaposition of public versus private policing.

State formation itself, *raison d'etat*, the rule of law, notions of justice and protection of citizen rights have their theoretical and conceptual concretization in discussions about *police science* in the late 17$^{th}$ through early 19$^{th}$ centuries (Foucault, 2003; Neocleous, 2000b; Rigakos et al., 2009). Much of the discussion surrounding what the state may or may not do revolves around its responsibility to its subjects and its duty to protect property and persons while safeguarding the interests of the sovereign. Not surprisingly, these seminal discussions related not only to the broad project of a police science (Delamare, 1722; Sonnefels, 1765; von Justi, 1756) but also to the specifics of organizing populations and the most favourable institutional formation for policing,

ensuring the welfare and security (Petty, 1927) of the sovereign's subjects and (later) the republic's citizenry.

The most profound shifts in the organization of public safety have come on the heels of public order debacles following widespread and destructive rioting. There is considerable discussion in the archives of political theory and governance about the correct response to these uprisings in both the European and later North American context. Central to the state response has been a consideration of the role of private and commercial actors in both the preparation and response to labour, and other political unrest. Indeed, a defining characteristic of contemporary institutional policing arrangements has been the state's reaction to failures in public order policing and, in particular, the role of private security during such unrest.

This paper will focus on the role and response of private policing to public order incidents including labour unrest and riots since the 1700s in the English, American and Canadian contexts. It is divided into five sections. The first deals with the formative logics of policing in the face of significant public order challenges and rioting in the English context up to the mid 19th century. The second section focuses on industrial unrest in North America and the effect of post-colonial urbanization and industrialization through to the 20th century that posed both echoes of policing challenges in England and France as well as unique crises of legitimacy for an emerging state apparatus in both Canada and the United States. The third section concentrates on the maturity and then recrudescence of private security after the Second World War in into the latter parts of the 20th century under the advance of global neoliberalism, mass private property, and accelerated capital accumulation. The fourth section examines the role of private security for public order policing in the aftermath of 9/11 that had both symbolic and structural effects on the relationship between public and private policing under the umbrella of the 'war on terror.' Finally, this paper turns to two very recent Canadian case studies of the role of private security during public order incidents: the Toronto G20 and the Ottawa convoy siege.

## 1. Private policing and the foundations of public order

It is a generally accepted historical milestone that the first organized, salaried, centralized and professional police were formed in metropolitan London in 1830. Operating out of Scotland Yard the new police are cited as the forerunners of the contemporary Anglo-American policing system. Of course, both French and other continental forces were already well-established many years prior (Emsley, 1999) and the English themselves had been experimenting with colonial forms of policing for

quite some time both overseas and closer to home with paramilitary Irish and Scottish constabularies. Moreover, night watchman, parish constables, marching watches, special constables as well as a very robust private policing system comprised of both unofficial “thief takers” (McMullan, 1995) who played both sides of the law and deputized “inspectors” operating out of the Bow Street (Critchley, 1967) office under Magistrate John Fielding had already been in place since the mid-1700s.

While there is some debate amongst historians about the particular catalyzing forces that gave birth to the Metropolitan Police, such as the political manoeuvring of Home Office Minister Robert Peel, the relative persuasiveness of police advocate Patrick Colquhoun, and the extent to which English subjects accepted the presence of the “Bobbies” based on class position (Emsley, 1991; Reiner, 1978; South, 1987; Storch, 1975), there is far more agreement on two interrelated factors that directly affect our understanding of public order policing. First, that the existing patchwork of 18th century watchmen, constables, thieftakers and patrols were wholly inept at mounting a coordinated response to rioting and, second, that this was most clearly exemplified in the catastrophic failures of the existing system to deal with the Gordon Riots of 1780 that led to days of bloodshed, an assault on the House of Commons, attacks against Members of the House of Lords, the near occupation of the Bank of England and breaches of Newgate Prison, New Prison, Fleet Prison and the Clink.

It was only after the military was called in, leading to the death of 285 rioters, the wounding of 200 more and the arrest of some 450 others that calm was finally restored. Yet the unrest left an indelible mark on Londoners and stoked fear among the British aristocracy and the emerging bourgeois class. There were calls for a centralized policing system and widespread criticism of the makeshift array of police and private thieftakers that patrolled London. The broadsheets of the time recounted how one night watchman rang his bell and called out the hour oblivious to the fact that the Bow Street police office was burning in the background.

A few years later the *London and Westminster Police Bill* was designed to establish nine police divisions in London consisting of a force of both mounted and foot constables including divisional chief constables in turn responsible to a head constable. The force would be overseen by three commissioners appointed by the government. According to Critchley “the Bill was poorly presented and abysmally managed in Parliament” such that it was withdrawn and a repurposed version applied to Dublin with far less opposition (Critchley, 1967: 20-1).

Despite fears of another insurrection and ongoing rioting in the intervening years the British establishment was slow to implement a government-subsidized policing system. Possibly due to the fact that the rioting was largely provincial during the war

against revolutionary and Napoleonic France from 1795-96 and then again from 1799-1800, and despite the fear of English Jacobin unrest, there was a general xenophobic reticence to implement any system of order maintenance that mimicked the French policing system. As a result, organizations such as The Associations for the Prosecution of Felons made up of "local worthies, usually gentlemen, farmers and tradesmen" would pay a small subscription to finance the investigation and prosecution of persons that committed criminal acts on or against their property. Sometimes, these prosecutions would take place against less fortunate competitors or, would employ private thieftakers who would themselves be involved in London's criminal underground, cashing in on bounties and rewards by turning in their own criminal accomplices and competitors. In such a policing chaos, notorious characters such as Jonathan Wild, self-proclaimed "thief taker general", would prowl the streets of London flanked by paid henchmen looking to enforce the law for the highest bidder (McMullan, 1995).

It was almost 20 years after the Gordon Riots, under new stipendiary magistrate Patrick Colquhoun that the first reported antecedents for our policing system were developed. Unsurprisingly, it was a private police force, set up by a group of West India merchants aimed at protecting their goods from theft on the Thames. The *Thames River Police Act* included the creation of a paid constabulary that instituted the earliest examples of workplace surveillance, access and egress control, the dispensation of salaries and the routine patrol of quays and docks for the purposes of mitigating losses (Emsley, 1991).[1] It was a quintessential early police office akin to the Bow Street office, paid for by the merchants themselves but sworn to uphold the public office of constable. From the outset, the first machinations of order maintenance and prevention in the face of public order was met with a private solution that only became fully public and incorporated into the London Police years later. By 1827 the Thames Police consisted of seven land constables and 64 river constables. Most importantly, however, "[w]hen it was considered necessary both these men, and the various other constables and patrols established in the metropolis, could be summoned to assist with crowd control" (Critchley, 1967: 21).

[1] The Marine police were to enforce strict rules of conduct and monitor the river's proletariat by implementing dress codes, paying 'lumping rates,' managing accounting, determining wagelessness and stopping illegal activities on London's shipping lane. They did so by applying themselves to the apparent trivialities of order maintenance: no frocks, wide trousers, jemmies, or hidden pockets were allowed on board boats; any on-the-job takings were forbidden and confiscated.

By 1867, the new professional police had largely replaced the watch and parish constabularies, spreading from the city of London to surrounding boroughs and throughout the English countryside. Much of this early adoption was as a result of the Poor Laws that criminalized vagrancy and idleness throughout the countryside and, not surprisingly, instigated a litany of riots and uprisings across the country. Many of the new police were paid for through the machinery of the Poor Law. Soon after the London police appeared, the guardians of the Blything Union, Suffolk, formed a paid, mounted police. Three metropolitans were hired to watch the beerhouses. They gathered information as to the 'haunts of suspected characters', and observing the 'habits of such as were vicious' after the riots against the poor laws. Another Suffolk union near Ipswich also got three metropolitans after anti-poor-law disturbances and paid them out of union funds (Storch, 1989: 117) . Very early, rural parishes would contract with Metropolitan police to investigate crimes.

After a brutal robbery and murder in the spring of 1834 in Stow-on-the-Wold, the divisional magistrates brought down a London policeman who solved the crime. Private associations, formerly created to hire private thieftakers on retainers, were now formed to hire police. While the new police were welcomed by the industrial and merchant classes, they were initially despised by radicals, Chartists and unions labelling them "despotic", a "threat to rights" (Critchley, 1967: 40) and as a standing army for the propertied classes. In fact, only three years after their inception, the London police came under attack when Sgt. Popay was caught infiltrating the National Political Union, posing as an artist. A London mob responded by stoning and stabbing three Bobbies – one of whom died. The courts originally ruled the killing a justifiable homicide until it was later successfully appealed. Much of the bitterness against the new police could be attributed to the fact that they were placed among the working classes to monitor all phases of working-class life – including trade union activity (Storch, 1975: 117). When it appeared that control of local councils by Chartists and sympathizers would result in the police being under the direction of radicals, in 1839 the Whig government took the drastic step of taking direct control over the police in Birmingham, Bolton and Manchester. In the case of Manchester, the government imposed the *Manchester Police Act* to ensure the long-term regional administration of policing service and to pre-empt smaller boroughs with radical elements from ever again taking control of the police (Joyce, 1993).

Despite protestations by leftist groups and a deep distrust and hostility from workers, the new police eventually became as ubiquitous and as identifiable with British culture as the crown itself (Loader and Walker, 2001). This was a relatively rapid ascent into popular acceptance. Over the course of only four decades the local "bobby" became an everyday part of British life and had replaced the retainer systems and dependence

on private police up to the late 18th century. This change was facilitated by the need to maintain a non-military force that could rapidly deploy in order to put down riots. Despite the fact that the new police were assigned to various rural, urban and borough offices, they were nonetheless part of a centralized and coordinated system of deployment in the face of potential civil unrest or emergency. Thus, a major catalyst for the development of the English public order policing system was the perceived ineffectiveness and insular nature the private and hybrid forms of policing that preceded it.

## 2. Industrial unrest and a crisis of legitimacy

Whereas the English policing system had all but abandoned its private roots by the end of the 19th century, in North America the political and economic context was markedly different. Nascent state legislatures and poorly financed town and city administrations with little to no tax revenue were poorly equipped for the flood of immigration, urbanization, rapid industrialization, and the concomitant unrest that this would entail. As a result, industrialists took it upon themselves to use henchmen and deputized private police to put down labour unrest, sometimes rather brutally, in contradistinction to established public policing in Europe.

In the American context, labour disruptions produced experiments with private policing such as the Coal and Iron Police, who worked directly for industrial interests and were often brutal in their methods of strike-breaking and unscrupulously infiltrating and undermining worker associations (Friedman, 1907). As American railroad baron and financier Jay Gould once put it: “I can hire one half the working class to kill the other half.”

While the RCMP was ‘getting their man’ north of the 49th parallel, Allan Pinkerton was conducting investigations that led him across the United States and into Canada. In 1868, Pinkerton and his men tracked the infamous Reno Gang from Indiana to Minnesota and on to Windsor, Ontario. He arrested the train robbers and delivered them up to New Albany, before the Indiana Vigilance Committee caught up with the culprits and exacted vigilante justice, hanging all four Reno gang members (Adler, 2000). The Burns Detective agency has a similarly illustrious past, acting as a national detective agency long before the country could mobilize its own investigative bodies.

Dubofsky and Dulles (2004) argue that the depressions of the 19th century increased workers’ persistence to form and sustain unions but the response to their efforts to obtain recognition was hostile, resulting in open warfare between workers and

employers. Throughout this period, workers received no support from either federal or state governments, or from the courts. Conversely, factory owners were endowed with the power to use police and military troops as well as private security – including the notorious Pinkerton Detective Agency (Morn, 1982; Hogg, 1944) against the labour unrest. In the U.S., the 19th century was marred by violent encounters between workers and police forces– often private, and often with the help of the military.[2]

This was perhaps most clearly evidenced in the brutal violence exhibited during the Homestead massacre instigated by the Pinkerton Detective Agency on behalf of Carnegie Steel in 1892. Three-hundred Pinkerton men set upon the strikers from barges pulled by tugboats on the Monongahela River and the two groups exchanged gunfire. The strikers used ancient guns and even a repurposed cannon while the Pinkerton men, funded by Carnegie Steel and working at the behest on anti-union zealot Henry Clay Frick, were equipped with Winchester repeating rifles. When the dust had settled, 12 people were dead and the National Guard had to deploy 8,500 troops to secure the private guards who were being bludgeoned by the strikers after their surrender (Krause, 1992). The Homestead strike was only one of many brutal engagements between hired henchmen or the military to subdue workers during the late 19th century. While Carnegie Steel eventually succeeded in crushing the union, public opinion turned against Frick and the Pinkertons. Twenty-six states subsequently passed laws outlawing the use of hired private union-busters like the Pinkertons (Dubofsky and Dulles, 2004).

The entrance of the U.S. in WWI created the conditions for organized labour to be officially recognized as an important player within the national economy. The *Clayton Act* (1914) exempted unions from prosecution under the anti-trust laws in recognizing the right to organize and to bargain collectively. President Wilson also established a National War Labour Board (NWLB) in 1918 to serve as a final court of appeal to settle all industrial disputes if they could not be solved through other means. These developments resulted in a gradual rise of wages and an increase in union membership to over a million from 1916 to 1919. However, when wartime restraints were removed and the NWLB was disbanded, the contest between the workers and employers started anew. 1919 witnessed industrial strife on a scale greater than the country had ever experienced. There were more than 3,500 strikes that were joined by over 4,000,000 workers (Dubofsky and Dulles, 2004: 221).

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[2] To name a few: Tompkins Square Riot (1874), Haymarket Square Riot (1876), Great Railway Strike (1877), Rolling Mills Workers Strike (Bay View Tragedy) (1886), Sugar Cane Workers Strike (1887), Homestead Strike (1892).

Recall that when class hegemony appeared to be slackening, English legislation introduced in 1859 took the unprecedented step of seizing control of policing out of the hands of the local authorities of three large industrial cities: Birmingham, Bolton and Manchester. The Whig government feared Chartist disorder and a sympathetic local government (Emsley, 1991: 41). The move to a police that would follow capitalist demands would thus be repeated in Canada and the United States over half a century later when local police forces failed to crush labour unrest, or in some cases, simply refused to deploy or joined the strike. During the 1919 Winnipeg General strike, the local police resolved to join rather than fight the workers. The RCMP was summoned, and with the assistance of hastily sworn-in 'specials' promptly and quite brutally smashed the strike. While many of these specials were returning military veterans, it was not lost on the government that the use of the Canadian military in Vancouver to suppress a general strike in the previous year, had resulted in only enraging the labour movement. The army had ransacked labour offices and thrown organizer Victor Midgley out of a window and forced him to kiss the British flag. The RCMP was later involved in similar violent strike breaking in Estevan Saskatchewan at the Souris coal field where they shot and killed three strikers and wounded eight others. A monument bearing the inscription "murdered in Estevan, September 29, 1931, by the RCMP" still stands in Bienfait cemetery. There are a litany of other examples of the RCMP being used as the police force of last resort throughout Canadian labour history (Brown and Brown, 1978).

American industrialists eventually began to employ state police, and in many instances they would seek to legislate their own private forces (see Couch, 1981; Weiss, 1978). As noted, clashes between private police and strikers were violent and lethal and the local militia were not always reliable allies. When the local sheriff, the local police, and a company's own private police appeared insufficient to control striking workers; the company would ask local authorities to demand state militia but they often found that these militia were sympathetic to the strikers. Militia from Pittsburgh refused act against their fellow citizens during the Great Railroad Strike of 1877. In Martinsburg, West Virginia, the local militia refused to ride a train operated by non-union labour (Robinson, 1978: :135).

In a move reminiscent of England a century earlier, when private security companies such as the notorious Pinkerton Detective Agency (Morn, 1982) proved too controversial and local guardsmen proved too unpredictable by galvanizing further resistance (Hogg, 1944), states across the union began to move to state-level law enforcement in an effort to create a more centralized, less locally dependent, and 'professional' service (Couch, 1981). In the same way it was clear to workers and political agitators in nineteenth century London, it was not lost on American labour

activists of the day that the legislative move towards the use of state "troopers" and "rangers" was a direct threat to their ability to mobilize. The police in Buffalo during the late nineteenth century did everything they could to smash union organizing, including stopping strikes and breaking up workers' meetings. The Broadway Market Riot, in the heart of the Polish community, broke out after a police charge stopped a labour meeting. Police reinforcements were called to quiet the disturbance. Radical working class meetings could not even start as the police blocked the entrances to rented halls (Harring and McMullin, 1975: 12).

Like their French, English and Irish brothers, the American labour movement was plainly aware of the role of these new state police. When the state of Illinois had before it a Bill to create a similar force, the labour organizations mobilized. The Illinois State Federation of Labor, under John H. Walker, sent a circular to all local unions: 'No more deadly menace to American institutions has ever crept into our government than the so-called 'constabularies' that have been created in several states where the corporation interests dominate and control. They are really armed government strike-breakers, kept for the purpose of crushing the workers into submission, preventing their organizing or improving their wages, hours, conditions, or treatment, against the wishes of the despotic interests' (as cited in Bechtel, 1995: 68). Walker argued to the state legislature that the proposed state police were just another example of the 'science of camouflage' by which anti-labour measures were made to appear as though they were *intended to serve the common good* (Bechtel, 1995: 70). Beginning in 1917, eight attempts were made to establish a paramilitary police in Illinois, ostensibly to undertake public order activities, but all attempts were heavily opposed by unions and eventually failed.

So, while it is very much true that private policing had all but been abandoned in Europe by the middle of the 19th century and yet emerged as a dominant form of public order policing in the United States a half century later (until similar issues of political expediency emerged), it nonetheless also seems that the public versus private dichotomy is less illustrative of police functionality than of state legitimation. In his historical examination of private detective industrial policing in the US from 1850-1940, Weiss (1978: 63) argues that "the public/private distinction can be seen as bogus" even though "this arrangement has had decided benefits in upholding the interests of capital". Similarly, in his analysis of the Coal and Iron Police, Couch (1981: 90) asserts that the move to state policing was as a result of the need to "guarantee stability of class and property relations" when the company cops proved too controversial. In the end, public and private police have historically been used interchangeably in the American pacification of the working class (Rigakos and Ergul, 2013). In Canada, the RCMP's use of 'specials' in lieu of the local police during the

Winnipeg General Strike was nonetheless facilitated alongside support by the wealthy Citizen's Committee of 1000 which was closely linked to the Borden government and had financed the infiltration, agitation and replacement of the strikers. Thus, at a pivotal moment in Canadian history, the state intervened to suppress a General Strike but, unlike the United States, it already had at its disposal a federal policing service that could be deployed to accomplish the job.

## 3. The re-emergence of private security under neoliberalism

By the end of the Second World War the dominant form of policing for maintaining public order, putting down industrial unrest, and the general pacification of the population was practically and conceptually, a public policing responsibility. Noted police sociologist Robert Reiner has argued that from about 1867 to about 1967 the police were in a type of "golden age," (Reiner, 1998) by which he does not mean beyond critique or controversy, as many minority populations, leftist organizers and civil rights activists would readily attest, but rather that public policing had become the *de facto* form of policing. Nonetheless, there were ample signs that the private security sector was about to undergo an important resurgence in the latter 20th century. Private security companies during the 1960s and 70s began to re-emerge and take a more active role in the infiltration, documentation, and surveillance of workers, students, and political agitators (Klare, 1975; South, 1984). Yet, it was not until the 1970s and into the 1980s that police researchers began to notice that the private security industry had overtaken the public police in North America (Rigakos, 2000b; Shearing and Stenning, 1982; Spitzer and Scull, 1977) and only a few decades later, most of Europe (de Waard, 1999; Jones and Newburn, 1995). Since the late sixties, the number of private security personnel relative to public police officers has been consistently higher in Canada (Sanders, 2003; Swol, 1999), Britain (Jones and Newburn, 1995), the United States (Cunningham, Strauchs, and Van Meter, 1990; Kakalik and Wildhorn, 1971) and many European nations (de Waard, 1999). In the U.S., it is estimated that private security outnumbers public police employment by at least 4:1, comparably higher than most western nations (de Waard, 1999).

Alongside the re-emergence of private security was an apparent re-evaluation of public order approaches (strategies and tactics) that police employ to manage and control mass demonstrations. Police researchers have noted that the turbulent 1960s and 70s saw Western governments increasingly using aggressive ("heavy-handed", "escalated-force") measures when attempting to manage left-wing mass

demonstrations (e.g. Anti-Vietnam and the civil rights movements) (Ericson and Doyle, 1999; Fernandez, 2008; Waddington, 1991). Others have argued that after the 1970s there was a move towards less coercion in Western Europe and North America (See for e.g.: Della Porta and Reiter, 1998; King and Brearly, 2005; McPhail, Schweingruber, and McCarthy, 1998). These researchers suggest that in the 1980s and 1990s the public police tended to employ 'softer' tactics oriented towards minimizing the use of force in their management of protests: often referred to as the "negotiated management model" or the "liaison approach". This purportedly softer form of protest policing relies on communicative rather than coercive intervention, flexible rather than strict law enforcement, and liaising/negotiation with moderate protest event organizers. Some critical scholars, however, dispute the claim that softer tactics supposedly superseded coercive measures throughout 80s and 90s (Ericson and Doyle, 1999; Gordon, 2006; Panitch and Swartz, 1993).

Empirical examinations of police paramilitarism show that since 1960, the number of police services with dedicated paramilitary units in the United States climbed from 0 per cent to 89 per cent in 1995 (Kraska and Kappeler, 1997). The tumultuous anti-capitalist protests in Seattle, Quebec City and Genoa demonstrate that police forces are well equipped and willing to use whatever force is necessary to disperse crowds.

As they have throughout the history of policing, and in particular in the United States (Couch, 1981; Weiss, 1978), private policing agencies are increasingly tied to this trend in public order policing. Wackenhut Services offers high-grade paramilitary security for American facilities. In Aiken, South Carolina, they hold a contract for protecting the Savannah nuclear facility run by the U.S. Department of Energy. The private police force (accredited by the Commission on Accreditation of Law Enforcement Agencies) operates special response teams and a helicopter. The officers are equipped with military rifles and uniforms. They are prepared for anti-nuclear protests. More comprehensive contract security firms are also available that offer complete labour suppression packages. Under the guise of 'asset protection' Vance Security Services is a one-stop shopping pavilion for all the needs of an industrialist. This security firm offers riots squads armed with batons, shields, helmets, etc., monitors labour picket lines by video surveillance, and even conducts private investigations on labourers. After Vance has secured your facility, infiltrated your workers, and begun "photo-documenting", they can even provide replacement workers. Their "workforce staffing team" provides temporary labour such as manufacturing and assembly workers, heavy machinery and precision equipment operators, warehouse and other distribution workers and forklift drivers who "take pride in exceeding productivity standards set by regular employees." Other security firms, such as Intelligarde, Scott Security and London Protection International

regularly engage in strike 'protection' duties. Special Response corporation specializes in labour disputes and offers military or police trained "disciplined" officers who may conduct photo surveillance and asset protection including planning for confrontations with unlawful pickets, compensation or identification for property of non-striking employees damaged during the strike, and provisions for recording working time and collecting pay. Gettier strike security offers similar services, including perimeter protection, video-taping picket lines, deploying strike dogs, and making sure scab labourers get into the facility. Other security agencies by-pass international laws by activating paramilitary and covert services to re-capture corporate hostages in oversees countries. Covert Recovery Service has operatives that are former soldiers in special services such as the CIA, Navy Seals, and MOSSAD. They brag: "diplomatic efforts fail, we never fail!" during their human 'snatch; operations and specialized intelligence gathering. In this particular case, colonial protection and military muscle has been undertaken by private contractors on behalf of international corporations. Jemsec International Security offers counter-piracy teams that will retrieve stolen cargo, escort ships, extract identified key figures and destroy boats and other vital equipment needed for the pirates to succeed. They will thus wage naval sabotage on behalf of private interest (see Rigakos, 2005).

Regardless of emphasis, since the late 1990s researchers have argued that the public police now tend to employ complex, hybrid approaches that also include (overt and covert) intelligence strategies and tactics in their attempts to control and manage mass protests. In particular, they argue that the anti-globalization demonstrations of the mid-1990s saw police adopt more aggressive, paramilitary measures alongside softer ones in order to manage mass convergences. For example, Ericson and Doyle (1999: 62) in their case study of the 1997 APEC protests in Vancouver found that the police reneged on a negotiated accord with student protesters as the RCMP made "illegal preventive arrests, censored peaceful expression and assaulted protesters who were already dispersing". Based on participant-observations at large protests in the United States from 2001 to 2005, Fernandez (2008: 8) argues that police now depend on both "hard-line" and "soft-line social control" tactics in order to manage anti-globalization protests. King (1997) also recognizes that there are indeed two opposing trends emerging simultaneously in Canadian public-order policing: conciliatory and consultative methods, he argues, operate alongside increasingly militarized potential for confrontation. Later, King (2004) adds emphasis to intelligence gathering, contingency planning, and crowd management. Regardless of when this mixture of soft and hard-line tactics became the dominant tendency, most scholars studying anti-globalization demonstrations now recognize the multi-modal character of protest policing.

de Lint and Hall (2009) try to move beyond both the 'return to coercion thesis' and the 'liaison approach' by providing a what they believe to be a more nuanced notion called 'intelligent control'. They provide a comprehensive historical analysis of protest policing that accounts for the development of both coercive and consensual tactics. The police haven't abandoned the liaison approach, but they suggest police agencies are now incorporate elements of both consent and coercion depending on the groups involved in a particular protest – what they refer to as "intelligent control". De Lint and Hall (2009: 6) recognize the "growth of intelligence-based, paramilitary and community policing applications" and argue that "these trends are complementary developments representing a shift from reactive ad hoc forms of coercion and accommodation to a more strategic integrated approach". The main objective of 'intelligent control' then is to exert as much control and predictability as possible during the ambiguous and dynamic instances of mass protests without causing a more radical politics. de Lint and Hall (2009: 275) stress the current role that intelligence gathering plays in protest policing operations which entails "action on information drawn as a result of pre-emptive or covert targeting, collection, analysis, and dissemination that then is used to manage conditions of mass public grievance expression". Thus, in concert with liaison and paramilitary practices police are reliant on intelligence-based tactics in their attempt to control anti-globalization protests.

This modulating approach, according to de Lint and Hall (2009: 7), aims to avoid dramatic confrontations and to conceal coercion and use pre-emptive and aggressive strategies to "identify, isolate, and target those they consider to be significant threats while the remainder are invited to cooperate or partner with the police liaison advice and information service." In sum, 'intelligent control' requires the strategic application of (1) a liaison function to negotiate with and accommodate with perceived moderate protest leaders; (2) the heavy use of surveillance to produce actionable intelligence; and (3) paramilitary policing measures to control perceived dangerous elements within protest crowds.

Beyond such notions of protest policing, more radical interpretations have explicitly linked the genesis of policing to the wage-labour system (Brewer, 1980; Couch, 1981; McMullan, 1995, 1998; Neocleous, 2000a; Spitzer, 1987; Storch, 1975). In this way, Neocleous (2006: 8) describes policing as an activity that "has been central to the historically massive operation on the part of the liberal capitalist state to consolidate the social power of capital and the wage form." Using the term *fabrication* to describe police helps us understand it as a productive and creative force. In other words, when Neocleous (2000b) argues that police fabricate social order it is a discursive way to conceptualize policing as a pro-active process that shapes social order rather than an institution that reactively responds to disorder. As a productive force in fabricating

capitalist relations, its main target and concern has been the working class and the poor. “That is, its mobilizing work was the mobilization of work” (Neocleous, 2006: 29). The historical task of police then was to employ a strategies, techniques, and technologies to manage and prevent idleness, resistance, and disruption by the working class in order to facilitate capitalist relations, circulation, and accumulation: to making the working classes work. This function is made even more transparent by examining the classic works of the early police intellectuals and political economists such as Patrick Colqunoun, who, as I have argued elsewhere (Rigakos, 2011: 70-1): “clearly realized that social control… was geared to the benefit of a particular class of property holders, which was consistent with his emphasis on managing the various classes of persons who he said threatened commercial interests.” Similarly, in his critical analysis of law enforcement in the United States, Kristian Williams (2007: 105) provocatively argues that the police are the “natural enemy of the working class” considering the “[c]ontrol of the lower classes has been a function of policing at every point since the institution’s birth, and has served as one of the major determinants of its development.”

Likewise, in Canada, police agencies and (since 1984) the Canadian Security Intelligence Service (CSIS) have a history of targeting leftist organizations aligned with workers. In their edited book *Whose National Security?* Kinsman, Buse, and Steedman (2000: 1) document how the RCMP covertly monitored as wide range of groups and individuals including high-school students, gays and lesbians, trade unionist leaders, and Canada’s left-wing political groups, including Communists, the Co-operative Commonwealth Federation (CCF), and the New Democratic Party (NDP). They even watched feminists and consumer housewives’ associations, university students and professors (Hewitt, 2002), peace activists, immigrants, Canada Council grant recipients, Learned Societies meetings, recipients of youth funding initiatives, black community activists, First Nations people and Native Studies programs and, of course, Quebec sovereignists. They argue that the extensive surveillance of perceived Canadian dissidents not only violated people’s democratic rights but also made a dramatic impact on the socio-political fabric of Canada. The wide scope of surveillance undertaken suggests that surveillance campaigns to protect Canada’s national security “was not only about state regulation, but also included a broader form of social and moral regulation and attempts to define ‘proper Canadian’ subjects” (Kinsman, Buse, and Steedman, 2000: 3). Through various case studies like the APEC 1997 student-led protests, they illustrate that national security has often served as a code word for the protection of powerful corporate interests.

In my own previous research I have documented how, in one year (August 1996 to September 1997), Intelligarde (a private security company based in Toronto)

submitted approximately 56,400 written reports that ranged in importance from major occurrences to simple shift summaries or alarm responses (Rigakos, 1999). The company managed a detailed database of the city's homeless population, including their primary locations, physical identifiers and even catalogued their possessions (see Rigakos, 2002b). In this sense 'knowing' means remembering previous incidents or interactions – and this is accomplished by a centralized computer system not unlike that of public police systems such as CPIC. Other security companies have larger, international systems that provide travel alerts to executives, or "snitch" lines that allow employees to report other malfeasance. Pinkerton's Alertline is a phone-based system that encourages workers to call in tips to a toll-free number. Wackenhut has a similar system. Thousands of telephone calls per year come into these centres. Each one is logged, after which the employee may be reported to the client or an investigation can take place. Of course, identical systems are also run by the public police today, including 'Crime Stoppers.' Contemporary access control now runs the gamut from securing sensitive nuclear facilities to embassy protection, to the rapidly growing number of gated communities where security officers replace public police. Residential security in closed communities is now a large market. Security officers not only stop unauthorized entry, but they also assist in emergencies and are trained in CPR. They are ambassadors for the community and are "impeccably dressed, exceptionally courteous and professional in attitude" (Rigakos, 2005). Many private police officers in the United States are also armed, proving to be a formidable threat to integrative community life (Davis, 1990) as they police the borders between inclusion and exclusion (Young, 1999) on the basis of risk knowledge.

So dominant has the private sector become that there is talk amongst some police executives that the police may hand over routine patrol to the private sector and merely regulate their activities. Then, Sussex police chief Ian Blair made a recommendation that police forces stamp security vehicles in their district with 'police compliant' decals if they come under the rubric of the local constable. The Law Commission of Canada has called for the incorporation of private security companies under the rubric of existing police services boards (Rigakos, 2002a) and policing researchers have advanced interagency networks designed to mobilize the private sector for the public good (Shearing and Wood, 2006).

Regardless of our theoretical and political interpretation of changes to protest policing, there are nonetheless two fundamental trends at play in the late 20th century that condition our analysis of the relationship between private security and public order policing: First, that the security apparatus and its associated surveillance and intelligence capacities have expanded exponentially through the ubiquitous adoption of technologies. Second, that within the gamut of this expansion, a burgeoning private

security industry has increasingly been brought into the fold of the broader security apparatus as a key informant and partner. The combined effects of these developments, whether considered a *new* "liaisoned", "networked", "intelligence-led", or "nodal" model or simply an *old* "recrudescence", "re-emergence" or continued "pacification" nonetheless points to a stronger and renewed interrelationship between public and private security agencies for maintaining public order before, during and after protests.

## 4. From mass private property to the war on terror

The terrorist attacks on the United States on September 11, 2001 significantly accelerated the ramping up of the security-industrial complex well underway in the previous decades (Rigakos 2016). The attacks took place both within the context of geopolitical upheaval and internal changes to policing under the advance of neoliberalism. Private security had witnessed a significant expansion in both size and responsibility since the 1960s. Private guards were now patrolling large swaths of urban (Button, 2003; Rigakos, 2002b), commercial (Jones and Newburn, 1999; Shearing and Stenning, 1983), and even theme-park (Shearing and Stenning, 1987) settings, while also undertaking security for key infrastructure and mega-events.

Three interesting developments that emerged after 9/11 further sets the context for private security in the 21st century (from: Rigakos et al., 2008). First, it was private security guards who acted as a weak first line of defense. They failed to stop the attackers during airport screening and then failed to minimize death through emergency evacuation at the World Trade Centre in the early moments. Nonetheless, it is estimated that 42 security guards were killed in terrorist attacks on 9/11, compared to 23 NYPD officers, and witness accounts relate stories of guards assisting public services during the subsequent evacuation (Howie, 2012). Second, as noted elsewhere, while the loss of lives and property resulting from the terrorist attacks "was not large enough to have a measurable effect on the productive capacity of the United States" (Makinen, 2002: 2), the attacks nonetheless did result in marked decreases in consumer confidence and the halt to trading on the New York Mercantile Exchange. It was for this reason that President Bush implored Americans to "not be afraid to travel", to "take their kids on vacation", "to go to ball games" and generally "go about their business" (George W. Bush, Oct. 3. 2001). The administration's message was that post-9/11 recovery was dependent on consumer confidence. Private security protected those commercial and retail spaces and were thus immediately deputized into the broader war on terror. Third, and relatedly, since the 9/11 attacks, resources seem to have been devoted to improve airport security, immigration and customs

controls and the security of nuclear facilities, while 'softer' sites, typically secured by private security, were seen as a source of continued concern .

Not long after the 9/11 attacks, the national media were characterizing private security as "homeland defense's weak link." Although a few states had introduced or raised hiring or training standards, most states still do not impose minimum training standards or even require background checks. Even in states that required training, there was little effort to monitor the content or quality of the programs. Soft targets that are part of homeland security concerns are protected, not by public police, but by private security (Rigakos et al., 2008). In Canada, there were no significant changes to private security training or licensing except that the Canadian Air Transport Security Authority (CATSA) took an active role in setting the minimum training, pay and ongoing testing of contract security personnel working as screeners across the country, especially in the context of the Air India bombing.

The relative growth and importance of private security in the everyday policing of citizens in advanced liberal democracies has been well documented in the academic literature (e.g. Jones and Newburn, 1998; Rigakos, 2002b; Shearing and Stenning, 1983). Not only are there more security guards in the United States and Canada but their role in safeguarding sensitive installations such as nuclear and biological facilities, residential areas, and 'mass private property' (Shearing and Stenning, 1983) where people congregate to shop, eat and enjoy the spectacle of a performance or sporting event is more profound than in many other nations. These private security agencies have moved beyond simply protecting private property. They are actively engaged in maintaining order, investigating crimes, and making arrests in public spaces. In other words, they are performing many activities that were, at least in the previous one-hundred years, largely performed by public police forces (Rigakos, 2006).

Thus, it would seem that the events of 9/11 thrust private security officers into an even more important role. Several US states—including California, Illinois, and Michigan—took steps to more closely regulate the industry in the year following 9/11 (Salladay, 2002). Nonetheless, several newspaper articles and limited surveys have reinforced the notion that security in the retail sector did not undergo significant change after 9/11 (Hall, 2003). Recognizing the importance of security in the retail sector, the 9/11 Commission determined that businesses have a "duty to care" about the security of their customers. The Commission endorsed the National Fire Prevention Association standard (NFPA 1600) for disaster and emergency management preparedness in the private sector: "…compliance with the standard should define the standard of care owed by a company to its employees and the public for legal purposes." The standard specifies that emergency management programs should address the four phases of emergency management and recovery, which include: (a) *mitigation*, or efforts to

eliminate or reduce the risk of a disaster or emergency, (b) *preparedness*, or activities and programs intended to support recovery from disaster, (c) *response*, or activities to address immediate and short-term effects of a disaster, and (d) *recovery*, or activities and programs designed to return conditions to normal.

Moreover, judicial determinations have reinforced the responsibility of the private sector to take steps to guard against terrorist attack. A NY district court ruling in 2003 denied a motion to dismiss a suit against the airlines by families of the 9/11 victims. The judge's ruling was based on the concept that it was foreseeable that a plane whose passengers have been negligently screened at check-in could be subject to terrorist attack. In another recent?? ruling, a New York State jury found that the agency that owned the World Trade Center was negligent for not doing enough to thwart the deadly 1993 terrorist bombing beneath the twin towers (Rigakos et al., 2008).

The events of 9/11, therefore, simply accelerated trends that were already well underway before the terrorist attacks. The expansion of the security-industrial complex alongside the increasing role played by private security in the everyday policing of citizens facilitated by mass private property, increased employment, and technological advances heightened surveillance and reinforced linkages between the public and private security sectors within the war on terror.

## 5. A 21st century public-private partnership

Up to this point we have seen that while the public-private distinction for understanding the history of public order policing has often been operationally blurred and, at times, irrelevant, the distinction has nonetheless remained politically salient for reaffirming the neutrality and legitimacy of the state and the rule of law. Over the last half-century, the private sector has become not only more important in the everyday policing of citizens but its relations with the public police have become far more entwined (Shearing, 1992, 1997) with the rise of neoliberalism and the war on terror. Today, there are few police administrators reluctant to acknowledge the importance of private security within a coordinated, intelligence-led, preparation and response to public order events or emergencies. In this section, I contrast the Toronto G20 with the Ottawa convoy siege as case studies for the role and function of private security within this emerging "integrated" model.

## Toronto G20

In late June 2010, thousands of protesters converged in the streets of Toronto and engaged in a diversity of protest tactics against the G20 Summit. The Canadian government was well prepared and fully anticipated resistance. The G20 had long been understood by its opponents as an elite global governance event: a security spectacle that formulates and implements neoliberal policies that intensify global inequalities and injustices (Fernandez, 2008). The RCMP were tasked with making preparations and they quickly instituted an Integrated Security Unit (ISU) and a Joint Intelligence Group (JIG) that went on to carry out the largest police and intelligence operation in Canadian history (RCMP, 2011: 15). In the aftermath of the G20, Canadian law enforcement agencies not only defended their actions during the Summit but heralded the security operation as a success[3] despite its billion-dollar price-tag (Fernandez, Starr, and Scholl, 2011: 50).

Police under the ISU-JIG carried out mass detentions and pre-emptive stops in the days leading up to and during the G20 Summit weekend resulting in 1,105 arrests: the largest mass arrest in Canadian history (Canadian Civil Liberties Association, 2011). Pre-emptive police raids and detentions (CBC News, 2010), the secretive enactment and vigorous enforcement of wartime legislation (Marin, 2010), the 'ketteling' of hundreds of protesters (Yang and Kennedy, 2011), the infiltration and disruption of activist groups (Groves, 2011), the snatching of protesters within crowds (Zig Zag, 2011), the firing of tear gas (Kidd, June 27 2010) and rubber bullets (CBC News, July 25 2010), as well as covert monitoring of protest mobilization (Groves, July 17 2011), and jailing of arrested protesters in deplorable and dehumanizing conditions (Botten, 2011) have all been well documented by researchers (Lamb and Rigakos, 2015).

The ISU-JIG was a joint forces operation mobilizing an extensive policing network composed of 26 police departments, several military and state intelligence units, and

[3] For instance, Toronto Deputy Police Chief Tony Warr accused the public and media for overreacting to the events of the G20 and proclaimed that "police should hold their heads high" (Rush, 2011). Internal reviews like the RCMP's After Action Report also contended that "the security and intelligence operations…had no precedent" since "[n]o host nation has ever conducted two world summits back to back in geographically different locations." Despite these "challenging conditions", the G20/G8 Integrated Security Unit and its Joint Intelligence Group "met its Mission Aim and achieved all objectives." Consequently, the "summit security operations" will have a "lasting legacy…that will benefit major security events in Canada to come" (2011: 15).

over a hundred corporate and government agencies. A key attribute of contemporary public order planning a strategic constellation of state, military, and corporate agencies employed to achieve the same objectives of marshalling the security resources of public, private, and military sectors in order to control particular populations within a specified territory (Rigakos, 2011:79). According to the RCMP's After-Action the G20 JIG was described as:

> …a joint forces operation partnering the RCMP, OPP [Ontario Provincial Police], TPS [Toronto Police Service] and PRP [Peel Regional Police]. Critical liaison roles were created for the Canadian Security Intelligence Service (CSIS), Communications Security Establishment Canada (CSEC), Canada Border Agency (CBSA) and the Canadian Forces (CF). The JIG also established hundreds of other key points of contact with other law enforcement agencies, federal, provincial and municipal government departments and corporate security sections (RCMP, 2011: 32).

According to the RCMP, this network was used to "identify opportunities, gather intelligence and seek input to specific issues and problems" relating to G20 security. Indeed, embedded within the G20 ISU, the JIG was a joint forces operation composed of an extensive network of state police, military, intelligence, and private sector agencies.

The JIG's investigative and analytical units deployed an array of security intelligence and counterintelligence surveillance techniques on populations considered to be adversarial to the Summit's security objectives. Whereas intelligence is specifically aimed at shaping "the visualisation of the adversary, counter-intelligence (CI) is employed to shape how the adversary perceives and visualises friendly [i.e. security forces] capabilities and intentions." The objective of CI is to produce uncertainty in the mind of adversaries in order to impede and disrupt their decision making capability by misrepresenting and/or denying them information necessary to conduct effective operations. In other words, the primary purpose of CI is the "collection of intelligence required to implement countermeasures designed to degrade an adversary's intelligence and targeting capabilities" (Canadian Forces, 2003: 6-6). In doing so, CI techniques produce security intelligence by gathering covert information on targeted adversaries while also disrupting the capabilities and activities of their targets.[4]

While the JIG also perceived a remote potential for a terrorist attack, internal documents reveal that Group's "joint forces security (counter)intelligence operation"

[4] For much more detail on the JIG's SI and CI activities see Lamb (2012)

primarily targeted radical left/ anarchist activism. For instance, the G20 intelligence reports reveal that the JIG was principally concerned with domestic radical left activists considering it was "assessed that persons associated to Left Wing extremism in Ontario will use high profile events such as the 2010 Winter Olympics and the 2010 G8-G20 Summits as staging grounds to further carry their ideological message to the public stage" (ISU-JIG, H 3551 [Strategic Intelligence Report #3], 2010: 386). The same report also discussed the political significance of the 2010 year for the Left and the importance of police remaining vigilant of criminal activism.

As Kitchen and Rygiel (2014) document, the hosting of mega-event such as the G20 are highly lucrative for the security sector. As security continues to ramp up and becomes part of the defence against terrorism, international delegates and corporate elites need to be safeguarded. Security costs for summits in Pittsburgh 2009 were $98.7 million and in London $28.6 million. The auditor general of Canada's 2011 report estimates that $664 million was spent on security for the Summit. The standing committee of public safety and national security puts the number closer to $790 million, $507.5 million for RCMP policing and security, $278.3 million for public safety, $3.1 million for CSIS, and finally, $1.2 for Border Services.

While the RCMP's share of security costs were actually under budget this was due to a smaller than anticipated RCMP deployment of officers, the competitive procurements process, and the fact that they held a $60 million contingency fund (Treasury Board of Canada 2011), private security costs were unexpectedly higher because, according to an internal RCMP report "private security firms were used more extensively than initially planned thus reducing the requirement for police personnel" (RCMP, 2010) which included both contract security providers and the Corps of Commissionaires. Besides personnel, the RCMP also spent $15.1M to cover the costs of Fencing and Perimeter Intrusion Detection Systems, with another $8.3M devoted to information technology equipment (RCMP 2010: 2). Finally, $33.9M was spent on Command Centers and Other Real Property Costs including "a Unified Command Center fit-up in Barrie as well Area Command centers established for the G8 and G20 in Huntsville and Toronto, respectively" along with other "operational facilities" that were "acquired and fit- up". Additional contracts in the hundreds of thousands of dollars were also provided to public safety consultants, security companies that patrolled the OPP staging areas as well as website and public relations coordinators (from: Kitchen and Rygiel, 2014).

Perhaps most importantly from the perspective of the interrelationship between public and private policing during public order events was the fact that the private security sector was invited into the ISU-JIG "war room" for integrative command. Private security was therefore enmeshed with both the military, provincial, federal, and

Canadian security establishment. The groundwork for such a relationship had already been laid through formalized public/private partnerships such as TAPPS (the Toronto Association of Police and Private Security) and the Canadian Bankers Association. According to Security Services and Emergency Management Director of the Ontario Ministry of Finance David Neely "Collective sharing of information and best practices achieved situational awareness during the G8/G20, the earthquake and other incidents that occurred during the week through public/private partnerships like TAPPS" (Brown, 2010). Security guards were providing information to the ISU-JIG in real time, apparently thwarting at least two serious breach attempts.

Thus, the G20 appears to represent the quintessential contemporary manifestation of the confluence of developments we have been outlining throughout this Report. Planning started nearly a year in advance, involved a wide assortment of security agencies from the military through to corporate security, spared no expense, and used advanced intelligence, subterfuge, and a wide array of violence to undermine and pre-emptively negate any potential threats. Notwithstanding that subsequent analyses have labeled the G20 both a security success and a human rights debacle, it also represents the pinnacle of the (re-)integration of public and private policing at public order events.

## The Ottawa convoy siege

Just over a decade after the Toronto G20 protests, the city of Ottawa was besieged by a convoy of trucks and a mass demonstration turned month-long occupation that encompassed a wide range of grievances from anti-Trudeauism, to anti-vaccination sentiment, through to alt-right extremism and even an anti-democratic call for the dissolution of Parliament (Williams and Paperny, 2022). The protests, which started in January 2022, also encompassed border crossings across the country. Trucks occupied the nation's capital for weeks while protesters built encampments and honked horns through all hours of the night.

It would be too easy to dismiss any relationship between Ottawa and the Toronto G20 by identifying that the public order issues were very different, the threats were less known, or that intelligence was less available. Moreover, it would be an oversimplification to suggest that Ottawa represents an outlier in the general public order trends we have been discussing. Some of this may very well be true, as early media accounts of the lack of Ottawa Police Service action (Dhanraj, Hoff, and Zimonjic, 2022) points to a significant deficit of leadership, lack of coordination, the complete absence of communication until well after the entrenchment of the protesters, and a general reticence to act (Paperny, 2022).

Nonetheless, there are important connections between the G20 and the Ottawa convoy protest that need to be understood. The police response during the Ottawa siege was haunted by the ghosts of the G20. Then-chief Peter Sloly and Public Safety Minister Bill Blair were both with the Toronto Police Service during the 2010 protests that included mass arrests, inhumane conditions at the detention centre, confirmed cases of police brutality, and the unconstitutional "kettling" of protesters. Senior officers were formally sanctioned and judicially reprimanded. The Toronto Police Service was subject to a $16.5-million class-action settlement, widespread criticism and repeated calls for Blair's resignation. It seems as if Sloly resolved not to be embroiled in a public order disaster and Blair continued to be dogged by accusations that he was instrumental in lobbying for a secretive wartime Order in Council to facilitate the arbitrary detention of protesters. For Blair, the lesson related to the importance of obtaining sufficient legal cover. And so, when Sloly resigned, Blair may have been too keen to recommend the Emergencies Act (Rigakos 2022). Nonetheless, Acting Ottawa Police Chief Steve Bell did not request (Kirkup and Spearchief-Morris, 2022) nor require the Act. He went about calmly clearing the city as the organizers were finally, and rather politely, rounded up without mass arrests or kettling. Protesters were repeatedly allowed to exit southward and most dispersed overnight. In the end, police laid 393 charges against 122 people during the convoy siege (Dawson and Passifiume, 2022) compared to 1,100 arrests at the G20 making the Toronto protest the largest mass arrest in Canadian history (Morrow, 2011).

In the absence of a coordinated command structure that included private security, the freedom convoy ended up costing the Rideau Centre and Cadillac Fairview millions of dollars in lost revenue. Despite their "ongoing engagement with police and city officials since the start of the demonstration" in-house security for the nation's downtown mall received no assurances that it would be safe to reopen or that the police would be able to assist security personnel in maintaining public order and safety within or around the Rideau Centre (Pringle, 2022: CTV News, Feb. 6). Cadillac Fairview would eventually sue the convoy's donors through names leaked on the GiveSendGo and GoFundMe platforms for $306 million (Crawford, 2022: Ottawa Citizen, Feb. 18).

It appears that in contradistinction to the G20, after decades of increased integration between security services and intelligence gathering, the Ottawa convoy protest did not trigger an intelligence-led nor integrated approach that would have involved the private security sector. Rather, it appears that like other agencies outside of the Ottawa Police Service's senior staff, and especially in the early days of the protest, the private security industry was treated like any other, rather unhappy, stakeholder. In the case of Cadillac Fairview security, a lack of police assurance that the safety of

the Rideau Centre could be maintained, meant that over 175 businesses at a cost of millions of dollars were forced to shutter their stores.

Indeed, there is scant secondary information about any concrete operational connections between the private security sector and the police during the convoy protests. In the absence of direct communications with security executives who have, to date, been reluctant to communicate with me, the limited available secondary information indicates that the general lack of preparedness by the Ottawa Police Service and its limited communication and coordination with other intelligence and policing services until the very late stages of the occupation similarly affected Ottawa's private security sector.

## Conclusion

In this Report I have outlined how the private security sector has been playing an increasingly important role in public order policing since the late 20th century. This re-emergence is part of the retooling of approaches to public order policing alternately described as "liaisoned", "networked", or "intelligence-led" but ultimately part of a broader integrated model employing a wide menu of coercive tactics.

The historical use of private police during labour unrest has proven to be a threat to the perceived neutrality of the state, both in Europe and North America which resulted in the increasing deployment of centralized, salaried and professional public police. In 19th century England, the Metropolitan Police of London served as a ready reaction force in lieu of a patchwork of ill-equipped parish constables, watchmen and thieftakers or the lethal response of the military. In Canada, the RCMP was quickly deployed to serve a similar purpose when local police were unable or unwilling to suppress civic disorder and the military were too keen to use violence in the early part of the 20th century. The United States had to develop their own state policing system when local militias, town police, private police forces and the notorious Pinkerton Detective Agency proved either too politically inflammatory or unreliable, jeopardizing the legitimacy and neutrality of government.

Despite the pull toward public policing up to the end of the 20th century, private security has once again become a major player in everyday order maintenance, taking on more responsibilities for policing. Unlike previous decades, this has not been perceived as a threat to the integrity of the public good, even during major public order events such as the Toronto G20 when the private security sector was fully integrated into both the preparations and responses of the Integrated Security Unit.

Private security companies compile a vast array of surveillance data (Ericson, 1994; Manning, 1992; Marx, 2004) on consumers, residents and members within their nodes (Shearing and Wood, 2006) or bubbles (Rigakos, 2000a) of governance. Depending on one's view of the integrity and purpose of private security, this makes their deployment and incorporation into the broader public order framework potentially more insidious than during the sector's early 20th century strike breaking heyday. Today, the involvement of private security is designed to be far more networked, far more integrated and perhaps even far more nuanced than ever before. The incorporation of private security is no longer a source of alarm for police and governments, but rather a prudent approach for extending the network of security intelligence. When public order is in crisis, when rioting takes place, or when emergencies are declared, the private sector's existing integration within the state security apparatus ought to give us pause. These ready-made networks have the potential to spontaneously expand the intrusiveness and intent of emergency security measures, affecting citizen privacy, liberty, and their freedom from surveillance and coercion.

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# The Policing of Large-Scale Protests in Canada: Why Canada Needs a Public Order Police Act

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## Summary

Police lack clear authority in Canada to employ a common tactic to maintain order at large public events: the creation of exclusion zones around large portions of public space. Limited exceptions to this include powers in emergency law and a federal statute on intergovernmental conferences – powers that are unclear in scope. The common law does not authorize a large exclusion zone. Ontario's resort to emergency powers in February of 2022 rendered Canada's resort to an emergency redundant – as a tool to authorize the "secure area" in Ottawa used to bring the trucker convoy protest to an end.

The use of emergency law in 2022 was only the most recent in a series of attempts on the part of governments and courts in recent decades to address the gap in the law authorizing large exclusion zones in an *ad hoc*, temporary, and reactive fashion. Each case involved confusion among police, plans for the zone formulated in secret, and significant infringements of core rights and freedoms. Rights would be better protected and policing more effective by drawing on law from the UK and Australia. Lawmakers there have created comprehensive frameworks for policing large gatherings and events. Legislatures in Canada and its provinces should do the same and pass a bill dealing, respectively, with events of a national or provincial scope. A Public Order Police Act would provide a test for when police could erect a secure zone based on the principles of reasonable necessity and proportionality, and set out rules about admission, compensation, oversight, and review. This would be the most effective means of avoiding resort to emergency law and the cycle of confusion and disorder arising from temporary measures. It would also bring police conduct into closer conformity with the rule of law.

## Acknowledgements

I thank Professors Kent Roach, Jamie Cameron and Richard Moon for their comments on earlier drafts of this report. I am indebted to W. Wesley Pue for the general argument about a gap in police powers to create secure zones.

# Introduction

This report highlights a gap in Canadian law that made it appear necessary to invoke emergency powers in response to the trucker convoy in February of 2022. Police draw on a range of powers to maintain order at large public events such as mass protests, intergovernmental meetings, or major sporting events – powers in motor vehicle, municipal, and criminal law, among others. But police have no clear legal authority in Canada to employ a common tactic at these events: the creation of large exclusion zones (entire city blocks), around which they regulate the entry of both vehicles and pedestrians.[1]

There are times when police need to make use of these zones to provide effective security. They interfere with – but also protect – rights to liberty, expression, and assembly. But governments have failed to provide clarity on the creation and use of these zones. They have instead passed temporary legislation *ad hoc* or relied on law intended for other purposes – and courts have done the same. Police have acquired only some of the powers they need and have been left guessing about their scope. Important questions about when and whether a large zone is reasonably necessary and proportionate to security concerns are left unclear, along with other critical details including who may come and go; who may be surveilled, searched, or detained; who must be compensated and how; which officers are empowered to do what, where? Without clear law on point, police imposing large scale closures of public space have decided these issues in a legal vacuum, acting for the most part in secret, beyond review, and outside the rule of law. Citizens have been left in a legal limbo, with core rights infringed. If the infringements are to be necessary and compliant with the *Charter of Rights and Freedoms*, they need first to be authorized by law.[2]

When they invoked emergency powers earlier this year, governments of Ontario and Canada added to a series of attempts to address this gap in the law in a hasty and reactive fashion. Similar confusion and uncertainty about these zones played out prior to, or in the course of, the 1997 Asia-Pacific Economic Cooperation (APEC)

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[1] One notable exception is the *Foreign Missions and International Organizations Act,* SC 1991, c 41 [*Foreign Missions Act*], amended in 2002 to provide for exclusion zones to secure intergovernmental meetings. Aside from authorizing police to close space in this narrow category of event, the scope of this power is unclear in the act, in ways explored further below.

[2] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

conference in Vancouver, the 2001 Quebec City Summit of the Americas, and the 2010 meeting of the G20 in Toronto – leading in each case to serious infringements of fundamental freedoms.[3] The measures taken in February 2022, however, were among the most extensive in Canada's recent history of public order policing — with some 70 city blocks of downtown Ottawa cordoned in a secure zone for several days.[4] Canada's resort to emergency measures provided authority for this, but it was neither a necessary nor appropriate tool.

Briefly, police created two large zones in Ottawa in February of 2022. On February 4th, Ottawa Police created a "red zone" around a portion of downtown restricting *vehicle* traffic. On February 17th, they erected a "secure area" regulating *any* access to roughly 3 square kilometers of downtown. The "red zone" may have been authorized under Ontario's *Highway Traffic Act*.[5] This report – and the gap in the law it points to – is concerned primarily with the "secure area" and similar police efforts to cordon off large portions of public space to regulate any movement within it.[6] (This report leaves to the Commission to determine whether the "secure area" was necessary in Ottawa.)

Ontario's reliance on emergency law in February 2022 provided *potential* authority to erect the "secure area" in place when police finally dispersed the trucker convoy.[7] Yet Ontario did not avail itself of the power to create an exclusion zone when it passed its emergency regulations. Days later, Canada included this power as part of its argument for needing to resort to emergency law – though given its availability under provincial law, the federal power was redundant.[8] A further source of authority for *some* police closures in Ottawa might be found in Ontario's *Fire Protection and*

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[3] The history of policing large-scale public events in Canada is addressed in more detail in Part II, below.

[4] The details are canvassed in Part I, below.

[5] R.S.O. 1990, c H8; see discussion in Part II, below.

[6] I refer to these throughout this report as "exclusion zones" or "secure zones".

[7] This assumes that Ontario's declaration of an emergency was lawful (met the threshold) under provincial emergency legislation – a question beyond the scope of this report.

[8] Federal emergency powers may not have been redundant for dealing with protests outside of Ontario (*i.e.*, for dismantling border blockades in other provinces), but police do not appear to have used exclusion zones in their dismantling efforts at those sites after the federal government invoked an emergency on February 14th: see, *e.g.*, Carrie Tait, "Last border blockade to be dismantled as protesters in Emerson, Man., agree to leave" (15 February 2022) *Globe and Mail*.

*Prevention Act*.[9] These powers appear to apply only to private space. If read to apply to public space, the act would authorize much smaller closures than what occurred in February 2022.

This report aims to assist the Commission in its mandate of assessing the basis for the Government of Canada's decision to declare a public order emergency in February 2022 and the appropriateness of the measures chosen under the emergency to deal with it.[10] Part I suggests that Canada's resort to emergency law to authorize a large exclusion zone followed in part from Ontario's decision not to invoke this power – and from recognition of the gap in the law on point. Part II demonstrates this gap by canvassing legislation and case law, and notes how in earlier large-scale public gatherings in Canada the gap in law led to confusion, disorder, and rights infringements. Part III draws on legislation from Britain and Australia as models that governments in Canada could draw upon to address the gap at issue.

Public order straddles federal and provincial heads of power. This report suggests that both governments should pass a *Public Order Police Act*, which would apply depending on the nature of the event at issue. Comprehensive legislation would provide police and civilians clarity on a range of issues, including a proportionality test for imposing large closures, and rules on admission, compensation, oversight, and review. This would avoid the need for temporary or emergency measures, the confusion and disorder that tend to follow, and it would bring police conduct within the rule of law.

# Part I: Context

## a. Chronology of events

To understand how the police powers considered in this report were relevant to emergency powers invoked in February 2022, this section outlines a chronology of events. The focus here is on what powers each government invoked, at certain points in time, to authorize police control of specific public spaces and the context in which this occurred.

[9] 1997, S.O. 1997, c. 4
[10] Order in Council, PC 2022-0392.

In early February 2022, a group of informally associated truckers (the "Trucker Convoy") began to occupy streets of downtown Ottawa adjacent to Parliament Hill. Similar protests emerged in cities across Canada and at ports of entry into Canada, including the Ambassador Bridge in Windsor; the Peace Bridge in Fort Erie and roads into Sarnia; Emerson, Manitoba; and Coutts, Alberta. The truckers encamped on public streets in Ottawa caused significant disruption to local residents by closing streets, honking horns at all hours, and idling their engines at length.

On February 4th, the Ottawa Police Service announced that it was "implementing a surge and contain strategy" which would entail "utilizing concrete and heavy equipment barricades to create no-access roadways throughout the downtown core."[11] The press release indicated that "If necessary, interprovincial bridges, highway off ramps and/or roads will be closed."[12] In its update for February 5th, Ottawa Police referred to cordoned areas as the "red zone", noting that roughly "500 heavy vehicles associated with the demonstration are in the red zone."[13]

The protest at the Ambassador Bridge in Windsor began Monday February 7th and shut down traffic on both sides of the border.[14] Early that week, the Toronto Police Service became aware that protesters intended to travel from Ottawa to Toronto. On Wednesday the 10th, seeking to avoid a similar blockade to the one in Ottawa, Toronto police used cruisers and buses to cordon off "two major stretches of the downtown core".[15] This included portions of University Avenue and College Street, near Toronto's 'hospital row,' and Queen's Park Circle between College and Bloor streets.[16]

Meanwhile, protestors kept the Ambassador Bridge closed and the Ottawa blockade pushed beyond its second week, with no sign of ending. On Monday February 7th,

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[11] Ottawa Police Service, "News and Community", release headed "Ottawa Police Service Implements Increased Measures to Protect Downtown Neighbourhoods (February 4, 2022)", online: (https://www.ottawapolice.ca/en/news/ottawa-police-service-implements-increased-measures-to-protect-downtown-neighbourhoods.aspx) [Ottawa Police, "News and Community" webpage].

[12] *Ibid*.

[13] *Ibid*, release headed "Ottawa Police Enforce Perimeter Containment Measures, Charges Delayed, New RCMP Resources Announced (February 5, 2022)".

[14] Jason Kirby, "Ambassador Bridge Blockade Brings Major Economic Artery to Standstill, Exposes Canada's Fragile Trade Infrastructure" (11 Feb 2022) *Globe and Mail*.

[15] Wendy Gillis, "'We're Going to Help Them Leave': Toronto Police Describe 'Robust Plan' for Weekend Truck Protests" (11 Feb 2022) *Toronto Star*.

[16] Wendy Gillis and David Rider, "Toronto Police Close Downtown Streets Over Ottawa Truck Protesters' Threat to Relocate" (9 Feb 2022) *Toronto Star*.

individual litigants in Ottawa obtained an injunction ordering truckers not to use their horns in the evenings, but it did not order truckers to leave.[17] On Friday the 11th, a group of auto parts manufacturers obtained an injunction compelling truckers to stop "impeding" the Ambassador Bridge and police began to clear them out.[18] To this author's knowledge, neither Ontario's Fire Marshall nor Ottawa's Fire Chief, acting under Ontario's *Fire Protection and Prevention Act*,[19] issued an "inspection order" or sought a court order in relation to the Trucker Convoy to close streets or direct that vehicles be moved – powers under the act discussed in Part II below.

On Friday the 11th of February, the same day on which the injunction was granted in relation to the Ambassador Bridge, the Ontario government declared an emergency under the *Emergency Management and Civil Protection Act*.[20] The following day, the Ford government enacted the *Critical Infrastructure and Highways Regulation*,[21] authorizing police to order people to remove their vehicles from public roads. Police cleared the Ambassador Bridge by Sunday the 13th.[22]

On that Sunday evening (Feb 13th), the Prime Minister and members of cabinet met with RCMP Commissioner Brenda Lucki and others for a "situation update."[23] Protests continued at border crossings in Surrey B.C., Coutts Alberta, and Emerson Manitoba, along with the blockade in Ottawa.[24] The next day, Monday the 14th, the federal government issued an Emergency Proclamation under the *Emergencies Act*.[25] On Tuesday the 15th, the government enacted the *Emergency Measures Regulations* and

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[17] Catharine Tunney, "Court Grants Injunction to Silence Honking in Downtown Ottawa for 10 Days" (7 Feb 2022) *CBC News*.
[18] The manufacturers were later joined in the application by the City of Windsor and Attorney General of Ontario. CBC News, "Ontario Judge Extends Injunction Against Ambassador Bridge Protesters Indefinitely" (18 Feb 2022) *CBC News*.
[19] *Supra* note 9.
[20] R.S.O. 1990, c. E.9, invoking the emergency by enacting O. Reg. 69/22.
[21] O. Reg. 71/22 [*Critical Infrastructure*].
[22] CBC News, *supra* note 18.
[23] Bill Curry, Marsha McLeod, "Trudeau government invoked Emergencies Act despite 'potential for a breakthrough' with convoy protesters, documents show" (11 August 2022) *Globe and Mail*.
[24] Carrie Tait, "Last border blockade", *supra* note 8, reporting that by the Tuesday all three border blockages were in the process of dispersing or being dismantled.
[25] *Proclamation Declaring a Public Order Emergency*, SOR/2022-20 [*Proclamation*], passed under the *Emergencies Act*, RSC 1985, c 22 (4th Supp) [*Emergencies Act*].

the *Emergency Economic Measures Order*.[26] These granted police a host of additional powers, including the power to create an exclusion zone (discussed below). On Thursday the 17th, Ottawa Police announced that they had "established a Secured Area" in downtown Ottawa, cordoning off roughly 70 square blocks.[27] Police stated that "residents may travel to the secured area if they have a lawful reason such as they live there, work there or are shopping and visiting businesses" – but were required to pass through checkpoints.[28] Police began removing protestors from the cordon and the trucker blockade was brought to an end by Sunday.[29] On Monday and Tuesday (February 21, 22), police reduced the size of the zone to roughly 35 square blocks, before removing it altogether at some point thereafter.[30]

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[26] *Emergency Measures Regulations*, SOR/2022-21 [*Emergency Regulations*]; *Emergency Economic Measures Order*, SOR/2022-22 [*Economic Order*].

[27] Ottawa Police, "News and Community" webpage, *supra* note 11, release headed "Secured Area Established (February 17, 2022). See also Staff Reporter, "Truck Convoy: Day 21; Police Establish 'Secure Area' from Queensway to Parliament; Two Protest Organizers Arrested Near Parliament Hill" (18 Feb 2022) *Ottawa Citizen* ["Truck Convoy"]. The zone extended from Wellington Street in the north (along Parliament) to Bronson Avenue in the west, Somerset Avenue in the South, and the Rideau Canal in the east – a significant portion of downtown Ottawa. A map can be found in Ted Raymond, Michael Woods, and Josh Pringle, "Secure Area in Ottawa Shrinks as Police Maintain Presence Following Removal of 'Trucker Convoy'" (21 Feb 2022) *CTV News* ["Secure Area in Ottawa"]. See also Robert Fife, Marieke Walsh, Janice Dickson, Erin Anderssen, "Police move in to clear downtown Ottawa of convoy protesters after weeks of demonstrations" (18 February 2022) *Globe and Mail*, noting on Friday the 18th that "[a] security perimeter has been set up around most of downtown Ottawa, and almost 100 checkpoints are in place, with officers stopping vehicles and only granting access to people who live and work in the area." A video segment by CTV News capturing scenes from the zone can be found in Josh Pringle, "What You Need to Know About the Secured Area in Downtown Ottawa" (21 Feb 2022) *CTV News*, online: (https://ottawa.ctvnews.ca/what-you-need-to-know-about-the-secured-area-in-downtown-ottawa-1.5785593).

[28] Ted Raymond, "Ottawa Police Further Reduce 'Secure Area' of Downtown" (22 Feb 2022) *CTV News*. See also Ottawa Police, "News and Community" webpage, *supra* note 11.

[29] Raymond *et al*, "Secure Area in Ottawa," *supra* note 27.

[30] Ottawa Police, "News and Community" webpage, *supra* note 11, release headed "Update on Police Operations to Remove Unlawful Protesters (February 21, 2022). See also Raymond, "Ottawa Police", *supra* note 28, noting the zone's southern border moved up to Laurier Avenue on February 22nd.

## b. Emergency powers and closures of public space

Ontario declared an emergency on February 11 under its *Emergency Management and Civil Protection Act*.[31] The act provides that under an emergency, the government may enact a law "[r]egulating or prohibiting travel or movement to, from or within any specified area."[32] This would allow police to create and oversee an exclusion zone of seemingly any size.[33] In the emergency regulation it passed the next day — the *Critical Infrastructure and Highways Regulation*[34] — Ontario did not include a power to restrict travel or close public space. Instead, the *Critical Infrastructure* regulation did four other things to assist police in dismantling blockades. It prohibited persons from impeding access to "critical infrastructure," which included hospitals and ports, but not streets of Toronto or Ottawa.[35] It prohibited people from impeding access to any highway (as defined in the *Highway Traffic Act*[36]) where it would cause a serious interference.[37] It allowed police to order a person to remove their vehicle and authorities to suspend or cancel the Ontario license or vehicle permit of any person impeding.[38]

As noted earlier, by the time Ontario declared a state of emergency and enacted powers under it (Saturday February 12th), police were already in the process of dismantling the Ambassador Bridge blockade and preparing to clear the blockade in Ottawa. On Monday the 14th, the government of Canada declared a 'public order emergency' under Part II of the *Emergencies Act*.[39] On Tuesday, it enacted the

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[31] *Supra* note 20.
[32] *Ibid*, s. 7.0.2(4).
[33] The federal *Emergencies Act*, *supra* note 25, contains similar set provisions discussed in Part II below.
[34] *Supra* note 21, passed under Ontario's *Emergency Management and Civil Protection Act*, *supra* note 20.
[35] Section 1 of the regulation, *supra* note 21, defining "critical infrastructure" includes only the "400-series highways" and no other roads or highways.
[36] *Highway Traffic Act*, RSO 1990, c H.8, section 1 of which states: "'highway' includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof".
[37] Section 3 of the *Critical Infrastructure* regulation, *supra* note 21.
[38] *Ibid*, ss. 4-6.
[39] The emergency was declared in *Proclamation*, *supra* note 25, citing section 25(1) of the *Emergencies Act*, *supra* note 25.

*Emergency Measures Regulations* and the *Emergency Economic Measures Order*.[40] The *Regulations* allowed authorities to control the use of public space in two ways.

One was to prohibit participation in a public assembly "that may reasonably be expected to lead to a breach of the peace" (a "section 2 assembly") – along with travel to partake in such an assembly and providing property to facilitate this.[41]

The other way was to create an exclusion zone. Section 6, headed "Designation of protected places" provided that a list of places — which included Parliament Hill, government buildings, and monuments — are "designated as protected and may be secured". Subsection 6(f) permitted the Minister of Public Safety and Emergency Preparedness to designate "any other place" as a protected place. On April 25, 2022, the government confirmed that (at some point after the *Regulation* was passed), the Minister of Public Safety had designated various streets comprising much of downtown Ottawa under 6(f).[42]

By Tuesday February 15th, when federal emergency powers became available, the focus of police efforts was on Ottawa. Police now had further powers to bring the Ottawa blockade to an end that were available only under federal emergency law, including powers to compel third-party tow operators to assist in towing vehicles;[43] to freeze bank accounts and other funding streams;[44] to suspend licenses and permits not registered in Ontario.[45] But media coverage suggests that police in Ottawa brought the blockade to an end primarily by doing three things: cordoning off a large stretch of

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[40] *Supra* note 26.

[41] *Emergency Regulations*, *ibid*, ss 2 to 5 (also prohibiting foreign nationals from entering Canada for this purpose).

[42] Section 6 of the *Emergency Regulations*, *ibid*, simply states that "any other place" may be "designated by the Minister" but does not indicate the *process* by which he or she does so. I have not found any public record of the designation being promulgated. I was alerted to the designation under section 6(f) in the Parliamentary record of 'Questions on the Order Paper' in the House of Commons for April 25, 2022, where Parliamentary Secretary to the Leader of the Government in the House of Commons provided an affirmative response (and details) to the question of whether a designation was made under s 6(f) of the *Emergency Regulations*. The affirmative response (and areas designated) can be found at p. 629, under "Q-366" House of Commons, 44th Parliament, 1st Session, "Journals: No 57", online (https://publications.gc.ca/collections/collection_2022/parl/X2-441-57.pdf).

[43] *Emergency Regulations*, *supra* note 26, s. 7.

[44] *Economic Order*, *supra* note 26, ss. 1 and 2.

[45] *Emergency Regulations*, *supra* note 26, s. 10(1).

downtown Ottawa; ordering people to leave that area or arresting them; and towing vehicles.

Ontario's *Critical Infrastructure* regulation permitted police to do most of this. And even though Ontario did not enact a police power to create an exclusion zone, it had the authority to do so under the *Emergency Management and Civil Protection Act*.[46] However, both governments resorted to emergency powers due in part to the recognition that police lacked clear authority to create a secure zone. The next section illustrates the gap in the law at issue.

## Part II: Gap in the law (authorizing closures)

With two exceptions, police in Canada lack specific statutory authority to create an exclusion zone. The common law does not authorize a large zone. The Trucker Convoy raises questions about the application of Ontario's *Fire Protection and Prevention Act*[47] as a possible tool for closing public space. It does not authorize a large exclusion zone.

### a. Statutory authority

The only statutes in Canada that explicitly authorize a secure zone are provincial and federal emergencies acts, noted above, and the *Foreign Missions and International Organizations Act*,[48] which permits the Royal Canadian Mounted Police [RCMP] to create a secure area at intergovernmental conferences.

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[46] Notably, in its press release of February 17th, Ottawa Police refer to two sources of authority to erect the Secured Area – the Ontario emergency act and the federal government's regulation: "Under the Emergency Management and Civil Protection Act, the Unified Command in control of policing in Ottawa has established a Secured Area to ensure that individuals comply with the Emergency Measures Regulations and to ensure designated places (Parliament, Government buildings, critical infrastructure etc) are protected." Ontario's statute could not authorize a secure zone without a regulation being passed. Only the federal regulation provided for this, as noted above. Ottawa Police, "News and Community" webpage, *supra* note 11, release headed "Secured Area Established (February 17, 2022).

[47] *Supra* note 9.

[48] Referred to in this report as the *Foreign Missions Act*, *supra* note 1.

In the first case, police may create an exclusion zone only under a declared emergency and where necessary to deal with it.[49] Canada's *Emergencies Act* provides for closure in a few ways — and for all four of the kinds of emergency contemplated in the Act. Under a 'Public Welfare Emergency' and a 'Public Order Emergency,' the Governor in Council, on reasonable grounds to believe it "necessary for dealing with the emergency", may make orders for the "regulation or prohibition of travel to, from or within any specified area".[50] Analogous provisions are found in provincial emergency law.[51] The federal *Emergencies Act* also provides for "the designation and securing of protected places" — a power available under a 'Public Order Emergency' and an 'International Emergency'.[52] Finally, under a 'War Emergency,' the Governor in Council may make *any* orders she reasonably believes necessary for dealing with the emergency.[53]

One might query whether there is a difference between a regulation that "prohibits travel within" a specified area and one that "secures" an area. As noted, Canada's *Emergencies Act* authorizes both; emergency statutes in Ontario and other provinces only contemplate travel prohibitions, but tend to include catchall provisions allowing for "such other measures… consider[ed] necessary" to address the emergency.[54] Setting these catchall provisions aside, on one reading, provisions that 'prohibit travel' only authorize a direction not to go somewhere (rather than also closing public space by 'securing' it with a fence or a checkpoint). In practical terms, the distinction seems

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[49] *Emergencies Act*, *supra* note 25, ss. 8(1); 19(1); 30(1); and 40(1). By contrast, section 7.0.2(2) of Ontario's *Emergency Management and Civil Protection Act*, *supra* note 20, requires a belief that the measures are "necessary and essential in the circumstances to prevent, reduce or mitigate serious harm to persons or substantial damage to property".
[50] *Emergencies Act*, *supra* note 25, ss. 8(1)(a) and 19(1)(a).
[51] see, *e.g.*, Ontario's *Emergency Management and Civil Protection Act*, *supra* note 20, s. 7.0.2(4)(2); Alberta's *Emergency Management Act*, RSA 2000, c E-6.8, section 19(1)(e) permitting a minister under a state of emergency to "control or prohibit or make an order to control or prohibit travel to or from any area of Alberta"; British Columbia's *Emergency Program Act*, RSBC 1996, c 111, permitting a minister under a state of emergency in s. 10(1)(f) to "control or prohibit travel to or from any area of British Columbia"; and Quebec's *Civil Protection Act*, CQLR c S-2.3, permits a minister under a state of emergency in s. 93(3) to "control access to or enforce special rules on or within roads or the territory concerned".
[52] *Emergencies Act*, *supra* note 25, ss. 19(1)(b) and 30(1)(f).
[53] *Ibid*, s 40(1).
[54] *Emergency Management and Civil Protection Act*, *supra* note 20, s. 7.0.2(4)(14). A further example can be found in British Columbia's *Emergency Program Act*, *supra*, note 51, in s. 10(1).

tenuous. If Ontario or Canada passed a regulation 'prohibiting travel within' a certain space, police might reasonably seek to *enforce* this prohibition through fencing or checkpoints.

The *Foreign Missions Act* was amended in 2002 to provide for exclusion zones when policing international conferences. The policing portion is brief:

> 10.1 (1) The Royal Canadian Mounted Police has the primary responsibility to ensure the security for the proper functioning of any intergovernmental conference in which two or more states participate, that is attended by persons granted privileges and immunities under this Act and to which an order made or continued under this Act applies.
>
> (2) For the purpose of carrying out its responsibility under subsection (1), the Royal Canadian Mounted Police may take appropriate measures, including controlling, limiting or prohibiting access to any area to the extent and in a manner that is reasonable in the circumstances.[55]

Subsection 3 clarifies that the Act is not intended to affect any statutory or common law powers of police, and subsection 4 allows for arrangements to be entered into between federal and provincial or municipal authorities. This is the full extent of the portion on policing. The act provides no guidance to police as to the size of a zone, how long it may last, or who may enter. Nor does it address means of compensating for interferences with business or private property. It is also unclear where federal jurisdiction over policing an event ends and provincial jurisdiction remains in place. Section 10.1(4) of the act allows for "arrangements" among authorities only "to facilitate *consultation and cooperation*," while section 10.1(2) explicitly confers on the RCMP the power to take "appropriate measures." When applied in 2010 to the G20 meeting in Toronto, the conferral under the act of "primary responsibility" to the RCMP for security led to confusion as to the role of the Toronto Police Service, whose command structures would prevail, and on what basis.[56]

Other statutes provide public order police powers, but not for exclusion zones.

Canada's *Criminal Code* prohibits causing a disturbance or creating an unlawful assembly or riot.[57] An unlawful assembly requires a common purpose to cause fear

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[55] *Foreign Missions Act*, *supra* note 1.
[56] This is discussed further below.
[57] *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], ss. 63 to 68.

among others that people gathered may "disturb the peace tumultuously."[58] A riot is "an unlawful assembly that has begun to disturb the peace tumultuously." Police may proclaim a riot is underway and order participants "peaceably to depart" and "disperse or arrest" those resisting. In late 2021, Parliament amended the *Criminal Code* to add the offences of intimidating to impede health care workers and persons accessing health care services.[59] No new police powers were added. The *Code* does not authorize an exclusion zone.

Provincial motor vehicle acts provide for road closures or routing of *vehicle* traffic. Ontario's *Highway Traffic Act*, for example, allows police to "close a highway or any part thereof to vehicles" where "reasonably necessary" to ensure "orderly movement of traffic, prevent injury, or in an emergency.[60] This entails something different from a secure zone, which can impede pedestrian as well as vehicle movement to a wider range of public and private property in addition to roads and highways.

In 2020, in response to protests at pipelines and railway crossings, Alberta passed the *Critical Infrastructure Defence Act*.[61] Containing only five provisions, the act defines as "essential infrastructure" potential sites of protest, such as pipelines, railways, mining sites, and highways and makes it an offence to wilfully obstruct or interfere with their use or operation.[62] Police are authorized to arrest without a warrant any person they find contravening these provisions. The act contains no further police powers.

Ontario's *Keeping Ontario Open for Business Act, 2022*, enacted in April of 2022,[63] puts into ordinary legislation powers analogous to the ones Ontario passed under a state of emergency in the *Critical Infrastructure and Highways Regulation*,[64] discussed in Part I of this paper. It does not authorize police to create exclusion zones or close public space. Instead, it permits removal of protesters and vehicles blocking

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[58] *Ibid*, s 63(1)(a).
[59] *An Act to amend the Criminal Code and the Canada Labour Code*, S.C. 2021, c. 27, adding the offences in sections 423.2(1) and 423.2(2) of the *Criminal Code*.
[60] *Supra*, note 36, at s 134(1) and (2). For further detail on these powers, see the discussion under "Traffic Safety" in Steven Penney and Colton Fehr, "Police Power & Public Order Disturbances: A Background Paper Prepared for the Public Order Emergency Commission".
[61] *Critical Infrastructure Defence Act*, SA 2020, c C-32.7.
[62] *Ibid*, ss 1, 2, and 3.
[63] *Keeping Ontario Open for Business Act, 2022*, S.O. 2022, c. 10 [*Keeping Ontario Open*].
[64] *Supra* note 21, passed under Ontario's *Emergency Management and Civil Protection Act*, *supra* note 20.

"protected transportation infrastructure", defined to include border crossings and airports.[65]

## b. Special case of fire protection law

Ontario's *Fire Protection and Prevention Act* ["the FFPA"] merits separate consideration due to the peculiar nature of the Trucker Convoy protests.[66] Some of the truckers involved in the protest may have created hazards under the FFPA: blocking a fire route and/or emitting dangerous levels of carbon monoxide by idling at length. The act permits Ontario's Fire Marshall or a city's fire chief to direct the removal of vehicles blocking fire routes and – on one reading of the act – the Marshall may order closure of entire streets. Yet the wording of the act suggests the powers at issue apply only to private land; the ambit of the closures is narrow; and obtaining a closure order requires steps that do not appear to have been taken in 2022.

Part V of the act, headed "Rights of Entry in Emergencies and Fire Investigations", the Fire Marshall or a fire chief may "enter on land or premises" to inspect and remove things.[67] Where they believe "a risk of fire poses an immediate threat to life", they may remove persons or things or "do any other thing… urgently required to remove or reduce the threat to life".[68] The use of the phrases "enter on land" and "on the land", suggest that these powers are intended to apply to private land. Neither "land" nor "premises" are defined terms in the act.

Under Part VI, the Fire Marshall or a city's fire chief may conduct "inspections" of fire hazards to ensure "fire safety," which is defined to include "the risk that the presence of unsafe levels of carbon monoxide on premises would seriously endanger the health and safety of any person."[69] After "enter[ing] on lands" to inspect, the Marshal or chief may issue an "inspection order" to remedy contraventions of the fire code.[70] The *Fire*

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[65] *Keeping Ontario Open*, *supra*, note 63, s. 1. I thank Professor Kent Roach for noting that, by contrast, Ontario's *Critical Infrastructure and Highways Regulation*, *supra* note 21, passed in February's emergency dealt with the broader concept of "critical infrastructure", which was defined, in section 1, to include highways, hospitals, railways, utility facilities.
[66] *Supra* note 9.
[67] *Ibid*, s. 14(2).
[68] *Ibid*, s. 15(1)(a),(c), and (g).
[69] *Ibid*, s. 18. Section 19 states that the "Fire Marshal, an assistant to the Fire Marshal or a fire chief is an inspector for the purposes of this Part."
[70] *Ibid*, s. 21(1).

*Code* mandates "fire access routes" remain clear at all times.[71] The Marshall or chief could direct truckers on public streets to move if a truck is a "structure" and a trucker parked on a public street is an "occupier".

If so, the Fire Marshall can also authorize an order to "close the land or premises" where she believes it necessary for the "immediate protection of persons and property".[72] But here too, the heading of the provision, along with the language of ordering an "owner or occupant of the land or premises" to do things, including "prevent[ing] persons from entering thereon", suggests an application to private rather than public land.[73]

If one were to read "land or premises" to include public streets, the powers in the act are still too narrow to allow for broad exclusion zones. Yet they might have provided authority for *some* street closures in Ottawa in February of 2022. Specifically, streets or portions of them where "necessary for the immediate protection of persons and property" – *i.e.*, where trucks were idling excessively or blocking fire routes.

## c. Common law

Police do not have clear authority at common law to create an exclusion zone of a significant size. The ancillary powers doctrine provides limited authority for police closure of public space, but recent decisions on the doctrine suggest that it would not authorize a zone on the scale of several city blocks.

*Knowlton* authorizes a small closure, adjacent to private property, in light of a specific threat.[74] It involved an arrest for obstructing a peace officer in the execution of his duties. During a visit to Ottawa a few days earlier, Premier Kosygin of the USSR was attacked and subject to death threats. To secure his visit to Edmonton's Chateau Lacombe Hotel, police cordoned off a portion of the sidewalk in front of the hotel,

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[71] O. Reg. 213/07, s. 2.5.1.3.
[72] *Supra* note 9, s 21(2).
[73] A further key power with a similar restrictive application is found under section 31, *ibid*. This provides that where (a) a person has been convicted of an offence under the act; and (b) where a judge of the Ontario Court of Justice believes it "necessary in the interests of public safety", the court may issue an order (under s 31(3)) authorizing the Fire Marshall to "(a) close access to, or remove, the building, structure or premises to which the order relates; or (b) remove or remove and dispose of any substance, material or thing from the building, structure or premises." This would seem to apply only to a building or structure or things within it. It unclear whether a vehicle is a structure.
[74] *Knowlton v. R.*, [1974] S.C.R. 443 [*Knowlton*].

hindering the accused, a photographer, from getting closer. Warned to stay back, Knowlton pushed past police and was arrested. The Supreme Court of Canada held that police had interfered with the "liberty of the appellant," including his "right to circulate freely on a public street,"[75] but relied upon the two-part test in the English Court of Appeal decision in *Waterfield* to uphold the police action in the circumstances.[76]

In *Waterfield* itself, the Court of Appeal had ascertained whether an officer was acting in the execution of his duties by asking, first, whether his conduct fell within the general scope of a duty under law and, second, if it was "justified."[77] Applying the test in *Knowlton*, LeDain J held that the police conduct here – creating the cordon in front of the hotel – fell within the general scope of a duty under the *Alberta Police Act* to keep the peace and prevent crime.[78] The conduct involved a "justifiable" use of powers associated with the duty, because the threat to Kosygin was real and the measures police took to protect him were reasonable.

The holding in *Knowlton* does not stand for the proposition that police have an ancillary power at common law to create an exclusion zone of any size or duration – so long as they are acting to keep the peace. It permits a minimal geographic restriction, for a limited time, where there is a credible threat of a specific nature, over a portion of a public street in front of *a property policed with its owner's consent*. *Knowlton* is authority for closing a sidewalk, perhaps a street. Not several blocks for days on end.[79]

The Supreme Court further refined its approach to *Waterfield* in *Dedman*.[80] The refined test might be used to recognize a power to cordon off a space larger than a sidewalk or street, but this would entail a vast expansion of the doctrine. *Dedman* concerned a challenge to police authority to conduct random traffic stops in the

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[75] *Ibid*, at 446.
[76] *Ibid*, at 446, citing *R. v. Waterfield*, [1963] 3 All ER 659, [1964] 1 Q.B. 164 [*Waterfield*] at 170.
[77] *Waterfield*, *ibid*.
[78] *Knowlton*, *supra* note 74, at 446.
[79] Former Ontario Chief Justice Roy McMurtry, in his "Report of the Review of the Public Works Protection Act" (Toronto: Ministry of Community Safety and Correctional Services, 2001) offered a different view of *Knowlton*, suggesting at 33, that it "supports the proposition that police have a broad range of responsibilities with deep historical roots in the common law and codified in statute". This view should be considered in light of the Supreme Court's recent, more restrictive approach to ancillary powers in *Fleming*, discussed below.
[80] *Dedman v. The Queen*, [1985] 2 S.C.R. 2 [*Dedman*].

context of impaired driving investigations (the R.I.D.E. program in Ontario). Justice LeDain held that police have authority to conduct these stops based on a modified version of *Waterfield*. The conduct at issue must be necessary to carrying out a police duty under law and it must be reasonable, "having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference."[81] In this case, police had a duty to enforce driving regulations and detaining drivers to question them about alcohol was reasonably necessary. The interference with liberty was small: "the stop would be of relatively short duration and of slight inconvenience".[82] Yet the stop would also advance an important public purpose. Here again, the balance struck was one between a pressing state interest and a *limited* infringement.

The Supreme Court would go on to recognize a host of other powers using the *Dedman-Waterfield* framework: investigative detention and search,[83] safety search in exigent circumstances,[84] and warrantless entry to a residence to locate the source of a disrupted 911 call.[85] In each case, the intrusion on liberty was narrow in scope and brief in duration.

*Fleming v Ontario* is the Supreme Court's most recent extended encounter with the *Dedman-Waterfield* test.[86] It involved police powers at a protest and the Court was reluctant to recognize a new power in that context. The Court's pronouncements about the limits of the ancillary powers doctrine are relevant here.

Fleming was involved in a counter-protest in close vicinity to an occupation of Crown land by members of the Six Nations. Police arrested him not because he was about to breach the peace, but because they believed that by waiving a flag and approaching other protesters, he might provoke others to do so. The Crown had sought recognition of a power to "arrest someone who is acting lawfully in order to prevent an

[81] *Ibid*, at 35.
[82] *Ibid*.
[83] *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52.
[84] *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37.
[85] *R. v. Godoy*, [1999] 1 S.C.R. 311; [1998] S.C.J. No. 85.
[86] *Fleming v. Ontario*, 2019 SCC 45, [2019] 3 S.C.R. 519 [*Fleming*].

apprehended breach of the peace".[87] Justice Côté, writing for the Court, declined to find this a 'reasonably necessary' police power:

> In the past, this Court has only recognized common law police powers that involve interference with liberty where there has been some connection with criminal activities. In these cases, the powers were restricted to circumstances in which there was at least a suspicion that the person affected by the exercise of the power was involved in, or might commit, some offence.[88]

The power here, by contrast, would "enable the police to interfere with the liberty of someone who they accept is acting lawfully and who they do not suspect or believe is about to commit any offence." Suggesting this is too large a step for the ancillary powers doctrine, she held: "It would be difficult to overemphasize the extraordinary nature of this power. Such a power would constitute a major restriction on the lawful actions of individuals in this country."[89] She writes here not just of an arrest but an *interference* with liberty. Creating a large exclusion zone would be a much greater interference. The reasoning here suggests authorizing a large exclusion zone using *Dedman* would be a gross and inappropriate expansion of the doctrine.

Lower courts have also applied the ancillary powers doctrine restrictively in cases involving police power over movement in public space. In *Figueiras v Toronto (Police Services Board)*,[90] a case arising from the G20 in Toronto in 2010, the Ontario Court of Appeal declined to recognize a power to turn people away from an area unless they submitted to a search. Justice Rouleau found no statutory authority for police control over access to public space that applied here. Police have a power at common law to establish a perimeter around "fires, floods, car crash sites, crime scenes and the like," but they do not have "a general power" to do so.[91] Police were concerned that violent protestors might enter the area in question. They sought to stop and search people in one small area of the city. The power was not reasonably necessary to keeping the

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[87] *Ibid*, para 6, or as Côté J put it more specifically: "a common law power to arrest individuals who have not committed any offence, who are not about to commit any offence, who have not already breached the peace and who are not about to breach the peace themselves."
[88] *Ibid*, para 77.
[89] *Ibid*, para 78. Justice Côté also held at para 83: "As a general rule, it will be more difficult for the state to justify invasive police powers that are preventative in nature than those that are exercised in responding to or investigating a past or ongoing crime".
[90] 2015 ONCA 208.
[91] *Ibid*, paras 59-60.

peace because it was "not effective" and "not rationally connected to the purpose" of avoiding a repeat of earlier "lawlessness in the entire downtown core".[92]

In *Teal Cedar Products Ltd v Rainforest Flying Squad*,[93] the BC Supreme Court considered police action in enforcing a prior injunction in a logging area. The injunction allowed police to arrest people interfering with the use of any road in an 'injunction area' comprising "a large tract of public land."[94] The RCMP sought to restrict access to this land "by means of expansive exclusion zones and checkpoints."[95] The court found the zone to interfere with public and media freedom in a manner that was "substantial and serious."[96] Police had no authority to create the zones aside from the ancillary powers doctrine. They did not establish that zones were reasonably necessary to arresting and removing people under the injunction.[97]

Running against the grain of these cases is *Tremblay c Quebec.*[98] This involved a challenge to the legality of an exclusion zone around much of the Upper Town of Quebec City during the Summit of the Americas conference in 2001. Heard only days before the event was to begin, the zone was found to violate rights to free expression and free assembly under the *Charter*, but upheld as a reasonable limit. Its precedential value is doubtful on three grounds.

If it recognized a police power to create a large exclusion zone under *Dedman-Waterfield*, it did so in only the context of intergovernmental conferences – and the *Foreign Missions Act* now codifies this power. Justice Blanchet's decision neglected to consider whether an exclusion zone (or one that large) was reasonably necessary under the test in *Dedman*. Its expansive application of the ancillary powers doctrine runs counter to the Supreme Court's later decisions on point and their generally more restrictive thrust. *Tremblay* is best read as a response to the exceptional circumstances in which it arose.

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[92] *Ibid*, para 100 and 105.
[93] 2021 BCSC 1554.
[94] *Ibid*, para 1.
[95] *Ibid*.
[96] *Ibid*, para 54.
[97] *Ibid*, para 50.
[98] *Tremblay c. Québec (Procureur général*), [2001] J.Q. no. 1504 [*Tremblay*], para 1, per Gilles Blanchet J. The ruling is translated into English in W. Wesley Pue, "Trespass and Expressive Rights," The Ipperwash Inquiry (2007), at 52–77 (Appendix): (https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Pue.pdf).

## d. Impact of the gap on earlier large public events

The recent history of public order policing in Canada sheds light on the impact of the gap in law on creating secure zones. It has led to confusion among police as to the scope of their authority, serious violations of core rights, and limited accountability.

Briefly, in November of 1997, Canada hosted a week-long meeting of leaders of APEC in Vancouver, at sites downtown and, on the final day, at the University of British Columbia. Events at UBC, involving a smaller gathering of leaders, were turbulent. Police pepper sprayed protesters, forced them to move their tents where they were peacefully assembled, and kept them well away from passing motorcades. Complaints were filed against 47 members of the RCMP, followed by extensive public hearings before the Commission for Public Complaints Against the RCMP.[99] Commissioner Hughes faulted police for "command structures, role separation, policy and planning, training, legal support, record keeping, and overall preparedness."[100] He also found police had infringed the *Charter* using excessive force, carrying out strip-searches without justification, and seizing signs without cause.[101] The question of authority for creating exclusion zones did not loom large at the hearings. Much of the focus was instead on whether the Prime Minister's staff had directed the RCMP as to the size and location of the zones, allegedly to shield Indonesia's President Suharto and other visiting dignitaries from the sight of protest. The Commission found no evidence of this as a driving motivation among PMO staff. But it did find

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[99] Letter of RCMP Commissioner Zaccardelli to Shirley Heafey, Chair of the Commission for Public Complaints Against the RCMP 6 September 2001, Appendix B, Commission for Public Complaints against the RCMP, *"Chair's final report following a public hearing into the complaints relating to RCMP conduct at events that took place at the UBC campus and the Richmond RCMP Detachment during the Asia Pacific Cooperation Conference in Vancouver, B.C., in November 1997* (Ottawa: CPC RCMP, 2002) at 5.

[100] *Ibid*, at 4, Zaccardelli summarizing findings in Commissioner Hughes' interim report: Commission for Public Complaints Against the RCMP, *RCMP Act – Part VII* Subsection 45.45(14), *Commission Interim Report Following a Public Hearing Into the Complaints regarding the events that took place in connection with demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver, B.C., in November 1997 at the UBC Campus and Richmond detachments of the RCMP* (Ottawa: CPC RCMP, 31 July 2001), at 431 to 441 [Interim Report]. On planning shortcomings, see also Mike King and David Waddington, "The Policing of Transnational Protest in Canada" in D Porta, A Peterson, and H Reiter, eds, *The Policing of Transnational Protest* (Hampshire: Ashgate, 2006) at 80-81.

[101] *Ibid*, Interim report at 218, 280, and 424.

"government interference" in decisions about the location of the security zones and the movement of protestors' tents, in violation of their *Charter* right to expression and for reasons unrelated to security.[102] The findings divert attention from a more basic point: the legal uncertainty in which events unfolded – uncertainty that conditioned at least some of the confusion and disorder at issue. A statute detailing when police could erect exclusion zones, on what grounds, of what size, and where would have helped avoid at least some of conduct that drew scrutiny here.

In April of 2001, Canada hosted 34 heads of state at the Summit of the Americas in Quebec City. Police erected a 6.1 kilometer security zone in the Upper Town, with a 3-meter-high chain-link and concrete fence.[103] The zone could only be entered with a pass issued by the RCMP and limited to residents, employees, dignitaries, police, and summit participants.[104] The creation of an exclusion zone of this scale drew considerable public condemnation.[105] The Summit drew tens of thousands of protesters, a small number of whom breached the fence early on in the conference, provoking police to use tear gas and to use it more aggressively as the conference unfolded.[106] Tremblay's challenge, noted above, threatened to disrupt security arrangements only days before the event was to begin. Soon after, Parliament amended the *Foreign Missions Act* to provide authority for secure areas. But given the generality or vagueness of the power set out in the act, even if it were available, it is not clear whether the zone used in Quebec was too large, whether details surrounding the issuing of passes, compensation, or review struck an appropriate balance between rights and security. These were matters left largely to police to decide in short order, with limited public input or oversight – a fact that remains the case under the act.

The G20 Summit in Toronto in 2010 serves as the most explicit cautionary tale for the gap in policing authority. Announced only four months prior to the event held in late June, the two-day meeting, along with a smaller meeting of the G8 in nearby Huntsville, was the "largest security operations in Canadian history", with almost

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[102] *Ibid* at 87-101 and 150-154. See also W. Wesley Pue, "The Prime Minister's Police? Commissioner Hughes' APEC Report" (2001) 39:1 *Osgood Hall Law Journal* 165 at 168.
[103] King and Waddington, *supra* note 100, at 86 and *Tremblay*, *supra* note 98.
[104] *Tremblay*, *supra* note 98.
[105] See, *e.g.* Sinclair Stevens, "A Police State in the Making" (24 April, 2001) *Globe and Mail*.
[106] King and Waddington, *supra* note 100, at 86.

21,000 security personnel involved.[107] The RCMP established three secure zones and policed the first two.[108] The 'Controlled Access Zone,' with a three-meter-high fence, surrounded the main venue, the Metro Toronto Convention Centre, and adjacent hotels. The Restricted Access Zone, also fenced, extended roughly a block or so beyond the first zone and contained private businesses and public thoroughfares.[109] Toronto Police oversaw the 'Interdiction Zone,' extending "several city blocks" beyond the prior zone. It contained condos, businesses, and other public space.[110] *Knowlton* and the *Foreign Missions Act* would likely have authorized the first zone. The act might have authorized the second zone. The third had no clear authority.

To address this concern, city officials and Toronto Police worked with Ontario's Ministry of Community Safety to have Ontario pass a regulation under the *Public Works Protection Act*.[111] Originally passed as an emergency measure at the outset of the Second World War, the act allowed the government to temporarily designate as 'public works' areas around generating stations and the like, including streets, buildings, and land. It allowed police to control access, demand identification, and conduct searches.[112] A regulation designating the Interdiction Zone a public work was passed on June 3rd and quietly posted on the province's "e-laws" website on June 16th, ten days before the conference.[113] Even Toronto's police chief remained

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[107] Gerry McNeilly, Office of the Independent Police Review Director, *Policing the Right to Protest: G20 Systemic Review Report* (Toronto: Office of the Independent Police Review Director, 2012) [*OIPRD Report*] at iii.

[108] For a map and more precise details, see W. Wesley Pue, Robert Diab, & Grace Jackson, "The Policing of Major Events in Canada: Lessons from Toronto's G20 and Vancouver's Olympics" (2015) 32 *Windsor Yearbook of Access to Justice* at 194-196.

[109] *OIPRD Report*, *supra* note 107 at iii.

[110] *Ibid*.

[111] *Public Works Protection Act*, RSO 1990, c P.55. The act was repealed by the *Security for Electricity Generating Facilities and Nuclear Facilities Act*, 2014, SO 2014, c 15, Schedule 1, s. 1. For a more detailed discussion of how and why this measure was employed, see Pue, Diab & Jackson, *supra* note 108 at 197 to 201.

[112] Former Ontario Chief Justice Roy McMurtry, in his "Report of the Review of the Public Works Protection Act" (Toronto: Ministry of Community Safety and Correctional Services, 2001), cast doubt on the constitutional validity of the act, noting, at 18, its definition of 'public work' was "extraordinarily broad".

[113] Pue, Diab & Jackson, *supra* note 108, at 197 to 201.

unaware of the regulation until the day before the conference. When it came to light, as officers began to apply it to detain and search, it took the public by surprise.[114]

Over the course of the two-day conference, widespread disorder played out on the streets of Toronto. A group of vandals carried out a rampage, damaging storefronts, intimidating civilians, and burning police vehicles, while police stood by.[115] Law abiding individuals were confined and abused at police hands, including a kettling incident in which police boxed in 400 people at a downtown intersection in torrential rainfall for 4 hours.[116] Over 1,000 people were arrested and held at length in a make-shift custodial facility.[117] Roughly only a third were charged.[118] Of the 321 people charged, 204 had charges stayed, leading one commentator to conclude that "nearly 90 percent of those arrested ... were quite possibly innocent of any wrongdoing."[119]

An extensive report on the event by the Office of the Independent Police Review Director faulted Toronto police for poor coordination on the ground and also noted that "[d]uring the planning process, the Toronto Police Service struggled to understand its role, planning responsibilities and the legal authority on which it would act in respect of certain G20 Summit issues."[120] The *Foreign Missions Act* gave the RCMP "primary

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[114] As the *OIPRD Report*, *supra* note 107 noted, "The manner in which the existence of a *Public Works Protection Act* and its application during the G20 came to light, and the way in which the police handled communications around it, was a public relations disaster. The media learned about the PWPA and its new regulation as a result of arrests made after the regulation had come into force. […] It certainly appeared as though the regulation had been passed in secret – and that's what the media reported."

[115] Christie Blatchford, "Black Bloc Interrupted Soldier's Cortège: Blair" (1 July 2010) *Globe and Mail*; Postmedia News, "Ottawa Agrees to Pay Businesses Nearly $2M in G8/G20 Compensation" (15 June 2011) *National Post*.

[116] *OIPRD Report*, *supra* note 107 at 142–157; Kelly Grant, "Police Chief Offers No Apologies for G20 Tactics", *Globe and Mail* (28 June 2010).

[117] See *OIPRD Report*, *supra* note 107, Chapter 9, detailing numerous deficiencies and operational concerns with the use of the "Prisoner Processing Centre," set up in a series of vacant buildings five kilometers east of downtown, including a lack of sufficient planning or communication around processing, holding, searching, and releasing detainees.

[118] James Stribopoulos, "The Rule of Law on Trial: Police Powers, Public Protest and the G20" in Margaret Beare & Nathalie Des Rosiers, eds, *Putting the State on Trial: The Policing of Protest during the G20 Summit* (Vancouver: University of British Columbia Press, 2015), 105 at 105–106.

[119] *Ibid*.

[120] John W Morden, Toronto Police Services Board, *Independent Civilian Review into Matters Relating to the G20 Summit* (Toronto: Toronto Police Services Board, 2012) at 124.

responsibility" over security for the conference, while Toronto Police retained authority over most of the city; yet command was divided between, on the one hand, the Integrated Security Unit, involving the RCMP, Toronto, and Ontario Police (led from a Unified Command Centre) and, on the other hand, Toronto's Major Incident Command Centre (MICC) at Toronto Police headquarters.[121] At crucial moments of civil unrest, communications and coordination between the two command centres failed, and "[c]ommunication within the MICC and between the MICC and field officers broke down often."[122] Among the many questions arising from the event is whether some of the confusion as to jurisdiction – along with the controversial use of a World War 2 statute to authorize the Toronto Police zone – might have been avoided had the RCMP created and policed a larger zone.[123] Yet even if the RCMP had done so, many matters of core concern to affected citizens would still have been decided here, as in Quebec City, by police acting at their sole discretion and without oversight or review, including size and location of the various zones, procedures for applying and obtaining passes, and eligibility.

A further point to note is the contrast presented that same year by the Vancouver Olympics. Preparations for policing the 2010 Olympics in Vancouver and Whistler were more extensive, began earlier, and involved more effective coordination among city, provincial, and federal governments, along with Vancouver Police and the RCMP.[124] In the year prior to the Olympics, provincial and civic debate led to the amendment of the province's *Vancouver Charter*[125] and the iterative crafting of a special Vancouver bylaw for the games.[126] The bylaw authorized restrictions on commercial speech, closure of public areas and streets, airport-style security check-points at certain venues, warrantless searches of persons and belongings, and surveillance. Lawsuits seeking to test the constitutional validity of the powers were dropped, leaving the *Charter* validity of the bylaw unclear – yet critical policing powers here were at least authorized by law under section 1.[127] Vancouver Police and the RCMP agreed to a clear division of authority, with the former policing the city of

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[121] *OIPRD Report*, *supra* note 107 at iii, 21-25.
[122] *Ibid*, at 38.
[123] Pue, Diab & Jackson, *supra* note 108 at 198.
[124] In British Columbia, the RCMP acts in some jurisdictions as a municipal or provincial force. For further details on the planning and coordination among governments and police, and relevant agreements, see Pue, Diab & Jackson, *supra* note 108 at 203-204.
[125] *Vancouver Charter*, SBC 1953, c 55.
[126] City of Vancouver, *Bylaw no 9962 on Vancouver 2010 Olympic and Paralympic Winter Games* (3 December 2009).
[127] For details, see Pue, Diab & Jackson, *supra* note 108 at 206-207.

Vancouver and the latter assuming a lead role in security around venues and surrounding spaces. The event unfolded smoothly, with no arrests flowing from breach of the bylaw. In an exemplary way, the details around closures, passes, and checkpoints were formulated not by the police in secret but by elected representatives, in municipal councils and provincial ministries. But a municipal bylaw, meant to address a single event in time, is not an ideal vehicle or appropriate substitute for comprehensive public order police legislation. Powers do not extend beyond city limits; not all cities have the resource to devote to drafting such law; and the gap in law remains a problem for future events.

To conclude this section, it is worth noting how the gap in Canadian law may have shaped police response to the trucker protest in Ottawa. I highlight three salient points. The conduct at issue in Ottawa did not come to an end until police created an exclusion zone in which they arrested and towed those who resisted. (Whether police needed an exclusion zone to carry out the arrests or conduct the evacuation is unclear.) Canada included the power to create exclusion zones in its *Emergency Regulations*,[128] demonstrating a belief that (a) the power was not available under other law, and (b) it was necessary. And until either government enacted law to create secure zones, there was confusion among police and the public as to who could do what.

## Part III: Filling the gap

Two issues arise: do police need a power to create exclusion zones and how best to submit them to the rule of law?

In some circumstances, police may need to regulate or close off access to public space as a primary means of keeping safe the people at a meeting of heads of state, a sporting event, or a protest. Too many people too close a sensitive site is a recipe for chaos, injury, and property damage. Secure zones restrict but can also facilitate the freedom to move, express, protest, or assemble during large events by helping to route traffic and to create dedicated, orderly spaces for protest and assembly. Whether in a given case an exclusion zone is necessary, and whether the measures involved in its use are proportionate to the rights affected, will depend on the facts.

[128] *Supra* note 26.

If police should have the power to create secure zones and – as Part II has shown – the law on point is at best unclear, what is the most effective way to ensure that police exercise the power in accordance with the rule of law? For without clear authority in law to create large exclusion zones, police are left to deal with a complex problem without guidance and with limited oversight.

One school of thought suggests that this is as it should be. Former Chief Justice of Ontario, Roy McMurtry has written that it would be "quite impractical and unnecessary to legislate an extensive code of police powers [for large gatherings] given their common law and statutory responsibilities to generally maintain public order."[129] It is not "advisable," he suggests, "to be prescriptive in anyway regarding what actions to police can take since they must discuss with the situation warrants, while at the same time considering individual rights and freedoms."[130]

But the recent history of public order policing supports a different view. Police, event planners, citizens have faced challenges sorting out issues around these zones; uncertainty has led to confusion, disorder, and violence involving police; accountability has suffered. Without clear statutory authority, police have been left to decide, behind closed doors, without effective oversight or review and without *a clear test or criteria*: whether circumstances require an exclusion zone; where and how big it will be, and how long it will last; who may enter, who must identify themselves, and who may be searched or detained. Homeowners, businesses, and other citizens have been left in the dark about all of these matters until the eve of or the middle of an event. As examples from Britain and Australia demonstrate, legislation could provide guidance on the policing of large events without unreasonably restricting police discretion.

A legislative framework would also be a more effective means of protecting *Charter* rights. It would reflect the idea that Justice Dickson, as he then was, articulated in *Hunter v Southam Inc* that *Charter* rights are more effectively protected by measures

[129] McMurtry, *supra* note 113 at 34.
[130] *Ibid*.

designed to avoid a breach rather than having courts referee police conduct after the fact.[131]

Legislation would also be preferable to temporary or emergency law, or to court injunctions. Federal and provincial lawmakers would have the benefit of careful deliberation, informed debate, research, and consultation. Public Order Policing Acts could be comprehensive, general, and indefinite in nature rather than temporary or issue specific.

## a. British and Australian models

No single piece of legislation from elsewhere in the Commonwealth provides a complete model on which to draw, but law from the UK and Australia contains valuable tools. Each of the examples considered here represents a recognition that civil liberties should not be interfered with by police without clear and specific statutory authority. Each is also a good example of how, in distinction to common law powers created piecemeal, a statute can address a matter more extensively and strike a balance between liberty and security in ways individual police or courts may not.

### UK legislation

The United Kingdom's *Public Order Act* of 1986 has provided a tool for policing premised on a different approach from that entailed in erecting an exclusion zone.[132] Instead of authorizing police to create a zone to keep protesters out, protest organizers are required to give police notice of a gathering and police are authorized to disperse unlawful gatherings. Policing large protests has involved police taking steps to route or channel what the act calls 'public processions' or imposing conditions on 'public assemblies'.[133]

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[131] [1984] 2 S.C.R. 145. James Stribopolous, *supra* note 118, at 107-108 and 114-116, makes many of the same arguments. The lack of a clear definition of public order police powers in legislation violates the rule of law requirement to provide citizens fair notice of the limits of lawful authority; hinders police accountability (rendering it "more theoretical than real"); leaves uncertain when or whether powers used at a given event were lawful; and overstates the impediment to police posed by "specif[ying], at least in general terms, the sorts of circumstances in which the police can close roads, erect security fences and barriers, employ crowd-control measures, and designate protest zones".

[132] Acts U.K., 1986, c. 64.

[133] P.A.J. Waddington, *Liberty and Order: Public Order Policing in a Capital City* (London: University College London Press, 1994), chapter 7.

The act defines a "public procession" broadly to include any form of protest or demonstration.[134] Organizers of a public procession must provide six days' notice to police of the date, time, and place of an intended gathering.[135] It is an offence to partake of a procession for which notice was not provided.[136] Where a "senior police officer" reasonably believes a public procession is being held or is intended to be held that "may result in serious public disorder, serious damage to property or serious disruption to the life of the community" she may "give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, [etc.] including conditions as to the route of the procession or prohibiting it from entering any public place specified in the direction."[137] Where a chief officer reasonably believes that powers to give directions would "not be sufficient to prevent the holding of public processions in that district or part from resulting in serious public disorder," she can apply to the council of the district for an order prohibiting all public processions in the district for up to 3 months.[138]

An analogous set of conditions pertain to "public assemblies," a term not defined. In this case, a senior officer may "give directions imposing on the persons organizing or taking part" in an assembly where she reasonably believes it "may result in serious public disorder", damage, or disruption to the life of the community.[139] In England and Wales, an officer may impose "such conditions as appear to the officer necessary to prevent the damage, disorder" [etc]; in Scotland, the power is limited to conditions as to maximum duration and number of persons involved.[140]

The *Public Order Act* also creates the categories of "disruptive trespassers" and "trespassory assemblies" and the offence of "aggravated trespass," which occurs when a person trespasses on land or intimidates or disrupts others carrying on lawful activities.[141] A "trespassory assembly" is any assembly of persons on land to which

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[134] *Supra* note note 132, s. 11(1), subsection letters omitted.
[135] *Ibid*, s 11(5).
[136] *Ibid*, s. 11(7).
[137] *Ibid*, s. 12(1). Other subsections define examples of what constitutes "serious disruption" including noise that generates intimidation or distress.
[138] *Ibid*, s. 13(1). In the City of London, the Commissioner of Police would apply to the Secretary of State for the order (s. 13(4)).
[139] *Ibid*, s 14(1).
[140] *Ibid*, s 14(1A).
[141] *Ibid*, Part V. Notably, the act specifically excludes "highways and roads" from the definition of land.

the public has either no right of access or a limited right and is conducting itself in a manner that a chief police officer reasonably believes "may result — (i) in serious disruption to the life of the community, or (ii) where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, in significant damage to the land, building or monument."[142] A prohibition order against a trespassory assembly may last up to four days and extend up to five miles from the specified site.[143]

Civil libertarians have been critical of the *Public Order Act* for, among other reasons, replacing older riot provisions of UK criminal law with "vaguely defined offences that leave enormous discretion in the hands of the police that can be used to harass marginal groups".[144] The act also provides police powers that are "not subject to effective judicial or political oversight or accountability".[145] By imposing rules on a wide range of gatherings, including picketing, the bill risks "criminalizing the entirely peaceful exercise of democratic rights."[146] One retort is that few of the powers or obligations in the act were new; it merely codified powers available to the police at common law and substituted a national requirement to give notice of a protest for various pre-existing local rules.[147] A study published in the mid-90s notes that of the 150 marches for which notice was provided each year since the passage of the act, none had been refused and conditions were imposed in only four.[148]

The UK Parliament has since amended the *Public Order Act* to expand police powers. An act passed in 2022 widens the range of conditions police can impose on protests.[149] A bill currently before Parliament would add new offences corresponding to increasingly common protest techniques, including the offences of 'locking on,' 'tunneling,' and 'interference with use or operation of key national infrastructure.'[150]

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[142] *Ibid*, s. 14A.
[143] *Ibid*, s. 14A(6).
[144] Waddington, *supra* note 133 at 31.
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid* at 32-34.
[148] *Ibid* at 37.
[149] *Police, Crime, Sentencing and Courts Act, 2022*, Acts UK, 2022, c. 32, Part 3 of the Act.
[150] "Public Order Bill", Bill 116 2022-23, UK.

## Australian legislation

The New South Wales *APEC Meeting (Police Powers) Act 2007* authorized police to create an exclusion zone and specified rules for policing it.[151] The act contemplated an "APEC Security Area" and an "APEC Period." Both were defined terms, with detailed maps of the area included in a schedule and the period extending from August 30 to September 12, 2007. The act permitted police to impose "check points, cordons or roadblocks" in and around the APEC Security Area, and to stop and search without a warrant people seeking to enter or move through the Area. It permitted police to seize anything on a list of "prohibited items," including spray-cans and flammables.[152] Police could also close roads inside the Security Area, but only for the "shortest possible period" and for limited purposes, including the safety of persons travelling to meetings and the protection of property.[153]

The *APEC Meeting (Police Powers) Act* also created the offence of entering a "restricted area" without "special justification," a defined term. This could include the need "to be in (or pass through) the area for the purposes of [a] person's employment, occupation, profession, calling, trade or business or for any other work-related purpose".[154] A person alleged to have obstructed police or damaged property during the APEC period was subject to a rebuttable presumption against the granting of bail. Other sections provided for the use of force by persons assisting police and for maintaining a list of "excluded persons."

Some of the measures in either of these acts may not withstand scrutiny under Canada's *Charter*. The general thrust of each act likely would. Lawmakers can debate limits on powers and these can be tested in court. The first step to fulfilling a commitment to the rule of law in this context is to decide on what limits are desirable and to provide at least a minimal degree of clarity and guidance to law enforcement.

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[151] The act was repealed soon after the event, but a copy can be found online: (http://www.austlii.edu.au/au/legis/nsw/repealed_act/ampa2007252/index.html#s1).
[152] *Ibid*, Part 3.
[153] *Ibid*, Part 3, Division 5.
[154] *Ibid*, s. 37.

## b. Jurisdiction over public order policing

The issue of jurisdiction over public order policing is not straightforward. Both provincial and federal governments regulate police conduct.[155] The topic of public order straddles federal and provincial heads of power. Depending on the type of event or the police power at issue, authority to make law might fall within the federal government's purview to regulate police conduct under the power in section 91(27) of the 1867 Constitution over criminal procedure or the power in the preamble to section 91 to make law to preserve "peace, order, and good government".[156] It might also or instead fall within the power of Canada's provinces regulate police conduct in section 92(14) over the "administration of justice in the province".[157]

There are reasons that both provincial governments and Canada should pass public order policing acts. They would not be redundant. They would address potential conflicts between federal and provincial or municipal forces at a given event. They would be tailored to the kinds of events falling within the jurisdiction of either government. Without a statute at both levels, gaps in the law would remain.

Provincial legislation would be an appropriate vehicle for setting out rules governing events of a local or provincial nature likely to be policed by municipal or provincial police (or the RCMP acting as such), including sporting events, fireworks, religious celebrations, and protests or demonstrations. A provincial public order act could provide effective guidance on matters in addition to exclusion zones, such as event security, managing pedestrian and vehicle traffic, facilitating protest and expression, and law enforcement (offences against the act).

Federal legislation would address events of a national or international nature likely to be policed by the RCMP (or several forces acting in coordination), such as major sporting events (Olympics, FIFA World Cup), intergovernmental conferences, and nation-wide protests. The bill would address all of the items noted above – closures,

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[155] Statutes constituting police forces, setting out police powers, and subjecting police to accountability or review can be found in both federal and provincial contexts, including the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10 and Ontario's *Community Safety and Policing Act, 2019*, S.O. 2019, c. 1, and in the investigatory and arrest powers found in the *Criminal Code*, provincial Offence Acts, and statutes such as Ontario's *Keeping Ontario Open*, *supra* note 63 and Alberta's *Critical Infrastructure Defence Act*, *supra* note 61.

[156] *The Constitution Act, 1867*, 30 & 31 Vict, c 3.

[157] *Ibid*.

traffic, facilitating protest, law enforcement – but also interagency jurisdiction, planning, and coordination.

Legislation at both levels could be structured analogously to the UK's *Public Order Act, 1986*, with its recognition of two kinds of gathering (public processions and assemblies) – or Canada's *Emergencies Act*, with its four kinds of emergency – by attaching specific powers to certain kinds of events. Powers and responsibilities could be tailored to different kinds of events.

## c. Content of public order policing legislation

A public order act at either the provincial or federal level, addressing various kinds of events, should define what constitutes a secure zone (the closure or regulation of any form of access to public and private space). It should set out a test or set of criteria for creating an exclusion zone based on the principles of reasonable necessity and proportionality. Restrictions imposed on admission and the use of passes should also be subject to these principles. Rules should be set out on compensating businesses and homeowners directly and significantly affected. Police decisions about imposing secure zones, admission, passes, and compensation should be subject to an expeditious form of independent review. Whether Canada should adopt a notice requirement for planned gatherings is an important but complex question, and beyond the scope of this report.

A federal *Public Order Policing Act* could be an occasion to repeal outdated provisions in the *Criminal Code*, including those prohibiting involvement in a riot or unlawful assembly, or those of questionable utility, such as the offence of intimidation or the power to arrest for breach of the peace.[158] Instead of overlapping and often confusing offences being used in this context, new law in this area could support law enforcement and provide clarity to the public by setting out a clearly escalating scale of offences for involvement in violent protest.[159] The act could also require that to detain and search in a secure zone, police need reasonable grounds to be believe a

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[158] *Criminal Code*, supra note 57, ss 31, 63-68, and 463. See the discussion of section 31 in Steven Penney and Colton Fehr's Report to the Commission, *supra* note 60, noting that "police have ample powers to arrest people who have committed or are 'about to commit' offences involving dangerous or violent conduct." See also Stribopoulos, *supra* note 118 at 116-118, assessing the abuse of this power at the G20 in 2010 in support of its repeal.

[159] I thank Professor Kent Roach for suggesting this.

public order offence is being committed. This would premise the use of these powers on other police powers circumscribed in the act.

## Conclusion

After invoking an emergency in February of 2022, Canada passed a regulation explicitly providing authority to create an exclusion zone. The power was not clearly available under other legislation, aside from provincial emergency law. The “secure area” police created in Ottawa in February represented a significant incursion on fundamental rights, by virtue of its scale and duration and the rights affected: mobility, expression, assembly. In a manner similar to earlier public order events in Canada, decisions made in Ottawa about whether an exclusion zone was reasonably necessary and proportionate to security concerns, and details about its use, were made behind closed doors. In this case, the Commission serves as a means of accountability and review, but future uses of exclusion zones may not. Police and the public would be better served by legislating on public order police powers so that large protests and other events unfold with fewer surprises and in accordance with the rule of law.

# The Role of Intelligence in Public Order Emergencies

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# Abbreviations:

ADM NS OPS: Assistant Deputy Minister Committee on National Security Operations

BCCLA: British Columbia Civil Liberties Association

CBSA: Canada Border Services Agency

CRCC: Civilian Review and Complaints Commission for the RCMP

CSIS: Canadian Security Intelligence Service

EP: Emergency Preparedness Secretariat (PCO)

FINTRAC: Financial Transactions and Reports Analysis Centre of Canada

GOC: Government Operations Centre, Public Safety

IAS: Intelligence Assessment Secretariat, PCO

IMCIT: Ideologically Motivated Criminal Intelligence Team (RCMP)

IMVE: Ideologically Motivated Violent Extremists

INSET: Integrated National Security Enforcement Team (RCMP-led)

IRG: Incident Response Group (Cabinet Committee)

ITAC: Integrated Terrorism Assessment Centre

NSI: National Security and Intelligence

NSIA: National Security and Intelligence Adviser to the Prime Minister

NSICOP: National Security and Intelligence Committee of Parliamentarians

NSIRA: National Security and Intelligence Review Agency

OSINT: Open Source Intelligence

PCO: Privy Council Office

PMO: Prime Minister's Office

RCMP: Royal Canadian Mounted Police

SIRC: Security and Intelligence Review Committee (succeeded by NSIRA in 2019)

SOCMINT: Social Media Intelligence

# Executive Summary *

Senior Canadian intelligence officials have publicly warned that Canada is facing a pivotal moment in dealing with a changing and volatile national security threat environment. In June 2021, the National Security and Intelligence Adviser to the Prime Minister stated:

> *"The world is at an inflection point…facing a complex combination of new and enduring national security challenges…National security threats against Canada—whether from state or non-state actors or global phenomena such as pandemics and climate change--are greater than ever and directly impact our economy, our democratic institutions, and our way of life. In the face of such massive change, Canada's national security and intelligence community needs to evolve and adapt."*[1]

Two recent examples of national security challenges came hard on the heels of each other in early 2022—the protests conducted under the umbrella of the so-called "Freedom Convoy," and the premeditated and brutal Russian invasion of Ukraine.

Canada's national security and intelligence system plays a fundamental role in allowing the federal government to understand the threats the country faces and respond accordingly. That role involves providing intelligence on the intentions, capabilities and operations of threat actors. Intelligence encompasses early warning and situational awareness. All of these functions were vital to intelligence performance with respect to the "Freedom Convoy" protests.

Two related issues must be faced squarely: whether Canada suffered an intelligence failure in monitoring the "Freedom Convoy;" and whether that intelligence failure affected the decision of the government to invoke the Emergencies Act on February 14, 2022. [2] Intelligence failure can be a loaded issue and sometimes a matter for scapegoating. What deserves serious attention is the accuracy and relevance of the available intelligence on the "Freedom Convoy," and whether it informed policy making appropriately. In this research paper there are indications of intelligence success and worrying signs of failure, including with regards to the governance of the national security and intelligence system. Full answers can only be known through more systematic study and access to classified records.

This research paper begins with a general analysis of intelligence as a function of government and proceeds to examine the activities of key national security and

intelligence organizations, from the Cabinet table to entities with very specialised mandates.

The conclusion to the paper offers some findings and suggestions for necessary changes to legislation and governance, based on the analysis contained herein. Key questions to be addressed in the text include:

> *Were there perceived authority limitations that impeded the ability of national security and intelligence entities to collect, process, analyse and disseminate intelligence on the "Freedom Convoy?"*
>
> *Were intelligence collection methods, especially open source, properly utilised?*
>
> *Was intelligence reporting from a variety of departments and agencies fully integrated?*
>
> *Were intelligence assessments on the national security threat posed by the "Freedom Convoy" accurate, relevant, and sufficiently forward-looking?*
>
> *Was the dissemination of intelligence to decision-makers timely and effective?*

If the answer to any of these questions is no, then there is urgent work to be done to improve the authorities, capabilities and reporting mechanisms of the national security and intelligence system. At the same time, it is important to ensure that political decision makers fully understand and trust the intelligence they receive.

In any future circumstance where a federal government might need to reach for extraordinary powers, as with the Emergencies Act, it is important to avoid a circumstance where inadequate intelligence, or lack of confidence in intelligence, or an inadequate national security and intelligence governance system, compels the use of such powers.

The research paper ends with a quote from the CSIS Director, David Vigneault, in which all Canadians should be invested:

> *"the fight for democracy is one we cannot afford to lose."*[3]

The national security and intelligence system must be equipped for that fight, in ways that the Canadian public will understand and accept. The available evidence and tentative judgement in this paper is that the NSI system was not ready and fully equipped when the "Freedom Convoy" descended on Ottawa and critical infrastructure at the border.

# Introduction:

It has repeatedly been said, and demonstrated in recent public opinion polling, that Canadians know little about their country's national security system.[4] A lack of understanding about national security may seriously hamper public discourse and weaken the fabric of our democratic processes. It is abetted by the secrecy that continues to surround national security practices in Canada. Lack of public knowledge and secrecy can give oxygen to conspiracy theories, as was demonstrated during the "Freedom Convoy." [5]

Understanding national security is also complicated by the inevitable tensions that arise in a democracy between practices aimed at achieving security and those designed to ensure the maintenance of our rights and civil liberties. National security discourse often carries with it the ball and chain of societal fears of "Big Brother." Extremist anti-government rhetoric only deepens such fears. Academic discussion can be hampered by ill-defined concerns about "securitization." [6]

The role that national security and intelligence organizations play in defending the state and society against threats has been torqued by new challenges. These include foreign interference, the malicious spread of disinformation, rampant espionage, cyber threats, and the undermining of Canadian economic security. Democracy itself is being challenged by a new threat environment in which authoritarian movements are on the rise globally and anti-government conspiracy theories flourish across the internet. Transnational threats to security posed by pandemics and climate change impacts are imposing increasingly stiff costs domestically and internationally.[7]

In February 2022, for a brief period of nine days, the government of Canada took the unprecedented step of invoking the Emergencies Act and declaring a Public Order Emergency, in response to a protest movement that called itself the "Freedom Convoy" and had encamped in the nation's capital and blockaded key border crossings between Canada and the U.S.

Investigating the role that intelligence played in advising the government on the threat posed by the "Freedom Convoy" is essential to any understanding of the rationale for the government's decision to invoke the Emergencies Act. This role is not singular and frozen in time. What happened in the lead up to February 14, 2022, must also be understood as an object lesson in how intelligence should perform in the future when protest movements, or other dangers, may again be seen to threaten national security.

Two questions must be at the heart of any examination of the role of intelligence in responding to protest movements that raise legitimate national security concerns. One is whether the intelligence system was able to deliver useful warning and situational intelligence to assist the government in decision-making about how to respond to the protest. The other is whether the governance arrangements for the intelligence system were shown to be in working order and effective. These are large issues that can never be addressed properly without access to the full classified record. But an initial examination based on publicly available records can be a starting point by identifying problem areas and raising questions for further study.

This study is based entirely on publicly available records extant between July and early September 2022, when the research and writing was conducted. It has been aided by the partial release of Cabinet records, by testimony given by government officials to Parliament, by publicly available court records, and by material released in response to Access to Information requests.[8] But none of this amounts to anything like a full record. This study takes no position on the legitimacy or otherwise of the government's decision to invoke the Emergencies Act and it does not seek to pronounce on whatever national security threats the protest movement may have presented. [9] It is designed to elucidate how the Canadian national security intelligence system responded to the "Freedom Convoy" protests.

The observations and analysis in this report are based on my own study of the available record and on my own knowledge of Canada's national security and intelligence system. The views expressed in this report are my own personal opinion. I hope they may be of use.

## Organization of the Report

The report focuses entirely on the federal government's national security and intelligence (NSI) system. The federal government has unique carriage of national security threats and deploys intelligence resources unavailable to other levels of government. The report does not include any study of security, intelligence and law enforcement practices at the provincial, territorial or municipal levels.

The study throughout refers to the "Freedom Convoy" as an object of the work of the federal national security and intelligence system.

The study examines events during January and February 2022, but does not consider the impacts of the invocation of the Emergencies Act on the work of the NSI community.

The study is broken down into component discussions, some general and high level regarding the nature of intelligence, the organization of the federal national security and intelligence community, the mandates and authorities of relevant NSI departments and agencies and the intersection between the Emergencies Act and the CSIS Act. It also looks at the known role played by various actors in the national security and intelligence space, from the Cabinet and National Security and Intelligence Adviser, through to specific entities with intelligence roles. It raises a speculative question about public intelligence and briefly discusses the importance of review and accountability.

Each component discussion is indicated by sub-headings in the report for ease of reference. Readers can refer to the Table of Contents for guidance to specific sections.

## Understanding Intelligence

In the 2004 National Security Policy, the only extant national security strategy issued by the Canadian government, intelligence is described as "the foundation of our ability to take effective measures to provide for the security of Canada and Canadians. To manage risk effectively we need the best possible information about the threats we face and about the intentions, capabilities and activities of those who would do us harm." [10]

This statement, while generic, does identify some of the principal features of intelligence—that it deals with threats to security; that the quality of intelligence matters; and that the focus of intelligence is on the intentions, capabilities and operations of threat actors.

In addition to these general features, it is important to understand that intelligence is a complex enterprise, often portrayed in the form of an intelligence "cycle" representing different elements of the genesis of intelligence knowledge with collection, analysis and dissemination at the core. [11] An intelligence picture will always be incomplete to some degree. This puts extra emphasis on maximising collection, building in corroboration of information, ensuring analysis/assessment is of the highest quality, providing for the timely dissemination of intelligence, and ensuring that

decision-makers understand the strengths and weaknesses of an intelligence product. Building and maintaining a system that operates to these goals is often referred to as facilitating a strong intelligence "culture."

While the subject matter of intelligence may be described as understanding threats to security, its objective goes beyond understanding, to encompass a notion of 'competitive' or 'informational advantage.' [12] That is, entities look to intelligence to provide warning, which may be elastic and future-oriented, and current situational awareness. If warning and situational awareness are sufficiently accurate, this helps to identify opportunities for action and generate optimal decision-making.

One more distinction to add to the mix concerns what is often called "actionable" intelligence, which is particularly important in dealing with unfamiliar or novel situations of surprise. Actionable intelligence needs to be timely, relevant to decision-makers, and of a precision that enables decision-makers to use it in responding to an emerging threat. This is the formula advanced by Erik Dahl in his major study of intelligence and surprise attack. [13] As Dahl also notes, actionable intelligence must be met with receptivity and understanding of the intelligence process on the part of decision-makers.

The 2004 National Security policy made clear the link between intelligence and security. Intelligence is a means by which security can be achieved. National security is situated as the highest obligation and greatest goal of government, even if this concept is rarely addressed in Canadian public discourse. [14]

But as a means to an important end, intelligence is also fraught with controversy. The very nature of intelligence, its attendant secrecy, its mystique, driven by popular culture depictions, its potential intrusiveness, all combine to generate natural concerns in democratic societies. A former senior UK intelligence official, Sir David Omand, has identified a significant contemporary shift in thinking about the security-intelligence linkage by arguing that:

> *"national security today should be defined as a state of trust on the part of the citizen that the risks to everyday life, whether from man-made threats or impersonal hazards, are being adequately managed to the extent there is confidence that normal life can continue."* [15]

Maintaining citizen trust and "carrying on" is a challenging goal in an age of political polarization, declining democratic norms, rampant misinformation and disinformation, and loss of faith in authority structures. Quite apart from these meta trends the idea of citizen trust more specifically in intelligence and the pursuit of security butts up

against engrained ideas of intelligence as posing dangers to democracy and rights, especially as new technologies of information gathering and analysis provide new tools for intelligence agencies. The 2004 National Security Policy, penned in a different technological and threat era from today, tried to put a brave face on the existential dilemma of security policy by arguing that "there is no conflict between a commitment to security and a commitment to or most deeply held values."[16] Better to recognize that tensions may often arise, or be perceived to arise, between the pursuit of security and the maintenance of democratic rights. How those tensions are managed through legislation, policy, action, accountability and public transparency are key.

The invocation of the Emergencies Act by the government on February 14, 2022, raises profound questions about the uses of intelligence, the pursuit of security, and the ongoing maintenance of citizen trust in a democracy. Paradoxically, growing reliance by security and law enforcement agencies on open-source intelligence in responding to potential threats to national security can be at the heart of this dilemma.

## On Open-Source intelligence (OSINT)

Open-Source intelligence is one of many intelligence collection methodologies (often referred to as "ints"). While it is of long-standing, it has been transformed by the volume and speed of information transiting the internet, information circulating on social media platforms, and information captured in data bases.[17]

Sir Mark Rowley, the newly appointed head of the UK Metropolitan Police, and former head of UK counter-terrorism policing, has recently written that:

> *"OSINT can be a powerful intelligence and investigative tool but it is too often overlooked. In many organizations there are significant barriers to the adoption of effective OSINT, as well as a failure to adapt fast enough to emerging technologies. A cultural shift is needed in order to elevate the status of OSINT and ensure that it is used to its full potential."*[18]

The barriers that Sir Mark referenced include misunderstandings about OSINT, which despite its many recent successes in the hands of NGOs such as Bellingcat, can "conjure a somewhat negative image, with connotations of hacker-like behaviour and invasions of privacy." [19]

Definitions of OSINT can go some way to addressing these misconceptions. The US intelligence community has an official definition of OSINT:

> "*produced from publicly available information that is collected, exploited and disseminated in a timely manner to an appropriate audience for the purpose of addressing a specific intelligence requirement*" [20]

The literature on OSINT offers many definitional variants. Stevyn Gibson offers this one: OSINT is, "the exploitation of information legally available in the public domain."[21] But as Gibson also notes the definition is problematic in all its parts—including the notion of what constitutes the public domain, the concept of 'legally available' and the matter of who does the exploitation, particularly when government intelligence services have no monopoly over OSINT and may benefit from working in partnership with private sector firms and NGOs.

Sir David Omand and his co-authors take a different approach to what they describe as "social media intelligence" (or SOCMINT) and argue that its potential must be anchored in concepts of necessity and legitimacy. Necessity involves an ability to demonstrate its applied use to advance public safety goals. Legitimacy, in their view, can be framed by principles drawn from just war doctrine, include right cause, motive, authority and proportionate use. They remind readers, flipping the just war doctrine on its head, that secret intelligence should be a last recourse because of its intrusive potential; social media intelligence should be a first recourse.[22]

If precisely framing OSINT (or SOCMINT) is difficult, its attributes are easier to determine. These attributes include: accessibility and relative low cost compared to more clandestine methods of intelligence collection; the flexibility it offers, particularly in terms of a surge capacity when more information on a particular target is urgently needed and other intelligence collection methodologies cannot be pivoted as quickly; and the ability of OSINT to serve as a gateway to more precise targeting. Finally, there is the practical benefit for security and intelligence systems of the lower classification levels for reporting derived from OSINT, which makes reporting products easier to circulate and gives them potentially much wider readership. [23]

OSINT has one characteristic that is both benefit and drawback: the volume of information available. To make use of OSINT's richness requires sophisticated technological tools, such as artificial intelligence and machine learning, and human analytical capacity.

But for all these attributes there is, counter-intuitively, an ongoing challenge with the deployment of OSINT. This involves the question of lawful authorities. Where more clandestine and intrusive methods of intelligence collection can be protected through a judicial authorization system, along with other accountability checks, the same is less true for OSINT. Warranted OSINT would be, in most cases, a contradiction in

terms, but this leaves open the boundaries around lawful collection, which is further complicated by the fast pace of technological change and pressures on traditional definitions of privacy. As a Library of Parliament report by Holly Porteous puts it, "pervasive digitalization raises difficult legal and ethical questions about what can reasonably expected to remain private and the extent to which an individual can control what happens to their personal information while continuing to participate in society."[24] In the Canadian context, these pressures are also framed by Charter protections against unreasonable search and seizure. Both the RCMP and CSIS have found themselves caught up in this dilemma, as my report demonstrates below.

The content of social media messaging could (and should) have provided national security and intelligence agencies with their best source of important clues about the intentions, capabilities and operations of the "Freedom Convoy" protest. Utilization of this source would have required an early determination about potential threats to national security posed by the protest, a sophisticated technological capacity to collect and assess the flow of information across mobile devices and the internet, both domestically and internationally, and timely action as discourse about the Freedom Convoy metastasized online. It would have required an appropriate governance framework to ensure effective use of OSINT, particularly in terms of analysis and dissemination.

Even in the absence of a full-scale examination of the social media activity of the "Freedom Convoy," the value of the material for national security and intelligence purposes seems clear. One indicator is a 4,000 page document detailing communications between two of the convoy organizers, Tamara Lich and Chris Barber, that was entered as evidence by the Crown in a bail hearing for Lich.[25]

*The Verge*, a multimedia organization founded in 2011, that tracks the intersection of technology and culture, curated one investigation into the "Freedom Convoy's" Facebook ecosystem.[26] It identified an informational "pipeline" that moved from physical protest to social media to right wing establishment outlets. It was that pipeline that gave the "Freedom Convoy" its global presence. *The Verge* tracked the rise of the "Freedom Convoy" on Facebook tracing its initial start to a post on Rumble, a right-wing video platform, on January 18, 2022, which was then picked up by a Facebook page called "Freedom Convoy 2022" which linked to another far-right activist, Pat King. Mentions for "convoy" across the web jumped enormously between January 25 and January 29, the beginning of the weekend demonstrations in Ottawa. As *The Verge* investigation found, the centre of gravity of the "Freedom Convoy" on Facebook had moved offshore by the end of January, with the largest Facebook group—"The People's Convoy-official" run by five administrators with U.S. ties. The analysis concludes that the social media presence of the "Freedom Convoy" initially involved

a “small collection of local conspiracy theorists”, but it was “given a megaphone by America’s powerful right-wing disinformation machine.” [27]

Foreign content mills also emerged as the amplification of the “Freedom Convoy” message took off online. One was run from Bangladesh.[28] Another from Bulgaria.[29] One investigation found that some of the largest Facebook groups involved in promoting the “Freedom Convoy” in the run-up to the arrival of demonstrators in Ottawa over the weekend of January 29-30, were being run through a stolen account belonging to a Missouri woman. Facebook moved to disable the illicit accounts on February 7.[30] The Canadian Anti-Hate coalition, early in the “Freedom Convoy’s” evolution, identified the significance of the “Freedom Convoy’s” crowd funding efforts and the role that far-right organizers, such as Pat King, and the accelerationist movement, Diagolon, played.[31]

The tracking and analysis by small media organizations and NGOs shows the potential of open-source intelligence when it comes to understanding the inner world of a protest movement and the ways in which its messaging can reach far beyond a small coterie to have global impacts, including reputational impacts for Canada.

Measuring the degree of success or failure involved in the national security and intelligence community’s efforts to deploy OSINT capabilities to understand the potential threats to national security presented by the “Freedom Convoy” is critical. There are two observations in play. One is that, in recent months, the combination of the “Freedom Convoy” protests at home and the momentous implications of the Russian invasion of Ukraine, where open-source intelligence has played such a prominent role, remind us of the vital importance of treating OSINT as a prime intelligence resource and, as Sir David Omand suggests, a first recourse of the national security intelligence system when faced with an emerging threat.

The second is that with heightened appreciation of the importance of OSINT as an intelligence tool, governance needs to be altered to match. Two recent Canadian reports have both called for enhancements to the national security and intelligence community’s capacities for OSINT. Greg Fyffe has argued that there should be a common OSINT platform for the Canadian intelligence community, coordinated by a senior official. [32] A separate report by the “Task Force on National Security,” asked “who in the government should be responsible for monitoring social media?” noting that partial mandates existed in numerous organizations. In the case of the “Freedom Convoy,” the Task Force authors believe that government mandates to collect social media intelligence were “strictly limited.” Like the Fyffe report, the Task Force proposed the option of creating a stand-alone unit to collect and analyze open-source. The idea of having it placed in Public Safety alongside a small unit that engages in

community counter-radicalization funding may be less attractive than placing the unit directly in the Privy Council Office, alongside the Intelligence Assessment Secretariat, and reporting to the National Security and Intelligence Adviser.[33]

Machinery of government changes always warrant careful reflection. But change to ensure a much enhanced capacity for OSINT collection, analysis and use is vital for both law enforcement and intelligence agencies.

## The Canadian National Security and Intelligence (NSI) system

The structure and operations of the federal government's intelligence community are opaque to most Canadians. Recent public opinion surveys conducted by both CSIS and CSE indicate low levels of public knowledge about these organizations, a finding bound to be replicated in any understanding of the broader intelligence system. [34]

The Privy Council Office published a small pamphlet in 2001 describing the Canadian security and intelligence community, complete with an organization chart. [35] It described the S and I community as a "significant national asset." The pamphlet's discussion of intelligence was kept at the most elementary level, but notably included a mention of open-source intelligence as a counter-point to secret intelligence:

> *"some components within the community possess a unique capability and authority to collect and assess information that is not available from conventional sources—in other words secret information. In doing their work, security and intelligence community staff must blend this information with all other available information, including openly-available information from international broadcasts, newspapers, the Internet and academia, other parts of government, and intelligence generated by foreign countries."* [36]

There has been no official public update of this basic accounting of the intelligence community since 2001.

However, the first annual report of the National Security and Intelligence Committee of Parliamentarians, submitted to the Prime Minister in December 2018 and published in April 2019, included a chapter on "A Functional Overview of the Security and Intelligence Community." The chapter wrestled with definitions of national security and intelligence, noting that neither is defined in legislation, the closest being the enumeration of threats to the security of Canada set out in the CSIS Act. The NSICOP

report also addressed the question of the organization of the security and intelligence community, drawing on, but adapting, material supplied to it by the Privy Council Office.

The organization chart that the committee came up with distinguishes between eight "core" federal organizations, with mandates that are "entirely or substantially related to national security, intelligence or both," and an outer ring of organizations that belong to the security and intelligence community but have mandates broader than security and intelligence.

The eight core members are listed as: [37]

*The National Security and Intelligence Adviser*

*Canadian Security Intelligence Service*

*Department of National Defence/Canadian Armed Forces*

*Canada Border Services Agency*

*Communications Security Establishment*

*Royal Canadian Mounted Police*

*Global Affairs Canada*

*Integrated Terrorism Assessment Centre*

## Table 1: Core Members of the Security and Intelligence Community

| | |
|---|---|
| **National Security and Intelligence Advisor**<br>- Advises the Prime Minister and Cabinet<br>- Coordinates the policy and operations of the security and intelligence community<br>- Provides intelligence assessments<br>- Provides a challenge function for the security and intelligence community | **Communications Security Establishment**<br>- Collects and reports on foreign signals intelligence<br>- Protects information and information infrastructures of importance to the Government of Canada<br>- Assists government departments |
| **Canadian Security Intelligence Service**<br>- Collects intelligence and advises on threats to the security of Canada<br>- Takes measures to reduce threats<br>- Collects foreign intelligence within Canada<br>- Conducts security assessments | **Royal Canadian Mounted Police**<br>- Investigates national security offences<br>- Investigates sophisticated organized crime<br>- Enforces federal legislation<br>- Takes measures to reduce threats<br>- Conducts threat assessments |
| **Department of National Defence / Canadian Armed Forces**<br>- Conducts 'full spectrum' intelligence operations to support military operations<br>- Collates and assesses intelligence | **Global Affairs Canada**<br>- Manages foreign policy, including international security issues<br>- Manages emergency response overseas<br>- Obtains privileged information through personnel posted abroad<br>- Manages foreign intelligence relationships |
| **Canada Border Services Agency**<br>- Ensures border integrity at ports of entry<br>- Uses intelligence and other data to make risk-based decisions regarding the admissibility of persons and goods to Canada | **Integrated Terrorism Assessment Centre**<br>- Analyzes terrorism threats to Canada and Canadian interests<br>- Recommends the National Terrorism Threat Level<br>- Sets terrorism threat levels against Canadian interests abroad, including special events |

Of the eight core members, two organizations—CSIS and the RCMP--have important roles in intelligence collection regarding national security threats generated from within Canada. A third, the Integrated Terrorism Assessment Centre, has an analytic role in addressing terrorism-related threats. The Canada Border Services Agency has a niche role as an intelligence collector but is an important consumer and user of intelligence to fulfil its mandate to ensure border integrity at ports of entry and to reach decisions on admissibility of persons and goods to Canada.

Three of the core members have intelligence mandates that primarily concern the global threat environment—Department of National Defence/CAF; The Communications Security Establishment; Global Affairs Canada. These will not be treated in my report.

Several entities not listed by NSICOP as core members of the security and intelligence community—FINTRAC, the Government Operations Centre, and the Emergency Preparedness Secretariat at PCO—are examined in my report because of their relevance or potential in responding to the "Freedom Convoy" protests.

The governance of the national security and intelligence community begins with the Prime Minister and Cabinet. There is currently no dedicated Cabinet committee for national security and intelligence. There are committees on "Canada and the World," which could consider national security-related issues; and on "Safety, Security and Emergencies," chaired by the Minister for Emergency Preparedness. The mandate of the Safety, Security and Emergencies committee is described as follows:

> "*Considers threats and risks to the safety and security of Canada and Canadians, manages ongoing emergencies, and ensures strategic, integrated and forward-looking leadership for emergency management*."[38]

There is also the Incident Response Group (IRG), described as a "dedicated emergency committee in the event of a national crisis or during incidents elsewhere that have major implications for Canada." [39]

Membership of the IRG is determined on a case-by-case basis.

The Incident Response Group was called together for the first time on February 10, 2022, to consider the "Freedom Convoy" protest activities. It would appear to have been the most significant Cabinet committee engaged on the protest, and was chaired by the Prime Minister. [40] A separate section of this report details what is known from redacted records about its discussions prior to the invocation of the Emergencies Act.

Below the level of the Prime Minister and Cabinet there is a cascading system of committees at the Deputy Minister, Assistant Deputy Minister and Director General levels that bring relevant officials from across the community together for policy and operational discussions on national security and intelligence issues. At the head of this committee system, operating from the Privy Council Office and reporting to the Clerk of the Privy Council, is the Prime Minister's National Security and Intelligence Adviser. The office of the NSIA is a lynch pin in trying to ensure that a decentralised system with individual departments and agencies responsible to Ministers, can be coordinated and made to work together. The NSIA is also a key point of connectivity between the national security and intelligence community and the Prime Minister and Cabinet. The NSIA played a lead role in briefing the Cabinet Incident Response Group on developments with regard to the Freedom Convoy protest and in bringing deputy ministers together in the Deputy Ministers Operations Committee, which she chairs. Two entities within the PCO structure serve the NSIA—the Security and Intelligence Secretariat for operational issues (colloquially known as the "hair on fire" gang) and the Intelligence Assessment Secretariat for strategic threat assessments. [41] Because of the important role played by the NSIA in the crisis a separate section of the report is devoted to that office and its functions.

The governance architecture of the Canadian national security system has changed over time, as new entities have been added and new authorities created. But a consistent feature since the earliest days of a post-1945 Canadian intelligence system has been its decentralised nature, the diffusion of responsibility across many different departments and agencies, and reliance on a sub-Cabinet committee system, with relatively weak central controls. Another persistent feature has been the relative disengagement by Cabinet and successive Prime Ministers from national security and intelligence issues, an aspect of Cabinet governance that began to change significantly after 9/11.[42] But the current absence of a dedicated Cabinet committee on national security and intelligence is one sign of an ongoing failure to ensure that national security and intelligence issues are truly at the heart of federal government decision-making.

As some recent independent reports have emphasised, Canada is an outlier among its Five Eyes and G7 partners in not having a permanent body at the cabinet level chaired by the Prime Minister with responsibility for national security. [43] Two of our leading Five Eyes partners have either long-established (US) or newly established (UK) National Security Council structures. Australia has a strong national security division in the Prime Minister's office. They offer lessons from which Canada can draw best practices.

The national security and intelligence governance system was challenged by the unprecedented nature of the "Freedom Convoy" protest movement. Reflecting on this experience should be a trigger for a thorough-going examination of the governance mechanisms, capacities and authorities of the security and intelligence community. Organizational change is never sufficient to guarantee success in the face of national security challenges, but without a properly functioning NSI system, human talent and effort can go to waste.

## Mandates and Authorities of Relevant NSI entities:

The relevant "core" members of Canada's national security and intelligence community examined in this report operate under a diffuse set of statutory and other authorities.[44] Some have no direct statutory authority for their intelligence gathering and national security activities—this would include the National Security and Intelligence Adviser and the elements of PCO that report to her, CBSA, the Government Operations Centre and the Emergency Preparedness Secretariat.[45] ITAC operates under the strictures of the CSIS Act but is not directly mentioned in it. The RCMP Act contains little direct mention of national security, but RCMP activities in the national security space are undertaken in accordance with the Security Offences Act.[46] The Security Offences Act links an RCMP role in national security investigations to the CSIS Act definition of the threats to the security of Canada, and was created at the same time.

To add to the complexity of the legislative picture, there are currently no legal definitions of national security, intelligence, or open-source intelligence in statute.

No one Minister is responsible for all elements of the national security and intelligence system. But ministerial accountability for four key core elements of the system—CSIS, ITAC, the RCMP, and CBSA—as well as the Government Operations Centre, is exercised by the Minister for Public Safety. A recent reorganization of Cabinet bifurcated the Public Safety portfolio to create a separate Minister for Emergency Preparedness, with a secretariat based at the Privy Council Office to assist him.

All entities in the national security and intelligence community are subject to the government's intelligence priorities and the disseminated process of "Standing Intelligence Requirements." But among the constituent members of the security and intelligence community, only CSE is bound by statute to conduct its foreign intelligence gathering activities according to the government's intelligence priorities. [47] A review of the national security and intelligence system could examine whether

meeting government intelligence priorities should be a more wide-spread statutory obligation.

Intelligence sharing among the elements of the Canadian national security and intelligence community is managed through memoranda of understanding and through the provisions of the *Security of Canada Information Disclosure Act* (2019), a modification of earlier legislation passed in 2015 (known as SCISA—Security of Canada Information Sharing Act). [48] The essence of the SCIDA regime, which involves some complexity in operationalization, is that for agencies to share intelligence with a government counterpart they must be sure that the receiving organization has the appropriate mandate to acquire such information, and agencies receiving intelligence must determine that it is appropriate to their mandate. The National Security and Intelligence Review Agency is charged with undertaking compliance reviews of SCIDA annually.[49]

All elements of the Canadian national security and intelligence community are now subject to external review from the National Security and Intelligence Review Agency (created in 2019) and the National Security and Intelligence Committee of Parliamentarians (created in 2017). But because of the relativeness newness of the revamped review system, not all constituents of the intelligence community have yet been touched by external review reporting.

The closest there is to one statutory “ring” that binds the practices of the national security and intelligence community is to be found in the CSIS Act that established the new Canadian Security Intelligence Service upon its creation in 1984. This is especially true regarding the definition of threats to the security of Canada found at section 2 of the Act. While some parts of the CSIS Act have been updated since 1984 and new powers added, s2 of the Act remains unchanged and of Cold War vintage.

Not only is that definition of threats to the security of Canada integral to CSIS activities and those of other entities in the national security system, it is also imported into the Emergencies Act as a key threshold.

Section 2 of the CSIS Act lists four elements that comprise the legal definition of threats to the security of Canada. They are (to paraphrase):

a) Espionage or sabotage
b) Clandestine or deceptive foreign influenced activities
c) Threats or use of serious violence
d) Undermining or attempting to overthrow constitutional government [50]

Of these four elements, espionage investigations are a constant preoccupation of the Service, as have been counter-terrorism investigations, captured by part c). Foreign interference, covered by part b) is a growing preoccupation. The subversion focus of part d) is a holdover and CSIS has hardly ever been engaged on such investigations since it took over responsibility for national security intelligence from the RCMP.[51]

Of these four elements, the only one not potentially engaged by the activities of the Freedom Convoy protests was a) espionage. Because it was ultimately relied on by the Governor in Council in invoking the Emergencies Act, the wording of c) is of particular importance. It reads in whole:

> *"activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state"* [52]

Parts of this definition were imported into the criminal code with the passage of Canada's first anti-terrorism act in 2001. Terrorism is similarly defined as involving acts or threats of violence for political, religious or ideological motives and there is an element of the criminal code definition of terrorism which refers to "serious interference with or serious disruption of an essential service, facility or system." While the criminal code definition of terrorism has distinctive features as well, what generally aligns the CSIS Act and the terrorism definition are references that protect "advocacy, protest or dissent." [53] However, the criminal code definition of terrorism did not import the concept of "lawful advocacy" from the CSIS Act, a matter that incurred much debate during passage of the Anti-terrorism act in 2001. The CSIS Act boundaries around lawful advocacy, protest and dissent, present an important and challenging factor in determining the authority of national security agencies to collect intelligence on protest movements. [54] It is a democratically-spirited inhibitor against intelligence collection, requiring judgement about when a protest movement may move from lawful to unlawful behaviour.

There are other elements of the CSIS Act that bear on the circumstances of the Freedom Convoy protest and delimit CSIS's sphere of operations. An important one, that also dates back to the original CSIS Act is section 12(1), which provides CSIS's authority for intelligence collection. S12(1) contains a "strictly necessary" provision:

> *"The Service shall collect, by investigation or otherwise, to the extent that is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of*

*constituting threat to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada."* [55]

It should also be noted that CSIS has newer statutory powers for threat reduction measures, first passed in 2015, and for data mining activities, codified in 2019. The data mining regime (section 11 of the CSIS Act) is complex and won't be analysed here, except to say that the Service may "retain, query and exploit" a publicly available dataset (s11.11(1)). Publicly available datasets are distinguished in the act from "Canadian" and from "foreign" datasets. There are higher fences around retaining, querying and exploiting Canadian datasets, which do not apply to "publicly available" datasets.

Threat reductions measures, first passed into law in 2015, and modified in statute in 2019 may be taken by the Service, "if there are reasonable ground to believe that a particular activity constitutes a threat to the security of Canada" (s12.1(1). Threat reduction measures are meant to be preventive, but it is not known if CSIS had recourse to these powers or to the use of its data mining regime in response to the "Freedom Convoy" protests.

The centrality of the CSIS Act definition of threats to the security of Canada extends to the financial intelligence unit known as FINTRAC, the Financial Transactions and Reports Analysis Centre of Canada. FINTRAC legislation is included as Part 3 of the "Proceeds of Crime (Money Laundering) and Terrorist Financing Act," first passed in 2000 and subsequently amended in December 2001 to include intelligence sharing on suspected terrorist financing.

Provisions of the CSIS Act have become embedded more broadly in national security law in Canada, especially regarding threats to the security of Canada. Given their closeness in time, and the ways in which the CSIS Act emerged out of the recommendations of a major judicial inquiry and lengthy deliberations by Parliament, it is little surprise that the CSIS Act definition of security threats was made to constitute one threshold for invocation when the Emergencies Act was passed four years later, in 1988.

## Emergencies Act

The Emergencies Act contemplates four different kinds of emergencies: a public welfare emergency; a public order emergency; an international emergency; and a war emergency.[56]

The Governor in Council invoked Part 2 of the Act, a public order emergency, on February 14, 2022. [57] Declaration of a public order emergency requires that two thresholds be met, captured in the definition: "a public order emergency means an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency." National emergency is defined at section 3 of the Act and, in turn, comprises two components.

> *"a national emergency is an urgent and critical situation of a temporary nature that*
>
> *a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or*
> *b) seriously threatens the ability of the Government to preserve the sovereignty, security and territorial integrity of Canada*
>
> *and that cannot be effectively dealt with under any other law of Canada."*

The two-part construction of a national emergency, in short, involves, firstly, a determination of its seriousness and of the absence of an effective alternative in other recourse under the law.

The second threshold for a Public Order emergency is that it must meet the meaning assigned to threats to the security of Canada in section 2 of the CSIS Act, discussed above. At least one of the four definitions of security threat must be found to apply.

The proclamation of the Public Order Emergency by the Governor in Council on February 15 declared that a public order emergency existed because of five conditions: [58]

- Continuing blockades
- Threats to economic security resulting from the impacts of blockades of critical infrastructure
- Adverse effects on Canada's relationship with its trading partners
- Breakdowns in supply chains and the risk these breakdowns will continue
- The potential "for an increase in the level of unrest and violence that would further threaten the safety and security of Canada."

There is no direct reference in the language of the 1988 Emergencies Act to threats to critical infrastructure, Canada's international relations, or supply chains. Where the CSIS Act definition of threat to the security of Canada is called into play by the proclamation is in reference to the first and fifth conditions set out in the proclamation, and most explicitly with regard to the first condition, reproduced in full here:

*"the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force**, which blockades are being carried out in conjunction with activities that are directed towards or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada."***[59]

In other words, the invocation of a Public Order Emergency relied on part c) of s2 of the CSIS Act to meet the threshold of a threat to the security of Canada.

The significance of this is that the Governor in Council determined that a threat to the security of Canada as defined in the CSIS Act existed by February 14 and was sufficient, in part, to declare a Public Order Emergency. It is important to move back in time from this moment to try to understand how national security and intelligence agencies may have responded, on reasonable grounds (as per the CSIS Act), to perceived threats to national security posed by the "Freedom Convoy." In order to engage national security and intelligence agencies, such threats must go beyond lawful protest, advocacy and dissent.

The next sections of this report look at how different entities in the federal government NSI community may have operationalized mandate authorities to collect and analyse intelligence on the threat and advise government.

## Intelligence at the Cabinet Table: The Incident Response Group

The Incident Response Group (IRG) is an ad-hoc Cabinet committee established in 2018, comprised of selected Cabinet ministers and their officials, who meet on an as-needed basis to deal with a national crisis or a major international event. It appears modelled on a long-standing British Cabinet committee that deals with national emergencies known as COBR/COBRA.

The Incident Response Group played a key role in Cabinet-level decision making in the lead up to the invocation of the Emergencies Act on February 14. It also held meetings during the period when the Emergencies Act was in force, before turning its full attention to the situation of the war in Ukraine. Aside from some statements released by PMO summarising the meetings of the IRG, there is a partial, redacted record of the minutes of IRG meetings made available to litigants before the Federal

court seeking to challenge the lawfulness of the invocation of the Emergencies Act. These records, even in their redacted form, provide some important insights into the issues that the IRG was dealing with.[60]

The IRG was convened on three occasions prior to the invocation of the Emergencies Act. In every case the Prime Minister chaired the meeting.

The first meeting took place on Thursday, February 10, fully two weeks after the first convoy of trucks had entered Ottawa and emplaced themselves in the downtown core and parliamentary precinct.[61] Four days previously the city of Ottawa had declared a state of emergency. A third border blockade had begun in Emerson, Manitoba, alongside the earlier and on-going blockades at Coutts, Alberta and at the Ambassador bridge in Windsor, Ontario. On February 10, the federal Conservative party began to shift its previous position in support of the "Freedom Convoy" protesters by calling for an end to border blockades. The Prime Minister was scheduled to hold a call with the US President to discuss ending the border blockades on the following day.

The National Security and Intelligence adviser was the lead briefer to the IRG at the first two meetings on February 10 and 12. On February 10, she noted that an "integrated planning cell" was developing a plan of action. She stated that the preference remains to seek a negotiated solution to the protests but that enforcement actions could start the following week if negotiations were unsuccessful. In discussing specific actions that could be taken, the redacted IRG minutes note that the Prime Minister discussed two possible tracks: actions that could be taken under existing authorities; and the invocation of the Emergencies Act.[62]

A second meeting of the IRG was held two days later, on Saturday, February 12. On this day the media reported that an estimated 4,000 protesters had converged on Parliament Hill. A large sound stage had been set up by the protesters as well as a hot tub. Counter-protest activity was beginning to take shape in Ottawa, accompanied by demands that the Ottawa Police Service (OPS) take more action. The day prior, the Ontario government had declared a state of emergency and the Ontario Premier had told protesters in Ottawa who had "held the city hostage for two weeks" to go home. [63]

The NSIA opened the February 12 meeting with a situation overview, noting that protest numbers were growing and that multiple ports of entry were experiencing blockages, with "slow roll" vehicle activity proving an effective protest tactic.[64] The situation at the Ambassador bridge in Windsor was described as "very fluid" with law enforcement having begun taking some action. Protest activity in Ottawa was

characterized as involving a significant escalation in "boldness," with protesters increasingly harnessing social media across Canada. Following the NSIA's situation report, various Cabinet Ministers, including the Public Safety Minister, the Minister of Transport, the Minister of Intergovernmental Affairs, Infrastructure and Communities and the Minister of Emergency Preparedness, all contributed remarks. The Minister of Public Safety (Mendicino) updated Cabinet on potential engagement with the leaders of the blockade, particularly in Ottawa. It was noted that engagement efforts by the Ontario government with protesters in Windsor had failed.

Minutes of the February 12 meeting included a detailed "IRG tracker" recording action items. This tracker document contains some revealing insights into the uses of intelligence for decision-making, including, as item #1, the fact that the NSIA would be charged with creating a daily situation report to "establish clear information sharing" and that a key Deputies committee, the Deputy Ministers committee on Operations (DMOC) would meet daily.[65]

The document also indicates that the Intelligence Assessment Secretariat at PCO, normally charged with the production of strategic intelligence assessments on global issues for the Prime Minister and Cabinet, would serve as the lead agency to pull together all intelligence reporting on the protests being produced across government agencies, including by CSIS and ITAC. Intelligence on the protection of critical infrastructure, including at ports of entry, was charged to Public Safety, to "leverage existing information sources." The document noted that an "evergreen list" of critical infrastructure was "in progress" with an especial need to identify critical infrastructure other than at ports of entry.[66]

Preparing for invocation of the Emergencies Act, denoted as "track 2," was clearly on the table, involving scenario planning "to show how bad things could actually get," and the laying down of objectives and a tactical plan. [67]

The final IRG meeting, prior to the decision to invoke the Emergencies Act, was held on late Sunday afternoon, February 13, 2022.[68] It was followed on the evening of February 13, by a full meeting of Cabinet. The minutes of the February 13 IRG meeting are heavily redacted. The agenda for the meeting listed three items: progress on federal actions; a targeted situational update; and key communications. Nothing is readable regarding the situational update.

The associated IRG tracker indicated information was still sought on progress being made by PCO-IAS to bring all sources of intelligence together ("aggregation of intel") and that this was to be presented at the February 13 meeting. The need to identify

critical infrastructure other than at ports of entry was repeated. Planning for the possible invocation of the Emergencies Act was proceeding.

While the details of the situational update for the February 13 IRG were completely redacted, the NSIA did provide an update to the full Cabinet meeting on the evening of the 13th, parts of which were released. [69] The agenda for the full Cabinet meeting contained, in addition to the situational update, two other items: an overview of the Emergencies Act; and an update on current activities/announcements for additional measures. The latter two agenda items were completely redacted. On February 14, a 33-page memorandum was prepared for Cabinet on "Invoking the Emergencies Act to End Nation-Wide protests and Blockades." It is not available in the public domain.[70]

The NSIA's situational update for Cabinet, which followed immediately after opening remarks by the PM, indicated that multiple border points of entry continued to experience blockades, despite the success of law enforcement action to clear the blockade from the Windsor bridge. As Ms. Thomas, the NSIA, had done in previous IRG meetings, she highlighted the importance of social media use by the protesters for communications and organization. The threat picture regarding ideologically motivated violent extremism (IMVE) remained "stable and unchanged," while CSIS continued to watch "persons of interest." Ms. Thomas noted that recent law enforcement gains had been important and that the RCMP was taking enforcement action at the border crossing at Coutts, Alberta. Embedded in this sentence was a note by the NSIA that "there was a potential for a breakthrough in Ottawa, Ontario…"[71] This statement became the headlines for media reporting as the documents were released by the Federal Court.[72] Its meaning was elucidated in a statement from a spokesperson for the Public Safety Minister who was quoted as saying that:

> *"the potential for a breakthrough referred to negotiations led principally by the City of Ottawa with illegal blockaders in the days before the invocation of the Emergencies Act. The government closely monitored the status of negotiations, which were disavowed by many associated with the so-called freedom convoy and were ultimately unsuccessful."*[73]

The NSIA subsequently told a conference in Ottawa on March 10 that the use of the Emergencies Act was justified because the Ottawa protesters were "dug in, they had supply chains, they had organization, they had funding coming in from across Canada, but also other countries" and "there's no doubt they came to overthrow the government." She indicated she was concerned about Canadian naivety regarding ideologically motivated extremism.[74]

This partial glimpse into discussions and decision-making at the Cabinet level is revealing in important ways about the uses of intelligence at the political level during the protest crisis. Any conclusions must be tempered by the fact that the Cabinet record available in public is very incomplete. With that recognition, five observations can be made.

The first is that the federal government marshalled its highest level, collective discussions at the Cabinet table only late in the evolution of the "Freedom convoy" protests. Ministers were being individually briefed by senior officials, but the first meeting of the Incident Response group only occurred on February 10, two weeks after truck convoys converged on downtown Ottawa. The NSIA only began to compile her own situation report as of February 11. This late engagement may need to be re-considered when it comes to protest movements that may threaten national security and take on national dimensions, where an early federal government lead would clearly be important.

While there were delays in constituting the IRG, this should not be taken to mean that sub-Cabinet activity was not underway much earlier. A key missing narrative concerns the work of the Security and Intelligence Secretariat at the Privy Council Office, headed by an Assistant Secretary to the Cabinet, Mike MacDonald, who reported to the NSIA, as well as the discussions undertaken in the Assistant Deputy Minister committee on National Security Operations (ADM NS Ops). There is a revealing email sent by Mike MacDonald to the NSIA and other PCO officials on January 24, 2022, which indicated that the ADM NS Ops committee would begin meeting the following day. MacDonald told the NSIA: "Will let you know what the prevailing thinking is on the convoy issue and how we might structure ourselves if required. I would rather have structure and governance on this issue out of an abundance of caution than not."[75] A limited set of "read-outs" from MacDonald to the NSIA, summarising ADM NS Ops meetings confirm the committee's important role as both a coordinating body and a table where available intelligence could be digested. By January 26, the committee was already grappling with a key law enforcement and intelligence issue—trying to determine the "trigger" that would move the "Freedom Convoy" from a peaceful event to one requiring law enforcement action." [76] By February 2, the ADM NS Ops committee had been tasked by a Deputy Minister committee (DMOC) "to consider options and potential federal levers to manage the situation to resolution." [77]

Whatever thinking and action prevailed at this level of the federal bureaucracy it remains an open question whether it percolated, in a timely and full way, to the Cabinet table. Nor do we know what role intelligence reporting may have played in the decision to constitute the IRG on February 10.

The second observation is that the government clearly struggled to find a way to bring together all the sources of intelligence available on the protest movement from different departments and agencies. There were multiple streams of threat reporting from different entities (ITAC, RCMP, Emergency Preparedness Secretariat and possibly others for which we lack public records). While they conveyed somewhat similar assessments of the "Freedom Convoy," the very fact of multiple sources would not have been helpful to senior decision-makers. A need for a more integrated intelligence picture ("aggregate intel" ) was clearly felt. The only surprise is this effort ultimately came to be led by the Intelligence Assessment Secretariat (IAS) of the Privy Council Office, which produces strategic intelligence assessment products for the Prime Minister and Cabinet on a range of global issues of importance. The IAS would not normally be a lead agency in reporting on domestic national security matters, a function within the mandate of both CSIS and ITAC.

There are possible explanations for the choice of the IAS as the Cabinet's source of aggregate intelligence. [78] These would include that the IAS reports directly to the NSIA, is embedded in a powerful central agency (PCO), has experience briefing the Cabinet and responding in a timely way to its informational needs, produces all-source intelligence assessments, and has a coordinating function across government for intelligence assessments. In addition, PCO-IAS might have been seen by senior decision-makers as a relatively neutral source, unencumbered by a mandate for domestic national security reporting focused on terrorism.

The IAS may simply have been seen as the best available option for intelligence integration as pressure mounted on the federal government to take action. It would, at the very least, have baseline knowledge-- in its normal reporting it would have had access to allied analysis on major protest events in other countries.

A third observation to be drawn from the Cabinet record is that the federal government did not have access to any granular picture of critical infrastructure across Canada and had to scramble to try to put one together. The most important and urgent need was to understand, as the IRG tracker suggests, key critical infrastructure vulnerabilities that might be targeted by the protesters, beyond the immediate border blockades. This was a reactive effort in the face of a lack of advance warning about the border blockades and an unclear picture of where protesters might strike next.

A data base of critical infrastructure, including vulnerability (or risk) assessments, should be part of any new critical infrastructure strategy being developed by the federal government. The existing critical infrastructure strategy ("National Strategy for Critical Infrastructure") dates back to 2009 and is currently under review. The federal government continues a many-years-long effort to produce a national risk profile or

register similar to that done by the UK government, but this has not been finalized. This work needs to be accelerated and brought to a conclusion, with both a classified and public version, as is the UK practice. [79]

A fourth observation is that the available picture of intelligence presented to Cabinet suggests that it operated at a high level of generality which may have been insufficient for truly informed decision-making. Intelligence is meant to provide a timely account of three dimensions presented by any perceived threat actor, whether state or non-state: intentions, capabilities and activities. Coming up with an actionable reading of any of these dimensions admittedly may be difficult.

With regard to the intentions of the protest movement and its leaders, the material presented to Cabinet (judging from the redacted record only) was almost non-existent. The Minister of Public Safety told the IRG on February 10 that they were seeing an "increase in systematic targeting and coordination" by "Freedom Convoy" leaders[80] No profiles of the leadership structure or personalities were mentioned in the redacted records. No indication of an intelligence picture of the protest movement's aims was provided in the released version of the cabinet records.

On capabilities, the intelligence pictured conveyed to Cabinet was similarly very imprecise and not always coherent. Public Safety officials told the IRG on February 10 that, according to the lead OPP negotiator, "80% of protesters had a weak connection to the cause…" That same negotiator believed, rather optimistically, (and on unknown grounds), that "leaders of the protest could potentially be encouraged to leave and denounce the blockade in exchange for a commitment to register their message…"[81] At the February 12 IRG, the Public Safety Minister provided a somewhat different picture, but still a very general one. He told his Cabinet colleagues that "there appear to be two distinct movements involved in the blockades. The first is relatively harmless and happy with a strong relationship to faith communities. The second is more concerning and comprised harder extremists trying to undermine government institutions and law enforcement."[82] No conclusion was drawn as to which movement might have the upper hand. Repeat statements by the NSIA made it clear that the government felt the protest movement was an adept user of social media to organize and fund-raise. Increasing reports of ex-military members advising and instructing the protests was noted and was clearly concerning. The RCMP commissioner told the IRG that her discussions with the OPS chief and the OPP commissioner indicated that the "mood on the ground has shifted to more hostility towards police."[83]

While it is understandable that the intentions of a grass-roots and factionalized protest movement may be difficult to divine, and may not be clearly known even to its leaders,

the movement's very reliance on social media platforms provided a potential opportunity for intelligence collection and assessment. The extent to which social media monitoring was a successful element of the overall intelligence picture presented to senior political decision-makers is an important issue but cannot be judged on the basis of the available Cabinet records. There is one fragmentary note in the redacted records that suggests impediments to the development of an intelligence picture based on social media. The IRG heard from the NSIA on February 12 that "tracking social media does not fall into the mandates of the agencies involved in this issue."[84]

As far as can be discerned from the redacted Cabinet records, no capabilities assessment regarding the protest movement was ever presented. Any such capabilities assessment would have needed to combine elements of financial resources, foreign support or interference, protest numbers, leadership competencies, the demographics of the protest movement, the tactics used (including the tactical use of heavy equipment, "slow rolling," and the deliberate presence of children in the protest blockades), social media capabilities and messaging, unity of purpose and factionalization, and the potential presence of weaponry, including any improvised devices. [85]

The question of opportunities embedded in the intelligence picture for Cabinet mostly focused on prospects for negotiations, rather than on identifying vulnerabilities in the protest movement itself that could be exploited to resolve the crisis.

A revealing comment was made by the NSIA in a public forum on March 10. She argued that "we apply middle class values to things" and suggested that had there been a classic terrorist (religiously motivated violent extremist) element to the protest the reaction would have been very different. Ms. Thomas told her audience that Canada has a lot to "unpack" with regard to extremist protests and the threats they pose to democracy.[86] The suggestion here is that that there was some residual reluctance to fully appraise the national security threat posed by the "Freedom Convoy."

A final observation concerns Cabinet governance of the national security and intelligence system. The IRG was pressed into service late in the evolution of the protest. It is a cabinet committee focused on managing emergencies, not on any more sustained strategic outlook and longer-term policy responses to the threat environment facing Canada. The circumstances of the protest, its extremist elements, its international implications in terms of blockages at the border, foreign funding, and impacts on Canada's reputation with allies and adversaries strongly suggests the need for a dedicated, full-time cabinet committee on national security and

intelligence.[87] It may also point to the need for a more fundamental restructuring of national security and intelligence governance through the creation of a national security council along the lines utilised by the US and UK.[88]

The National Security and Intelligence Adviser played a lead role, as appropriate to the office, in briefing the IRG and Cabinet, but that very role raises perennial questions about the authorities and influence possessed by the NSIA and whether these are adequate to ensure that the NSIA possesses a timely and coordinated intelligence picture that could be communicated to the PM and Cabinet, fully understood by senior political decision-makers, and able to be acted upon. Related to the authorities issues are perennial questions of resources and expertise within the Privy Council Office structure.

## The National Security and Intelligence Adviser (NSIA)

The National Security and Intelligence Adviser to the Prime Minister (NSIA) occupies a pinnacle role in the Canadian national security and intelligence community. [89] That role is not laid down in statute and has evolved since the creation of the office in 2003.

The National Security and Intelligence Adviser position was established in December 2003 (as the National Security Adviser) as part of a series of governance reforms to Canadian national security. The office was meant to be a more powerful version of the previous function of Security and Intelligence Coordinator at the Privy Council Office, which dated back to the 1980s. The first NSIA, Rob Wright, once described the new office as a 'Security and Intelligence Coordinator on steroids.' [90] The brief description of the new office contained in the National Security Policy, released in April 2004, simply said that the purpose was to "improve coordination and integration of security efforts among government departments." [91]

In its 2018 framework report on the Government's security and intelligence community, the National Security and Intelligence committee of Parliamentarians (NSICOP) identified the NSIA as a "core component", because of "the important role the Advisor and his or her officials play in advising the Prime Minister and coordinating much of the security and intelligence community."[92] In addition to the advice to Cabinet and coordination function, exercised through membership on key deputy minister committees, such as the Deputy Ministry Committee on Operations (DMOC), the NSIA also serves as a principal channel for the flow of intelligence reporting to the Prime Minister and as a key coordinator for the setting of government intelligence priorities-- the importance of which, the NSICOP report said, "cannot be overstated."[93]

NSICOP also identifies a "challenge function" undertaken by the NSIA with the security and intelligence community. In terms of support for the NSIA, the Committee noted that two elements of the PCO reported directly to the NSIA: The Security and Intelligence Secretariat and the Intelligence Assessment Secretariat.

As part of the same annual report issued in 2018, the NSICOP also published a separate framework study on the government process for setting intelligence priorities. With regard to the NSIA's stewardship over the intelligence priority process, the NSICOP made a series of recommendations designed to strengthen the leadership and managerial role of the NSIA, including with regard to the identification and implementation of Standing Intelligence Requirements (SIRs), which are key to ensuring that government-set general priorities are translated into operational missions. [94]

NSICOP reports have opened up a small window on the role of the NSIA. Beyond its reporting, relatively little information is available in the public domain about the exercise of the NSIA's authority, as important as it has become in the years since 2003.

It was not until 2014 that a National Security Adviser, then Stephen Rigby, first testified before a Parliamentary committee. No public address was given by any holder of the office until June 2021, when Vincent Rigby delivered a public speech hosted by the Centre for International Governance Innovation. External accountability has rarely been exercised, the sole instance being a special report undertaken by the National Security and Intelligence Committee of Parliamentarians regarding the role played by then NSIA, Daniel Jean, in dealing with concerns about foreign interference that emerged during the Prime Minister's official visit to India in February 2018.

The most recent indication of aspects of the NSIA's role was contained in a first-ever public address, delivered by the then NSIA, Vincent Rigby, to the Centre for International Governance Innovation in June 2021. [95] He began by trying to explain what the NSIA actually does, understanding that few Canadians will have any awareness of the office. He noted that the NSIA provides "policy and operational advice as well as intelligence to the Prime Minister and Cabinet on issues related to national security." He also mentioned his coordination role—"I help convene and coordinate the security and intelligence community," to ensure " we work as one integrated team." Mr. Rigby also emphasised the importance of his office in helping ensure decision-makers have access to the best possible intelligence, noting that "the case for intelligence has never been stronger" in order to understand the threats we face. The NSIA also plays an important role in liaising with international partners, especially in the Five Eyes intelligence partnership.

A relatively decentralised and siloed Canadian national security and intelligence system, needs to compensate for its governance architecture with a strong coordinating authority and connectivity with senior decision-makers across government—the *raison d'etre* behind the creation of the office nearly two decades ago. Whether the NSIA was able to fulfill this function in a consistent way, sufficiently early in the evolution of the "Freedom Convoy" protest cannot be determined from the public record. Seemingly ad-hoc decisions to have the NSIA responsible for compiling situational reports for Cabinet, and to have the Intelligence Assessment Secretariat that reports to her responsible for pulling together an integrated intelligence picture, suggests that there are lessons to be learned about strengthening the central governance of the national security and intelligence community and its responsiveness to public order emergencies. [96]

## The Canadian Security Intelligence Service (CSIS)

CSIS is Canada's main intelligence agency charged with both domestic and foreign intelligence gathering, and analysis and advice to government on threats to the security of Canada.[97] It is a civilian service created as a successor to the former RCMP security service in 1984, with its scope of lawful activities initially framed in the CSIS Act of that year.

The intelligence cycle for CSIS begins with establishing intelligence priorities and Service requirements.[98] Setting CSIS intelligence priorities is part of a community-wide process involving Ministers, and the National Security Intelligence Adviser. As part of this process the Minister of Public Safety would provide a Ministerial Directive to the Service, which is then translated into intelligence requirements by the CSIS Intelligence Assessments Branch. These intelligence requirements are then operationalized according to three descending tiers, with tier 1 requirements as fully resourced as possible, and tier 3 collection only when resources allow. There is a further tier reserved for "watching briefs." [99]

CSIS intelligence collection is based on a variety of methods including OSINT, information provided by members of the public, HUMINT (human sources managed by the Service), information from foreign governments, especially Five Eyes partners, intelligence shared by other Canadian government partners, and technical means used for surveillance and to intercept communications, involving warrants authorised by the Federal Court. [100]

The analysis component of the CSIS intelligence cycle involves two distinct entities. One is the Intelligence Assessments branch (IAB), which is the CSIS centre of expertise for analysis of threats to the security of Canada. It is paralleled by the CSIS-hosted Integrated Terrorism Assessment Centre (ITAC), with a more focused mandate. ITAC's known reporting on the "Freedom Convoy" protests is discussed in a later section of this study. There is nothing in the public domain about any relevant assessments that may have been produced by the IAB.

CSIS disseminates its intelligence reports primarily to the Government of Canada and Canadian law enforcement agencies. Dissemination also occurs to global intelligence partners, especially through the Five Eyes partnership. The key senior government of Canada clients for CSIS reporting are the Minister for Public Safety, the Privy Council Office and Cabinet. [101]

CSIS engages in a variety of intelligence missions including counter-espionage, foreign interference, election security, cyber threats, counter-proliferation and guarding against insider threats through security screening. Reporting on threats of serious violence to national security is one of the key CSIS missions, with a majority of CSIS resources devoted to counter-terrorism in the post 9/11 period.

Attention paid by CSIS to right-wing extremist threats has fluctuated over the past decade. A review conducted by the Security and Intelligence Review Committee (SIRC) and reported to the Minister in November 2017 charted the history of CSIS investigations of "Right-Wing Extremism" (RWE) over the previous five years.[102] At that time CSIS included a basket of issues in its investigations of right-wing extremism, including groups and individuals that espoused racism, white supremacy, white nationalism, "white religion," antisemitism, nativism, anti-immigration, anti-government and anti-law enforcement, and homophobia. Also included were a subset of groups that promote hate online.

The SIRC report noted that CSIS investigations of RWE were mainly event driven. CSIS characterized RWE in the period from 2012 as "infrequent, generally unplanned and opportunistic, and carried out by individuals rather than groups." This outlook, and concerns that most RWE activities were "near to" lawful protest, advocacy and dissent, which CSIS is prohibited from investigating under s12 of the Act, as well as law enforcement attention to the issue, led CSIS to end its investigations of RWE in March 2016 on the grounds of lack of mandate authority and the absence of any value-added from such efforts, compared to police work. This decision was reversed following the shootings by a lone gunman at a Quebec City mosque in January 2017, which resulted in the deaths of six people, with a further five injured. [103]

Since 2017, CSIS has devoted increasing resources to investigations of what it now calls "ideologically motivated violent extremism" (IMVE). The most recent CSIS annual public report for 2020-2021 (published in March 2022) noted that the IMVE threat is "complex and constantly evolving" and that since the beginning of the COVID-19 pandemic:

> *"IMVE activity has been fueled by an increase in extreme anti-authority and anti-government rhetoric often rooted in the weaponization of conspiracy theories. A number of Canadian influencers and proselytizers have emerged within IMVE movements. These IMVE influencers promote misinformation and action, including violence"* [104]

The same annual report gives short shrift to a distinct category of extremist threats, which CSIS now denotes as "politically motivated violent extremism," and describes as "the use of violence to establish new political systems, or new structures and norms within existing systems." Such investigations would be conducted under the CSIS Act s12, part d) mandate, usually referred to as subversion. The report simply noted that there were no PMVE-related attacks in Canada in 2021. [105]

A third semantic category of violent extremism, often referred to as "Islamist terrorism" since the 9/11 attacks, is now labelled by the Service as "religiously motivated violent extremism" (RMVE) and continues to be a preoccupation of CSIS, although the threat is arguably greatly diminished from post-9/11 days. The 2020-21 annual report noted that "the ongoing threat of RMVE in Canada comes primarily from Daesh-inspired lone actors," who operate without any direct connection or support from the Daesh movement that has lost considerable ground globally since the collapse of its so-called "caliphate" in the face of Western-supported military action in Iraq and Syria in 2016-207. No RMVE- inspired attacks occurred in Canada in 2021. [106]

A recent 2019 study by the National Security and Intelligence Review Agency (NSIRA) of investigations related to Canada-based extremists found significant ongoing problems in intelligence sharing between CSIS and the RCMP. NSIRA also noted the absence of any joint long-term strategy to address the threat.[107] It stated that, "on the whole, NSIRA found that CSIS and the RCMP have made little progress in addressing the threat under investigation." [108] While key passages of the NSIRA study are redacted, it also clearly called attention to resource gaps in the CSIS intelligence collection program.

NSIRA's study noted what it called a "fraught legal context" associated with CSIS's human source collection problem, following a Federal Court finding in April 2018 that CSIS had used information derived from seemingly illegal activities in support of some

of its warrant applications. These issues were addressed in Bill C-59, which provided CSIS with a new statutory framework for human source activities, with more checks and balances in terms of oversight by the Minister and by the new office of the Intelligence Commissioner. [109]

The NSIRA review also addresses ongoing challenges with the framework that governs CSIS-RCMP intelligence sharing, known as "One Vision 2.0" which was amended in 2015. Despite the various tools contained in the framework, NSIRA noted "a mutual reluctance to pursue the formal disclosure of information from CSIS, even in cases where the alleged threats were serious or imminent, and even though the alternative investigative path was slower and involved different challenges." At the RCMP end, there were found to be trickle-down problems with CSIS-provided intelligence to regions, including INSETS, conducting investigations.

One of the most alarming findings of the NSIRA review was that by mid-2020, the RCMP was deprioritizing the investigation into right wing extremism and had admitted to CSIS that criminal charges remained "far off." [110] CSIS's information was not making its way into the hands of RCMP investigators. NSIRA concluded on the state of the "intelligence-to-evidence" problem, that:

> *"Ultimately, CSIS and the RCMP appear to be trapped by the constraints that both organizations believe they must operate within in order to avoid compromising prosecutions."* [111]

For the RCMP this means conducting independent investigations using evidentiary standards; for CSIS it means limiting any granular intelligence flow to the RCMP via advisory letters.

In an effort to tackle the problems and move beyond the limits of One Vision 2.0, CSIS and the RCMP jointly agreed to an independent study, called the "Operational Improvement Review," (OIR) undertaken by an experienced security-cleared lawyer, Anil Kapoor. A final OIR report was delivered in March 2019. It called for significant changes to approaches to the intelligence-to-evidence problem to allow more robust sharing of intelligence by CSIS with the RCMP, including doing away with Advisory and Disclosure letters. The OIR final report also noted that "the strategic management of threats to national security requires a whole of government approach. This means there ought to be a consideration beyond the Service and the RCMP, of what action is in the broader public interest." [112] It argued that whole-of-government strategic discussions could be handled by the current ADM committee on national security operations.

Finally, of relevance to this study, the OIR report argued for the RCMP to adjust its approach to national security investigations by devoting more effort to investigations in the "pre-crime" space and giving greater attention to counter-radicalisation efforts.

NSIRA saluted the OIR final report as "complex, ambitious and a promising effort to address longstanding problems that have hindered Canada's ability to prosecute or otherwise address threats to national security." It also believed that implementation of the OIR would be challenging. [113] In response to the NSIRA recommendations CSIS and the RCMP noted that the OIR contained 76 recommendations. They committed to implementing them and creating a new "One Vision 3.0" framework for intelligence sharing. But CSIS and the RCMP also noted that "this complex work…is ongoing and challenges remain." [114]

What progress had been made in the report's implementation by the time the "Freedom Convoy" took to the road, is unknown.

CSIS and the RCMP did not directly respond to the NSIRA recommendation on the need for a joint, long-term strategy to deal with investigations into extremist threats, nor did they directly address resource constraints. [115]

Another recent NSIRA review looked at a technical capability employed to support open-source intelligence—the use of geolocation. This review was prompted by a Federal court decision in September 2017 (the "IMSI decision") which found that it was lawful for CSIS to obtain, under its section 12 authority, geolocation information for which there is a low expectation of privacy—e.g. subscriber information and device number—but reaching beyond that for the actual location of an individual as pinpointed by their mobile device would require a warrant. The NSIRA review is heavily redacted but it is clear that CSIS examined legal issues around the collection of geolocation data in preparation for a pilot project in early 2018 but was prepared to push ahead. Eventually a formal legal opinion was provided to the Service that provided for a narrow window for use of geolocation data collection without a warrant. In general, the NSIRA review found that new technologies for data collection combined with a "fluid" legal situation created high legal risks for the Service which would need to be better managed. [116]

The challenges associated with ramping up intelligence collection against IMVE threats, with information sharing with the RCMP, and with technological adaptation, are compounded by long-running public criticisms of the methods employed by the Service in monitoring protest movements.

## CSIS and protest monitoring:

The Service has been locked in a long battle with a Canadian civil liberties NGO, the British Columbia Civil Liberties Association (BCCLA) over allegations made by the BCCLA, beginning in 2014, that CSIS had illegally spied on pipeline protestors (who opposed the Northern Gateway Pipelines project—subsequently abandoned following an adverse environmental assessment). The BCCLA concerns were rooted initially in a news story based on access to information records. The BCCLA allegations were set out as a complaint to the Security Intelligence Review Committee, CSIS's external review agency at the time. [117] SIRC engaged in a lengthy complaint investigation, and eventually rendered a decision in September 2017.

SIRC found that CSIS had not engaged in intelligence collection against lawful advocacy, protest or dissent and thus had not contravened section 12 limitations. It noted that SIRC had kept a "watchful eye" on this area as it related to CSIS operations and had found in reviews dating back to 2002-2003 that CSIS's conduct in monitoring protests had been found to be appropriate. However, the SIRC report understood that there was a perceptual issue about spying that the Service needed to acknowledge and encouraged CSIS to hold "inclusive public discussions with the groups involved in the present complaint." [118]

The BCCLA did not accept the SIRC ruling on its complaint and has appealed the ruling to the Federal Court. It also appealed the SIRC order sealing the evidence presented in the case, and won a ruling from the Federal Court that it could make the records of the case provided to BCCLA in redacted form, totalling over 2200 pages, public. BCCLA then proceeded to publish these records in 19 volumes on its website, under the heading of "The Protest Papers." BCCLA rejected the SIRC argument that CSIS could legitimately investigate specific targets associated with environmental protests, and also believed that information collected incidentally or for what the Service referred to as "domain awareness" was offside. As the BCCLA stated: "we believe that this amounts to keeping tabs on peaceful environmental groups, which is not only unlawful under the CSIS Act, it suggests a bias in the spy agency that sees environmentalists as an inherent threat." [119]

While CSIS witnesses before SIRC upheld the lawfulness of CSIS's behaviour, it is difficult to measure the extent to which public suspicions of CSIS spying may negatively impact on the Service's own investigations, as CSIS is aware that it requires social licence to function effectively. [120] As a recent CSIS online publication devoted to the IMVE threat put it, "CSIS is committed to establishing itself as a trusted partner for Canadian communities and to building those partnerships through

dialogue, mutual respect and reciprocal action." [121] It is difficult to do this if some proportion of Canadians feel CSIS is spying on them without reason.

While there is currently no public access to CSIS reports on the "Freedom Convoy" demonstration, unlike material now available on ITAC reporting, indications of the Service's general engagement can be found in two sources.

One source involves two public speeches delivered by the CSIS Director, David Vigneault, which bracket the protest movement. Both speeches call attention to the rising threat posed by IMVE and link its acceleration in part to the COVID-19 pandemic and associated conspiracy theories, online hate, and anti-government rhetoric. In February 2021, Mr. Vigneault stated that "while violent extremism remains an ongoing threat to our safety and a significant preoccupation for CSIS, the greatest strategic threat to Canada's national security comes from hostile activities by foreign states."[122] He referenced spying, cyber attacks, data theft, economic attacks, the targeting of Canadian research, foreign interference, and insider threats.

In the speech the CSIS Director delivered in May 2022, following the law enforcement shut- down of the "Freedom Convoy" protest, Mr. Vigneault gave greater emphasis to the IMVE threat, noting that it is constantly evolving, "fueled by extreme views around race, gender, power and authority." He told his University of British Columbia audience that CSIS continues to increase its resources dedicated to investigations of IMVE, while also indicating that "we need to understand threats in an international context," and cannot ignore the world outside our borders. [123]

Therein lies a new dilemma for CSIS, how best to balance investigations of domestic threats to national security, with international ones. This dilemma is further extended by a problem that CSIS has not been shy to raise in recent months—the limitations of the CSIS Act.

The CSIS Director stated in February 2021 that the CSIS Act was better suited to the threats of the Cold War Era and now "greatly impedes our ability to use modern tools, and assess data and information. We need laws that enable these types of data driven investigations, carefully constructed to reflect the values we share in our democracy, including assurances of robust privacy protections." [124]

A similar message was conveyed in the CSIS annual Public Report for 2021, making a direct pitch for a comprehensive review of the CSIS Act, which "has not adequately evolved to meet the challenges of today's complex global threat environment." [125]

Whether and how this inadequate evolution of the CSIS Act might have affected its reporting on the "Freedom Convoy" protests in early 2022 can only be determined by access to confidential records.

There are breadcrumb clues in the testimony that the CSIS Director provided to a joint parliamentary special committee in its study of the exercise of the Emergencies Act. Mr. Vigneault affirmed the material included in ITAC reporting, to the effect that CSIS was looking at specific targets of which it was previously aware, that it focused attention on IMVE proponents seizing on the protest movement to recruit and radicalise it, and that it worried about lone actors. CSIS provided intelligence to law enforcement partners through a "joint intelligence group (likely a reference to the RCMP's National Security Joint Operations Centre (NSJOC)) and also informed the government. [126]

The most revealing statement made by the CSIS director came in a question from Senator Harder. Mr. Vigneault told the Committee that CSIS was providing "sometimes very definitive views," but qualified this by saying "*but it's also clear that what we saw and what we knew then was fluid.* ***We did not have the full picture****. That added to the level of uncertainty that everybody we were working with was feeling about how this very volatile demonstration was evolving. I think these would be some of the elements that we would want to make sure the Governor in Council would have been aware of while making the decision to invoke or not the Emergencies Act.*"[127]

This seems the crux of the matter when it comes to understanding the nature of CSIS intelligence reporting on the "Freedom Convoy." There was a mixture of fluidity and volatility in the makeup of the protests; there was no full intelligence picture; there was a widely shared sense of uncertainty about what might happen next. All may have contributed to the decision to use the Emergencies Act. There is a direct link in one of the conditions stated by the Governor in Council to support the invocation of the Act, namely:

The potential *"for an increase in the level of unrest and violence that would further threaten the safety and security of Canada."*[128]

That there was a lack of a "full intelligence picture" is a significant admission. But it also must be acknowledged that intelligence services never have a "full picture." What seems clear in the case of the intelligence assessment of the "Freedom Convoy" is that it was not just partial but that there was a lack of confidence in its findings as a guide to what the future might hold. Left uncertain, the Government may have felt compelled to reach for the powers of the Emergencies Act as a last resort.

Minister Blair in later testimony to the committee put a somewhat different construction on the intelligence picture. He referred on more than one occasion to "strong intelligence" about the intentions of those taking part in border blockades to either return to blockades that had been cleared by law enforcement or take their fight to new border crossing points.[129] He said that the government did not want to play "whack a mole" with the border blockades "and we wanted to make sure that we ended that threat conclusively and forever." [130] When pressed by a NDP member of the committee about "strong intelligence" documentation on the intentions of protestors involved in the border blockades, Mr. Blair said he was orally briefed on the matter and "read a number of open source reports." But he also shifted his language from "strong intelligence," to "a very sincere, legitimate concern that these blockades would return…" [131] Normally, we would assume a difference between "strong" intelligence, based on assessed reporting, and "concern."

The question that emerges from this testimony is whether the government possessed "strong intelligence," (Minister Blair) on the intentions of "Freedom Convoy" protestors, or only an incomplete intelligence picture (CSIS Director Vigneault) in which it lacked full confidence. It cannot be both.

## The Integrated Terrorism Assessment Centre (ITAC)

A key to a deeper understanding of the nature of CSIS threat reporting, and a confirmation of the extent to which that reporting was never able to generate a holistic ("full") intelligence picture, can be found in the work of the CSIS-hosted Integrated Terrorism Assessment Centre.

The Integrated Terrorism Assessment Centre is an intelligence fusion centre housed in CSIS. It serves as a government-wide resource and as an asset for the National Security and Intelligence Adviser. The Centre was first created in 2003. Its function was announced and highlighted in the Government's National Security Policy in 2004.[132]

The National Security Policy noted that the creation of what was then called the Integrated Threat Assessment Centre, mirrored that of post-9/11 units established by our close Five Eyes partners, including the UK's Joint Threat Assessment Centre. The new Canadian centre would be staffed by representatives drawn from a broad range of departments and agencies, to help ensure that organizational silos in intelligence reporting would be broken down. Prior to the creation of ITAC, the national security policy noted that "there has been no comprehensive and timely central government

assessment that brings together intelligence about potential threats from a wide range of sources to allow better and more integrated decision-making."[133] The new centre's remit was thus ambitiously framed:

*"The centre will do a comprehensive analysis of all available information on potential threats to Canada and make the results of that analysis available to all who require them."*[134]

This ambitious agenda proved difficult to realize. Staffing was an issue from the outset, with departments and agencies not always willing to lose analytical talent to the new body. Reporting frameworks and channels had to be created. ITAC had to build a reputation for quality reporting, which was often hampered by a view that it was overly reliant on open- source intelligence and tended to mirror media reporting. Difficult decisions had to be made about the nature of distribution of ITAC's reporting and associated levels of classification. If it tried to reach a wide range of first-responders at both the federal, provincial and territorial, and municipal levels, it could only do so with low levels of security classification for its reports, which may have also harmed its reputation within the intelligence community.[135]

The greatest unmet ambition for ITAC was that it was never able to embrace a mission to conduct integrated threat assessments on a wide range of issues. The stimulus for this larger mission was in part derived from the experience of the SARS outbreak in Canada in 2003 and a realization of the gaps that existed between public health security and national security. The National Security Policy, in its chapter on Public Health Emergencies noted that:

> *"Going forward, the Government intends to take all necessary measures to fully integrate its approach to public health emergencies with the national security agenda…the public health dimension will figure prominently in the Government's integrated threat assessments."* [136]

No such development occurred at any time in the evolution of ITAC, including with regard to the outbreak of COVID-19 in 2020.

The reasons for this were various—resource constraints; leadership challenges; the absence of an identifiable government readership for wide-ranging threat assessments; and the fact that ITAC was housed at CSIS, reported to CSIS for management issues, and was inevitably drawn into the orbit of CSIS's mandate activities. The brief description of ITAC on the Government of Canada's website notes that it "operates under the provisions and authorities of the CSIS Act," which would include the Act's definition of threats to the security of Canada at s2.[137]

Over time ITAC was renamed and refocused, becoming the Integrated Terrorism Assessment Centre in 2011, reflecting an over-riding concern with terrorist threats in the years after 9/11. It operates today as such, with the original wider-scope ambition long-forgotten.[138] One commentator, former CSIS analyst Stephanie Carvin, notes that ITAC has little transparency, and an unclear mandate. She also argues that some of its reporting on protest movements attracted controversy over the years. Her conclusion is worthy of note: "it seems clear that fifteen years after its founding, ITAC continues to struggle to find its place in the Canadian national security architecture."[139]

ITAC reporting on the "Freedom Convoy" was centred on the possibility of threats emanating from ideologically motivated violent extremism (IMVE), which fell directly under the Centre's mandate for reporting on terrorism-related issues. Possible violence stemming from civil unrest was seen as a police matter, not within ITAC's mandate.[140] But this distinction proved challenging for intelligence coverage of the "Freedom Convoy."

Some classified ITAC threat reporting on the "Freedom Convoy" protest movement was leaked to reporter Justin Ling and included in an article Ling published with the Guardian newspaper.[141] This led to an unsuccessful effort by ITAC to identify the source of the leak.

More recently, an Access to Information request has led to the release of a tranche of ITAC reporting on the protest, including the material leaked to Ling. [142] The release was in response to an ATIP request for intelligence reports, intelligence studies and intelligence briefs on protests in Ottawa and at Canada-US border crossings against COVID-19 measures. The released material responsive to this request includes eleven ITAC reports related to the "Freedom Convoy" protests, issued between January 26 and February 24, 2022.[143] It does not include any reporting undertaken by the CSIS's Intelligence Assessment Branch or any reports generated by CSIS's open source centre. In their totality, they may not represent all the reporting undertaken by CSIS, but the ITAC material, even with redactions, provides an important insight into the nature of its intelligence contribution during the protests.

The very first ITAC threat assessment was published on January 26, under the title "Possibility of IMVE-driven opportunistic violence on the margins of truck convoy protest." The threat assessment is redacted almost in its entirety, but was at least timely in noting that the protest truck convoy was expected in arrive in Ottawa on January 28-29.[144]

This first ITAC report was followed by a series with a similar emphasis on the potential for violence stemming for IMVE online rhetoric, swirling around the protest convoy,

and the physical presence of some IMVE threat actors and conspiracy theorists in the convoy movement. ITAC foresaw a possible violent clash between extremists and law enforcement as the protest movement arrived in Ottawa, but also was at pains to distinguish between legitimate protest actions, which it initially believed the convoy organizers embraced, and those who might be driven to extremist violence. In a second report on January 27, ITAC noted that the resumption of Parliament on January 31 could motivate a "dedicated group of protesters to prolong their protest in Ottawa and/or seek interaction with Canadian politicians." [145] This indication was supported by the reproduction of a "Permanent Gridlock zone" map originally circulated on 4Chan on January 27. [146]

The ITAC reports of January 26-27 can be usefully compared with public announcements made by the Ottawa Police Service (OPS). The OPS briefings were a form of public intelligence, discussed in a later section of this report, and signalled the Ottawa police assessment of the threat posed by the "Freedom Convoy."

In a media briefing on January 28, as the first convoy of trucks arrived in Ottawa, OPS Chief Peter Sloly stated that:

"the demonstrations this weekend will be unique, fluid, risky and significant. These demonstrations are national in scope, massive in scale, polarizing in nature and come almost two full years into a highly stressful and tragic global pandemic." [147]

Chief Sloly noted that while the OPS had been in touch with protest organizers and that they had indicated they will engage in peaceful demonstrations, he also stressed that there were many "parallel" demonstrators that the police had not been able to engage with, and social media actors domestically, nationally and internationally "who may or may not come to the demonstrations but who are inciting hate, violence and criminality."

Chief Sloly was also candid about what the OPS did not know. They did not have a fix on the number of trucks to descend on Ottawa or the number of demonstrators. They did not know when the demonstrations might end—suggesting that they could go into the following week.

The OPS chief also indicated on January 28 that the Ottawa police were employing 'intelligence-led policing' approaches, stating that the OPS had been meeting with its partners to develop an operational plan "to ensure that we have the most current information and intelligence from all sources. This intelligence will inform the spectrum of risks, threats and variables." [148]

Analysis of OPS intelligence is beyond the scope of this report, as is the operational plan that was deployed to meet the Freedom Convoy protest in Ottawa, which was heavily criticized. But is notable that the intelligence picture available to the OPS, at least that part of it conveyed in public, shared common elements with that of ITAC and in some respects exceeded ITAC reporting in its early depiction of the dynamics of the "Freedom Convoy" protest.

Further ITAC reporting on February 3 continued the assessment of possible "opportunistic, low-level violence," in the days ahead fueled by several factors: the "potential" presence of IMVE adherents; protester frustrations; and citizen counter-protest and action.[149] This assessment was repeated following the second weekend of the truck convoy presence in Ottawa and demonstrations across the country. It noted a shift away from the original focus on supporting truckers contesting government COVID-19 vaccination policies to a wider protest umbrella featuring "various groups opposing public health measures."[150] The ITAC threat assessment update on February 7 noted that some 7,000 people had been engaged in protests and counterprotests over the previous weekend in Ottawa. The protest activity was deemed "relatively peaceful" but concern was expressed about violent online rhetoric and the physical presence of ideological extremists at some demonstration. [151]

Again, the ITAC reporting can be compared to OPS media briefings assessing the threat posed by the "Freedom Convoy." On Friday, February 4, as the second weekend of protest activity began in Ottawa, The OPS chief stated that the police would begin a surge and contain strategy. He noted that downtown Ottawa residents had been "severely impacted by unlawful acts. Including harassment, mischief, hate crimes and noise violations. He noted that intelligence gathering efforts were being stepped up by national, provincial and local law enforcement agencies and that these efforts would support evidence-gathering for criminal prosecutions. Chief Sloly admitted that the "current occupation" of the Parliamentary precinct remained unresolved. He characterised the demonstrators in the "red zone" as "highly organized, well-funded and extremely committed to resisting efforts to end the demonstration safely." This remains, the OPS chief stated, "a very violative and very dangerous situation." [152] In its public pronouncements, the OPS demonstrated, once again, that it was ahead of ITAC in depicting the nature of the "Freedom Convoy" threat.

As the third weekend of convoy protests approached, ITAC sounded one new note in its threat reporting on February 10. It now worried that IMVE adherents "may feel empowered by the level of disorder resulting from the protests."[153] This would have been old news to the Ottawa Police Service. It also noted increasing online violent rhetoric responding to enforcement actions or threats of action by the Ottawa Police

Service—these included a suggestion for protesters to collect the personal information of law enforcement officers and politicians supporting the OPS measures. A "corrected" but very similar version issued the following day represented the last ITAC threat reporting produced prior to the weekend meetings of the Cabinet Incident Response Group and the government's decision to invoke the Emergencies Act on February 14. [154]

At the same time that ITAC was concluding its series of threat assessments prior to the invocation of the Emergencies Act, the OPS held a further media briefing on February 10. Chief Sloly began by referring to his efforts to secure additional resources from federal and provincial partners to deal with an unlawful occupation, a matter to which he gave repeated emphasis and which he said was essential to deal with the protest. The OPP was taking the lead in trying to coordinate additional police resources that could flow to Ottawa. Hate crimes were being investigated and arrests had been made. Chief Sloly urged additional protestors not to come to Ottawa on the weekend and warned against unlawful activities. He noted that 400 trucks remained in the red zone and that at least one major tow truck operator had been threatened; other operators were proving to be uncooperative. Asked about the involvement of former military and police personnel in the demonstration he emphasised what he called the unprecedented capability of the protest movement, which posed a significant risk. [155]

Following the lifting of the Emergencies Act on February 23, ITAC issued a report the following day with the melancholy observation that:

"Supporters of IMVE will continue to encourage and capitalize on, anti-government sentiments and protest movements, whether related to the pandemic or other issues, in an attempt to degrade public confidence and social cohesion, and to attract vulnerable individuals to their ideological cause." [156]

ITAC believed IMVE threats would persist "into the foreseeable future."[157]

Several things are worth noting about the series of ITAC reports. One is their sheer generality. They consistently pointed to possible outcomes only. More precise predictions about the dynamics of the protest movement were missing. Even levels of confidence in their observations were not indicated—at least in the redacted pages. The only exception was in the repeated finding that a "coordinated, complex" terrorist attack arising from the "Freedom Convoy" was unlikely. The inability to produce more "actionable," as opposed to contextual, intelligence would presumably have lessened the value of these reports for decision-makers and would not have helped in ensuring the receptivity of decision-makers to ITAC reports.

A second point is that the ITAC reporting did not deliver any holistic picture of the protest movement, its leadership, its constituents, or its stated objectives. ITAC was more narrowly focused on any IMVE element, either in terms of online rhetoric or the presence of known IMVE actors and anti-government conspiracy theorists in the protest camp. This was an important focus and clearly within ITAC's mandate and that of its host, CSIS. But built into this assessment lens may have been a tendency to assume that other, less examined, elements of the protest movement were engaged in lawful democratic protest and somehow did not share the anti-government/anti-authority sentiments rampant among IMVE ideologues. A bifurcated approach to the protest movement, separating out possible IMVE elements from others was an artificial construct, not least given the ITAC observation that IMVE incitement might trigger opportunistic violence by individual ("lone") protestors or that IMVE influencers might find ways to mobilize the larger protest movement to violence by exploiting protester frustrations and capitalizing on the dissemination of conspiracy theories.

A third observation is that at no time was ITAC able to predict or comment on the border blockade tactics developed by the "Freedom Convoy." Its threat metrics did not include threats to critical infrastructure. On the protest at Coutts, Alberta, it simply commented on February 7 that "the size of the protest has ebbed and flowed over the last ten days. And there is no information to suggest the organizers intend to end the protest."[158] The Coutts border blockade would emerge as one of the most dangerous flash points during the "Freedom Convoy" protests. An ITAC threat assessment issued on February 17, days after arrests had been made at Coutts and weaponry and body armour seized, astonishingly made no reference to these developments despite widespread media coverage. [159]

There was no reporting from ITAC on the border blockade at the Ambassador Bridge (at least in the released material) or at other sites (Emerson, Manitoba, and the Pacific highway in B.C.)

Comparisons between known ITAC threat assessments and information made publicly available by the Ottawa Police Service suggest that the OPS had, from the outset, a better overall appreciation of the threat posed by the "Freedom Convoy" movement, even while its policing operations were overwhelmed by the size, volatility, and duration of the protests in the downtown Ottawa core.

ITAC operated in a narrow groove. This may explain, in part, the late determination of the Cabinet Incident Response Group to turn to the Intelligence Assessment Secretariat at PCO for a more integrated intelligence picture. But it is also a comment on the extent to which ITAC had drifted away from the original vision behind its creation in 2003-04.

A recent independent report on Canadian national security, published in May 2022, made the interesting recommendation that ITAC should be moved from CSIS and merged with the Intelligence Assessment Secretariat at PCO, to report to the NSIA. The rationale for this recommendation was not rooted overtly in the intelligence assessment challenges posed by the Freedom Convoy protest, but instead referenced the need for a strong, central assessment unit that could also serve a coordinating function for assessment across the government of Canada and help strengthen "the coherence of the intelligence cycle as a whole."[160] This sounds like a reincarnation of the original vision for ITAC, and may be made all the more necessary by the experiences of the "Freedom Convoy" protests.

## The Royal Canadian Mounted Police (RCMP)

Alongside CSIS and ITAC, the RCMP played a key role in advising the government on potential national security threats posed by the "Freedom Convoy," a role that stemmed from its mandate to investigate and prevent national security criminal activities. This mandate is conducted under the RCMP's federal policing program, with oversight and coordination provided by the Federal Policing National Security unit at RCMP headquarters in Ottawa, headed by an Assistant Commissioner. Investigations themselves are conducted by teams in the RCMP's regional divisions, some of which have Integrated National Security Enforcement Teams (INSETS). There are INSETS in Ottawa (National Division) in Ontario (O division, based in Toronto), and in Alberta (K Division based in Calgary), for example. [161]

As noted earlier, the RCMP manages intelligence sharing with CSIS, a key partner, in accordance with a framework doctrine called "One Vision 2.0," now under review. [162] A redacted reference to RCMP-CSIS relations in talking points prepared for the NSIA for a Deputy Ministers' meeting on February 9, simply states that: "RCMP remains well connected with CSIS."[163]

How effectively intelligence sharing was managed between the two agencies during the "Freedom Convoy" protests cannot be assessed on the basis of the available evidence, but it is unlikely that deep-rooted problems were fully surmounted.

A selection of RCMP threat reporting has become available through an Access to Information Request. It may not represent a complete picture of the intelligence perspective of the RCMP, but it suggests RCMP threat assessments replicated the same deficiencies as the ITAC reports in their generality and inability to provide any foresight analysis.

Details of the distribution of this RCMP threat reporting are unavailable. According to testimony provided by Commissioner Lucki on May 10 to the Special Committee on the Declaration of Emergency 2022, the RCMP provided situational reports throughout the duration of the "Freedom Convoy" protest; these were given to the Privy Council Office, who she described as "the keepers and distributors of all information regarding this event."[164]

The RCMP reports on the "Freedom Convoy" were generated by the "Ideologically Motivated Criminal Intelligence Team," (IMCIT) within the RCMP's Federal Policing National Intelligence. The team produced special threat advisories on the "Freedom Convoy" beginning on January 25 and running till at least February 11, 2022. These advisories were circulated with a low security classification ("Protected A"), relied almost exclusively on open source intelligence, which they documented, and were designed, according to the team, "to provide situational awareness of threats to public order, public safety and the security of public officials arising from violent online rhetoric opposing new and ongoing public health restrictions." [165] Situational awareness by the RCMP was basically a form of current intelligence reporting.

The starting point for the threat advisories was a series of unknowns—regarding numbers of vehicles and protestors associated with the "Freedom Convoy," the likely targets of their Ottawa protest, and the uses of funds raised online. A consistent feature of the reporting from January 25 identified IMVE actors as part of the convoy movement but no determination was made about the likelihood of IMVE action. [166] IMCIT reporting soon added another important unknown—how long the protestors might remain encamped in Ottawa. [167]

From the outset the IMCIT threat advisories painted a picture of an extremely diverse protest movement, ranging from those who had experienced "hardship" due to COVID-19, to ideologues who sought participation in the "Freedom Convoy" to "further their narratives." Within the latter group, the RCMP team believed that there was a "diversity of views" regarding the use of violence. IMCIT was particularly interested, as it observed the social dynamics of the protest movement through the lens of social media, to determine its attitude to law enforcement. [168]

The intentions behind the "Freedom Convoy" protest remained a mystery to IMCIT even as trucks began to arrive in Ottawa. The presence of heavy machinery on some of the transport trucks headed to Ottawa was regarded as a puzzle. The IMCIT simply noted that "it is possible it will be used to obstruct areas." An online post, complete with photograph, that referred to a "Freedom Convoy" helicopter and a drone pilot embedded with the protest (accuracy unknown) may have sparked a decision to issue a "NOTAM" closing access to airspace over a large swath of downtown Ottawa. [169]

Past the first weekend of the "Freedom Convoy" encampment in downtown Ottawa, IMCIT tried to look ahead, but their OSINT sources provided little direct help—"there is limited information posted about formal activities planned for the coming week." The RCMP team did note online information indicating that some protestors intended to stay until public health restrictions and vaccine mandates had been removed, but offered no assessment of the likelihood of this protest development. [170]

ICMIT noted solidarity actions in every province of Canada and offered a pessimistic outlook on the potential impact of law enforcement efforts, stating that action at any one event "will likely be perceived negatively and may spark more solidarity activities or adverse behaviour elsewhere." [171]

Inexplicably, IMCIT took a one week break, between February 3 and February 10, from its threat advisory reporting. In its last available update prior to the invocation of the Emergencies Act, the RCMP team posted its longest report yet. By February 10 it was prepared to conclude from its OSINT sources that the protesters had no intention of leaving Ottawa. Even then IMCIT was uncertain whether the protest movement might be satisfied with meeting with government representatives or would pursue maximalist aims to force all public health restrictions to be lifted. This uncertainty was reinforced by an emerging belief that there was no real "central leadership" to the Ottawa protests.[172]

IMCIT also now took notice, for the first time, of the fact that convoy supporters formerly employed in law enforcement and the military were associated with the convoy organizers. The concern was that their knowledge of policing tactics and techniques might be deployed by the "Freedom Convoy" to counter law enforcement actions. Added to this was a speculative fear of the potential for "serious insider threats" on the part of serving members of law enforcement and the military. As the threat advisory put it:

"Those who have not lost their jobs, but are sympathetic to the movement and their former colleagues, may be in a position to share law enforcement or military information to the convoy protesters."[173]

This was a striking claim. The basis for it is unknown. What we do know is that by February 10, the IMCIT was liaising with RCMP Divisional Criminal Analysis units across Canada and feeding their reports into a picture of nation-wide "solidarity actions."

The bright line for any form of intelligence reporting involves straying across the boundary between presenting situational information to inform policy-making and

using intelligence to lead policy-making in some desired direction. IMCIT reporting did not cross any bright lines, and probably did not have the power or influence to do so, but neither was it helpful in assessing the intentions, capabilities or anticipated future directions of the "Freedom Convoy." Its repeated note of pessimism about the likely blowback from any law enforcement actions in the face of what it described as a nation-wide movement is striking. Nor was IMCIT ever prepared to pronounce in any decisive way on the ideological make-up of the "Freedom Convoy." Its February 10 portrait was little changed from that offered in its first report on January 25:

"IMCIT assesses that this protest has attracted both in-person and online support of individuals with a variety of grievances, some ideological in nature and others who may have experienced personal hardships due to COVID-19 or are experiencing pandemic fatigue. Overall there is anti-government sentiment based on the fact that the protesters want public health restrictions lifted and the government has the power to do so. However, not all individuals who may hold anti-government views on the specific topic of public health restrictions are believed to support extreme activities and there are diverse views regarding the use of violence during the convoy."[174]

There are different ways to read this determinedly even-handed assessment. It may, simply, be a realistic portrait; it may be far too sympathetic. What is clear is that the IMCIT threat advisories maintained a relatively unchanged picture of the makeup of the protest movement from the inception of its reporting and were unable to successfully capture any dynamic changes.

The threat reporting produced by the RCMP team reflects two perils. One is an inability to treat open source intelligence as other than a large and diverse assemblage of information from which no conclusions can be drawn. OSINT on a target may even lead to distorted perceptions influenced by the contents of social media messaging, if not properly assessed—a form of 'drinking the kool-aid.' The second peril concerns the absence of any value-added to such intelligence reporting, despite drawing, as it did, on the best available source of information about the "Freedom Convoy."

The RCMP was no better placed than its intelligence partners in offering any early warning in the form of actionable intelligence on "Freedom Convoy" developments in general. But in one specific case, an RCMP INSET investigation, drawing on a variety of investigative tools, was able to arrest a group of individuals associated with the border blockade at Coutts, Alberta and in particular involved in providing security for the protesters. Members of this "sub-group" as they were defined in court-redacted warrant applications, had transported weapons and body armour to a site near the blockade. They were arrested on the evening of February 13 and the morning of February 14, 2022 and charged by the RCMP with conspiracy to murder, following a

search of three trailers. [175] Among the material seized, in addition to lethal weaponry ,was a body-armour vest with a "Diagolon" patch. Diagolon is a far-right organization whose activities have been analysed by the Canadian Anti-Hate Network.[176] The network has identified two of the individuals arrested at Coutts as having prior links to Diagolon.

As the court warrant applications indicate, not only did the RCMP insert two undercover officers into the group, who provided crucial intelligence on the organization and leadership of the protest, and on a weapons smuggling scheme, but they used other intelligence gathering techniques, including social media searches and emergency wiretaps.[177] CSIS membership in the Alberta INSET based out of Calgary indicates their likely involvement in some form in intelligence gathering on the Coutts blockade. The ability to successful deploy RCMP undercover operatives, both female, into the protest group, suggests a longer term and on-going investigation into the IMVE threat that was presented at Coutts and may be a striking indication of at least one investigative success in the face of threatening developments presented by elements of the "Freedom Convoy."

Whether RCMP or other agency reporting of these developments at Coutts, coming as they did just prior to the invocation of the Emergencies Act, had any decisive impact on the government's decision cannot be determined on the basis of the available evidence. As noted above, ITAC, as one key channel of threat reporting, does not seem to have been focused on them. Its gaze may have been Ottawa-centric.

RCMP intelligence work was meant to be enhanced with a key initiative begun in 2014, the creation of the National Security Joint Operations Centre. NSIJOC was established as an inter-agency fusion centre to deal with threats posed by terrorism and high-risk travellers, taking its initial inspiration from the experience of the October 2014 terrorist attacks on Parliament Hill and in Quebec. Membership of the NSJOC grew to include representatives from RCMP, CBSA, CSIS, IRCC, DND, FINTRAC, CSE, GAC and the CRA by 2017. The NSJOC was meant to be a centre of expertise on national security investigations, to share information and intelligence among its partners, and to help coordinate a whole of government response to "emerging issues." [178] Whether it performed any of those functions in January and February 2022 is not known. Its explicit terrorism and high-risk travellers focus may have limited its operational role with regard to acting as a fusion centre for intelligence on the "Freedom Convoy" protests. The degree to which the RCMP's Ideologically Motivated Criminal Intelligence Team liaised with the NSJOC is unknown.

Like CSIS, the RCMP may have been impacted in their overall efforts to use OSINT effectively by long-standing and unresolved issues around their collection and use of

intelligence from social media monitoring. Like CSIS, it has faced public criticisms for its deployment of "spy" tactics. Very recently, these criticisms have come to focus on the use by the RCMP of commercial spyware to capture data from cell phones. [179]

OSINT challenges for the RCMP date back to 2014, when the Civilian Review and Complaints Commission for the RCMP initiated two investigations into the RCMP's handling of protests. One was a public interest investigation stemming from a complaint lodged by the BCCLA into the actions of the RCMP in investigating people involved in pipeline protests in British Columbia. The other was a Chair's complaint and investigation into the RCMP's action in managing protests over shale gas exploration by a company in New Brunswick that operated, in part, on land of the Elsipogtog First Nation. Both CRCC investigations came to essentially the same conclusions with regard to deficiencies in policy in the RCMP's use of open-source intelligence.

Both investigations were slow moving; foot-dragging responses by the RCMP added further to the delay. The CRCC issued an interim report into the handling of the shale gas protests in 2019, and received the RCMP's response to its report in June 2020, in which the RCMP rejected some of its recommendations. The CRCC issued a final report on the shale gas protests in November 2020, six years after beginning its investigation. [180] One of the recommendations rejected by the RCMP concerned the CRCC's finding that the RCMP's policy with regard to open-source intelligence collection was flawed and needed to be tightened up, especially with regard to the limits on collection of personal information from social media sites, the permitted use of such information, processes for verification, and limits on retention. The RCMP Commissioner provided to the CRCC a detailed defence of the RCMP's use of open-source intelligence and its importance as an investigative tool for the handling of public protests, a need that extended beyond a criminal nexus.[181] The CRCC was not satisfied by the Commissioner's response. As the CRCC Chair put it, "The RCMP strongly rejected recommendations limiting collection and retention of open-source information. The Commission has serious concerns about the RCMP's approach in such matters."[182] A similar impasse developed between the CRCC and the RCMP over the CRCC's nearly identical recommendations in its final report on the use of open source intelligence in response to pipeline protests in B.C. [183]

An internal audit was conducted by the RCMP into its policies for open-source intelligence while the CRCC investigations were still underway. [184] The audit identified an RCMP practice that distinguished between three tiers of open source intelligence collection. Tier 1 was described as overt online activities which might involve such things as research, environmental scanning, inquiry and public engagement and was considered low risk. Tier 2 was labelled as passive online activities for intelligence

and investigations that were designed to be "discreet"—that is there would be no direct engagement with any target of OSINT collection. Tier 3 was "covert" monitoring and was designed to hide and safeguard any RCMP OSINT collection. The audit released a final report in January 2021, based on a study of OSINT use between April 2018 and March 2019. The audit report reached a number of conclusions, including that internet related OSINT activities were not consistent or compliant with policy guidance and that a more robust governance framework was needed. Many employees, it found, were unaware of the existing policy—O.M. (Operational Manual) 26.5, "Using the Internet for Open Source Intelligence and Criminal Investigations." The audit worried about risks to investigations "if users are not aware of the appropriate methods to capture, store and retain OSI [open source intelligence]." The risks identified included potential damage to court prosecutions, reputational risk, and the possibility of future imposed limitations on OSINT usage. The audit urged better training and information sharing. [185]

The audit report also suggests that technological solutions for Tier 2 OSINT collection may have been incomplete, including the creation of a cloud-based solution, involving protection against attribution back to RCMP computers, and the use of smart phones for OSINT. As the audit noted, "Any enterprise-wide IT solutions for Tier 2 should consider the widespread use of mobile devices in addition to potential attribution risks, IM (Information Management) requirements, and privacy considerations."[186]

In response the RCMP undertook to create a policy "hub" with centralized expertise on OSINT, which the audit had found was missing, and to establish an "Oversight Working Group" to help develop a new policy suite and revise the existing O.M 26.5 document. [187] All of this activity was meant to occur in 2020 and 2021, but the extent to which it was completed and applied is not known and work may have been delayed because of the pandemic.

Because of past high-profile criticisms and ongoing development work, the RCMP may not have been well placed to fully exploit OSINT as an important intelligence tool in response to the "Freedom Convoy." Determining future OSINT needs for the RCMP would be an important part of any systematic review of the NSI system as a whole.

## The Canada Border Services Agency (CBSA)

The Canada Border Services Agency was established in December 2003 as part of a wide- ranging overhaul of Canada's security architecture and governance. The Agency is in the portfolio of the Department of Public Safety and Emergency

Preparedness, created at the same time. The original establishment was based on an Order in Council; CBSA legislation followed in 2005. The CBSA Act does not list any specific national security, intelligence or law enforcement activities but provides the Agency with a high-level mandate that includes support for national security and public safety priorities. [188]

The operations of the Canada Border Services Agency were profoundly impacted by the events surrounding illegal blockades at the border. These blockades went to the heart of CBSA's mandate for border integrity at ports of entry and decision-making on admissibility of people and goods at the border. Four key ports of entry: at the Ambassador Bridge, Ontario; Coutts, Alberta; Emerson, Manitoba; and the Pacific Highway in British Columbia experienced multi-day closures because of the protests. Re-routing of border traffic was required.

Official border 'Ports of Entry' (POE) are secure, controlled areas not accessible to persons other than those crossing the border. It is a criminal offence under the Customs Act to hinder the work of a Border Security Officer (BSO), but it is important to note that CBSA does not have any jurisdiction or enforcement powers regarding protest measures taken to block access to ports of entry, such as the placing of concrete barriers or heavy machinery, beyond the limited, defined physical area of the POE. Such activities must be dealt with by police of jurisdiction. At two locations, CBSA officers had to lock down offices to prevent entry.

The Emergency Measures Regulations, proclaimed on February 15, 2022, gave CBSA a distinctive new power to prohibit entry of foreign nationals who were identified as seeking to participate in or facilitate a prohibited public assembly. CBSA confirmed a statement made by the Prime Minister that some foreign nationals were turned back at the border, though exact numbers were not provided.[189]

While the operations of CBSA were affected by the border blockages, its response role was largely confined to managing alternative routes for cross-border traffic and, once the Emergencies Act was invoked, to identifying and prohibiting the entry of foreign nationals coming to Canada to engage in a prohibited public assembly. Whether CBSA produced a range of threat reporting during the "Freedom Convoy" border blockades is unknown.

The current wording of the Emergencies Act does not specifically provide for the securing of critical infrastructure, including critical infrastructure at the border. This is an element of the legislation that may require modernization, in the light of the experience of the protest activities in Ottawa and at border crossing points in early 2022. [190] Legislative and/or regulatory change, including to the CSIS Act definition of

threats to the security of Canada, may be necessary. Such changes may be considered in the light of the federal government's current efforts to update its critical infrastructure strategy, which dates from 2009 and does not list border infrastructure among the ten identified critical infrastructure sectors. [191]

## The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)

FINTRAC, created in 2000, has been described by one commentator as a financial intelligence "clearing house." [192] It operates at an intersection between financial institutions in Canada and law enforcement and national security partners. According to its statute, FINTRAC

*"collects, analyses, assesses and discloses information in order to assist in the detection, prevention and deterrence of money laundering and of the financing of terrorist activities."*[193]

Under the act, financial institutions have a responsibility to report certain classes of suspicious transactions potentially related to money laundering and terrorism financing to FINTRAC. [194] FINTRAC then takes the "Suspicious Transaction Reports" (STRs) provided to it, and assesses them on a 'reasonable grounds to suspect' standard. Based on assessment findings, FINTRAC can then proceed to make disclosure reports to law enforcement and other investigative bodies in the criminal and national security space. For threats to national security, FINTRAC may disclose to CSIS, an appropriate police force, CBSA, and the Department of National Defence. The designated information that FINTRAC may provide is laid out in the Act and involves a wide range of identifying information including the criminal record of a person involved in a suspicious transaction. Whether FINTRAC produced any disclosure reports related to financing of the "Freedom Convoy" has not been divulged.

FINTRAC's intelligence collection mandate is mostly passive, in the sense that it receives reporting from financial institutions, but its Act allows it to augment that flow of intelligence with open source information and with data held by federal or provincial government partners, and by foreign states or international organizations, subject to established agreements.

One special bulletin published by FINTRAC in July 2021 studied the financial behaviour of IMVE threat actors. [195] The bulletin was prompted by a series of new

additions of IMVE organizations to the Criminal Code list of terrorist entities. The practice of listing terrorist entities was codified in the original anti-terrorism act of December 2001, but it wasn't until 2019 that the first IMVE groups were listed. Currently the following IMVE entities are listed:

Aryan Strikeforce

Atomwaffen Division

Blood and Honour

Combat 18

James Mason

Proud Boys

Russian Imperial Movement

The Base

Three Percenters[196]

In its published study FINTRAC noted several features of financial behaviour by IMVE actors, distinguishing between lone actors, individuals funding IMVE networks, and organizers. Lone actors typically used personal funds and regular banking methods. Financial transactions were typically small and difficult to observe. Individuals funding IMVE networks with donations were observed to rely on payment processing companies and money services. Organizations used both personal and business accounts and while transactions tended to be small, they were also more observable given connections between IMVE threat actors and companies charged with various criminal offences.

The FINTRAC report urged financial institutions with reporting requirements to FINTRAC to pay heightened attention to indicators of IMVE related financing and added in a IMVE indicator in its STR reporting form. The July 2021 report was a clear indication that FINTRAC was alert to the broad typology of IMVE financing. [197]

On the available evidence, it seems unlikely that FINTRAC was able to add to the intelligence picture regarding the "Freedom Convoy." This was partly a result of its specialized mandate and reporting structure; partly a reflection of its own findings on

IMVE related financing. Some of the convoy organizers had started a "GoFundMe" fundraiser as early as January 14, but prior to the invocation of the Emergencies Act and the subsequent filing of new regulatory requirements, crowd-funding platforms and related financial service providers were not among the entities required to provide reports to FINTRAC.

The very specialised role played by FINTRAC raises questions about the need for a more broadly based economic intelligence capacity within the federal national security and intelligence system to provide reporting on economic threats to Canada's national security.

## Who's On First?: The Government Operations Centre (GOC) and the Emergencies Preparedness Secretariat, PCO

The Government Operations Centre (GOC) was established in 2004 as an entity within the newly created department of Public Safety Canada. It was designed to play an important coordinating role regarding events of "national significance" during an emergency by sharing information and intelligence with federal departments, the provinces and territories and other countries, including the US.[198]

According to a current official description, the daily activities of the GOC including monitoring the threat environment; "providing national-level awareness of situations that could evolve into national emergencies;" preparing warning reports and integrated risk assessments; coordinating whole-of-government response management; and providing support to senior decisionmakers.[199]

The occurrences it may scrutinise, among a wide range of natural hazards and human-induced events, include "civil disturbance." [200]

In the context of the "Freedom Convoy" protest movement and its activities, publicly available information about the actual role played by the GOC appears almost non-existent. A reference in an internal email communication indicates that in late January the Centre was asked to "start pulling together a 'common picture' report working with other Ops centres as well. [201] A subsequent tracking record for IRG meetings on February 12 and 13 indicated that the GOC was being deployed as a "supporting department" in efforts to ensure that a holistic picture of the available intelligence was at hand.[202]

The indications are that the Government Operations Centre may have been sidelined during the "Freedom Convoy," protests for reasons that remain unclear. Its previous role in monitoring protest demonstrations had proven controversial and this may have impacted on a decision to avoid making the GOC a central clearing house for information and intelligence on the "Freedom Convoy" protest.

Moreover, its role appears to have been subsumed by the work of a new secretariat in PCO that was created to support the Minister of Emergency Preparedness, when that Ministerial appointment was announced in the Fall of 2021. [203] An internal email dated January 26 noted that PCO EP (Emergencies Preparedness Secretariat) "will roll up GOC/ADM NS OPS debriefs into a nightly common operating picture for Ministers of SSE (the Cabinet committee on Safety, Security and Emergencies), Minister of IGA (Intergovernmental Affairs), and their respective offices, as well as PMO."[204]

The Emergencies Preparedness Secretariat issued a series of daily unclassified "National Operations" updates that referenced the "Freedom Convoy," starting on January 25, 2022. These were brief situational awareness reports that drew on open source intelligence and information from law enforcement agencies. The daily 'snapshots' mostly lacked any strategic assessment of the national security threat potentially posed by the protest movement, and to that extent were of limited value as intelligence products. The updates drew on other reporting by government agencies regarding IMVE threats, repeatedly stressing that:

> "*There is a concern that individuals with a range of views, some ideologically motivated with violent extremist action, could exploit the convoy to promote action that pose a risk to the public and officer safety. No substantiated threats or credible plans have been identified at this time."* [205]

This reporting essentially replicated similar messages contained in ITAC and RCMP reports discussed earlier in my paper. The existence of multiple centres of reporting with overlapping messaging may ultimately have contributed to the decision taken just prior to the invocation of the Emergencies Act to task the PCO Intelligence Assessment Secretariat with the unusual mission of pulling together an "aggregate intelligence" picture.

A stable governance structure for unified threat reporting is an important element that appeared missing during much of the "Freedom Convoy" protests.

## On Public intelligence

When the federal government announced the invocation of the Emergences Act on February 14, 2022, the news was greeted by a degree of public shock and significant political division in Canada. Some Western provincial premiers argued that the use of the Emergencies Act was unnecessary. The Quebec premier stated that it should not be utilised in his province.[206] The Conservative party decried it as a form of wedge politics. The interim leader of the party argued that it was an "irresponsible escalation."[207] The leader of the New Democratic Party, Jagmeet Singh, told the House of Commons that the use of the Act was a product of a failure of leadership, and that governments "did not take the threat of this convoy seriously."[208] He characterised the goal of the protest movement as to "overthrow a democratically elected government."[209] Mr. Singh indicated that his party would support the use of the Emergencies Act but added, "We will be watching. And we will withdraw our support if these powers are misused." [210] The Canadian Civil Liberties Association came out as opposed to the measure because it felt the legal thresholds in the Act had not been met. The Toronto Star published an editorial that stated that "the protests and blockades could and should have been resolved by good intelligence, smart planning, and effective coordination among police forces."[211] Experts were divided.[212]

The nature of the response was in part predicated on the fact that the Emergencies Act had never before been used, since its creation as a successor to the War Measures Act in 1988. But the circumstances around the invocation of the Emergencies Act, late in the manifestation of the "Freedom Convoy" protest, and the attendant political discord, raises an important question about the public use of intelligence by a government in power. The question is: should the federal government have made public, in some form, its intelligence on the threat posed by the "Freedom Convoy," prior to the invocation of the Emergencies Act?

This is a controversial issue, but not outlandish. Intelligence no longer resides permanently behind a secret curtain, never to be revealed. It can have a role to play in public warning, objective truth-telling, and in response to disinformation. We have only to consider the remarkable ways in which intelligence has been used in public by key Western allies (and to a small degree by Canada) in responding to the Russian invasion of Ukraine on February 24.[213] This effort began even before the Russian attack. US and UK intelligence assessments pointing to a Russian premeditated assault on Ukraine were declassified and used in briefings to the media and in talks with foreign allies. In January the British Foreign Office issued a statement that Putin wanted to install a pro-Moscow regime in Ukraine. [214] It said it was making the

intelligence assessment findings public because of the "exceptional circumstances." One week before the Russian attack the UK Ministry of Defence, on its twitter feed, posted an intelligence update which stated that "Russia retains a significant military presence that can conduct an invasion without further warning."[215] The tweet was accompanied by a map showing the likely invasion routes to be used by the Russian armed forces (all of which proved accurate one week later). Since the invasion began, the UK MOD has issued a near daily social media intelligence update on highlights of the Ukraine war. [216]

The then chief of UK Defence intelligence, Lt. Gen. Sir Jim Hockenhull, gave an interview to the BBC in which he explained the unusual decision to use intelligence in the public domain, arguing that the decision wasn't easy but that he felt it necessary—"to get the truth out before the lies come." [217] Another UK intelligence chief, the head of the Government Communications Headquarters, Britain's signals intelligence agency, told an Australian audience that:

> *It is already a remarkable feature of this conflict [the war in Ukraine] just how much intelligence has been so quickly declassified to get ahead of Putin's actions. From the warnings of the war. To the intelligence on false flag operations designed to provide a fake premise to the invasion. And more recently, to the Russian plans to falsely claim Ukrainian use of banned chemical weapons. On this and many other subjects, deeply secret intelligence is being released to make sure the truth is heard. At this pace and scale, it is really unprecedented."*[218]

Sir Jeremy Fleming added, "In my view, intelligence is only worth collecting if we use it, so I unreservedly welcome this development." [219]

But can decisions to release intelligence in public to counter a foreign state adversary with a formidable apparatus of disinformation, no restraints on its use, and control of its domestic information space, engaged in waging an illegal war that threatens the stability of the global order, really be analogous to the situation that faced the federal government in January and February 2022? Put another way, could a government legitimately use intelligence in the domestic public domain to try to inform public opinion, counter disinformation, and possibly deter elements of a protest movement or reduce the threat it posed?

Clearly, the circumstances in which the federal government might consider releasing into the public domain current intelligence about domestic and non-state threats to national security in a time of emergency must be carefully weighed. Such

unprecedented (for Canada) use of intelligence would have to factor in a whole host of considerations. At least eight arise, and others may be thought of.

The first would be simply to underline that such use of public intelligence would have to be considered on a case-by-case basis and severely restricted to protest demonstrations that posed clear threats to national security and engaged in significant disinformation. A second would be whether the government possessed intelligence about a national security threat that it had full confidence in and was prepared to defend in public. A third would be whether such intelligence could be safely declassified without threatening sources and methods of intelligence or interfering with ongoing criminal investigations. A fourth would be whether the release of intelligence could be managed in such a way that it was not seen as propaganda or as designed to advance the political interests of the government in power. Such release would have to come from a "trusted" official source. A fifth, very significant consideration, would be whether the use of intelligence in the public domain would be seen as a Charter violation, threatening free speech and assembly rights. A sixth would be possible impacts on privacy rights of any named individuals, especially leaders of a protest movement. A seventh calculation would be whether such intrusion by the government into domestic reporting would seriously impact and distort media coverage. A final calculation would be about 'blowback.' Would such public use of intelligence only exacerbate tensions and divisions around a protest movement?

These are all high hurdles, on top of the precedent-setting nature of any such use. Every single consideration would have to be carefully weighed.

To even contemplate such an action two things would have to be determined to properly limit the scope. One is that that any exercise of the use of intelligence in public would be strictly fact-based. This could not be undertaken as an "information operation" in the military sense. The other would be that the primary rationale would be to target disinformation—to "get ahead of the lies." Such restrictions make the idea of the public use of intelligence less outlandish and more in keeping with the kind of public information campaign that a police force might routinely use (and in the case of the OPS, did use).

What would be the benefits? Any such use of intelligence would be heavily reliant on OSINT, and would reinforce the importance of OSINT among intelligence collection sources. The idea that intelligence might be used in the public domain might introduce additional rigour into the intelligence process, to ensure accuracy and meet contestability standards. The use of public intelligence would be a clear signal of its importance to decision-making at the senior-most levels. Public knowledge and

debate could be enhanced. A protest movement that posed a threat to national security could be undermined.

This weighing action is purely hypothetical in the context of the invocation of the Emergencies Act. There is no indication that releasing intelligence in public was ever considered, prior to February 14 or in the aftermath of the proclamation of a Public Order Emergency.

This brief examination of the potential uses of public intelligence is stimulated by the confusion and discord that surrounded the invocation of the Emergencies Act. Its justification is forward-looking. The more that a variety of national security threats, some open, some more hidden, threaten our democracy, the more necessary it might become to bring intelligence into the public domain, with the proper safeguards and decision-making process.

## On Review and Accountability:

In a public address hosted by the Centre for International Governance Innovation in February 2021, CSIS Director David Vigneault remarked: "Keeping Canada safe requires a national security-literate population. By this I mean a citizenry that understands the key dilemmas Canada faces, and recognizes the need to adapt and respond in a thoughtful, meaningful, and timely way." [220]

One of the principal means by which the goal of a national security literate population can be advanced is through the work and reporting of independent review bodies.

The Public Order Emergencies Commission is a powerful review and accountability tool, so designed by the 1988 legislation. It takes its place alongside the key elements of Canada's new review system—the National Security and Intelligence Committee of Parliamentarians, the National Security and Intelligence Review Agency, and the Intelligence Commissioner (properly an oversight body)-- in offering Canadians answers to important questions about the use of government powers. Like the review system, the Commission will have to find its own balance between compliance and efficacy issues, between lawfulness and performance. Like the review system, the Commission will make recommendations for improvements.

Both the Commission and the review system share a common question as Canada faces a new world of threats—that question is: what is the role of intelligence in protecting democracy? This is not a question Canadians are used to asking in recent years. [221] As troubling aspects of the "Freedom Convoy" demonstrated, a national

security environment beset by disinformation and misinformation, by conspiracy theories, by foreign interference, by concerns about IMVE threats, by virulent distrust of government, by attacks on critical infrastructure, by societal trauma and division caused by the impacts of two years of an unprecedented public health crisis, all require that we seek answers and make necessary adjustments to our thinking about intelligence, with a more mature leaning away from concerns about intelligence practices being a threat to democracy itself, and towards a notion that intelligence can be a safeguard for democracy, if appropriately used.

Was the intelligence system ready and able to be a safeguard in response to the events of the "Freedom Convoy" protest? Canadians deserve a full answer to that question, not least to prepare for the future.

## Conclusion: Findings and Issues for Future Study

Understanding the role played by intelligence reporting on potential threats posed by the "Freedom Convoy" protests should be central to the work of the Public Order Emergencies Commission and to future thinking about Canada's national security needs. [222] The Commission's mandate directs it to "examine and report on the circumstances that led to the declaration of a public order emergency…" There is no more important 'circumstance' than the performance of the intelligence function. Intelligence should have provided the basis for informed decision-making in response to the "Freedom Convoy" at all levels from local law enforcement to the Cabinet table.

The question must be asked—was there an intelligence failure with regard to understanding the intentions, capabilities, and operations of the "Freedom Convoy" protest?

Intelligence failure occurs when there is a failure of early warning, allowing for a surprise threat to take shape and have impact, or when there is a failure to assess a threat situation accurately, leading to a failure in response. As the expansive literature on intelligence failure records, deficiencies can occur at every stage of the intelligence cycle, including collection, analysis and reporting—they can occur as a result of cascading failures across the entire cycle.[223] Policing failures in confronting a protest are inseparable from intelligence failures. One feeds the other.

Any answer to the intelligence failure question must be nuanced and must be predicated on an assumption that there existed a realistic possibility of providing early warning and accurate, forward-looking situational assessments. If the "Freedom

Convoy" protest simply evolved and mutated, at speed, beyond the control of its organizers and elements within its midst, and according to no set plan, then that realistic possibility does not exist. An intelligence system cannot be expected to predict the unpredictable or know the unknowable. It is not a crystal ball.

Any findings regarding intelligence failure based solely on the extant public record at the time of writing are liable to be partial and possibly wrong. But there are troubling features to the performance of the national security and intelligence system in response to the "Freedom Convoy."

The most striking is that there was no demonstrated ability to assess the capabilities and intentions that animated the "Freedom Convoy." Intelligence reporting simply left decision-makers guessing.

Some of the operations of the "Freedom Convoy", including its online fund-raising successes, its tactical use of heavy equipment and "weaponizing" of trucks, its border blockades, the presence of children among the protesters, and the ways in which its messages metastasized across Canada and beyond, took the national security and intelligence system by surprise and forced it into a reactive mode.

There were multiple streams of threat reporting and efforts to pull together an integrated intelligence picture, as indicated by the IRG records, came very late in the day

OSINT, as an intelligence methodology, underperformed for reasons that deserve further scrutiny. It could and should have been a rich intelligence resource, given the reliance of the Freedom Convoy leadership and followers on social media messaging. But OSINT requires resources, technological capacity, and analytical skill sets that may have been unavailable. It has to be valued by the NSI system and by decision-makers. Concerns about the limitations of authorities for the national security and intelligence system may also have been a hindrance.

The national security and intelligence system maintained a narrow focus in its threat reporting on concerns about IMVE. While in keeping with lawful mandates, the ways in which this narrow focus was operationalized significantly reduced the value of intelligence.

Threat reporting in general missed the significance of critical infrastructure vulnerabilities, especially at the border, and the prospect of significant supply chain disruptions.

Collective, Cabinet-level governance, as represented by the IRG, came into play too late in the crisis and encouraged emergency thinking

Sub-cabinet level operations in the NSI committee system may have had a better handle on the threats posed by the "Freedom Convoy," but until the records of the ADM NS Ops committee can be investigated, this is speculation. All that can be said was that the early intent was there as expressed by the desire, as the Assistant Secretary to the Cabinet put it, to have "structure and governance on this issue…"[224]

The idea of using public intelligence as a way to inform the public and prepare the ground for responses by the federal government was never contemplated. Such action would have been unprecedented. It may also have been helpful.

The threat reporting paid little attention to any subversive threat opposed by the "Freedom Convoy"

If these are indicators of failure, they must be weighed against elements of success, to provide a balanced picture. CSIS, ITAC, the RCMP, and the Emergency Preparedness Secretariat all appear to have been cautious in their assessment of the nature of the IMVE threat posed by the "Freedom Convoy," drawing attention to the possibility of incitement to violence through extremist rhetoric, particularly online, and to the possibility of lone actor attacks. The intelligence system was paying attention to online extremist rhetoric disseminated by elements of the "Freedom Convoy" protest.

It has to be deemed a success that the "Freedom Convoy" was never painted with a broad brush as posing a terrorist threat. Rather the depiction was of a protest movement that became unlawful and contained the possible seeds of violence. The notion that the "Freedom Convoy" might generate any kind of coordinated or dangerous terrorist attack on the parliamentary precinct was dismissed.

In short, the NSI system avoided creating an exaggerated terrorist threat picture, for which they deserve some credit. The NSI system proved less capable of generating a more holistic understanding of anti-authority/anti-democratic, subversive, economic, and foreign interference dimensions of the "Freedom Convoy" threat.

The overt and narrow focus of the NSI system on IMVE threats stemmed from mandate authority limitations of such organizations as CSIS, ITAC and the RCMP. This raises the question of the overall capacity of the Canadian national security and intelligence system to pivot to potential threats posed to our democracy. In particular it may require new thinking about a stand-alone open source intelligence centre, decoupled from the CSIS Act and with its own statutory or regulatory authority,

supported crucially by transparency about its mission, collection capabilities and objectives. It would be necessary to provide such a centre with sufficient "social licence," as it would be bound to be met by concerns about mass surveillance and privacy intrusions. [225] The record of previous public criticisms of alleged spying on protest movements by CSIS, the RCMP, and the Government Operations Centre documented in this report underscores this need. There would need to be a clear public review and accountability regime for such a centre.

The creation of a stand-alone OSINT centre would reflect lessons from the "Freedom Convoy" experience about both the importance of this intelligence methodology and the challenges involved in ensuring its effectiveness, including governance challenges around integration. Multiple streams of OSINT-based threat reporting, as witnessed during the protest movement, are not efficacious and may only serve to lessen the impact and appreciation of such an intelligence source. They may also create an "echo chamber" effect in which assessments become duplicative, especially if there is no built-in challenge function.

Given the role played by the NSIA, as demonstrated during the events of the "Freedom Convoy," an open source centre would best placed in PCO, reporting to her.

Developing such an OSINT centre would be one way to ensure that the Canadian national security and intelligence system has the capabilities, resources, governance structures and authorities needed to respond appropriately to future, broad-based threats to democracy. But it will only be one way and the experience of NSI system responses to the "Freedom Convoy" reinforces the need for a comprehensive examination of the capabilities and authorities of the NSI system as a whole. No such comprehensive examination has ever been undertaken in the history of the Canadian NSI system.

Intelligence failures always matter. In the context of the invocation of the Emergencies Act a putative intelligence failure may have deprived the federal government of decision time, narrowed opportunities to consider alternative policies, and reduced flexibility. It may have driven reactive decision-making and contributed to paving the way for a "last resort" measure. These are high consequences.

The centrality of the CSIS Act and its definition of threats to the security of Canada was evident during the reporting on the "Freedom Convoy," notably in the emphasis given to IMVE concerns. The CSIS Act definition of threats to the security of Canada and its operational mandate at section 12 are thirty-eight years old, a product of an earlier and searing historical experience for Canada, of a vastly different threat environment, and reflective of an age with very different intelligence methodologies.

The CSIS Act needs a thorough-going review to ensure that it provides the Service with a modern, fit mandate, while maintaining adherence to Canadian laws and democratic norms.

Alongside questions of intelligence failure and possible fixes, there is a related issue: in what ways does the language of the 1988 Emergencies Act need to be modernized to ensure that it remains relevant in future, as we confront threat environments that could not have been imagined thirty-four years ago? In particular, do threats to national security need to be redefined in the Act and should protection of critical infrastructure, economic security, and harms to international relations, be incorporated in the statute for a Public Order Emergency?[226]

As the CSIS Director stated in a public speech following the "Freedom Convoy" protests, **"the fight for democracy is one we cannot afford to lose."**[227]

The national security and intelligence system must be equipped for that fight, in ways that the Canadian public has a chance to debate, understand and accept. The available evidence and tentative judgement is that the NSI system was not ready and fully equipped when the "Freedom Convoy" descended on Ottawa and critical infrastructure at the border. If there is one statement that bears witness to this lack of readiness and absence of intelligence foresight, it was provided by RCMP Commissioner Lucki. Commissioner Lucki testified on May 10 that: "I think, when people came to Ottawa, people honestly thought that they were going to do their thing on the weekend and then were going to leave after the first day that Parliament resumes". "Obviously," she said, " that did not happen."[228]

## ENDNOTES

* *I wish to thank Morgan Wark, a third year philosophy major at the University of Toronto, for his research assistance in combing through voluminous Parliamentary committee records. The author also wishes to extend his appreciation to two persons who read and commented on an earlier draft. This report benefitted from the willingness of individuals who shared the results of their Access to Information Requests with the author.*

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[1] Speech by the National Security and Intelligence Advisor to the Prime Minister, "National Security Challenges in the 21st Century," Centre for International Governance and

Innovation, June 8, 2021, https://www.canada.ca/en/privy-council/services/national-security-intelligence-advisor-challenges.html

[2] The issue of intelligence failure is also raised by Kent Roach, "The February Emergency: Intelligence, Policing and Governance Failures and the Future of Charter-Proofed Emergencies, " The Criminal Law Quarterly, 70, no. 2, pp. 195-229

[3] Speech by CSIS Director David Vigneault, " Protecting National Security in Partnership with all Canadians," University of British Columbia, May 4, 2022, https://www.canada.ca/en/security-intelligence-service/news/2022/05/remarks-by-director-david-vigneault-to-the-university-of-british-columbia.html

[4] National Security and Intelligence Committee of Parliamentarians (NSICOP), Annual Report 2018, published in redacted form April 2019, noted "Canadians do not appear to have a strong understanding of the individual mandates or activities of the organizations of the security and intelligence community, how they work together, or the role of review bodies," p. 23. https://www.nsicop-cpsnr.ca/reports/rp-2019-04-09/2019-04-09_annual_report_2018_public_en.pdf

[5] Allegations of "false flag" operations by protesters were noted in RCMP threat reporting, see IMCIT Special Threat Advisory, Update 5, February 3, 2022, ATIP release package A-2021-00438. Copy in the possession of the author. For one such narrative by a self-proclaimed "intelligence office" for the "Freedom Convoy, "see an interview with Tom Quiggin, Saskatchewan Today, August 5, 2022, https://www.sasktoday.ca/south/local-news/protests-at-police-stations-could-turn-violent-military-expert-5663148

[6] The academic theory of securitization originated in writing from the Copenhagen School of International Relations in the 1990s. See Barry Buzan, Ole Waever and Jaap de Wilde, Security: A New Framework for Analysis (Boulder, Colorado: Lynne Rienner, 1998). For a recent application to studies of disinformation, see Nicole Jackson, "The Canadian Government's response to foreign disinformation: Rhetoric, stated policy intentions and practices," International Journal, 76(4), 2021, 544-63. https://journals.sagepub.com/doi/full/10.1177/00207020221076402

[7] Aaron Shull and Wesley Wark, "Reimagining a Canadian National Security Strategy," CIGI Special Report, Centre for International Governance Innovation, 2021, pp. 11-19, https://www.cigionline.org/static/documents/NSS_Special-Report_web_eX1LDtj.pdf

[8] I am very grateful to Canadian journalist who willingly provided me with copies of records released to them through the Access to Information Act

[9] A few days prior to the declaration of the Emergencies Act, I wrote about the legislation, calling attention to some of its challenges, and argued that the federal government needed to take the lead in responding to the "Freedom Convoy." See Wesley Wark, "Is it Time for the Emergencies Act," Institute for Research on Public Policy (IRPP), Policy Options, February 11, 2022, https://policyoptions.irpp.org/magazines/february-2022/is-it-time-for-the-emergencies-act/; reprinted in The Ottawa Citizen, https://ottawacitizen.com/opinion/wark-is-it-time-for-the-federal-emergencies-act

[10] Securing an Open Society, Canada's National Security Policy (April 2004), p. 15, https://publications.gc.ca/collections/Collection/CP22-77-2004E.pdf

[11] CSIS, "The Intelligence Cycle," https://www.canada.ca/en/security-intelligence-service/corporate/publications/2019-public-report/the-intelligence-cycle.html
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[13] Erik J. Dahl, Intelligence and Surprise Attack: Failure and Success from Pearl Harbor to 9/11 and Beyond (Georgetown University Press, 2013)
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