

Public Order Policing: a Proposal for a Charter-compliant Legislative Response

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ABSTRACT

This article offers a brief response to the Final Report of the Public Order Emergency Commission by two authors who provided expert reports to the Commission. We focus on Commissioner Rouleau’s recommendation that the provinces and the federal government create a “major event management unit” to ensure “integrated command and control” of large events, and that governments clarify the scope of police power to create exclusion zones and to impose other limits on protest and assembly. We argue that nothing short of legislation on point would suffice to address problems of coordination among police agencies and the lack of clarity on public order police powers that arose in Ottawa and in other large events over the past two decades. We emphasize the need for public order legislation to address and protect the Charter rights of protestors, especially and including freedom of peaceful assembly.

INTRODUCTION

This article offers a brief response to Commissioner Rouleau’s Final Report (Rouleau Report)¹ by two authors who provided expert reports to the Public Order Emergency Commission (POE

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¹ Canada, *Report of the Public Inquiry into the 2022 Public Order Emergency* (Ottawa: Public Order Emergency Commission, 2023) (Chair: Hon Paul S. Rouleau). [Rouleau Report].

Commission).² Our short comment presents recommendations for law reform to address public order policing, namely: protection of freedom of peaceful assembly and other rights of protest, and a legislative framework for policing large-scale public order events, whether federal or provincial.³

Protecting the right to free assembly depends in large part on how police power is structured and exercised. The Rouleau Report found a lack of coordination among police at all levels, and a lack of clarity on the scope of police authority to manage protest activities in Ottawa, Windsor, and elsewhere. Commissioner Rouleau recommended that the provinces and federal government create a “major event management unit” to ensure “integrated command and control is immediately initiated” at public order events, and do so through “changes to existing legislation, regulations, polices, and procedures”.⁴ In particular, he called on governments to clarify the “scope and limitations on police powers in relation to protest activities”, including the creation of exclusion zones, and development of criteria for restrictions on rights of protest that comply with the Charter.⁵

While supporting these recommendations, we maintain that nothing short of legislation suffices to address the problems that arose from the lack of legal authority to create exclusion zones (i.e., closures of public space, limiting people as well as vehicles), and absence of a chain of command and coordination of police agencies at large events.⁶ Part I outlines the underlying constitutional rights at stake in considering public order legislation, and Part II explains why a statutory response to public protest events is imperative.

² See Jamie Cameron, “Freedom of Peaceful Assembly and Section 2(c) of the Charter” (Ottawa: Public Order Emergency Commission, 2022) [Cameron “Peaceful Assembly”]; Robert Diab, “The Policing of Large-Scale Protests in Canada: Why Canada Needs a Public Order Police Act” (Ottawa: Public Order Emergency Commission, 2022) [Diab “Policing”] (both available online: publicorderemergencycommission.ca/documents/policy-papers/).

³ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), 1982m c. 11. See ss. 2(b) (protecting freedom of expression), 2(c) (freedom of peaceful assembly), and 2(d) (freedom of association).

⁴ Rouleau Report, *supra* note 1, vol 1 at 256, Recommendations 10 to 12.

⁵ *Ibid* at 258, Recommendation 23.

⁶ Foreign Missions and International Organizations Act, SC 1991, c 41.

I. POLICING AND THE RIGHT TO PROTEST

The Freedom Convoy presented a distinctive opportunity for interpreting freedom of peaceful assembly under section 2(c) of the Charter.⁷ Though it focused more on the systemic, cross-sectoral failure of policing and the *Emergencies Act* threshold than on the Charter, the Rouleau Report firmly supported the free expression, association, and peaceful assembly rights of the Freedom Convoy protestors. Additionally, and from a rights perspective, one of the key lessons of the Freedom Convoy is that the police failed the protestors as well as the Ottawa community.

A. Section 2(c) of the Charter and Freedom of Peaceful Assembly

Defining peaceful assembly in section 2(c) is critical to the integrity of this right because there is a gulf between a concept of ‘unpeaceful’ as a lack of quiet and one that equates unpeacefulness with threats and acts of violence. How “peaceful” is interpreted therefore has huge implications for the scope of this entitlement. While accepting that disruption is inherent in public protest gatherings and movements, the Report equivocated on the central issue, accepting that the lengthy “occupation” of downtown Ottawa was not violent, but finding that it was not peaceful because violence was a pervasive – if speculative – risk, and also because Ottawa residents experienced the Convoy as an unpeaceful assembly.⁸ The Report cited the Criminal Code definition of “serious bodily harm”, which includes psychological harm, to support a conclusion that the Freedom Convoy posed a threat to the security of Canada under the *Emergencies Act*.⁹

Leaving aside the Report’s questionable use of that definition in this context, the central question under section 2(c) is whether the guarantee protects assemblies that are disruptive and engage in law-breaking behaviour that is not violent in nature. As explained in the expert report, section 2(c) must receive a broad interpretation that protects assemblies not engaged in violent threats or actions, and leave the question of restrictions on

⁷ An expert report on point was commissioned; see Cameron, “Peaceful Assembly”, *supra* note 2.

⁸ Rouleau Report, *supra* note 1, vol 1 at 140, and generally at 49-73 (“The Ottawa Protests”). See generally Cameron, “Peaceful Assembly”, *supra* note 2 at 11.

⁹ *Ibid* at 202-3. *Emergencies Act*, RSC 1985, c 22(4th Supp).

disruptive and unlawful conduct to section 1's standard of justification.¹⁰ Short of proposing a constitutional concept of peaceful assembly, the Report opened section 2(c) up to interpretation and development by the courts. That is a welcome overture for a long-overlooked Charter guarantee.

Some recommendations follow from section 2(c)'s engagement during the Freedom Convoy. The *Emergencies Act* was enacted in 1988, only a few years after constitutional rights were introduced in 1982. The Preamble references the Charter, citing its existence but without making the implications for constitutional rights an imperative part of the emergency-invoking process.¹¹ The Preamble is not sufficient to protect Charter rights that are at risk when emergency powers are invoked, and a modernization of the Act should require the government to address the Charter before invoking emergency powers. Instead of, or in addition to, the Preamble, the Act should require the government to declare that it reasonably believed it was necessary to violate the Charter in the circumstances, and that it reasonably believed any emergency measures enacted impaired constitutional rights as little as possible. In addition, Criminal Code provisions and other statutory measures that restrict or prohibit assemblies, whether federal or provincial, must be reviewed for compliance with 2(c) and section 2's other fundamental freedoms.¹²

B. Peaceful Assembly and the Police

During the Ottawa Freedom Convoy the police failed the protestors as well as the public. Severe deficiencies at all levels and functions of policing at the outset and throughout its tenure in downtown Ottawa undermined the Convoy's capacity and incentive to understand and comply with rule of law requirements, which were almost non-existent for more than two weeks. The Report detailed the police deficiencies at length, finding that the Ottawa Police Service (OPS) was in a "state of dysfunction" and "could not manage the downtown core streets", which led to "a general sense of lawlessness in the downtown area and a breakdown of order and social

¹⁰ Cameron, "Peaceful Assembly", *supra* note 2, at 31-35.

¹¹ The Preamble states only that the Governor General in Council, in taking temporary measures, is "subject to" the Charter and Bill of Rights, and "must have regard" to the International Covenant on Civil and Political Rights. *Emergencies Act*, *supra* note 9.

¹² Cameron, "Peaceful Assembly", *supra* note 2 at 45-48.

norms”.¹³ Though protestors are not free to disrupt with abandon, freedom of assembly is an entitlement that cannot be exercised collectively and in public space without support from police and a clear delineation of its parameters.

The constitutional relationship between police and protestors in this context is complex, and this comment can do little more than stress the state’s dual responsibilities to protect freedom of peaceful assembly and place limits on the assembly’s activities, where appropriate.¹⁴ A couple of examples illustrate how police must intervene to protect the rights of protestors. For instance, police cannot stand by when interlopers, lone wolves, or rogue participants undermine or exceed the objectives of a peaceful assembly by engaging in violent or threatening conduct. Police are required, instead, to enforce the law against outliers and protect the integrity of an assembly that may be disruptive but is otherwise peaceful in nature.¹⁵ Police are also required to protect an assembly from the aggressive or hostile actions of a counter protest. While third parties also have rights, police cannot allow counter protestors to subvert an assembly that is otherwise peaceful and negate its constitutional entitlement.¹⁶ Finally, exclusion zones and the coercive dispersal of public assemblies violate constitutional rights and must be addressed by a detailed legislative framework of regulation. Dispersal is a last resort and should only be undertaken when less rights-impairing alternatives have been tried and failed. The duties and responsibilities of the state and police on these issues are canvassed in detail in the interpretive comments on the right of peaceful assembly in international human rights guarantees.¹⁷

¹³ Rouleau Report, *supra* note 1, vol 1 at 50-53.

¹⁴ Cameron, “Peaceful Assembly”, *supra* note 2, explains how these duties and responsibilities are addressed in authoritative interpretations of freedom of peaceful assembly in international human rights laws). See General Comment No 37, on Right of Peaceful Assembly, (article 21), Human Rights Committee, September 17, 2020, CCPR/C/GC/37; and European Commission for Democracy Through Law Guidelines on Freedom of Peaceful Assembly, 3rd ed., CDLAD (2019)017rev (2020). [Venice Commission Guidelines].

¹⁵ *Ibid* at 34-35.

¹⁶ Rouleau Report, *supra* note 1, referred to the risk of violence arising from counter protests in finding a threat to the security of Canada: vol 1 at 202.

¹⁷ See General Comment No. 37, at paras 26-27; and Venice Commission Guidelines, *supra* note 14, at 2.2 (Counter-demonstrations).

To summarize, the systemic failures of policing and response management during the Freedom Convoy were dangerous to all, including the protestors. Though risks to public safety did arise from Convoy activities, the failure to maintain order was on the OPS and other police agencies. That scenario cannot recur. A legislative framework for the management of large-scale public protests is essential to prevent another public order breakdown of serious scale and magnitude. To be effective, such legislation must address the dual objectives of protecting public safety and enabling the exercise of constitutionally protected rights to engage in peaceful protest.

II. THE NEED FOR PUBLIC ORDER POLICE LEGISLATION

A. *A Gap in the Law*

With one exception, Canada lacks legislation setting out what police may do to maintain order and security at large public gatherings. The *Foreign Missions and Intergovernmental Organizations Act (FMIOA)*¹⁸ is limited in application, but confers lead authority for security at “intergovernmental conferences” on RCMP, permits the creation of exclusion zones, and allows RCMP to enter into arrangements with other agencies.¹⁹ Yet the *FMIOA* sets no criteria for the size, location, and regulation of such zones, and says nothing about the powers of other agencies to police public order. Police make decisions about these matters in a legal vacuum.

Apart from emergency law, there is no legislative source of authority in Canada for police to create large exclusion zones.²⁰ The *Criminal Code*’s riot provisions do not provide for this,²¹ nor do recent provincial statutes

¹⁸ SC 1991, c 41.

¹⁹ *Ibid*, s 10.1(1), stating that the RCMP has “the primary responsibility to ensure the security for the proper functioning of any intergovernmental conference....” and s 10.1(2), permitting RCMP to “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”.

²⁰ Under emergency legislation, thresholds must be met. See Emergency Management and Civil Protection Act, RSO 1990, c. E.9, and Canada’s *Emergencies Act*, *supra* note 9.

²¹ Criminal Code, RSC 1985, c C-46 [Criminal Code], ss 63 to 68.

dealing with protest confer this power.²² Nor do police have the power to create large exclusion zones at common law.²³

The Rouleau Report found that pervasive uncertainty as to the authority of police to create exclusion zones and exercise other powers created a degree of confusion and hesitation within the Ottawa Police Service that was “unacceptable”.²⁴ Accordingly, Recommendation 23 called on both levels of government to address the complex requirements of policing public protests.²⁵ As we explain, these challenges can only be addressed by legislation that sets a framework for policing that also protects constitutionally protected rights of protest.

B. Problems That Flow From the Gap

Two key points emerge from Canada’s history with large public events over the last two decades. First, despite the absence of clear authority to do so, police routinely create large exclusion zones at these events.²⁶ Second, in the absence of *a single agency or entity in a lead role* and, with few exceptions, efforts to coordinate police agencies before and during an event have led to confusion, disorder, and violence. The expert report provides detailed analysis of policing issues and their consequences at the Quebec Summit of the Americas (2001) and G20 Summit in Toronto.²⁷

The Rouleau Report’s discussion mirrors that analysis. Among other things, the Commissioner found that the OPS lacked adequate intelligence

²² See the discussion in Diab, “Policing” *supra* note 2 at 17-18, of the Critical Infrastructure Defence Act, SA 2020, c C-32.7 and Keeping Ontario Open for Business Act, 2022, SO 2022, c 10. Provincial highway traffic law permits the closure of roads and limits on vehicle traffic, but not complete closure of public space to persons on foot. See, e.g., Highway Traffic Act, RSO 1990, c H8, ss 134(1) and (2), discussed further in Diab, “Policing” *supra* note 2 at 17.

²³ See Diab, “Policing” *supra* note 2 at 20-25 (explaining the scope of and limits on police powers in *Knowlton v R*, [1974] SCR 443, *Dedman v The Queen*, [1985] 2 SCR 2; *R v Mann*, 2004 SCC 52; *R v MacDonald*, 2014 SCC 3, and *Fleming v Ontario*, 2019 SCC 45.

²⁴ Rouleau Report, *supra* note 1, Volume 3 at 301.

²⁵ *Ibid* at 301-302.

²⁶ For further details see Diab, “Policing” *supra* note 2 at 27-28 and 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 YB Access Just* 181 at 194-196.

²⁷ Diab, “Policing” *supra* note 2 at 25-31.

prior to the Convoy's arrival in Ottawa,²⁸ and that the OPS, Ontario Provincial Police (OPP), and RCMP were unable to coordinate and work together.²⁹ The OPS was unclear whether they had the authority to close public space³⁰ and involve external police agencies.³¹

Invoking powers under the *Emergencies Act* gave police the authority to create an exclusion zone.³² Police created a secure zone in downtown Ottawa of roughly 70 square blocks, with almost 100 check-points, restricting pedestrian traffic as well as vehicles to those who could provide a satisfactory explanation for their movement.³³ Once again, police were left to sort out the logistics, limits, and details about the zone in a legal vacuum.

C. Why We Need Legislation Rather Than Just Policy

The Report's findings are consistent with lessons from the past two decades of policing large protests. Police lack clear authority to manage the risks that arise at large public protest events, and require guidance in coordinating with other agencies. These issues should be addressed by legislation, because exclusion zones closing large portions of public space – limiting speech, assembly, and movement – involve profound incursions on fundamental rights. Such measures raise concerns that should be debated in legislatures and regulated by statute. Public protest legislation can prescribe a test, based on reasonable necessity and proportionality, for creating and defining the scope of exclusion zones, establishing criteria for entry into zones and restrictions on speech and assembly. The statute can address the question of compensation for businesses and homeowners who are directly and significantly affected by the disruption of their activities.

Dedicated public order legislation can also develop coordination by mandating police agencies to follow the lead of a 'major event management unit'. The statute can define the unit's structure, and subject it to oversight

²⁸ Rouleau Report, *supra* note 1, vol 1 at 45.

²⁹ *Ibid* at 57, 146-148, 152.

³⁰ *Ibid* at 157.

³¹ *Ibid* at 174.

³² The zone was authorized under ss 4 and 6 of the Emergency Measures Regulations, SOR/2022-21, passed under the *Emergencies Act*, *supra* note 9. Commissioner Rouleau notes in the Final Report, *supra* note x, vol 1 at 231, that police relied on section 4 of the Emergency Regulations, which banned travel to or within a prohibited public assembly, as authority to create the zone.

³³ For details, see the sources cited in Diab, "Policing" *supra* note 2 at 10.

and after-the-fact review by the courts. It can define the meaning of a ‘major event’ and assign the ‘major event management unit’ specific authority to disseminate intelligence, deploy personnel, and address resourcing issues. Legislating these powers would reduce discretion and uncertainty as well as enable various stakeholders to plan ahead.³⁴

In this, the *Emergencies Act* can serve as a model for public order legislation.³⁵ The Act identifies four categories of emergency, providing specific powers in each case and setting a threshold test for the exercise of exceptional, temporary authority. Analogously, public order police legislation at either the provincial or federal level can define a category of event, such as a provincial or national-scale protest, a major sporting event, or large public gathering, and assign lead authority over it to a major event policing unit. Like the *Emergencies Act*, this legislation can set a threshold test and create a process to determine when statutory powers are engaged. It could also submit police discretion in creating zones and decisions about compensation to an expeditious form of independent review.

A bill serving these purposes would help to avoid confusion among police agencies, and the disorder and violence that often follows – without unduly restricting or taxing the agencies involved. It would also bring the police practice of creating large exclusion zones into closer conformity with the rule of law, without imposing undue limits or obstacles on the police use of this tool.

III. CONCLUSION

The unprecedented national emergency of 2022 tested Canada’s ability to protect rights of peaceful assembly and protest, and challenged police authority to facilitate those rights and maintain order. It demonstrated the need – at federal and provincial levels – for legislation to provide police and citizens clear guidance on how to maintain order at large events, and respect constitutional rights and their justifiable limits.

³⁴ This paper is focused on the legislative framework that is essential to define and direct police operations during large scale public assemblies. Government oversight of such operations is beyond the scope of the paper, and is addressed by another comment in this volume. See Kent Roach, “The Dangers of Police ‘Operational’ Independence” in this volume.

³⁵ *Emergencies Act*, *supra* note 9.