Are Protests Illegal in Alberta? *Charter* Issues with Bill 1

In February 2020, amidst protests across the country interfering with railways and pipeline construction, the Government of Alberta introduced the *Critical Infrastructure Defence Act*. More commonly known as Bill 1, it outlaws interference with "essential infrastructure". Several commentators oppose the Bill, arguing it violates the *Charter of Rights and Freedoms*.[1] A group of professors from the University of Calgary called on the Government to recognize "that Bill 1 violates the *Charter*".[2] This article will summarise the Bill and analyze some of the key ways in which it may violate the *Charter*.

The *Critical Infrastructure Defence Act*[3]

Bill 1 aims to outlaw interference with "essential infrastructure," a term it introduces and defines. Section 1 of the Bill lists 16 types of infrastructure as essential, including: highways, utilities, railways, pipelines, and dams.[4] While most of the list is self-explanatory, some types of infrastructure are defined by other statutes and regulations. This occurs in sometimes surprising ways. For example, the *Traffic Safety Act* defines "highway" to include any roadway the public is ordinarily entitled to use, as well as sidewalks and ditches.[5] This means that under Bill 1, sidewalks and ditches qualify as essential infrastructure. The Bill also allows Cabinet to define nearly anything as essential infrastructure whenever it chooses through regulation.[6]

Section 2 of the Bill prohibits damaging, destroying, interfering, interrupting, and obstructing any of this essential infrastructure.[7] It also prohibits wilfully entering essential infrastructure.[8] This means that walking onto essential infrastructure can put you in contravention of the Bill unless you have "lawful right, justification or excuse".[9] While "justification" and "excuse" have specific legal meanings, "lawful right" is somewhat vague.[10] The Bill also outlaws counselling another to commit any of these acts.[11]

Section 3 of the Bill lists the penalties for violation. Individuals face a fine between $1,000 and $10,000 and up to 6 months in jail for their first offence. Corporations will be fined between $10,000 and $200,000.[12] Every day spent in violation constitutes another offence and an additional fine or more jail time.[13] Lastly, section 4 allows peace officers to arrest those in contravention of the Bill without a warrant.[14]

Legislators' comments suggest the Bill's purpose is to protect Alberta's economically important infrastructure by preventing 'illegal protests' and improving public safety. Premier Jason Kenney said the Bill would "strengthen penalties against those who would lawlessly trespass or jeopardize public safety by seeking to block critical public infrastructure".[15] Justice Minister Doug Schweitzer said the Bill sends "a clear signal to those that would try to jeopardize the future of Alberta's economy: not now, not ever in the province of Alberta".[16]

Opposition to Bill 1 has been forceful.[17] Some opposition relates to the duplicative effects of the Bill.[18] In Alberta, the *Petty Trespass Act* and *Trespass to Premises Act* already make it an offence to enter public or private property without right.[19] This article focuses instead on a few major ways in which the Bill may violate the *Canadian Charter of Rights and Freedoms*.

Potential *Charter* Issue 1: Fundamental Freedoms

There are a number of ways the Bill may violate the "fundamental freedoms" guaranteed by section two of the *Charter*. These freedoms are the basic liberties required for a democracy. They enable citizens to do, think, say, and believe what they wish without undue interference. Because Bill 1 restricts protest and expression, it may violate three of these fundamental freedoms.

Bill 1 may violate the section 2(b) guarantee of freedom of expression because it restricts the ways in which citizens can express themselves. Freedom of expression protects the expression of meaningful views and opinions.[20] While the right does not extend this protection to violent activity, peaceful protest is a meaning-conveying activity, and receives protection under section 2(b).[21] In so far as the Bill limits citizens' ability to express their opinions through peaceful protest, it may violate their right to free expression.

Bill 1 may also violate the section 2(c) guarantee of freedom of peaceful assembly because it makes an offence of non-violent assembly. This right has received less judicial interpretation than other section 2 freedoms, in large part because protests usually attempt to convey meaning, and so overlap with section 2(b) freedom of expression.[22] Because of this, it is hard to know how a court would interpret the right. What is clear is that section 2(c) protects only the right to *peaceful* protest. Additionally, while governments can limit the form of protests, they cannot restrict them entirely.[23] To the extent Bill 1 bars protests, it may violate the freedom of peaceful assembly guaranteed by section 2(c).

Bill 1 may also violate the section 2(d) guarantee of freedom of association because it restricts the ways in which protestors are able to associate with one another. This right protects collective activity by empowering groups and protecting individual's ability to associate with likeminded others.[24] If a law precludes "activity because of its associational nature, thereby discouraging the collective pursuit of common goals" it will likely be found to violate section 2(d).[25] Because protests are collective activities, Bill 1's restrictions may be a violation of the section 2(d) guarantee of freedom of association.

Potential *Charter* Issue 2: The Right to Liberty

Bill 1 may violate the right to liberty guaranteed in section 7 of the *Charter*.[26] Section 7 guarantees everyone the right to "life, liberty and security of the person" and requires that government only deprive people of these rights in accordance with the principles of fundamental justice.[27] Because Bill 1 threatens jail time, and imprisonment violates the right to liberty, Bill 1 must accord with the principles of fundamental justice. [28]

While some commentators have suggested Bill 1 violates several principles of fundamental justice, this article will only focus on overbreadth.[29] An overbroad law "goes too far and interferes with some conduct that bears no connection to its objective".[30] For example, in the Supreme Court case *Bedford*, the Court found that a law prohibiting anyone from living off the profits of prostitution was overbroad. It was overbroad because it also captured legitimate labour, like bodyguards and assistants who worked with and for prostitutes, instead of only targeting those who exploit prostitutes.[31]

Bill 1 may be overbroad for several reasons. First, it may be overbroad because it applies to lands not connected to the economically important infrastructure it aims to protect. Protests blocking railways have an economic impact far greater than protests in parks or on sidewalks. Second, the Bill may be overbroad because it prohibits merely entering essential infrastructure in addition to damaging, obstructing, or interfering with it. Outlawing merely entering essential infrastructure may go too far and penalize conduct not connected to the Bill's goal, since entering does not threaten the usefulness of the infrastructure. If it is found by a court to be overbroad, the Bill would be in violation of section 7 of the *Charter*.

Potential *Charter* Issue 3: Equality

Another way Bill 1 may violate the *Charter* is with regard to section 15's guarantee of equality. It guarantees that everyone be equal "before and under the law" and that everyone has the right to not be discriminated against.[32] For a government law or action to violate section 15, two things must be shown:

1. the law makes a distinction based on a protected ground, and
2. that distinction results in disadvantage.[33]

Bill 1 may violate step 1 of the test because its effects single out marginalised groups who rely more on protest for political expression than more politically powerful groups.[34] Recent protests and gatherings across Canada, including Black Lives Matter protests, protests by Indigenous persons against pipeline construction, persons with disabilities protesting funding cuts to government assistance, and more, all appear to contravene Bill 1. These groups, Indigenous persons, persons of colour, and persons with disabilities, and other historically marginalised "others," rely on protest and public displays to advocate for themselves and their causes.[35] While Bill 1 does not make explicit distinctions on any lines, it may still be discriminatory because these groups may suffer more under the Bill than other groups. These groups suffer "adverse effects" discrimination: discrimination that results from the effects of a law adversely impacting them more than other groups.

Bill 1 may violate step 2 of the test because these differing effects result in disadvantage for these groups, which have been historically disadvantaged and have relied on protest to voice their political opinions. Bill 1 may further this disadvantage by removing this key tool for minority groups to voice their political opinions.[36]

Courts rarely accept "adverse effects" discrimination cases under section 15. However, the Supreme Court has not decided on an adverse effects case under section 15 in several

years. A case currently at the Supreme Court presents an opportunity for them to express their views again.[37]

Section 1: Can the Government Justify its *Charter* Violations?

At the time of writing, the *Critical Infrastructure Defence Act* is already being challenged in court. The Alberta Union of Provincial Employees, Alberta's largest public sector union, alleges that Bill 1 violates the *Charter*.[38] If they succeed in proving the Bill has violated any of the above *Charter* rights, the Government of Alberta would need to justify its infringement of the right. Courts balance the rights of individuals against the interests of society by determining if the government's limits on rights are reasonable and justifiable. While it is hard to know for certain whether the Government could succeed, a few observations can be made.

For a violation of a *Charter* right to be justified by the Government, the violation must be rationally connected to the goal or purpose of the law.[39] Assuming the government's purpose is to protect economically important infrastructure to bolster Alberta's economy, it is difficult to see how some parts of Bill 1 are connected to that goal.[40] For example, it is not clear how fining or arresting those who enter a public park, square, or sidewalk to protest is connected to the Bill's goal of protecting economically important infrastructure. In other words, it is unclear whether Bill 1's effects are rationally connected to its objectives.

It is also unclear whether Bill 1 minimally impairs *Charter* rights. To justify a rights violation, the violation of the right must be minimally impairing.[41] Laws fail here when the government has other ways to achieve its goals that would have impaired *Charter* rights less. For example, a court may ask if there are less intrusive ways of protecting essential infrastructure than fining or imprisoning those who simply walk onto that infrastructure. Again, if the goal of Bill 1 is to protect economically important infrastructure from interference, it is unclear that a wholesale ban on entering essential infrastructure, or indeed any property deemed essential infrastructure, impairs rights as minimally as possible.[42]

Conclusion

At the time of writing, the Lieutenant Governor has just signed the Bill into law. As mentioned above, the Alberta Union of Provincial Employees has already filed suit against the government, claiming Bill 1 violates the *Charter*.[43] With the ongoing COVID-19 pandemic, it may be a while until the case appears before a judge.

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 .

[2] Jennifer Koshan, Lisa Silver, and Jonnette Watson Hamilton, "Protests Matter: A *Charter* Critique of Alberta's Bill 1" *ABLawg* (9 June 2020), online: <www.ablawg.ca/2020/06/09/protests-matter-a-charter-critique-of-albertas-bill-1/>.

[3] Bill 1, *Critical Infrastructure Defence Act*, 2nd Sess, 30th Leg, Alberta, 2020 (assented to

17 June 2020).

[4] *Ibid*, s 1(1)(a)(i-xvi).

[5] See *Traffic Safety Act*, RSA 2000, c T-6, s 1(1)(p)(i-iii).

[6] See Kim Siever, "The UCP Government passed Bill 1; is protest illegal?" *Kim Siever News* (30 May 2020), online: <www.kimsiever.ca/2020/05/30/the-ucp-government-passed-bill-1-is-protest-illegal/>.

[7] Bill 1, *supra* note 3, s 2(1)(2-3).

[8] *Ibid*, s 2(1).

[9] *Ibid*.

[10] See Koshan, *supra* note 2.

[11] See Bill 1, *supra* note 3, s 2(4).

[12] See *Ibid*, s 3(1).

[13] See *Ibid*, s 3(3).

[14] See *Ibid*, s 4.

[15] Alberta, Legislative Assembly, *Hansard*, 30-2, No 1 (25 February 2020) at 4 (Hon Jason Kenney).

[16] Alberta, Legislative Assembly, *Hansard*, 30-2, No 22 (28 May 2020) at 861 (Hon Doug Schweitzer).

[17] See Brandi Morin, "Alberta's Bill 1 is 'Racially Targeted': First Nations Leaders" *Huffington Post* (11 June 2020), online: <www.huffingtonpost.ca/entry/alberta-bill1-indigenous-first-nations-protests_ca_5ed9a4e9c5b6d90c9a5bb3b4>. See also "Alberta's Bill 1 – Say No!" *International Association of Machinists and Aerospace Workers* (3 June 2020), online: <www.iamaw.ca/albertas-bill-1-say-no/>.

[18] See Alberta, Legislative Assembly, *Hansard*, 30-2, No 22 (28 May 2020) at 861 (Kathleen Ganley).

[19] See *Petty Trespass Act*, RSA 2000, c P-11; *Trespass to Premises Act*, RSA 2000, c T-7. See also Koshan, *supra* note 2.

[20] See *Irwin Toy Ltd. v Quebec (Attorney General)*, 1989 CanLII 87 (SCC) at para 41.

[21] See *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para 28.

[22] See *Smiley v Ottawa (City)*, 2012 ONCJ 479 at para 41. See also *British Columbia Teachers' Federation v British Columbia Public School Employers' Assn.*, 2009 BCCA 39 at para 39, leave to appeal to SCC refused, [2009] SCCA No 160.

[23] See e.g. *Ontario (Attorney General) v Dieleman*, 1994 CanLII 7509 (ON SC). See also *Villeneuve v Ville de Montreal*, 2018 QCCA 321.

[24] See *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at paras 54-58.

[25] *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 16.

[26] See Koshan, *supra* note 2.

[27] *Charter*, *supra* note 1, s 7.

[28] See Peter Hogg, *Constitutional Law of Canada*, vol 1, 5th ed (Scarborough: Thomson, 2007) (loose-leaf 2010 supplement) at 47.7(a).

[29] See Letter from the British Columbia Civil Liberties Association to Premier Jason Kenney and Rachael Notley (9 March 2020), online (pdf): <www.bccla.org/wp-content/uploads/2020/03/BCCLA-Opposition-to-Alberta-Critical-Infrastructure-Bill.pdf>.

[30] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 101.

[31] *Ibid* at paras 139-140.

[32] *Charter*, *supra* note 1, s 15.

[33] See *R v Kapp*, 2008 SCC 41 at para 17; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras 19-20. See also *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25.

[34] See Koshan, *supra* note 2.

[35] *Ibid*.

[36] See *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC) at para 60.

[37] See *Fraser v Canada (Attorney General)*, 2018 FCA 223, leave to appeal to SCC granted, [2019] SCCA No 65.

[38] See Ashley Joannou, "Alberta's largest public sector union taking government to court over Bill 1, claiming it violates Charter of Rights and Freedoms," *Edmonton Journal* (24 June 2020), online: <www.edmontonjournal.com/news/politics/aupe-bill-1-alberta-charter>.

[39] See *R v Oakes*, 1986 CanLII 46 (SCC) at para 77 . See also Hogg, *supra* note 31 at 38.10(a).

[40] See Koshan, *supra* note 2.

[41] *Oakes*, *supra* note 37 at para 70.

[42] See Koshan, *supra* note 2.

[43] Joannou, *supra* note 38.