



**PUBLIC ORDER  
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# Commissioned Paper: Police Powers & Public Order Disturbances

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Police Powers & Public Order Disturbances:  
A Background Paper for the Public Order Emergency Commission

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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.

## 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*<sup>1</sup> during the nine days that the emergency declaration was in effect.<sup>2</sup>

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.<sup>3</sup> Allowing too much “freedom,” in contrast, may compromise public safety, economic stability, and

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<sup>1</sup> [RSC 1985, c 22](#) (4th Supp).

<sup>2</sup> 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](#).

<sup>3</sup> 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).

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.<sup>4</sup> 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.<sup>5</sup> In this Part, we examine the criminal law enforcement powers most relevant to public order disturbances.

#### 3.1. Arrests for offences

Arrest<sup>6</sup> 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.”<sup>7</sup> 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*.<sup>8</sup> This provision allows police to arrest without a warrant in two main circumstances. First, under section 495(1)(a), any “peace

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<sup>4</sup> 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.

<sup>5</sup> 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”).

<sup>6</sup> 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.

<sup>7</sup> *Fleming v Ontario*, [2019 SCC 45](#) at para 65, [2019] 3 SCR 519.

<sup>8</sup> [RSC 1985, c C-46](#) [*Criminal Code* or *Code*].

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.<sup>9</sup> While there is no precise, quantitative measurement of the degree of suspicion required to meet this standard, the Supreme Court has suggested that it connotes something akin to probable guilt.<sup>10</sup>

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.”<sup>11</sup>

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.<sup>12</sup> 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 pure summary conviction offences as

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<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> See *R v Beaudette*, [1957] OJ No 440, 118 CCC 295 (ONCA).

<sup>12</sup> *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.



well as indictable and hybrid offences.<sup>13</sup> 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.”<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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 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.<sup>17</sup> 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

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<sup>13</sup> 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).

<sup>14</sup> See *R v McCowan*, [2011ABPC79](#) 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.

<sup>15</sup> *The Queen v Biron*, [1975CanLII13](#) (SCC), [1976] 2 SCR 56 at 72; *R v Roberge*, [1983CanLII120](#) (SCC), [1983] 1 SCR 312 at 324-27.

<sup>16</sup> 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 (NSCA).

<sup>17</sup> *Criminal Code*, s 495(2)(d), 495(2)(e).

informal warning.<sup>18</sup> If they decide that charges are warranted, they may give the person an “appearance notice,”<sup>19</sup> require them to enter into an “undertaking,”<sup>20</sup> or obtain a summons from a court.<sup>21</sup> Each of these procedures ultimately obliges the person to appear in court to face the charge; failing to do so constitutes an offence.<sup>22</sup>

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.<sup>23</sup> However, section 495(3) deems police to have acted lawfully “notwithstanding” this requirement. Most courts have concluded that this precludes claims that “unnecessary” arrests are unlawful.<sup>24</sup>

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.<sup>25</sup> This

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<sup>18</sup> See *R v Beaudry*, [2007 SCC 5](#) at paras 35-40, [2007] 1 SCR 190.

<sup>19</sup> *Criminal Code*, ss 497, 489(1)(b), 500, Form 9.

<sup>20</sup> *Criminal Code*, ss 498(1)(c), 499(b), 501, 503(1.1)(b), Form 10.

<sup>21</sup> *Criminal Code*, ss 498(1)(a), 507(1)(b), 507(4), Form 6.

<sup>22</sup> 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.

<sup>23</sup> 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).

<sup>24</sup> See *R v Cayer*, [1988] OJ No 1120 (ON CA); *R v Adams*, [1972 CanLII 867](#) (SK CA); *R v McKibbin*, [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.

<sup>25</sup> 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),

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 culpable.<sup>26</sup> 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.”<sup>27</sup> The impugned conduct must also “reasonably be expected” to cause disturbance going beyond “mere mental or emotional annoyance or disruption.”<sup>28</sup> 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.”<sup>29</sup> According to the Court, this interpretation best accords with the “principal of legality,

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[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.

<sup>26</sup> 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.”).

<sup>27</sup> [1992 CanLII 112](#) (SCC), [1992] 1 SCR 167 at 177.

<sup>28</sup> *Ibid* at 177-78.

<sup>29</sup> *Ibid* at 178-79.

which affirms the entitlement of every person to know in advance whether their conduct is legal.”<sup>30</sup> 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.”<sup>31</sup>

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.”<sup>32</sup> Preventing 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.<sup>33</sup> 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.<sup>34</sup>

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<sup>30</sup> *Ibid* at 180.

<sup>31</sup> *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”).

<sup>32</sup> 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).

<sup>33</sup> 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”).

<sup>34</sup> See *e.g.*, *Green v Klassen et al*, [2015 MBOB 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

*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.”<sup>35</sup> 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 other persons to disturb the peace tumultuously.”<sup>36</sup> 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.”<sup>37</sup>

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.”<sup>38</sup> No matter how disruptive or raucous, peaceful protests would not meet this standard.

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customary use of a roadway by the public” and arrest justified by refusal to provide identity and evidence that he would continue to offend).

<sup>35</sup> 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.

<sup>36</sup> *Criminal Code*, s 63(1). See *R v Leconte*, [2000 CanLII 8782](#) (QCCA), 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.”

<sup>37</sup> *Criminal Code*, s 64. See *R v Bernitt*, [1997 CanLII 12528](#) (BCCA) (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.”).

<sup>38</sup> *R v Lockhart*, [1976] NSJ No 387 at para 35 (CA). See also *R v Bernitt*, [1997 CanLII 12528](#) at paras 19-26 (BCCA); *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 (BCSC), citing *R v Thomas* (1971), 2 CCC (2d) 514 (BC Co Ct); *R v Brien*, [1993 CanLII 2842](#) at paras 26, 31 (NWT SC).

Where twelve<sup>39</sup> 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 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.”<sup>40</sup>

*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.”<sup>41</sup> “Nuisance” is defined as either an unlawful act or a failure to discharge a legal duty<sup>42</sup> 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.”<sup>43</sup>

The language of this awkwardly and redundantly phrased offence must be read very carefully.<sup>44</sup> 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.<sup>45</sup>

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<sup>39</sup> 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.

<sup>40</sup> *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.

<sup>41</sup> *Criminal Code*, s 180(1).

<sup>42</sup> 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.

<sup>43</sup> *Criminal Code*, s 180(2).

<sup>44</sup> 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.”).

<sup>45</sup> *R v Thornton*, [1991 CanLII 7212](#) (ONCA), affirmed [1993 CanLII 95](#) (SCC), [1993] 2 SCR 445.

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 delays access to essential medical services such as hospitals.<sup>46</sup> 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.<sup>47</sup> 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 ...”.<sup>48</sup> Any road that permits public access constitutes a “highway” for the purposes of this provision.<sup>49</sup>

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.”<sup>50</sup> 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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<sup>46</sup> 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”).

<sup>47</sup> See generally Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff, Criminal Law*, 5th ed (2015) at 1021-22.

<sup>48</sup> [Criminal Code](#), s 423(1)(g).

<sup>49</sup> See e.g., *R v Stockley* (1977), 36 CCC (2d) 387 (NL CA).

<sup>50</sup> Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff, Criminal Law*, 5th ed (2015) at 1022, n 252.

property.”<sup>51</sup> The offence is indictable if the mischief causes “actual danger to life” and hybrid if it only affects property.<sup>52</sup>

While mischief is often regarded as an offence against property, its scope is broad enough to capture conduct akin to causing a disturbance.<sup>53</sup> Causing any degree of permanent damage to property would obviously suffice to make out the offence.<sup>54</sup> 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.<sup>55</sup>

As Manning and Sankoff point out, this interpretation could capture relatively innocuous conduct that is “not obviously criminal,” including otherwise lawful political expression.<sup>56</sup> 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.”<sup>57</sup> 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.<sup>58</sup>

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

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<sup>51</sup> Section 428 of the *Criminal Code* defines property as “real or personal corporeal property.”

<sup>52</sup> [Criminal Code](#), ss 430(2)-(4.1).

<sup>53</sup> See Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff Criminal Law*, 5th ed (2015) at 1277.

<sup>54</sup> 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”).

<sup>55</sup> See *e.g.*, *R v Mammolita*, [1983 CanLII 3563](#) (ON CA); *R v WT*, [1993] BCJ No 2031 (Sup Ct).

<sup>56</sup> Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff Criminal Law*, 5th ed (2015) at 1281.

<sup>57</sup> *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 ABOB 314](#) at para 46 (no liability unless conduct alleged to constitute nuisance otherwise unlawful).

<sup>58</sup> 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 LO* 262 (suggesting that mischief charges would have been appropriate in dealing with elements of the Ottawa protest).



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.<sup>59</sup> 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.<sup>60</sup>

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*.<sup>61</sup>

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).<sup>62</sup> 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 authority of the court.”<sup>63</sup> As criminal contempt may be prosecuted

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<sup>59</sup> 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.

<sup>60</sup> See *R v Tremblay*, [2010 ONCA 469](#); *R c Bertrand*, [2011 OCCA 1412](#); *R v Dooling*, [1994 CanLII 10215](#) (NLCA); *R v Osborne*, [2007 NBPC 3](#).

<sup>61</sup> 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.”

<sup>62</sup> See Morris Manning and Peter Sankoff, *Manning, Mewitt and Sankoff Criminal Law*, 5th ed (2015) at 16.175-178

<sup>63</sup> *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

summarily or by indictment,<sup>64</sup> 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.<sup>65</sup>

*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,<sup>66</sup> or by a person who “aids,”<sup>67</sup> “abets,”<sup>68</sup> or “counsels” the commission of that offence.<sup>69</sup> 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.<sup>70</sup> Police accordingly have the same authority to arrest alleged aiders, abettors, or counsellors as they do principals. In addition, section 464 of the *Code*

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para 33 (conviction for criminal contempt does not require “actual knowledge of the potential sentence for a contemplated contemptuous act”).

<sup>64</sup> *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.

<sup>65</sup> 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”).

<sup>66</sup> *Criminal Code*, s 21(1)(a) (“Every one is a party to an offence who ... actually commits it ...”).

<sup>67</sup> *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 ...”).

<sup>68</sup> *Criminal Code*, s 21(1)(c) (“Every one is a party to an offence who ... abets any person in committing it.”).

<sup>69</sup> 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.”

<sup>70</sup> See generally Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 161-78.

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.”<sup>71</sup> Although breaching the peace is not an offence,<sup>72</sup> courts have permitted police to arrest under this provision for conduct that “result[s] in actual or threatened harm to someone.”<sup>73</sup> 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.”<sup>74</sup>

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,”<sup>75</sup> which increases the risk that police will deploy the power abusively. A review of the police’s conduct

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<sup>71</sup> 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.”

<sup>72</sup> 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.

<sup>73</sup> *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 Lefebvre* [1982 CanLII 3852](#) (BC SC), affirmed 1984 CanLII (BC CA); *R v Januska*, [1996 CanLII 8288](#) (ON CA).

<sup>74</sup> See *Fleming v Ontario*, [2019 SCC 45](#) at para 59, [2019] 3 SCR 519.

<sup>75</sup> See Canada (Law Reform Commission), [Arrest, Working Paper 41](#) (1985) at 62.

during the 2010 G20 summit in Toronto, for example, found many instances where they used this arrest power in dubious circumstances.<sup>76</sup>

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.<sup>77</sup> 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 must release such persons as soon as the danger to the peace has subsided,<sup>78</sup> others have concluded that they may be held for the full 24-hour period.<sup>79</sup>

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.<sup>80</sup> Keeping a person arrested for any longer than necessary to prevent a further breach of the

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<sup>76</sup> 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.

<sup>77</sup> [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).

<sup>78</sup> 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").

<sup>79</sup> 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).

<sup>80</sup> 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 Dushman, 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).

peace would therefore be unlawful and constitute an arbitrary detention under section 9 of the *Charter*.<sup>81</sup>

That said, we agree with Professor (now Justice) Stribopoulos and the Law Reform Commission of Canada that Parliament should seriously consider repealing section 31.<sup>82</sup> As detailed in Part 3.1, police have ample powers to arrest people who have 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.<sup>83</sup>

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,<sup>84</sup> in *Fleming v Ontario* the Supreme Court of Canada strongly suggested that this was mistaken.<sup>85</sup> “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

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<sup>81</sup> See *Ward v City of Vancouver*, [2007 BCSC 3](#) at para 71, affirmed [2010 SCC 27](#), [2010] 2 SCR 28; *R v Grosso*, [1995] BCJNo 1802 at para 58 (PC).

<sup>82</sup> 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 Dushman, 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.

<sup>83</sup> 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 Dushman, 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.

<sup>84</sup> 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).

<sup>85</sup> [2019 SCC 45](#) at paras 60-61, [2019] 3 SCR 519.

still be necessary in Canada today.”<sup>86</sup> 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.”<sup>87</sup>

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.<sup>88</sup> The proposed power was not “reasonably necessary” under the ancillary powers doctrine,<sup>89</sup> 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.”<sup>90</sup>

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.”<sup>91</sup> 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.”<sup>92</sup>

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<sup>86</sup> *Ibid* at para 60.

<sup>87</sup> *Ibid* at para 61.

<sup>88</sup> *Ibid* at paras 62-100.

<sup>89</sup> We discuss this doctrine more extensively in Part 3.3.

<sup>90</sup> *Fleming v Ontario*, [2019 SCC 45](#) at para 78, [2019] 3 SCR 519.

<sup>91</sup> 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.”

<sup>92</sup> *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*

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 vicinity to ensure public safety and discover evidence.<sup>93</sup> 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.<sup>94</sup>

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.<sup>95</sup> 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.<sup>96</sup> Before the expiry of the 24-hour period, police must present persons held in custody to a justice in provincial court.<sup>97</sup> While arrestees may apply for pretrial release at this time, these “bail” hearings are often adjourned for several

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*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.”

<sup>93</sup> 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.

<sup>94</sup> 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 1-1](#), s 2(1).

<sup>95</sup> *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.

<sup>96</sup> 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.

<sup>97</sup> *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).

days.<sup>98</sup> If the hearing is adjourned or bail denied, the individual will be transferred from police custody to a provincial correctional (“remand”) facility.<sup>99</sup>

### 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.<sup>100</sup> 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.<sup>101</sup> 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.”<sup>102</sup> The decision to detain, however, must be made on “objectively discernible facts, which can then be subjected to independent judicial scrutiny.”<sup>103</sup>

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.<sup>104</sup> To exercise this power, an officer must reasonably believe that “his or her own safety, or the safety of others, is at risk.”<sup>105</sup> Unlike the power to search incident to arrest, police cannot use this power to search for evidence. If the frisk does not provide reasonable grounds to believe the suspect is concealing a weapon, police can intrude no further.<sup>106</sup>

### 3.5. Use of force to suppress a riot

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<sup>98</sup> 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.

<sup>99</sup> [Criminal Code](#), s 516(1); *R v Precourt*, (1976) 39 CCC (2d) 311 at 318-19 (ON CA).

<sup>100</sup> We examined the common law power to search incident to arrest in Part 3.3.

<sup>101</sup> *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.

<sup>102</sup> *R v Chehil*, [2013 SCC 49](#), [2013] 3 SCR 220.

<sup>103</sup> *Ibid* at para 26.

<sup>104</sup> *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.

<sup>105</sup> *R v Mann*, [2004 SCC 52](#) at para 40, [2004] 3 SCR 59.

<sup>106</sup> *Ibid* at para 49 (police exceeded scope of safety search power by removing soft object from suspect’s pocket).



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.”<sup>107</sup> 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.<sup>108</sup> If this interpretation is correct, it would be of questionable constitutional validity as it would permit the state to use unnecessary and disproportionate violence.<sup>109</sup>

#### 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.<sup>110</sup> In the sections below, we canvass the main statutory and

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<sup>107</sup> 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.”

<sup>108</sup> See *Berntt v Vancouver (City)*, [1999 BCCA 345](#) at paras 10-11.

<sup>109</sup> 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*).

<sup>110</sup> 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

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.”<sup>111</sup> 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.”<sup>112</sup> And it empowers a police officer engaged in “the lawful execution of his or her duties” to direct drivers to stop<sup>113</sup> and produce relevant driving documents.<sup>114</sup> Similar provisions are contained in other provinces’ statutes.<sup>115</sup>

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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”).

<sup>111</sup> [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.*

<sup>112</sup> *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”).

<sup>113</sup> *Ibid*, s 216.

<sup>114</sup> *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).

<sup>115</sup> 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 licence 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 licence, driver’s certificate and a “motor

Municipalities also have extensive powers to direct traffic, close roads, prohibit parking, and control access to public areas.<sup>116</sup> 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.”<sup>117</sup> It has also enacted extensive rules regulating parking,<sup>118</sup> limiting pedestrian access to roadways,<sup>119</sup> prohibiting excessive noise,<sup>120</sup> and permitting the removal of unlawfully parked vehicles.<sup>121</sup>

Both the provincial traffic statutes and municipal bylaws typically create offences or impose administrative penalties for failing to abide by these

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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”).

<sup>116</sup> 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.

<sup>117</sup> 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.

<sup>118</sup> 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.

<sup>119</sup> 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.

<sup>120</sup> 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 No. 2017-255](#), *Noise* (12 July 2017), ss 2, 3, 4, 15, 16, 17, 26, 27.

<sup>121</sup> 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 No. 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).

rules.<sup>122</sup> 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<sup>123</sup> or issued administrative penalties.<sup>124</sup> These bylaws may be enforced by both municipal officers and city police,<sup>125</sup> each of whom is empowered to issue either a “penalty notice” (in the case of an administrative penalty violation)<sup>126</sup> or an “offence notice” or “summons” (in the case of an offence violation).<sup>127</sup>

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.<sup>128</sup> Alberta’s legislation is similar, but limits the power to arrest to cases where police reasonably believe that the individual: (i) will

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<sup>122</sup> 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.

<sup>123</sup> 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.

<sup>124</sup> 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).

<sup>125</sup> 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).

<sup>126</sup> City of Toronto, [Municipal Code Chapter 610](#), *Penalties, Administration of* (1 January 2001), s 2.1.

<sup>127</sup> *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).

<sup>128</sup> *Highway Traffic Act*, [RSO 1990, c H.8](#), ss 217. See also *R v Black*, [2020 ONSC 495](#) at para 16, n 4.

continue to offend; or (ii) failed to provide proper identification.<sup>129</sup> British Columbia’s statute permits arrest only for the offences of driving while prohibited or lacking insurance or failing to remain at the scene of an accident.<sup>130</sup>

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.”<sup>131</sup> While this power cannot be used for bylaw infractions,<sup>132</sup> the city of Winnipeg empowers officers to arrest pedestrians who contravene traffic safety

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<sup>129</sup> 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.

<sup>130</sup> *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).

<sup>131</sup> *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 OCCC 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*, [RSO, 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”).

<sup>132</sup> *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.”<sup>133</sup>

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*.<sup>134</sup> 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.”<sup>135</sup> In *R v Moore*,<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup>

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 adequate means to enforce the regulatory infraction.<sup>139</sup> On this view, an arrest for criminal obstruction is only

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<sup>133</sup> 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).

<sup>134</sup> [RSC 1985, c C-46](#).

<sup>135</sup> *Ibid.*

<sup>136</sup> [1978 CanLII 160 \(SCC\)](#); [1979] 1 SCR 195.

<sup>137</sup> *Ibid* at 203.

<sup>138</sup> *Moore v The Queen*, [1978 CanLII 160 \(SCC\)](#) at 203-04, [1979] 1 SCR 195.

<sup>139</sup> 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 ABOB 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](#).

possible when there is either no regulatory enforcement mechanism<sup>140</sup> or the failure to comply with a legal duty prevents such enforcement.<sup>141</sup>

For example, in *R v Yussuf*, police saw the accused unlawfully talking on his phone while driving.<sup>142</sup> 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 identify himself.<sup>143</sup> As Justice Paciocco (then of the Ontario Court of Justice) explained:

...[I]f 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*.<sup>144</sup>

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

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<sup>140</sup> 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.

<sup>141</sup> 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.

<sup>142</sup> *R v Yussuf*, [2014 ONCJ 143](#) at paras 21-38.

<sup>143</sup> *Ibid* at para 61.

<sup>144</sup> *Ibid* at paras 64-65.

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.”<sup>145</sup> 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.”<sup>146</sup> 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.<sup>147</sup> While the Act does not grant specific powers to police, it authorizes many different kinds of intrusions into legally and constitutionally-protected 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.”<sup>148</sup>

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.”<sup>149</sup> 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

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<sup>145</sup> [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.

<sup>146</sup> *Ibid*, s 1.

<sup>147</sup> *Ibid*, ss 19(1)-(1.1). See also *ibid*, s 18(4) (setting out duration of emergency in various circumstances).

<sup>148</sup> *Ibid*, ss 19(1)(d), (h). It is also an offence to fail to comply with any obligation or order imposed: *ibid*, s 17.

<sup>149</sup> [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).



operation” in a manner that renders it “dangerous, useless, inoperative or ineffective.”<sup>150</sup> “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.<sup>151</sup> Under this latter authority, specified health care facilities have also been included.<sup>152</sup>

*British Columbia* ~ Under the *Emergency Program Act*, the government may declare an emergency if it is “satisfied that an emergency exists or is imminent.”<sup>153</sup> 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 damage to property.”<sup>154</sup> In all but rare and extreme circumstances, the types of public disturbances considered in this paper would be unlikely to meet this definition.<sup>155</sup>

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.<sup>156</sup> 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

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<sup>150</sup> *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.

<sup>151</sup> *Ibid*, s 1(1)(a).

<sup>152</sup> [AR169/2021](#).

<sup>153</sup> [RSBC1996, c 111](#), ss 9(1), 12(1). Specifically, this power may be exercised by the relevant minister, Lieutenant Governor in Council, or local authority.

<sup>154</sup> *Ibid*, s 1.

<sup>155</sup> 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*, [SBC2020, c 8](#), s 3 (permitting cabinet to extend ordinary emergency powers).

<sup>156</sup> [SBC2021, c 23](#), s 7.

regulation.<sup>157</sup> 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.<sup>158</sup>

Police are permitted to conduct warrantless arrests of anyone believed on reasonable and probable grounds to be violating these rules.<sup>159</sup> The Act does not, however, make it an offence to do so.<sup>160</sup> Instead, it empowers superior court judges to issue injunctions against people reasonably believed to have contravened or who are likely to contravene the Act.<sup>161</sup> As discussed in Part 3.1, police may arrest people who defy 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”.<sup>162</sup> The Act defines an “emergency” as “a

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<sup>157</sup> *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).

<sup>158</sup> *Ibid*, s 2(2).

<sup>159</sup> *Ibid*, s 4.

<sup>160</sup> 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.

<sup>161</sup> *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).

<sup>162</sup> [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”:

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.”<sup>163</sup> 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.”<sup>164</sup> 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”<sup>165</sup> and “authorize the entry into any building, or upon any land without warrant”.<sup>166</sup> 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 ... 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.”<sup>167</sup>

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.<sup>168</sup> 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

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*ibid*, s 1. Once an emergency is declared, local authorities have the power to make the same orders: *ibid*, s 12(1).

<sup>163</sup> *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).

<sup>164</sup> *Ibid*, ss 1, 10(1).

<sup>165</sup> *Ibid*, s 12(1)(d).

<sup>166</sup> *Ibid*, s 12(1)(g).

<sup>167</sup> *Ibid*, s 12(4)(b).

<sup>168</sup> *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).

evidence relating to the offence ... or ... prevent the continuation or repetition of the offence or the commission of another offence.”<sup>169</sup>

*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.”<sup>170</sup> 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
- 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.<sup>171</sup>

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.”<sup>172</sup> 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.<sup>173</sup> When implementing orders, police and other actors must act in a minimally

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<sup>169</sup> *Ibid*, s 20(1.2).

<sup>170</sup> [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).

<sup>171</sup> *Ibid*, s 7.0.1(3).

<sup>172</sup> *Ibid*, s 7.0.2(2).

<sup>173</sup> *Ibid*, s 7.0.2(4).

intrusive manner, only within designated areas, and only for as long as reasonably necessary.<sup>174</sup>

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.”<sup>175</sup> 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.<sup>176</sup>

On February 14, 2022, the Ontario government issued the *Critical Infrastructure and Highways Regulations*<sup>177</sup> under the *Emergency Management and Civil Protection Act*’s order-making authority. This regulation was repealed on April 15, 2022.<sup>178</sup> While in force, it prohibited anyone from impeding access (or helping to impede access) to “critical infrastructure.”<sup>179</sup> Critical infrastructure was defined to encompass a broad range of facilities, including highways, railways, hospitals, utilities, and airports.<sup>180</sup> 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.”<sup>181</sup>

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.”<sup>182</sup> It also required individuals to remove any vehicles used, and if they refused, empowered police to do

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<sup>174</sup> *Ibid*, s 7.0.2(3).

<sup>175</sup> *Ibid*, s 7.0.11.

<sup>176</sup> *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*.”

<sup>177</sup> [Ont Reg 71/22](#).

<sup>178</sup> [Ont Reg 25/21, Sched 1](#), s 2.

<sup>179</sup> [Ont Reg 71/22](#), s 2(1).

<sup>180</sup> *Ibid*, s 1.

<sup>181</sup> *Ibid*, s 3.

<sup>182</sup> *Ibid*, s 4(1).

so.<sup>183</sup> 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.<sup>184</sup> The Act forbids significant interferences with “protected transportation infrastructure” reasonably expected to either disrupt “ordinary economic activity” or threaten public safety.<sup>185</sup> “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.”<sup>186</sup>

As under the repealed regulation, the Act authorizes police to direct compliance and remove items and vehicles.<sup>187</sup> But unlike the regulation, it also creates offences for non-compliance<sup>188</sup> and empowers police to arrest when they have reasonable grounds to believe that someone has contravened the Act.<sup>189</sup> Police with such grounds may also require any person to identify themselves for the purposes of laying charges.<sup>190</sup> Failing to comply with this obligation is also an offence.<sup>191</sup> 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.<sup>192</sup> Lastly, the government may apply to a superior court for an order restraining persons unlawfully interfering with protected transportation infrastructure.<sup>193</sup>

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<sup>183</sup> *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.

<sup>184</sup> [SO 2022, c 10](#).

<sup>185</sup> *Ibid*, s 2. The Act also prohibits assisting someone to do one of these things: *ibid*, s 2(4).

<sup>186</sup> *Ibid*, s 1.

<sup>187</sup> *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*.

<sup>188</sup> *Ibid*, ss 10 (creating offences for failing to comply with orders or obstructing anyone performing a power or duty under the Act).

<sup>189</sup> *Ibid*, s 13.

<sup>190</sup> *Ibid*, s 12.

<sup>191</sup> *Ibid*, s 12(3).

<sup>192</sup> *Ibid*, s 7.

<sup>193</sup> *Ibid*, s 14.

### 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.<sup>194</sup> While the ancillary powers jurisprudence has been criticized,<sup>195</sup> some limited police responses to public order disturbances would likely be authorized under this doctrine.<sup>196</sup>

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

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<sup>194</sup> 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).

<sup>195</sup> 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.

<sup>196</sup> 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](#) (QCCS) (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].

authorize the power, the Crown must demonstrate that it was “necessary for the carrying out of the particular police duty and ... reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.”<sup>197</sup>

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.”<sup>198</sup> 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.<sup>199</sup>

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.”<sup>200</sup>

In its 1973 decision in *Knowlton v R*,<sup>201</sup> 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: (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

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<sup>197</sup> *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”).

<sup>198</sup> *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.

<sup>199</sup> *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.

<sup>200</sup> *Fleming v Ontario*, [2019 SCC 45](#) at para 48, [2019] 3 SCR 519.

<sup>201</sup> [1973 CanLII 148](#) (SCC), [1974] SCR 443.



was “not an unjustifiable use of the powers associated with the duty imposed on them.”<sup>202</sup>

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.<sup>203</sup> 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*,<sup>204</sup> 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.<sup>205</sup> It also stressed that action taken to *prevent* offending should be scrutinized more strictly than that directed at investigating offences already committed.<sup>206</sup>

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)*,<sup>207</sup> 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 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

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<sup>202</sup> *Ibid* at 447-48.

<sup>203</sup> 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 Dushman, 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).

<sup>204</sup> [2019 SCC 45](#), [2019] 3 SCR 519

<sup>205</sup> 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.

<sup>206</sup> *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).

<sup>207</sup> [2015 ONCA 208](#).

not justifiable.<sup>208</sup> Given the widespread nature of the unrest, the court reasoned, these measures were unlikely to have suppressed much unlawful activity.<sup>209</sup> Nor was it evident that they were “temporally, geographically and logistically responsive” to the threat posed by the protests.<sup>210</sup>

The British Columbia Superior Court came to a similar conclusion in *Teal Cedar Products Ltd v Rainforest Flying Squad*.<sup>211</sup> There, police established an exclusion zone around a remote area of Vancouver Island subject to an injunction prohibiting protestors from interfering with logging activity.<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup>

Despite views to the contrary,<sup>215</sup> 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.<sup>216</sup> Ideally, this should require such restrictions to be expressly demarcated in advance in legislation. Enabling courts to 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

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<sup>208</sup> *Ibid* at paras 92-139.

<sup>209</sup> *Ibid* at paras 101-03.

<sup>210</sup> *Ibid* at para 107, citing *R v Clayton*, [2007 SCC 32](#) at para 41, [2007] 2 SCR 725.

<sup>211</sup> [2021 BCSC 1554](#).

<sup>212</sup> 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.

<sup>213</sup> *Ibid* at para 50.

<sup>214</sup> *Ibid* at paras 62-63.

<sup>215</sup> 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”).

<sup>216</sup> See James Stribopoulos, “In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*” (2005) [31 Queen’s LJ 1](#) at 6-13.

policing.<sup>217</sup> 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.<sup>218</sup> This suggests that any such powers “would have to be clear and highly protective of liberty.”<sup>219</sup>

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.<sup>220</sup> 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.<sup>221</sup>

## 5. Military assistance to law enforcement

The *National Defence Act* contains two mechanisms permitting the Canadian Forces to become involved in civilian law enforcement.<sup>222</sup> 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

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<sup>217</sup> 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 Dushman, eds, *Putting the State on Trial: The Policing of Protest During the G20 Summit* (Vancouver: UBC Press, 2015) 105 at 114-16.

<sup>218</sup> *Fleming v Ontario*, [2019 SCC 45](#) at para 84, [2019] 3 SCR 519.

<sup>219</sup> *Ibid.*

<sup>220</sup> 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.

<sup>221</sup> 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.”).

<sup>222</sup> [RSC 1985, c N-5](#).

with.”<sup>223</sup> 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.<sup>224</sup> 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.<sup>225</sup>

While the aid to civil power has existed in some form since Confederation, it has been used only sparingly since World War II.<sup>226</sup> 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.<sup>227</sup> 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.”<sup>228</sup>

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.”<sup>229</sup> Curiously, this provision does not give soldiers peace officer status, so it is unclear

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<sup>223</sup> *Ibid*, ss 275. See also ss 274, 276-85.

<sup>224</sup> *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.”

<sup>225</sup> *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.

<sup>226</sup> 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 Military & Strategic Studies](#) 1.

<sup>227</sup> 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 Military & Strategic Studies](#) 1.

<sup>228</sup> [Queen’s Regulations and Orders \(OR&O\) Volume 1](#), c 23, art 23.03 (1).

<sup>229</sup> [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.”

whether they would be permitted to exercise any coercive investigative powers in performing this role.<sup>230</sup>

The federal government may also direct the military to assist the police under its royal prerogative powers.<sup>231</sup> 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<sup>232</sup> and the other to the RCMP.<sup>233</sup>

## 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.

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.

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<sup>230</sup> See Kent Roach, "Calling out the Troops" (2003) 48:2 Crim LQ 141.

<sup>231</sup> See generally Philippe Lagassé, "Parliamentary and judicial ambivalence toward executive prerogative powers in Canada" (2012) 55:2 Can Pub Admin 15; Alexander Bolt and Phillippe Lagassé, "Beyond Dicey: Executive Authorities in Canada" (2021) [3J Commonwealth Law 1](#) at 42; Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (2008) at 168-69.

<sup>232</sup> *Canadian Forces Assistance to Provincial Police Forces Directions*, PC 1996-833.

<sup>233</sup> *Canadian Forces Armed Assistance Directive*, PC 1993-624.