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Commissioned Paper:

**The Policing of Large-Scale Protests in
Canada: Why Canada Needs a Public Order
Police Act**

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The Policing of Large-Scale Protests in Canada:
Why Canada Needs a Public Order Police Act

Report for the Public Order Emergency Commission

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Summary

Police lack clear authority in Canada to employ a common tactic to maintain order at large public events: the creation of exclusion zones around large portions of public space. Limited exceptions to this include powers in emergency law and a federal statute on intergovernmental conferences – powers that are unclear in scope. The common law does not authorize a large exclusion zone. Ontario's resort to emergency powers in February of 2022 rendered Canada's resort to an emergency redundant – as a tool to authorize the "secure area" in Ottawa used to bring the trucker convoy protest to an end.

The use of emergency law in 2022 was only the most recent in a series of attempts on the part of governments and courts in recent decades to address the gap in the law authorizing large exclusion zones in an *ad hoc*, temporary, and reactive fashion. Each case involved confusion among police, plans for the zone formulated in secret, and significant infringements of core rights and freedoms. Rights would be better protected and policing more effective by drawing on law from the UK and Australia. Lawmakers there have created comprehensive frameworks for policing large gatherings and events. Legislatures in Canada and its provinces should do the same and pass a bill dealing, respectively, with events of a national or provincial scope. A Public Order Police Act would provide a test for when police could erect a secure zone based on the principles of reasonable necessity and proportionality, and set out rules about admission, compensation, oversight, and review. This would be the most effective means of avoiding resort to emergency law and the cycle of confusion and disorder arising from temporary measures. It would also bring police conduct into closer conformity with the rule of law.

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Introduction

This report highlights a gap in Canadian law that made it appear necessary to invoke emergency powers in response to the trucker convoy in February of 2022. Police draw on a range of powers to maintain order at large public events such as mass protests, intergovernmental meetings, or major sporting events – powers in motor vehicle, municipal, and criminal law, among others. But police have no clear legal authority in Canada to employ a common tactic at these events: the creation of large exclusion zones (entire city blocks), around which they regulate the entry of both vehicles and pedestrians.¹

There are times when police need to make use of these zones to provide effective security. They interfere with – but also protect – rights to liberty, expression, and assembly. But governments have failed to provide clarity on the creation and use of these zones. They have instead passed temporary legislation *ad hoc* or relied on law intended for other purposes – and courts have done the same. Police have acquired only some of the powers they need and have been left guessing about their scope. Important questions about when and whether a large zone is reasonably necessary and proportionate to security concerns are left unclear, along with other critical details including who may come and go; who may be surveilled, searched, or detained; who must be compensated and how; which officers are empowered to do what, where? Without clear law on point, police imposing large scale closures of public space have decided these issues in a legal vacuum, acting for the most part in secret, beyond review, and outside the rule of law. Citizens have been left in a legal limbo, with core rights infringed. If the infringements are

¹ One notable exception is the *Foreign Missions and International Organizations Act*, SC 1991, c 41 [*Foreign Missions Act*], amended in 2002 to provide for exclusion zones to secure intergovernmental meetings. Aside from authorizing police to close space in this narrow category of event, the scope of this power is unclear in the act, in ways explored further below.

to be necessary and compliant with the *Charter of Rights and Freedoms*, they need first to be authorized by law.²

When they invoked emergency powers earlier this year, governments of Ontario and Canada added to a series of attempts to address this gap in the law in a hasty and reactive fashion. Similar confusion and uncertainty about these zones played out prior to, or in the course of, the 1997 Asia-Pacific Economic Cooperation (APEC) conference in Vancouver, the 2001 Quebec City Summit of the Americas, and the 2010 meeting of the G20 in Toronto – leading in each case to serious infringements of fundamental freedoms.³ The measures taken in February 2022, however, were among the most extensive in Canada’s recent history of public order policing — with some 70 city blocks of downtown Ottawa cordoned in a secure zone for several days.⁴ Canada’s resort to emergency measures provided authority for this, but it was neither a necessary nor appropriate tool.

Briefly, police created two large zones in Ottawa in February of 2022. On February 4th, Ottawa Police created a “red zone” around a portion of downtown restricting *vehicle* traffic. On February 17th, they erected a “secure area” regulating *any* access to roughly 3 square kilometers of downtown. The “red zone” may have been authorized under Ontario’s *Highway Traffic Act*.⁵ This report – and the gap in the law it points to – is concerned primarily with the “secure area” and similar police efforts to cordon off large portions of public space to regulate any movement within it.⁶ (This report leaves to the Commission to determine whether the “secure area” was necessary in Ottawa.)

² *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

³ The history of policing large-scale public events in Canada is addressed in more detail in Part II, below.

⁴ The details are canvassed in Part I, below.

⁵ R.S.O. 1990, c H8; see discussion in Part II, below.

⁶ I refer to these throughout this report as “exclusion zones” or “secure zones”.

Ontario's reliance on emergency law in February 2022 provided *potential* authority to erect the "secure area" in place when police finally dispersed the trucker convoy.⁷ Yet Ontario did not avail itself of the power to create an exclusion zone when it passed its emergency regulations. Days later, Canada included this power as part of its argument for needing to resort to emergency law – though given its availability under provincial law, the federal power was redundant.⁸ A further source of authority for *some* police closures in Ottawa might be found in Ontario's *Fire Protection and Prevention Act*.⁹ These powers appear to apply only to private space. If read to apply to public space, the act would authorize much smaller closures than what occurred in February 2022.

This report aims to assist the Commission in its mandate of assessing the basis for the Government of Canada's decision to declare a public order emergency in February 2022 and the appropriateness of the measures chosen under the emergency to deal with it.¹⁰ Part I suggests that Canada's resort to emergency law to authorize a large exclusion zone followed in part from Ontario's decision not to invoke this power – and from recognition of the gap in the law on point. Part II demonstrates this gap by canvassing legislation and case law, and notes how in earlier large-scale public gatherings in Canada the gap in law led to confusion, disorder, and rights infringements. Part III draws on legislation from Britain and Australia as models that governments in Canada could draw upon to address the gap at issue.

⁷ This assumes that Ontario's declaration of an emergency was lawful (met the threshold) under provincial emergency legislation – a question beyond the scope of this report.

⁸ Federal emergency powers may not have been redundant for dealing with protests outside of Ontario (*i.e.*, for dismantling border blockades in other provinces), but police do not appear to have used exclusion zones in their dismantling efforts at those sites after the federal government invoked an emergency on February 14th: see, *e.g.*, Carrie Tait, "Last border blockade to be dismantled as protesters in Emerson, Man., agree to leave" (15 February 2022) *Globe and Mail*.

⁹ 1997, S.O. 1997, c. 4

¹⁰ Order in Council, PC 2022-0392.

Public order straddles federal and provincial heads of power. This report suggests that both governments should pass a *Public Order Police Act*, which would apply depending on the nature of the event at issue. Comprehensive legislation would provide police and civilians clarity on a range of issues, including a proportionality test for imposing large closures, and rules on admission, compensation, oversight, and review. This would avoid the need for temporary or emergency measures, the confusion and disorder that tend to follow, and it would bring police conduct within the rule of law.

Part I: Context

a. Chronology of events

To understand how the police powers considered in this report were relevant to emergency powers invoked in February 2022, this section outlines a chronology of events. The focus here is on what powers each government invoked, at certain points in time, to authorize police control of specific public spaces and the context in which this occurred.

In early February 2022, a group of informally associated truckers (the “Trucker Convoy”) began to occupy streets of downtown Ottawa adjacent to Parliament Hill. Similar protests emerged in cities across Canada and at ports of entry into Canada, including the Ambassador Bridge in Windsor; the Peace Bridge in Fort Erie and roads into Sarnia; Emerson, Manitoba; and Coutts, Alberta. The truckers encamped on public streets in Ottawa caused significant disruption to local residents by closing streets, honking horns at all hours, and idling their engines at length.

On February 4th, the Ottawa Police Service announced that it was “implementing a surge and contain strategy” which would entail “utilizing concrete and heavy equipment barricades to create no-access roadways throughout the downtown core.”¹¹ The press

¹¹ Ottawa Police Service, “News and Community”, release headed “Ottawa Police Service Implements Increased Measures to Protect Downtown Neighbourhoods (February 4, 2022)”, online: (<https://www.ottawapolice.ca/en/news-and-community/weekend-demonstration-information-and->

release indicated that “If necessary, interprovincial bridges, highway off ramps and/or roads will be closed.”¹² In its update for February 5th, Ottawa Police referred to cordoned areas as the “red zone”, noting that roughly “500 heavy vehicles associated with the demonstration are in the red zone.”¹³

The protest at the Ambassador Bridge in Windsor began Monday February 7th and shut down traffic on both sides of the border.¹⁴ Early that week, the Toronto Police Service became aware that protesters intended to travel from Ottawa to Toronto. On Wednesday the 10th, seeking to avoid a similar blockade to the one in Ottawa, Toronto police used cruisers and buses to cordon off “two major stretches of the downtown core”.¹⁵ This included portions of University Avenue and College Street, near Toronto’s ‘hospital row,’ and Queen’s Park Circle between College and Bloor streets.¹⁶

Meanwhile, protestors kept the Ambassador Bridge closed and the Ottawa blockade pushed beyond its second week, with no sign of ending. On Monday February 7th, individual litigants in Ottawa obtained an injunction ordering truckers not to use their horns in the evenings, but it did not order truckers to leave.¹⁷ On Friday the 11th, a group of auto parts manufacturers obtained an injunction compelling truckers to stop “impeding”

[updates.aspx#Ottawa-Police-Enforce-Perimeter-Containment-Measures-Charges-laid-new-RCMP-resources-announced-February-5-2022](https://www.ottawapolicy.com/updates.aspx#Ottawa-Police-Enforce-Perimeter-Containment-Measures-Charges-laid-new-RCMP-resources-announced-February-5-2022)) [Ottawa Police, “News and Community” webpage].

¹² *Ibid.*

¹³ *Ibid*, release headed “Ottawa Police Enforce Perimeter Containment Measures, Charges Delayed, New RCMP Resources Announced (February 5, 2022)”.

¹⁴ Jason Kirby, “Ambassador Bridge Blockade Brings Major Economic Artery to Standstill, Exposes Canada’s Fragile Trade Infrastructure” (11 Feb 2022) *Globe and Mail*.

¹⁵ Wendy Gillis, “‘We’re Going to Help Them Leave’: Toronto Police Describe ‘Robust Plan’ for Weekend Truck Protests” (11 Feb 2022) *Toronto Star*.

¹⁶ Wendy Gillis and David Rider, “Toronto Police Close Downtown Streets Over Ottawa Truck Protesters’ Threat to Relocate” (9 Feb 2022) *Toronto Star*.

¹⁷ Catharine Tunney, “Court Grants Injunction to Silence Honking in Downtown Ottawa for 10 Days” (7 Feb 2022) *CBC News*.

the Ambassador Bridge and police began to clear them out.¹⁸ To this author's knowledge, neither Ontario's Fire Marshall nor Ottawa's Fire Chief, acting under Ontario's *Fire Protection and Prevention Act*,¹⁹ issued an "inspection order" or sought a court order in relation to the Trucker Convoy to close streets or direct that vehicles be moved – powers under the act discussed in Part II below.

On Friday the 11th of February, the same day on which the injunction was granted in relation to the Ambassador Bridge, the Ontario government declared an emergency under the *Emergency Management and Civil Protection Act*.²⁰ The following day, the Ford government enacted the *Critical Infrastructure and Highways Regulation*,²¹ authorizing police to order people to remove their vehicles from public roads. Police cleared the Ambassador Bridge by Sunday the 13th.²²

On that Sunday evening (Feb 13th), the Prime Minister and members of cabinet met with RCMP Commissioner Brenda Lucki and others for a "situation update."²³ Protests continued at border crossings in Surrey B.C., Coutts Alberta, and Emerson Manitoba, along with the blockade in Ottawa.²⁴ The next day, Monday the 14th, the federal government issued an Emergency Proclamation under the *Emergencies Act*.²⁵ On Tuesday the 15th, the government enacted the *Emergency Measures Regulations* and the

¹⁸ The manufacturers were later joined in the application by the City of Windsor and Attorney General of Ontario. CBC News, "Ontario Judge Extends Injunction Against Ambassador Bridge Protesters Indefinitely" (18 Feb 2022) *CBC News*.

¹⁹ *Supra* note 9.

²⁰ R.S.O. 1990, c. E.9, invoking the emergency by enacting O. Reg. 69/22.

²¹ O. Reg. 71/22 [*Critical Infrastructure*].

²² CBC News, *supra* note 18.

²³ Bill Curry, Marsha McLeod, "Trudeau government invoked Emergencies Act despite 'potential for a breakthrough' with convoy protesters, documents show" (11 August 2022) *Globe and Mail*.

²⁴ Carrie Tait, "Last border blockade", *supra* note 8, reporting that by the Tuesday all three border blockages were in the process of dispersing or being dismantled.

²⁵ *Proclamation Declaring a Public Order Emergency*, SOR/2022-20 [*Proclamation*], passed under the *Emergencies Act*, RSC 1985, c 22 (4th Supp) [*Emergencies Act*].

Emergency Economic Measures Order.²⁶ These granted police a host of additional powers, including the power to create an exclusion zone (discussed below). On Thursday the 17th, Ottawa Police announced that they had “established a Secured Area” in downtown Ottawa, cordoning off roughly 70 square blocks.²⁷ Police stated that “residents may travel to the secured area if they have a lawful reason such as they live there, work there or are shopping and visiting businesses” – but were required to pass through checkpoints.²⁸ Police began removing protestors from the cordon and the trucker blockade was brought to an end by Sunday.²⁹ On Monday and Tuesday (February 21, 22), police reduced the size of the zone to roughly 35 square blocks, before removing it altogether at some point thereafter.³⁰

²⁶ *Emergency Measures Regulations*, SOR/2022-21 [*Emergency Regulations*]; *Emergency Economic Measures Order*, SOR/2022-22 [*Economic Order*].

²⁷ Ottawa Police, “News and Community” webpage, *supra* note 11, release headed “Secured Area Established (February 17, 2022). See also Staff Reporter, “Truck Convoy: Day 21; Police Establish ‘Secure Area’ from Queensway to Parliament; Two Protest Organizers Arrested Near Parliament Hill” (18 Feb 2022) *Ottawa Citizen* [“Truck Convoy”]. The zone extended from Wellington Street in the north (along Parliament) to Bronson Avenue in the west, Somerset Avenue in the South, and the Rideau Canal in the east – a significant portion of downtown Ottawa. A map can be found in Ted Raymond, Michael Woods, and Josh Pringle, “Secure Area in Ottawa Shrinks as Police Maintain Presence Following Removal of ‘Trucker Convoy’” (21 Feb 2022) *CTV News* [“Secure Area in Ottawa”]. See also Robert Fife, Marieke Walsh, Janice Dickson, Erin Anderssen, “Police move in to clear downtown Ottawa of convoy protesters after weeks of demonstrations” (18 February 2022) *Globe and Mail*, noting on Friday the 18th that “[a] security perimeter has been set up around most of downtown Ottawa, and almost 100 checkpoints are in place, with officers stopping vehicles and only granting access to people who live and work in the area.” A video segment by CTV News capturing scenes from the zone can be found in Josh Pringle, “What You Need to Know About the Secured Area in Downtown Ottawa” (21 Feb 2022) *CTV News*, online: (<https://ottawa.ctvnews.ca/what-you-need-to-know-about-the-secured-area-in-downtown-ottawa-1.5785593>).

²⁸ Ted Raymond, “Ottawa Police Further Reduce ‘Secure Area’ of Downtown” (22 Feb 2022) *CTV News*. See also Ottawa Police, “News and Community” webpage, *supra* note 11.

²⁹ Raymond *et al*, “Secure Area in Ottawa,” *supra* note 27.

³⁰ Ottawa Police, “News and Community” webpage, *supra* note 11, release headed “Update on Police Operations to Remove Unlawful Protesters (February 21, 2022). See also Raymond, “Ottawa Police”, *supra* note 28, noting the zone’s southern border moved up to Laurier Avenue on February 22nd.

b. Emergency powers and closures of public space

Ontario declared an emergency on February 11 under its *Emergency Management and Civil Protection Act*.³¹ The act provides that under an emergency, the government may enact a law “[r]egulating or prohibiting travel or movement to, from or within any specified area.”³² This would allow police to create and oversee an exclusion zone of seemingly any size.³³ In the emergency regulation it passed the next day — the *Critical Infrastructure and Highways Regulation*³⁴ — Ontario did not include a power to restrict travel or close public space. Instead, the *Critical Infrastructure* regulation did four other things to assist police in dismantling blockades. It prohibited persons from impeding access to “critical infrastructure,” which included hospitals and ports, but not streets of Toronto or Ottawa.³⁵ It prohibited people from impeding access to any highway (as defined in the *Highway Traffic Act*³⁶) where it would cause a serious interference.³⁷ It allowed police to order a person to remove their vehicle and authorities to suspend or cancel the Ontario license or vehicle permit of any person impeding.³⁸

As noted earlier, by the time Ontario declared a state of emergency and enacted powers under it (Saturday February 12th), police were already in the process of dismantling

³¹ *Supra* note 20.

³² *Ibid*, s. 7.0.2(4).

³³ The federal *Emergencies Act*, *supra* note 25, contains similar set provisions discussed in Part II below.

³⁴ *Supra* note 21, passed under Ontario’s *Emergency Management and Civil Protection Act*, *supra* note 20.

³⁵ Section 1 of the regulation, *supra* note 21, defining “critical infrastructure” includes only the “400-series highways” and no other roads or highways.

³⁶ *Highway Traffic Act*, RSO 1990, c H.8, section 1 of which states: “‘highway’ includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof”.

³⁷ Section 3 of the *Critical Infrastructure* regulation, *supra* note 21.

³⁸ *Ibid*, ss. 4-6.

the Ambassador Bridge blockade and preparing to clear the blockade in Ottawa. On Monday the 14th, the government of Canada declared a 'public order emergency' under Part II of the *Emergencies Act*.³⁹ On Tuesday, it enacted the *Emergency Measures Regulations* and the *Emergency Economic Measures Order*.⁴⁰ The *Regulations* allowed authorities to control the use of public space in two ways.

One was to prohibit participation in a public assembly "that may reasonably be expected to lead to a breach of the peace" (a "section 2 assembly") – along with travel to partake in such an assembly and providing property to facilitate this.⁴¹

The other way was to create an exclusion zone. Section 6, headed "Designation of protected places" provided that a list of places — which included Parliament Hill, government buildings, and monuments — are "designated as protected and may be secured". Subsection 6(f) permitted the Minister of Public Safety and Emergency Preparedness to designate "any other place" as a protected place. On April 25, 2022, the government confirmed that (at some point after the *Regulation* was passed), the Minister of Public Safety had designated various streets comprising much of downtown Ottawa under 6(f).⁴²

³⁹ The emergency was declared in *Proclamation, supra* note 25, citing section 25(1) of the *Emergencies Act, supra* note 25.

⁴⁰ *Supra* note 26.

⁴¹ *Emergency Regulations, ibid*, ss 2 to 5 (also prohibiting foreign nationals from entering Canada for this purpose).

⁴² Section 6 of the *Emergency Regulations, ibid*, simply states that "any other place" may be "designated by the Minister" but does not indicate the *process* by which he or she does so. I have not found any public record of the designation being promulgated. I was alerted to the designation under section 6(f) in the Parliamentary record of 'Questions on the Order Paper' in the House of Commons for April 25, 2022, where Parliamentary Secretary to the Leader of the Government in the House of Commons provided an affirmative response (and details) to the question of whether a designation was made under s 6(f) of the *Emergency Regulations*. The affirmative response (and areas designated) can be found at p. 629, under "Q-366" House of Commons, 44th Parliament, 1st Session, "Journals: No 57", online (https://publications.gc.ca/collections/collection_2022/parl/X2-441-57.pdf).

By Tuesday February 15th, when federal emergency powers became available, the focus of police efforts was on Ottawa. Police now had further powers to bring the Ottawa blockade to an end that were available only under federal emergency law, including powers to compel third-party tow operators to assist in towing vehicles;⁴³ to freeze bank accounts and other funding streams;⁴⁴ to suspend licenses and permits not registered in Ontario.⁴⁵ But media coverage suggests that police in Ottawa brought the blockade to an end primarily by doing three things: cordoning off a large stretch of downtown Ottawa; ordering people to leave that area or arresting them; and towing vehicles.

Ontario's *Critical Infrastructure* regulation permitted police to do most of this. And even though Ontario did not enact a police power to create an exclusion zone, it had the authority to do so under the *Emergency Management and Civil Protection Act*.⁴⁶ However, both governments resorted to emergency powers due in part to the recognition that police lacked clear authority to create a secure zone. The next section illustrates the gap in the law at issue.

Part II: Gap in the law (authorizing closures)

With two exceptions, police in Canada lack specific statutory authority to create an exclusion zone. The common law does not authorize a large zone. The Trucker Convoy

⁴³ *Emergency Regulations*, *supra* note 26, s. 7.

⁴⁴ *Economic Order*, *supra* note 26, ss. 1 and 2.

⁴⁵ *Emergency Regulations*, *supra* note 26, s. 10(1).

⁴⁶ Notably, in its press release of February 17th, Ottawa Police refer to two sources of authority to erect the Secured Area – the Ontario emergency act and the federal government's regulation: "Under the Emergency Management and Civil Protection Act, the Unified Command in control of policing in Ottawa has established a Secured Area to ensure that individuals comply with the Emergency Measures Regulations and to ensure designated places (Parliament, Government buildings, critical infrastructure etc) are protected." Ontario's statute could not authorize a secure zone without a regulation being passed. Only the federal regulation provided for this, as noted above. Ottawa Police, "News and Community" webpage, *supra* note 11, release headed "Secured Area Established (February 17, 2022).

raises questions about the application of Ontario's *Fire Protection and Prevention Act*⁴⁷ as a possible tool for closing public space. It does not authorize a large exclusion zone.

a. Statutory authority

The only statutes in Canada that explicitly authorize a secure zone are provincial and federal emergencies acts, noted above, and the *Foreign Missions and International Organizations Act*,⁴⁸ which permits the Royal Canadian Mounted Police [RCMP] to create a secure area at intergovernmental conferences.

In the first case, police may create an exclusion zone only under a declared emergency and where necessary to deal with it.⁴⁹ Canada's *Emergencies Act* provides for closure in a few ways — and for all four of the kinds of emergency contemplated in the Act. Under a 'Public Welfare Emergency' and a 'Public Order Emergency,' the Governor in Council, on reasonable grounds to believe it "necessary for dealing with the emergency", may make orders for the "regulation or prohibition of travel to, from or within any specified area".⁵⁰ Analogous provisions are found in provincial emergency law.⁵¹ The federal *Emergencies Act* also provides for "the designation and securing of protected places" —

⁴⁷ *Supra* note 9.

⁴⁸ Referred to in this report as the *Foreign Missions Act*, *supra* note 1.

⁴⁹ *Emergencies Act*, *supra* note 25, ss. 8(1); 19(1); 30(1); and 40(1). By contrast, section 7.0.2(2) of Ontario's *Emergency Management and Civil Protection Act*, *supra* note 20, requires a belief that the measures are "necessary and essential in the circumstances to prevent, reduce or mitigate serious harm to persons or substantial damage to property".

⁵⁰ *Emergencies Act*, *supra* note 25, ss. 8(1)(a) and 19(1)(a).

⁵¹ see, e.g., Ontario's *Emergency Management and Civil Protection Act*, *supra* note 20, s. 7.0.2(4)(2); Alberta's *Emergency Management Act*, RSA 2000, c E-6.8, section 19(1)(e) permitting a minister under a state of emergency to "control or prohibit or make an order to control or prohibit travel to or from any area of Alberta"; British Columbia's *Emergency Program Act*, RSBC 1996, c 111, permitting a minister under a state of emergency in s. 10(1)(f) to "control or prohibit travel to or from any area of British Columbia"; and Quebec's *Civil Protection Act*, CQLR c S-2.3, permits a minister under a state of emergency in s. 93(3) to "control access to or enforce special rules on or within roads or the territory concerned".

a power available under a 'Public Order Emergency' and an 'International Emergency'.⁵² Finally, under a 'War Emergency,' the Governor in Council may make *any* orders she reasonably believes necessary for dealing with the emergency.⁵³

One might query whether there is a difference between a regulation that "prohibits travel within" a specified area and one that "secures" an area. As noted, Canada's *Emergencies Act* authorizes both; emergency statutes in Ontario and other provinces only contemplate travel prohibitions, but tend to include catchall provisions allowing for "such other measures... consider[ed] necessary" to address the emergency.⁵⁴ Setting these catchall provisions aside, on one reading, provisions that 'prohibit travel' only authorize a direction not to go somewhere (rather than also closing public space by 'securing' it with a fence or a checkpoint). In practical terms, the distinction seems tenuous. If Ontario or Canada passed a regulation 'prohibiting travel within' a certain space, police might reasonably seek to *enforce* this prohibition through fencing or checkpoints.

The *Foreign Missions Act* was amended in 2002 to provide for exclusion zones when policing international conferences. The policing portion is brief:

10.1 (1) The Royal Canadian Mounted Police has the primary responsibility to ensure the security for the proper functioning of any intergovernmental conference in which two or more states participate, that is attended by persons granted privileges and immunities under this Act and to which an order made or continued under this Act applies.

(2) For the purpose of carrying out its responsibility under subsection (1), the Royal Canadian Mounted Police may take appropriate measures, including controlling,

⁵² *Emergencies Act*, *supra* note 25, ss. 19(1)(b) and 30(1)(f).

⁵³ *Ibid*, s 40(1).

⁵⁴ *Emergency Management and Civil Protection Act*, *supra* note 20, s. 7.0.2(4)(14). A further example can be found in British Columbia's *Emergency Program Act*, *supra*, note 51, in s. 10(1).

limiting or prohibiting access to any area to the extent and in a manner that is reasonable in the circumstances.⁵⁵

Subsection 3 clarifies that the Act is not intended to affect any statutory or common law powers of police, and subsection 4 allows for arrangements to be entered into between federal and provincial or municipal authorities. This is the full extent of the portion on policing. The act provides no guidance to police as to the size of a zone, how long it may last, or who may enter. Nor does it address means of compensating for interferences with business or private property. It is also unclear where federal jurisdiction over policing an event ends and provincial jurisdiction remains in place. Section 10.1(4) of the act allows for "arrangements" among authorities only "to facilitate *consultation and cooperation*," while section 10.1(2) explicitly confers on the RCMP the power to take "appropriate measures." When applied in 2010 to the G20 meeting in Toronto, the conferral under the act of "primary responsibility" to the RCMP for security led to confusion as to the role of the Toronto Police Service, whose command structures would prevail, and on what basis.⁵⁶

Other statutes provide public order police powers, but not for exclusion zones.

Canada's *Criminal Code* prohibits causing a disturbance or creating an unlawful assembly or riot.⁵⁷ An unlawful assembly requires a common purpose to cause fear among others that people gathered may "disturb the peace tumultuously."⁵⁸ A riot is "an unlawful assembly that has begun to disturb the peace tumultuously." Police may proclaim a riot is underway and order participants "peaceably to depart" and "disperse or arrest" those resisting. In late 2021, Parliament amended the *Criminal Code* to add the offences of

⁵⁵ *Foreign Missions Act*, *supra* note 1.

⁵⁶ This is discussed further below.

⁵⁷ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], ss. 63 to 68.

⁵⁸ *Ibid*, s 63(1)(a).

intimidating to impede health care workers and persons accessing health care services.⁵⁹ No new police powers were added. The *Code* does not authorize an exclusion zone.

Provincial motor vehicle acts provide for road closures or routing of *vehicle* traffic. Ontario's *Highway Traffic Act*, for example, allows police to "close a highway or any part thereof to vehicles" where "reasonably necessary" to ensure "orderly movement of traffic, prevent injury, or in an emergency."⁶⁰ This entails something different from a secure zone, which can impede pedestrian as well as vehicle movement to a wider range of public and private property in addition to roads and highways.

In 2020, in response to protests at pipelines and railway crossings, Alberta passed the *Critical Infrastructure Defence Act*.⁶¹ Containing only five provisions, the act defines as "essential infrastructure" potential sites of protest, such as pipelines, railways, mining sites, and highways and makes it an offence to wilfully obstruct or interfere with their use or operation.⁶² Police are authorized to arrest without a warrant any person they find contravening these provisions. The act contains no further police powers.

Ontario's *Keeping Ontario Open for Business Act, 2022*, enacted in April of 2022,⁶³ puts into ordinary legislation powers analogous to the ones Ontario passed under a state of emergency in the *Critical Infrastructure and Highways Regulation*,⁶⁴ discussed in Part I of this paper. It does not authorize police to create exclusion zones or close public

⁵⁹ *An Act to amend the Criminal Code and the Canada Labour Code*, S.C. 2021, c. 27, adding the offences in sections 423.2(1) and 423.2(2) of the *Criminal Code*.

⁶⁰ *Supra*, note 36, at s 134(1) and (2). For further detail on these powers, see the discussion under "Traffic Safety" in Steven Penney and Colton Fehr, "Police Power & Public Order Disturbances: A Background Paper Prepared for the Public Order Emergency Commission".

⁶¹ *Critical Infrastructure Defence Act*, SA 2020, c C-32.7.

⁶² *Ibid*, ss 1, 2, and 3.

⁶³ *Keeping Ontario Open for Business Act, 2022*, S.O. 2022, c. 10 [*Keeping Ontario Open*].

⁶⁴ *Supra* note 21, passed under Ontario's *Emergency Management and Civil Protection Act*, *supra* note 20.

space. Instead, it permits removal of protesters and vehicles blocking “protected transportation infrastructure”, defined to include border crossings and airports.⁶⁵

b. Special case of fire protection law

Ontario’s *Fire Protection and Prevention Act* [“the FFPA”] merits separate consideration due to the peculiar nature of the Trucker Convoy protests.⁶⁶ Some of the truckers involved in the protest may have created hazards under the FFPA: blocking a fire route and/or emitting dangerous levels of carbon monoxide by idling at length. The act permits Ontario’s Fire Marshall or a city’s fire chief to direct the removal of vehicles blocking fire routes and – on one reading of the act – the Marshall may order closure of entire streets. Yet the wording of the act suggests the powers at issue apply only to private land; the ambit of the closures is narrow; and obtaining a closure order requires steps that do not appear to have been taken in 2022.

Part V of the act, headed “Rights of Entry in Emergencies and Fire Investigations”, the Fire Marshall or a fire chief may “enter on land or premises” to inspect and remove things.⁶⁷ Where they believe “a risk of fire poses an immediate threat to life”, they may remove persons or things or “do any other thing... urgently required to remove or reduce the threat to life”.⁶⁸ The use of the phrases “enter on land” and “on the land”, suggest that these powers are intended to apply to private land. Neither “land” nor “premises” are defined terms in the act.

Under Part VI, the Fire Marshall or a city’s fire chief may conduct “inspections” of fire hazards to ensure “fire safety,” which is defined to include “the risk that the presence

⁶⁵ *Keeping Ontario Open*, *supra*, note 63, s. 1. I thank Professor Kent Roach for noting that, by contrast, Ontario’s *Critical Infrastructure and Highways Regulation*, *supra* note 21, passed in February’s emergency dealt with the broader concept of “critical infrastructure”, which was defined, in section 1, to include highways, hospitals, railways, utility facilities.

⁶⁶ *Supra* note 9.

⁶⁷ *Ibid*, s. 14(2).

⁶⁸ *Ibid*, s. 15(1)(a),(c), and (g).

of unsafe levels of carbon monoxide on premises would seriously endanger the health and safety of any person.”⁶⁹ After “enter[ing] on lands” to inspect, the Marshal or chief may issue an “inspection order” to remedy contraventions of the fire code.⁷⁰ The *Fire Code* mandates “fire access routes” remain clear at all times.⁷¹ The Marshall or chief could direct truckers on public streets to move if a truck is a “structure” and a trucker parked on a public street is an “occupier”.

If so, the Fire Marshall can also authorize an order to “close the land or premises” where she believes it necessary for the “immediate protection of persons and property”.⁷² But here too, the heading of the provision, along with the language of ordering an “owner or occupant of the land or premises” to do things, including “prevent[ing] persons from entering thereon”, suggests an application to private rather than public land.⁷³

If one were to read “land or premises” to include public streets, the powers in the act are still too narrow to allow for broad exclusion zones. Yet they might have provided authority for *some* street closures in Ottawa in February of 2022. Specifically, streets or portions of them where “necessary for the immediate protection of persons and property” – *i.e.*, where trucks were idling excessively or blocking fire routes.

⁶⁹ *Ibid*, s. 18. Section 19 states that the “Fire Marshal, an assistant to the Fire Marshal or a fire chief is an inspector for the purposes of this Part.”

⁷⁰ *Ibid*, s. 21(1).

⁷¹ O. Reg. 213/07, s. 2.5.1.3.

⁷² *Supra* note 9, s 21(2).

⁷³ A further key power with a similar restrictive application is found under section 31, *ibid*. This provides that where (a) a person has been convicted of an offence under the act; and (b) where a judge of the Ontario Court of Justice believes it “necessary in the interests of public safety”, the court may issue an order (under s 31(3)) authorizing the Fire Marshall to “(a) close access to, or remove, the building, structure or premises to which the order relates; or (b) remove or remove and dispose of any substance, material or thing from the building, structure or premises.” This would seem to apply only to a building or structure or things within it. It unclear whether a vehicle is a structure.

c. Common law

Police do not have clear authority at common law to create an exclusion zone of a significant size. The ancillary powers doctrine provides limited authority for police closure of public space, but recent decisions on the doctrine suggest that it would not authorize a zone on the scale of several city blocks.

Knowlton authorizes a small closure, adjacent to private property, in light of a specific threat.⁷⁴ It involved an arrest for obstructing a peace officer in the execution of his duties. During a visit to Ottawa a few days earlier, Premier Kosygin of the USSR was attacked and subject to death threats. To secure his visit to Edmonton's Chateau Lacombe Hotel, police cordoned off a portion of the sidewalk in front of the hotel, hindering the accused, a photographer, from getting closer. Warned to stay back, Knowlton pushed past police and was arrested. The Supreme Court of Canada held that police had interfered with the "liberty of the appellant," including his "right to circulate freely on a public street,"⁷⁵ but relied upon the two-part test in the English Court of Appeal decision in *Waterfield* to uphold the police action in the circumstances.⁷⁶

In *Waterfield* itself, the Court of Appeal had ascertained whether an officer was acting in the execution of his duties by asking, first, whether his conduct fell within the general scope of a duty under law and, second, if it was "justified."⁷⁷ Applying the test in *Knowlton*, LeDain J held that the police conduct here – creating the cordon in front of the hotel – fell within the general scope of a duty under the *Alberta Police Act* to keep the peace and prevent crime.⁷⁸ The conduct involved a "justifiable" use of powers associated

⁷⁴ *Knowlton v. R.*, [1974] S.C.R. 443 [*Knowlton*].

⁷⁵ *Ibid.*, at 446.

⁷⁶ *Ibid.*, at 446, citing *R. v. Waterfield*, [1963] 3 All ER 659, [1964] 1 Q.B. 164 [*Waterfield*] at 170.

⁷⁷ *Waterfield*, *ibid.*

⁷⁸ *Knowlton*, *supra* note 74, at 446.

with the duty, because the threat to Kosygin was real and the measures police took to protect him were reasonable.

The holding in *Knowlton* does not stand for the proposition that police have an ancillary power at common law to create an exclusion zone of any size or duration – so long as they are acting to keep the peace. It permits a minimal geographic restriction, for a limited time, where there is a credible threat of a specific nature, over a portion of a public street in front of a *property policed with its owner's consent*. *Knowlton* is authority for closing a sidewalk, perhaps a street. Not several blocks for days on end.⁷⁹

The Supreme Court further refined its approach to *Waterfield* in *Dedman*.⁸⁰ The refined test might be used to recognize a power to cordon off a space larger than a sidewalk or street, but this would entail a vast expansion of the doctrine. *Dedman* concerned a challenge to police authority to conduct random traffic stops in the context of impaired driving investigations (the R.I.D.E. program in Ontario). Justice LeDain held that police have authority to conduct these stops based on a modified version of *Waterfield*. The conduct at issue must be necessary to carrying out a police duty under law and it must be reasonable, “having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.”⁸¹ In this case, police had a duty to enforce driving regulations and detaining drivers to question them about alcohol was reasonably necessary. The interference with liberty was small: “the stop would be of relatively short duration and of slight inconvenience”.⁸² Yet the stop would also advance

⁷⁹ Former Ontario Chief Justice Roy McMurtry, in his “Report of the Review of the Public Works Protection Act” (Toronto: Ministry of Community Safety and Correctional Services, 2001) offered a different view of *Knowlton*, suggesting at 33, that it “supports the proposition that police have a broad range of responsibilities with deep historical roots in the common law and codified in statute”. This view should be considered in light of the Supreme Court’s recent, more restrictive approach to ancillary powers in *Fleming*, discussed below.

⁸⁰ *Dedman v. The Queen*, [1985] 2 S.C.R. 2 [*Dedman*].

⁸¹ *Ibid*, at 35.

⁸² *Ibid*.

an important public purpose. Here again, the balance struck was one between a pressing state interest and a *limited* infringement.

The Supreme Court would go on to recognize a host of other powers using the *Dedman-Waterfield* framework: investigative detention and search,⁸³ safety search in exigent circumstances,⁸⁴ and warrantless entry to a residence to locate the source of a disrupted 911 call.⁸⁵ In each case, the intrusion on liberty was narrow in scope and brief in duration.

Fleming v Ontario is the Supreme Court's most recent extended encounter with the *Dedman-Waterfield* test.⁸⁶ It involved police powers at a protest and the Court was reluctant to recognize a new power in that context. The Court's pronouncements about the limits of the ancillary powers doctrine are relevant here.

Fleming was involved in a counter-protest in close vicinity to an occupation of Crown land by members of the Six Nations. Police arrested him not because he was about to breach the peace, but because they believed that by waiving a flag and approaching other protesters, he might provoke others to do so. The Crown had sought recognition of a power to "arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace".⁸⁷ Justice Côté, writing for the Court, declined to find this a 'reasonably necessary' police power:

In the past, this Court has only recognized common law police powers that involve interference with liberty where there has been some connection with criminal activities. In these cases, the powers were restricted to circumstances in which

⁸³ *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52.

⁸⁴ *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37.

⁸⁵ *R. v. Godoy*, [1999] 1 S.C.R. 311; [1998] S.C.J. No. 85.

⁸⁶ *Fleming v. Ontario*, 2019 SCC 45, [2019] 3 S.C.R. 519 [*Fleming*].

⁸⁷ *Ibid*, para 6, or as Côté J put it more specifically: "a common law power to arrest individuals who have not committed any offence, who are not about to commit any offence, who have not already breached the peace and who are not about to breach the peace themselves."

there was at least a suspicion that the person affected by the exercise of the power was involved in, or might commit, some offence.⁸⁸

The power here, by contrast, would “enable the police to interfere with the liberty of someone who they accept is acting lawfully and who they do not suspect or believe is about to commit any offence.” Suggesting this is too large a step for the ancillary powers doctrine, she held: “It would be difficult to overemphasize the extraordinary nature of this power. Such a power would constitute a major restriction on the lawful actions of individuals in this country.”⁸⁹ She writes here not just of an arrest but an *interference* with liberty. Creating a large exclusion zone would be a much greater interference. The reasoning here suggests authorizing a large exclusion zone using *Dedman* would be a gross and inappropriate expansion of the doctrine.

Lower courts have also applied the ancillary powers doctrine restrictively in cases involving police power over movement in public space. In *Figueiras v Toronto (Police Services Board)*,⁹⁰ a case arising from the G20 in Toronto in 2010, the Ontario Court of Appeal declined to recognize a power to turn people away from an area unless they submitted to a search. Justice Rouleau found no statutory authority for police control over access to public space that applied here. Police have a power at common law to establish a perimeter around “fires, floods, car crash sites, crime scenes and the like,” but they do not have “a general power” to do so.⁹¹ Police were concerned that violent protestors might enter the area in question. They sought to stop and search people in one small area of the city. The power was not reasonably necessary to keeping the peace because it was “not

⁸⁸ *Ibid*, para 77.

⁸⁹ *Ibid*, para 78. Justice Côté also held at para 83: “As a general rule, it will be more difficult for the state to justify invasive police powers that are preventative in nature than those that are exercised in responding to or investigating a past or ongoing crime”.

⁹⁰ 2015 ONCA 208.

⁹¹ *Ibid*, paras 59-60.

effective” and “not rationally connected to the purpose” of avoiding a repeat of earlier “lawlessness in the entire downtown core”.⁹²

In *Teal Cedar Products Ltd v Rainforest Flying Squad*,⁹³ the BC Supreme Court considered police action in enforcing a prior injunction in a logging area. The injunction allowed police to arrest people interfering with the use of any road in an ‘injunction area’ comprising “a large tract of public land.”⁹⁴ The RCMP sought to restrict access to this land “by means of expansive exclusion zones and checkpoints.”⁹⁵ The court found the zone to interfere with public and media freedom in a manner that was “substantial and serious.”⁹⁶ Police had no authority to create the zones aside from the ancillary powers doctrine. They did not establish that zones were reasonably necessary to arresting and removing people under the injunction.⁹⁷

Running against the grain of these cases is *Tremblay c Quebec*.⁹⁸ This involved a challenge to the legality of an exclusion zone around much of the Upper Town of Quebec City during the Summit of the Americas conference in 2001. Heard only days before the event was to begin, the zone was found to violate rights to free expression and free assembly under the *Charter*, but upheld as a reasonable limit. Its precedential value is doubtful on three grounds.

If it recognized a police power to create a large exclusion zone under *Dedman-Waterfield*, it did so in only the context of intergovernmental conferences – and the

⁹² *Ibid*, para 100 and 105.

⁹³ 2021 BCSC 1554.

⁹⁴ *Ibid*, para 1.

⁹⁵ *Ibid*.

⁹⁶ *Ibid*, para 54.

⁹⁷ *Ibid*, para 50.

⁹⁸ *Tremblay c. Québec (Procureur général)*, [2001] J.Q. no. 1504 [*Tremblay*], para 1, per Gilles Blanchet J. The ruling is translated into English in W. Wesley Pue, “Trespass and Expressive Rights,” *The Ipperwash Inquiry* (2007), at 52–77 (Appendix): (https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Pue.pdf).

Foreign Missions Act now codifies this power. Justice Blanchet's decision neglected to consider whether an exclusion zone (or one that large) was reasonably necessary under the test in *Dedman*. Its expansive application of the ancillary powers doctrine runs counter to the Supreme Court's later decisions on point and their generally more restrictive thrust. *Tremblay* is best read as a response to the exceptional circumstances in which it arose.

d. Impact of the gap on earlier large public events

The recent history of public order policing in Canada sheds light on the impact of the gap in law on creating secure zones. It has led to confusion among police as to the scope of their authority, serious violations of core rights, and limited accountability.

Briefly, in November of 1997, Canada hosted a week-long meeting of leaders of APEC in Vancouver, at sites downtown and, on the final day, at the University of British Columbia. Events at UBC, involving a smaller gathering of leaders, were turbulent. Police pepper sprayed protesters, forced them to move their tents where they were peacefully assembled, and kept them well away from passing motorcades. Complaints were filed against 47 members of the RCMP, followed by extensive public hearings before the Commission for Public Complaints Against the RCMP.⁹⁹ Commissioner Hughes faulted police for "command structures, role separation, policy and planning, training, legal support, record keeping, and overall preparedness."¹⁰⁰ He also found police had infringed

⁹⁹ Letter of RCMP Commissioner Zaccardelli to Shirley Heafey, Chair of the Commission for Public Complaints Against the RCMP 6 September 2001, Appendix B, Commission for Public Complaints against the RCMP, *Chair's final report following a public hearing into the complaints relating to RCMP conduct at events that took place at the UBC campus and the Richmond RCMP Detachment during the Asia Pacific Cooperation Conference in Vancouver, B.C., in November 1997* (Ottawa: CPC RCMP, 2002) at 5.

¹⁰⁰ *Ibid*, at 4, Zaccardelli summarizing findings in Commissioner Hughes' interim report: Commission for Public Complaints Against the RCMP, *RCMP Act – Part VII Subsection 45.45(14), Commission Interim Report Following a Public Hearing Into the Complaints regarding the events that took place in connection with demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver, B.C., in November 1997 at the UBC Campus and Richmond detachments of the RCMP* (Ottawa: CPC RCMP, 31 July 2001), at 431 to 441 [Interim Report]. On planning shortcomings, see also Mike King and David Waddington, "The Policing of Transnational Protest in Canada" in D Porta, A

the *Charter* using excessive force, carrying out strip-searches without justification, and seizing signs without cause.¹⁰¹ The question of authority for creating exclusion zones did not loom large at the hearings. Much of the focus was instead on whether the Prime Minister's staff had directed the RCMP as to the size and location of the zones, allegedly to shield Indonesia's President Suharto and other visiting dignitaries from the sight of protest. The Commission found no evidence of this as a driving motivation among PMO staff. But it did find "government interference" in decisions about the location of the security zones and the movement of protestors' tents, in violation of their *Charter* right to expression and for reasons unrelated to security.¹⁰² The findings divert attention from a more basic point: the legal uncertainty in which events unfolded – uncertainty that conditioned at least some of the confusion and disorder at issue. A statute detailing when police could erect exclusion zones, on what grounds, of what size, and where would have helped avoid at least some of conduct that drew scrutiny here.

In April of 2001, Canada hosted 34 heads of state at the Summit of the Americas in Quebec City. Police erected a 6.1 kilometer security zone in the Upper Town, with a 3-meter-high chain-link and concrete fence.¹⁰³ The zone could only be entered with a pass issued by the RCMP and limited to residents, employees, dignitaries, police, and summit participants.¹⁰⁴ The creation of an exclusion zone of this scale drew considerable public condemnation.¹⁰⁵ The Summit drew tens of thousands of protesters, a small number of whom breached the fence early on in the conference, provoking police to use tear gas and

Peterson, and H Reiter, eds, *The Policing of Transnational Protest* (Hampshire: Ashgate, 2006) at 80-81.

¹⁰¹ *Ibid*, Interim report at 218, 280, and 424.

¹⁰² *Ibid* at 87-101 and 150-154. See also W. Wesley Pue, "The Prime Minister's Police? Commissioner Hughes' APEC Report" (2001) 39:1 *Osgood Hall Law Journal* 165 at 168.

¹⁰³ King and Waddington, *supra* note 100, at 86 and Tremblay, *supra* note 98.

¹⁰⁴ Tremblay, *supra* note 98.

¹⁰⁵ See, e.g. Sinclair Stevens, "A Police State in the Making" (24 April, 2001) *Globe and Mail*.

to use it more aggressively as the conference unfolded.¹⁰⁶ Tremblay's challenge, noted above, threatened to disrupt security arrangements only days before the event was to begin. Soon after, Parliament amended the *Foreign Missions Act* to provide authority for secure areas. But given the generality or vagueness of the power set out in the act, even if it were available, it is not clear whether the zone used in Quebec was too large, whether details surrounding the issuing of passes, compensation, or review struck an appropriate balance between rights and security. These were matters left largely to police to decide in short order, with limited public input or oversight – a fact that remains the case under the act.

The G20 Summit in Toronto in 2010 serves as the most explicit cautionary tale for the gap in policing authority. Announced only four months prior to the event held in late June, the two-day meeting, along with a smaller meeting of the G8 in nearby Huntsville, was the “largest security operations in Canadian history”, with almost 21,000 security personnel involved.¹⁰⁷ The RCMP established three secure zones and policed the first two.¹⁰⁸ The ‘Controlled Access Zone,’ with a three-meter-high fence, surrounded the main venue, the Metro Toronto Convention Centre, and adjacent hotels. The Restricted Access Zone, also fenced, extended roughly a block or so beyond the first zone and contained private businesses and public thoroughfares.¹⁰⁹ Toronto Police oversaw the ‘Interdiction Zone,’ extending “several city blocks” beyond the prior zone. It contained condos, businesses, and other public space.¹¹⁰ *Knowlton and the Foreign Missions Act*

¹⁰⁶ King and Waddington, *supra* note 100, at 86.

¹⁰⁷ Gerry McNeilly, Office of the Independent Police Review Director, *Policing the Right to Protest: G20 Systemic Review Report* (Toronto: Office of the Independent Police Review Director, 2012) [OIPRD Report] at iii.

¹⁰⁸ For a map and more precise details, see W. Wesley Pue, Robert Diab, & Grace Jackson, “The Policing of Major Events in Canada: Lessons from Toronto’s G20 and Vancouver’s Olympics” (2015) 32 *Windsor Yearbook of Access to Justice* at 194-196.

¹⁰⁹ OIPRD Report, *supra* note 107 at iii.

¹¹⁰ *Ibid.*

would likely have authorized the first zone. The act might have authorized the second zone. The third had no clear authority.

To address this concern, city officials and Toronto Police worked with Ontario's Ministry of Community Safety to have Ontario pass a regulation under the *Public Works Protection Act*.¹¹¹ Originally passed as an emergency measure at the outset of the Second World War, the act allowed the government to temporarily designate as 'public works' areas around generating stations and the like, including streets, buildings, and land. It allowed police to control access, demand identification, and conduct searches.¹¹² A regulation designating the Interdiction Zone a public work was passed on June 3rd and quietly posted on the province's "e-laws" website on June 16th, ten days before the conference.¹¹³ Even Toronto's police chief remained unaware of the regulation until the day before the conference. When it came to light, as officers began to apply it to detain and search, it took the public by surprise.¹¹⁴

Over the course of the two-day conference, widespread disorder played out on the streets of Toronto. A group of vandals carried out a rampage, damaging storefronts,

¹¹¹ *Public Works Protection Act*, RSO 1990, c P.55. The act was repealed by the *Security for Electricity Generating Facilities and Nuclear Facilities Act*, 2014, SO 2014, c 15, Schedule 1, s. 1. For a more detailed discussion of how and why this measure was employed, see Pue, Diab & Jackson, *supra* note 108 at 197 to 201.

¹¹² Former Ontario Chief Justice Roy McMurtry, in his "Report of the Review of the Public Works Protection Act" (Toronto: Ministry of Community Safety and Correctional Services, 2001), cast doubt on the constitutional validity of the act, noting, at 18, its definition of 'public work' was "extraordinarily broad".

¹¹³ Pue, Diab & Jackson, *supra* note 108, at 197 to 201.

¹¹⁴ As the *OIPRD Report*, *supra* note 107 noted, "The manner in which the existence of a *Public Works Protection Act* and its application during the G20 came to light, and the way in which the police handled communications around it, was a public relations disaster. The media learned about the PWPA and its new regulation as a result of arrests made after the regulation had come into force. [...] It certainly appeared as though the regulation had been passed in secret – and that's what the media reported."

intimidating civilians, and burning police vehicles, while police stood by.¹¹⁵ Law abiding individuals were confined and abused at police hands, including a kettling incident in which police boxed in 400 people at a downtown intersection in torrential rainfall for 4 hours.¹¹⁶ Over 1,000 people were arrested and held at length in a make-shift custodial facility.¹¹⁷ Roughly only a third were charged.¹¹⁸ Of the 321 people charged, 204 had charges stayed, leading one commentator to conclude that “nearly 90 percent of those arrested ... were quite possibly innocent of any wrongdoing.”¹¹⁹

An extensive report on the event by the Office of the Independent Police Review Director faulted Toronto police for poor coordination on the ground and also noted that “[d]uring the planning process, the Toronto Police Service struggled to understand its role, planning responsibilities and the legal authority on which it would act in respect of certain G20 Summit issues.”¹²⁰ The *Foreign Missions Act* gave the RCMP “primary responsibility” over security for the conference, while Toronto Police retained authority over most of the city; yet command was divided between, on the one hand, the Integrated Security Unit, involving the RCMP, Toronto, and Ontario Police (led from a Unified Command Centre) and, on the other hand, Toronto’s Major Incident Command Centre (MICC) at Toronto

¹¹⁵ Christie Blatchford, “Black Bloc Interrupted Soldier’s Cortège: Blair” (1 July 2010) *Globe and Mail*; Postmedia News, “Ottawa Agrees to Pay Businesses Nearly \$2M in G8/G20 Compensation” (15 June 2011) *National Post*.

¹¹⁶ *OIPRD Report*, *supra* note 107 at 142–157; Kelly Grant, “Police Chief Offers No Apologies for G20 Tactics”, *Globe and Mail* (28 June 2010).

¹¹⁷ See *OIPRD Report*, *supra* note 107, Chapter 9, detailing numerous deficiencies and operational concerns with the use of the “Prisoner Processing Centre,” set up in a series of vacant buildings five kilometers east of downtown, including a lack of sufficient planning or communication around processing, holding, searching, and releasing detainees.

¹¹⁸ James Stribopoulos, “The Rule of Law on Trial: Police Powers, Public Protest and the G20” in Margaret Beare & Nathalie Des Rosiers, eds, *Putting the State on Trial: The Policing of Protest during the G20 Summit* (Vancouver: University of British Columbia Press, 2015), 105 at 105–106.

¹¹⁹ *Ibid.*

¹²⁰ John W Morden, Toronto Police Services Board, *Independent Civilian Review into Matters Relating to the G20 Summit* (Toronto: Toronto Police Services Board, 2012) at 124.

Police headquarters.¹²¹ At crucial moments of civil unrest, communications and coordination between the two command centres failed, and “[c]ommunication within the MICC and between the MICC and field officers broke down often.”¹²² Among the many questions arising from the event is whether some of the confusion as to jurisdiction – along with the controversial use of a World War 2 statute to authorize the Toronto Police zone – might have been avoided had the RCMP created and policed a larger zone.¹²³ Yet even if the RCMP had done so, many matters of core concern to affected citizens would still have been decided here, as in Quebec City, by police acting at their sole discretion and without oversight or review, including size and location of the various zones, procedures for applying and obtaining passes, and eligibility.

A further point to note is the contrast presented that same year by the Vancouver Olympics. Preparations for policing the 2010 Olympics in Vancouver and Whistler were more extensive, began earlier, and involved more effective coordination among city, provincial, and federal governments, along with Vancouver Police and the RCMP.¹²⁴ In the year prior to the Olympics, provincial and civic debate led to the amendment of the province’s *Vancouver Charter*¹²⁵ and the iterative crafting of a special Vancouver bylaw for the games.¹²⁶ The bylaw authorized restrictions on commercial speech, closure of public areas and streets, airport-style security check-points at certain venues, warrantless searches of persons and belongings, and surveillance. Lawsuits seeking to test the constitutional validity of the powers were dropped, leaving the *Charter* validity of the

¹²¹ *OIPRD Report*, *supra* note 107 at iii, 21-25.

¹²² *Ibid*, at 38.

¹²³ Pue, Diab & Jackson, *supra* note 108 at 198.

¹²⁴ In British Columbia, the RCMP acts in some jurisdictions as a municipal or provincial force. For further details on the planning and coordination among governments and police, and relevant agreements, see Pue, Diab & Jackson, *supra* note 108 at 203-204.

¹²⁵ *Vancouver Charter*, SBC 1953, c 55.

¹²⁶ City of Vancouver, *Bylaw no 9962 on Vancouver 2010 Olympic and Paralympic Winter Games* (3 December 2009).

bylaw unclear – yet critical policing powers here were at least authorized by law under section 1.¹²⁷ Vancouver Police and the RCMP agreed to a clear division of authority, with the former policing the city of Vancouver and the latter assuming a lead role in security around venues and surrounding spaces. The event unfolded smoothly, with no arrests flowing from breach of the bylaw. In an exemplary way, the details around closures, passes, and checkpoints were formulated not by the police in secret but by elected representatives, in municipal councils and provincial ministries. But a municipal bylaw, meant to address a single event in time, is not an ideal vehicle or appropriate substitute for comprehensive public order police legislation. Powers do not extend beyond city limits; not all cities have the resource to devote to drafting such law; and the gap in law remains a problem for future events.

To conclude this section, it is worth noting how the gap in Canadian law may have shaped police response to the trucker protest in Ottawa. I highlight three salient points. The conduct at issue in Ottawa did not come to an end until police created an exclusion zone in which they arrested and towed those who resisted. (Whether police needed an exclusion zone to carry out the arrests or conduct the evacuation is unclear.) Canada included the power to create exclusion zones in its *Emergency Regulations*,¹²⁸ demonstrating a belief that (a) the power was not available under other law, and (b) it was necessary. And until either government enacted law to create secure zones, there was confusion among police and the public as to who could do what.

Part III: Filling the gap

Two issues arise: do police need a power to create exclusion zones and how best to submit them to the rule of law?

In some circumstances, police may need to regulate or close off access to public space as a primary means of keeping safe the people at a meeting of heads of state, a

¹²⁷ For details, see Pue, Diab & Jackson, *supra* note 108 at 206-207.

¹²⁸ *Supra* note 26.

sporting event, or a protest. Too many people too close a sensitive site is a recipe for chaos, injury, and property damage. Secure zones restrict but can also facilitate the freedom to move, express, protest, or assemble during large events by helping to route traffic and to create dedicated, orderly spaces for protest and assembly. Whether in a given case an exclusion zone is necessary, and whether the measures involved in its use are proportionate to the rights affected, will depend on the facts.

If police should have the power to create secure zones and – as Part II has shown – the law on point is at best unclear, what is the most effective way to ensure that police exercise the power in accordance with the rule of law? For without clear authority in law to create large exclusion zones, police are left to deal with a complex problem without guidance and with limited oversight.

One school of thought suggests that this is as it should be. Former Chief Justice of Ontario, Roy McMurtry has written that it would be “quite impractical and unnecessary to legislate an extensive code of police powers [for large gatherings] given their common law and statutory responsibilities to generally maintain public order.”¹²⁹ It is not “advisable,” he suggests, “to be prescriptive in anyway regarding what actions to police can take since they must discuss with the situation warrants, while at the same time considering individual rights and freedoms.”¹³⁰

But the recent history of public order policing supports a different view. Police, event planners, citizens have faced challenges sorting out issues around these zones; uncertainty has led to confusion, disorder, and violence involving police; accountability has suffered. Without clear statutory authority, police have been left to decide, behind closed doors, without effective oversight or review and without *a clear test or criteria*: whether circumstances require an exclusion zone; where and how big it will be, and how long it will last; who may enter, who must identify themselves, and who may be searched

¹²⁹ McMurtry, *supra* note 113 at 34.

¹³⁰ *Ibid.*

or detained. Homeowners, businesses, and other citizens have been left in the dark about all of these matters until the eve of or the middle of an event. As examples from Britain and Australia demonstrate, legislation could provide guidance on the policing of large events without unreasonably restricting police discretion.

A legislative framework would also be a more effective means of protecting *Charter* rights. It would reflect the idea that Justice Dickson, as he then was, articulated in *Hunter v Southam Inc* that *Charter* rights are more effectively protected by measures designed to avoid a breach rather than having courts referee police conduct after the fact.¹³¹

Legislation would also be preferable to temporary or emergency law, or to court injunctions. Federal and provincial lawmakers would have the benefit of careful deliberation, informed debate, research, and consultation. Public Order Policing Acts could be comprehensive, general, and indefinite in nature rather than temporary or issue specific.

a. British and Australian models

No single piece of legislation from elsewhere in the Commonwealth provides a complete model on which to draw, but law from the UK and Australia contains valuable tools. Each of the examples considered here represents a recognition that civil liberties should not be interfered with by police without clear and specific statutory authority. Each is also a good example of how, in distinction to common law powers created piecemeal, a statute can address a matter more extensively and strike a balance between liberty and security in ways individual police or courts may not.

¹³¹ [1984] 2 S.C.R. 145. James Stribopolous, *supra* note 118, at 107-108 and 114-116, makes many of the same arguments. The lack of a clear definition of public order police powers in legislation violates the rule of law requirement to provide citizens fair notice of the limits of lawful authority; hinders police accountability (rendering it "more theoretical than real"); leaves uncertain when or whether powers used at a given event were lawful; and overstates the impediment to police posed by "specif[ying], at least in general terms, the sorts of circumstances in which the police can close roads, erect security fences and barriers, employ crowd-control measures, and designate protest zones".

UK legislation

The United Kingdom's *Public Order Act* of 1986 has provided a tool for policing premised on a different approach from that entailed in erecting an exclusion zone.¹³² Instead of authorizing police to create a zone to keep protesters out, protest organizers are required to give police notice of a gathering and police are authorized to disperse unlawful gatherings. Policing large protests has involved police taking steps to route or channel what the act calls 'public processions' or imposing conditions on 'public assemblies'.¹³³

The act defines a "public procession" broadly to include any form of protest or demonstration.¹³⁴ Organizers of a public procession must provide six days' notice to police of the date, time, and place of an intended gathering.¹³⁵ It is an offence to partake of a procession for which notice was not provided.¹³⁶ Where a "senior police officer" reasonably believes a public procession is being held or is intended to be held that "may result in serious public disorder, serious damage to property or serious disruption to the life of the community" she may "give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, [etc.] including conditions as to the route of the procession or prohibiting it from entering any public place specified in the direction."¹³⁷ Where a chief officer reasonably believes that powers to give directions would "not be sufficient to prevent the holding of public processions in that district or part from resulting in serious

¹³² Acts U.K., 1986, c. 64.

¹³³ P.A.J. Waddington, *Liberty and Order: Public Order Policing in a Capital City* (London: University College London Press, 1994), chapter 7.

¹³⁴ *Supra* note note 132, s. 11(1), subsection letters omitted.

¹³⁵ *Ibid*, s 11(5).

¹³⁶ *Ibid*, s. 11(7).

¹³⁷ *Ibid*, s. 12(1). Other subsections define examples of what constitutes "serious disruption" including noise that generates intimidation or distress.

public disorder," she can apply to the council of the district for an order prohibiting all public processions in the district for up to 3 months.¹³⁸

An analogous set of conditions pertain to "public assemblies," a term not defined. In this case, a senior officer may "give directions imposing on the persons organizing or taking part" in an assembly where she reasonably believes it "may result in serious public disorder", damage, or disruption to the life of the community.¹³⁹ In England and Wales, an officer may impose "such conditions as appear to the officer necessary to prevent the damage, disorder" [etc]; in Scotland, the power is limited to conditions as to maximum duration and number of persons involved.¹⁴⁰

The *Public Order Act* also creates the categories of "disruptive trespassers" and "trespassory assemblies" and the offence of "aggravated trespass," which occurs when a person trespasses on land or intimidates or disrupts others carrying on lawful activities.¹⁴¹ A "trespassory assembly" is any assembly of persons on land to which the public has either no right of access or a limited right and is conducting itself in a manner that a chief police officer reasonably believes "may result — (i) in serious disruption to the life of the community, or (ii) where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, in significant damage to the land, building or monument."¹⁴² A prohibition order against a trespassory assembly may last up to four days and extend up to five miles from the specified site.¹⁴³

Civil libertarians have been critical of the *Public Order Act* for, among other reasons, replacing older riot provisions of UK criminal law with "vaguely defined offences

¹³⁸ *Ibid*, s. 13(1). In the City of London, the Commissioner of Police would apply to the Secretary of State for the order (s. 13(4)).

¹³⁹ *Ibid*, s 14(1).

¹⁴⁰ *Ibid*, s 14(1A).

¹⁴¹ *Ibid*, Part V. Notably, the act specifically excludes "highways and roads" from the definition of land.

¹⁴² *Ibid*, s. 14A.

¹⁴³ *Ibid*, s. 14A(6).

that leave enormous discretion in the hands of the police that can be used to harass marginal groups".¹⁴⁴ The act also provides police powers that are "not subject to effective judicial or political oversight or accountability".¹⁴⁵ By imposing rules on a wide range of gatherings, including picketing, the bill risks "criminalizing the entirely peaceful exercise of democratic rights."¹⁴⁶ One retort is that few of the powers or obligations in the act were new; it merely codified powers available to the police at common law and substituted a national requirement to give notice of a protest for various pre-existing local rules.¹⁴⁷ A study published in the mid-90s notes that of the 150 marches for which notice was provided each year since the passage of the act, none had been refused and conditions were imposed in only four.¹⁴⁸

The UK Parliament has since amended the *Public Order Act* to expand police powers. An act passed in 2022 widens the range of conditions police can impose on protests.¹⁴⁹ A bill currently before Parliament would add new offences corresponding to increasingly common protest techniques, including the offences of 'locking on,' 'tunneling,' and 'interference with use or operation of key national infrastructure.'¹⁵⁰

Australian legislation

The New South Wales *APEC Meeting (Police Powers) Act 2007* authorized police to create an exclusion zone and specified rules for policing it.¹⁵¹ The act contemplated an "APEC Security Area" and an "APEC Period." Both were defined terms, with detailed

¹⁴⁴ Waddington, *supra* note 133 at 31.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid* at 32-34.

¹⁴⁸ *Ibid* at 37.

¹⁴⁹ *Police, Crime, Sentencing and Courts Act, 2022*, Acts UK, 2022, c. 32, Part 3 of the Act.

¹⁵⁰ "Public Order Bill", Bill 116 2022-23, UK.

¹⁵¹ The act was repealed soon after the event, but a copy can be found online: (http://www.austlii.edu.au/au/legis/nsw/repealed_act/ampa2007252/index.html#s1).

maps of the area included in a schedule and the period extending from August 30 to September 12, 2007. The act permitted police to impose “check points, cordons or roadblocks” in and around the APEC Security Area, and to stop and search without a warrant people seeking to enter or move through the Area. It permitted police to seize anything on a list of “prohibited items,” including spray-cans and flammables.¹⁵² Police could also close roads inside the Security Area, but only for the “shortest possible period” and for limited purposes, including the safety of persons travelling to meetings and the protection of property.¹⁵³

The *APEC Meeting (Police Powers) Act* also created the offence of entering a “restricted area” without “special justification,” a defined term. This could include the need “to be in (or pass through) the area for the purposes of [a] person’s employment, occupation, profession, calling, trade or business or for any other work-related purpose”.¹⁵⁴ A person alleged to have obstructed police or damaged property during the APEC period was subject to a rebuttable presumption against the granting of bail. Other sections provided for the use of force by persons assisting police and for maintaining a list of “excluded persons.”

Some of the measures in either of these acts may not withstand scrutiny under Canada’s *Charter*. The general thrust of each act likely would. Lawmakers can debate limits on powers and these can be tested in court. The first step to fulfilling a commitment to the rule of law in this context is to decide on what limits are desirable and to provide at least a minimal degree of clarity and guidance to law enforcement.

¹⁵² *Ibid*, Part 3.

¹⁵³ *Ibid*, Part 3, Division 5.

¹⁵⁴ *Ibid*, s. 37.

b. Jurisdiction over public order policing

The issue of jurisdiction over public order policing is not straightforward. Both provincial and federal governments regulate police conduct.¹⁵⁵ The topic of public order straddles federal and provincial heads of power. Depending on the type of event or the police power at issue, authority to make law might fall within the federal government's purview to regulate police conduct under the power in section 91(27) of the 1867 Constitution over criminal procedure or the power in the preamble to section 91 to make law to preserve "peace, order, and good government".¹⁵⁶ It might also or instead fall within the power of Canada's provinces regulate police conduct in section 92(14) over the "administration of justice in the province".¹⁵⁷

There are reasons that both provincial governments and Canada should pass public order policing acts. They would not be redundant. They would address potential conflicts between federal and provincial or municipal forces at a given event. They would be tailored to the kinds of events falling within the jurisdiction of either government. Without a statute at both levels, gaps in the law would remain.

Provincial legislation would be an appropriate vehicle for setting out rules governing events of a local or provincial nature likely to be policed by municipal or provincial police (or the RCMP acting as such), including sporting events, fireworks, religious celebrations, and protests or demonstrations. A provincial public order act could provide effective guidance on matters in addition to exclusion zones, such as event security, managing

¹⁵⁵ Statutes constituting police forces, setting out police powers, and subjecting police to accountability or review can be found in both federal and provincial contexts, including the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10 and Ontario's *Community Safety and Policing Act*, 2019, S.O. 2019, c. 1, and in the investigatory and arrest powers found in the *Criminal Code*, provincial Offence Acts, and statutes such as Ontario's *Keeping Ontario Open*, *supra* note 63 and Alberta's *Critical Infrastructure Defence Act*, *supra* note 61.

¹⁵⁶ *The Constitution Act, 1867*, 30 & 31 Vict, c 3.

¹⁵⁷ *Ibid.*

pedestrian and vehicle traffic, facilitating protest and expression, and law enforcement (offences against the act).

Federal legislation would address events of a national or international nature likely to be policed by the RCMP (or several forces acting in coordination), such as major sporting events (Olympics, FIFA World Cup), intergovernmental conferences, and nation-wide protests. The bill would address all of the items noted above – closures, traffic, facilitating protest, law enforcement – but also interagency jurisdiction, planning, and coordination.

Legislation at both levels could be structured analogously to the UK's *Public Order Act, 1986*, with its recognition of two kinds of gathering (public processions and assemblies) – or Canada's *Emergencies Act*, with its four kinds of emergency – by attaching specific powers to certain kinds of events. Powers and responsibilities could be tailored to different kinds of events.

c. Content of public order policing legislation

A public order act at either the provincial or federal level, addressing various kinds of events, should define what constitutes a secure zone (the closure or regulation of any form of access to public and private space). It should set out a test or set of criteria for creating an exclusion zone based on the principles of reasonable necessity and proportionality. Restrictions imposed on admission and the use of passes should also be subject to these principles. Rules should be set out on compensating businesses and homeowners directly and significantly affected. Police decisions about imposing secure zones, admission, passes, and compensation should be subject to an expeditious form of independent review. Whether Canada should adopt a notice requirement for planned gatherings is an important but complex question, and beyond the scope of this report.

A federal *Public Order Policing Act* could be an occasion to repeal outdated provisions in the *Criminal Code*, including those prohibiting involvement in a riot or unlawful assembly, or those of questionable utility, such as the offence of intimidation or

the power to arrest for breach of the peace.¹⁵⁸ Instead of overlapping and often confusing offences being used in this context, new law in this area could support law enforcement and provide clarity to the public by setting out a clearly escalating scale of offences for involvement in violent protest.¹⁵⁹ The act could also require that to detain and search in a secure zone, police need reasonable grounds to believe a public order offence is being committed. This would premise the use of these powers on other police powers circumscribed in the act.

Conclusion

After invoking an emergency in February of 2022, Canada passed a regulation explicitly providing authority to create an exclusion zone. The power was not clearly available under other legislation, aside from provincial emergency law. The “secure area” police created in Ottawa in February represented a significant incursion on fundamental rights, by virtue of its scale and duration and the rights affected: mobility, expression, assembly. In a manner similar to earlier public order events in Canada, decisions made in Ottawa about whether an exclusion zone was reasonably necessary and proportionate to security concerns, and details about its use, were made behind closed doors. In this case, the Commission serves as a means of accountability and review, but future uses of exclusion zones may not. Police and the public would be better served by legislating on public order police powers so that large protests and other events unfold with fewer surprises and in accordance with the rule of law.

¹⁵⁸ *Criminal Code*, supra note 57, ss 31, 63-68, and 463. See the discussion of section 31 in Steven Penney and Colton Fehr’s Report to the Commission, supra note 60, noting that “police have ample powers to arrest people who have committed or are ‘about to commit’ offences involving dangerous or violent conduct.” See also Stribopoulos, supra note 118 at 116-118, assessing the abuse of this power at the G20 in 2010 in support of its repeal.

¹⁵⁹ I thank Professor Kent Roach for suggesting this.