

The Keeping Ontario Open for Business Act Forgets about Human Rights

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By: Alex Neve

What lessons have we learned from the debacle as to how police and governments responded to the occupation, blockades and protests associated with the self-styled Freedom Convoy earlier this year? Is there an appreciation of the range of human rights concerns that were in play and sold short; and are any reforms being guided by a clear human rights framework?

Early indications are not particularly encouraging. Notably, proposed legislative reforms that have been brought forward by Doug Ford's government in Bill 100, the Keeping Ontario Open for Business Act, 2022, miss the mark by a longshot.

Bill 100 is primarily motivated by the truckers' blockade of the Ambassador Bridge linking Windsor and Detroit, which brought commercial traffic across the busiest Canada/US border crossing to a grinding

halt for six days in February 2022. Billions of dollars of goods are estimated to have been delayed during that time and the economic impact was considerable.

In response, the Bill focuses on “protected transportation infrastructure”, which includes:

"(a) any land or water border crossing point between Ontario and the United States, (b) any airport that regularly accommodates flights directly between Ontario and a country other than Canada and that is prescribed by the regulations, and (c) any other transportation infrastructure that is of significance to international trade and that is prescribed by the regulations."

To avoid a repeat of the Ambassador Bridge blockade, Bill 100 makes it an offence to,

“impede access to or egress from, or the ordinary use of, protected transportation infrastructure, or directly or indirectly cause such access, egress or ordinary use to be impeded, if the impediment has or is reasonably expected to have the effect of, (a) disrupting ordinary economic activity; or (b) interfering with the safety, health or well-being of members of the public.”

This applies whether a person is acting individually or in concert with others, includes “the use of a vehicle or by any other means” and extends to providing assistance, such as supplies or fuels, that “knowingly aids” a person involved in such a blockade.

The prohibition does not apply if “the effect of the impediment, (a) is or is reasonably expected to be trivial, transient or minor in nature; or (b) can easily be avoided by persons attempting to access, use or depart from the protected transportation infrastructure.” And there are three specified exceptions, including when the activity in question has been lawfully authorized, is required pursuant to legislation or a court order, or is being carried out by a peace officer in the course of their duties.

So the upshot is that protests that block the ordinary use of border crossings (land or water) between Ontario and the United States, airports with flights outside Canada or any other designated transportation infrastructure that is of significance to international trade are prohibited if they disrupt ordinary economic activity or interfere with public safety, health or well-being. Protests with trivial, transient or minor impact are okay, as are those that can easily be circumvented by people attempting to use the transportation infrastructure in question. Protests that have been authorized by a responsible government official, legislation or court order similarly have a green light.

How does this measure up against Ontario’s binding international human rights obligations, particularly those guaranteeing the fundamental freedoms of expression, association and assembly which are at the heart of the crucial right to peaceful protest? Provincial governments are not always famous for recognizing and accepting that the country’s international human rights obligations apply, not only to the federal government, but to them as well. When Canada ratifies or accedes to human rights treaties those obligations apply to all levels of government in the country.

International law, notably in the International Covenant on Civil and Political Rights, which Canada acceded to more than 45 years ago, in 1976, explicitly recognizes limitations on those freedoms in the "interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others." That is by no means a carte blanche, UN human rights bodies and experts have made it clear that such restrictions must be in keeping with the principles of legality, proportionality and necessity, and cannot be discriminatory.

Right away what is notable is that international human rights standards do not provide any blanket exception related to "ordinary economic activity" as such, or public "well-being", whatever that vague and undefined latter term is intended to entail. That the only allowance for blockades of that nature, particularly those interfering with economic activity, would be when their impact is "trivial, transient or minor" or when they can "easily be avoided" is surely no comfort. Essentially that is nothing more than permission to conduct symbolic, ineffective and inconsequential blockades targeting economic activity. Nor is it sufficient that blockades that have official permission or legal authorization from a government official, or through legislation or a court order, are allowed to proceed. Needless to say, such permission or authorization is routinely denied, especially when powerful economic interests are in play.

Let us not forget that this is about much more than what happened on the Ambassador Bridge. This sets a legal framework with wide application across Ontario for years to come. And it is an obvious and very troubling overreach. That is why we must be so vigilant, and why it is crucial that Bill 100 be substantially reformed. What is at stake is far too precious.

Blockades and protests that seek to interfere with economic activity are often the most impactful. UN human rights experts, such as the UN Special Rapporteur on the rights of peaceful assembly and of association have highlighted how important that is for groups and social movements representing or made up of groups that are marginalized in society and excluded from power. In Ontario that would certainly include blockades organized by Indigenous peoples, groups protesting systemic racism, and movements drawing attention to poverty, homelessness and economic inequality. To limit their ability to challenge economic power to situations with trivial, transient or minor economic impact, or instances when they have somehow unexpectedly managed to get a permit from government officials, simply does not sufficiently safeguard peaceful protest rights. In many ways it makes those rights meaningless.

This is not hypothetical. One of the major concerns that surfaced throughout the course of the Freedom Convoy occupation, blockades and protest were the glaring double standards evident in the take-it-easy, go-slow police response to this situation as compared to aggressive and frequently violent responses to protests and blockades by Indigenous land defenders, anti-racism groups and environmentalists. Already frequently subject to troubling violations of their protest rights, Bill 100 would seemingly enshrine that possibility in law.

Notably absent from Bill 100 are meaningful provisions that focus on the human rights harms that were perpetrated by people involved in Freedom Convoy activities, including tactics that caused physical and mental suffering for members of the public, and numerous instances of racist, misogynist and homophobic threats, harassment and assaults against people living in or passing by areas where blockades and protests were being held. That is not surprising perhaps, given that the legislation is entitled the *Keeping Ontario Open for Business Act* as opposed to something along the lines of the *Upholding Peaceful Protest and Protecting Human Rights in Ontario Act*. When the priority is that clear, the human rights shortcomings are sadly predictable.

So in both directions Bill 100 fails to deliver on human rights. It sets the ground for banning peaceful protests that are entirely consistent with the province's international human rights obligations. And it does not grapple with setting legitimate restrictions when they are needed to better ensure that protesters themselves are not given free rein to abuse human rights.

The next step? Bill 100 should be rewritten. It urgently needs a strong human rights framework that should include:

- Explicit acknowledgement of the government's human rights obligations with respect to peaceful protest, including under the Charter of Rights and Freedoms, the Ontario Human Rights Code, and international human rights standards.
- Delineation of the strict limitations on peaceful protest that are permissible, in keeping with international human rights principles and Canadian jurisprudence.
- Recognition of the government's authority and responsibility to take action, in keeping with international human rights obligations, when the actions of protesters result in human rights abuses against others.
- Establishment of clear standards to ensure that police responses to protest, when justified, are lawful and in keeping with requirements to use the least force possible.
- Development of independent oversight to ensure that government and police responses to different protests are consistent and not discriminatory.

Events at the Ambassador Bridge, in downtown Ottawa and elsewhere in the province during the self-styled Freedom Convoy have put protest and human rights in the spotlight. We have been reminded of the fundamental importance of peaceful protest, had debates about the nature and tactics of protest, and come to realize that in exceptional circumstances human rights also allow and, in fact, may require police intervention to curtail harmful conduct. In response we need thoughtful reflection and reform. Bill 100, currently, does neither. But there is still time to get it right.

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About the author

Alex NeveAlex Neve believes in a world in which the human rights of all people are protected. He served as Secretary General of Amnesty International Canada’s English Branch from 2000 - 2020. In that role he carried out numerous human rights research missions throughout Africa, Asia and Latin America, and closer to home to such locations as Grassy Narrows First Nation in NW Ontario and to Guantánamo Bay. He speaks to audiences across the country about a wide range of human rights issues, appears regularly before parliamentary committees and UN bodies, and is a frequent commentator in the media. Alex is a lawyer, with an LLB from Dalhousie University and a Master’s Degree in International Human Rights Law from the University of Essex. He has served as a member of the Immigration and Refugee Board, taught at Osgoode Hall Law School and the University of Ottawa, been affiliated with York University's Centre for Refugee Studies, and worked as a refugee lawyer in private practice and in a community legal aid clinic. He is a Senior Fellow at the Graduate School of International and Public Affairs at the University of Ottawa and serves on the Board of Directors of the Centre for Law and Democracy. Alex has been named an Officer of the Order of Canada and a Trudeau Foundation Mentor. He is a recipient of a Queen Elizabeth II Diamond Jubilee Medal. He has received honorary Doctorate of Laws degrees from St. Thomas University, the University of Waterloo and the University of New Brunswick.

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