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Commissioned Paper:
Freedom of Peaceful Assembly and Section
2(c) of the *Charter*

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

Report for the Public Order Emergency Commission

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Executive Summary

Those who participated in the 2022 protest convoy were exercising their rights under the *Canadian Charter of Rights and Freedoms* when the federal government declared an emergency, creating a large secure zone and dispersing the truckers' demonstration. These rights, including and especially freedom of peaceful assembly, form the backdrop to consideration of the federal government's decision to declare an emergency under the *Emergencies Act* and enact regulations for bringing the demonstrations to an end.

Though it is one of the *Charter's* fundamental freedoms, s.2(c)'s freedom of peaceful assembly received little or no attention in the first 40 years of *Charter* interpretation and jurisprudence. The circumstances of the protest convoy and its dispersal under the *Emergencies Act* bring s.2(c) into the spotlight and call for a discussion of the guarantee.

This background paper proposes a conception of peaceful assembly under the *Charter* that can guide and inform the work of the POE Commission. Specifically, the paper examines s.2(c)'s underlying values and purposes to create a foundation for peaceful assembly. In addition, it considers how s.2(c) should be interpreted, proposing a definition of peaceful assembly and standard of breach. Finally, it considers justifiable limits on assembly under s.1 of the *Charter*, identifying principles that guide the determination of reasonable limits. In developing this proposal, the analysis relies on the *Charter* jurisprudence, and draws additionally on other sources, including the First Amendment of the US Constitution, and international human rights guarantees.

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I. Introduction

Cascading public assemblies, movements, and protests in recent years have energized freedom of assembly, bringing this concept to the forefront of rights discourse. A dynamic that has surfaced in international, U.S., and Canadian settings calls attention to the distinctive role public assemblies play, leveraging collective action to propel a dynamic form of experiential democracy. The impetus to assemble as a collective and create a public presence is ingrained in tradition and entrenched in the democratic imagination. Assemblies are enormously variable and can be notoriously fluid, unpredictable, and volatile, inspiring hopes for transformative change and yet stoking fears of collective frenzy and a descent into rank disorder. In 2022, a movement to protest vaccine mandates led to a protest of unprecedented scope and duration in Canada's capital city, and other sites across the country.

In January of 2022, a convoy of trucks set out from British Columbia with Ottawa as the destination for a protest against COVID-19 vaccine mandates. Building unexpected support and publicity along the way, the convoy arrived in Ottawa late in January. Far from unannounced, truckers celebrated their arrival and the protest quickly received international attention. A convoy of truckers and their trucks, who were joined by professing sympathetic political and ideological purposes, numbered in the hundreds. The protest locked the capital city down for more than two weeks, causing untold distress and disruption to Ottawa residents and businesses.¹

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With the convoy settled in and little prospect of a voluntary dispersal, the federal government declared a public order emergency under s.17(1) of the *Emergencies Act*, and Cabinet adopted the Emergency Measures Regulations (EMR) and Emergency Economic Measures Order (EEMO).² Section 19(1) of the *Act* authorizes the government to prohibit or regulate public assemblies and to designate and secure “protected places” (*i.e.*, create secure or exclusion zones).³ The public order emergency was declared on February 14th and ended seven days later on February 22, 2022. That was the time it took to disperse the convoy assembly and remove trucks from the streets of Ottawa.⁴

The Preamble of the *Act* declares that special temporary measures are subject to the *Canadian Charter of Rights and Freedoms* and *Canadian Bill of Rights*, and “have regard” to the *International Covenant of Civil and Political Rights* (“ICCPR”).⁵ Freedom of peaceful assembly, which is at the center of the Ottawa convoy protest and its dispersal, is protected by s.2(c) of the

earlier draft of this paper and making invaluable suggestions. As stated in the text, the paper presents my academic analysis and views, and not those of the Commission.

¹ For a sympathetic account of the Ottawa convoy protest, see A. Lawton, *The Freedom Convoy: The Inside Story of Three Weeks That Shook the World* (Toronto: Sutherland House Books, 2022).

² *Emergencies Act*, R.S.C. 1985, c.22, s.17(1); Emergency Measures Regulations & Emergency Economic Measures Order, *Canada Gazette*, Part II, vol. 156 Extra (February 15, 2022).

³ Section 19(1) provides that a public assembly “that may reasonably be expected to lead to a breach of the peace” may be prohibited or regulated.

⁴ The protest against vaccine mandates was not limited to the Ottawa demonstration, but included assemblies that blocked the Ambassador Bridge and disrupted the movement of traffic and goods at the Alberta-US border. These and other sites that form part of the background to the decision to declare a public order emergency are noted but not discussed. The Ottawa demonstration poses the key s.2(c) issues that are addressed in this paper.

⁵ Preamble of the *Act*, *supra* note 2. See the *Canadian Charter of Rights and Freedoms*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11; see also ICCPR, 19 December 1966, 999 UNTS 171 (entered into force March 23, 1976; accession by Canada on May 19, 1976).

Charter and article 21 of the *ICCPR*.⁶ Though the rise and prevalence of COVID-19 restrictions on public gatherings had already lifted its profile, the protest convoy and its dispersal under emergency powers is a catalyzing moment in the history of peaceful assembly under the *Charter*. Alongside a variety of protests and demonstrations in recent years, the protest convoy has drawn s.2(c) of the *Charter* into the spotlight. In combination, these events place s.2(c)'s freedom of peaceful assembly at a crossroads, not simply presenting an opportunity, but also posing a challenge – at last – to acknowledge and protect this guarantee.

Forty years after the *Charter*'s enactment in 1982, s.2(c) has not received an authoritative interpretation. There is no definition of peaceful assembly in Supreme Court of Canada jurisprudence, and no doctrinal framework to determine the permissibility of limits on this guarantee. This background paper is a work in progress that addresses that gap in the *Charter* jurisprudence, offering a starting point for a conception of peaceful assembly under the *Charter*.⁷ The paper is commissioned by the Public Order Emergency Commission (“POE” or “Rouleau

⁶ Article 4 of the *ICCPR* allows States Parties to derogate from their responsibilities under the Covenant during public emergencies. Though freedom of assembly is not one of art. 4(2)'s non-derogable rights, derogations from art.21 and other guarantees are subject to a rigorous standard of justification. See General Comment No. 29 on States of Emergency, CCPR/C/21/Rev.1/Add.11, at para. 4 (August 31, 2001) (stating that any measures that derogate are limited to the extent strictly required by the exigencies of the situation, and relate to the duration, geographic coverage, and material scope of the state of emergency).

⁷ The current s.2(c) scholarship includes: B. Alexander, “Exploring a More Independent Freedom of Peaceful Assembly in Canada”, (2018) 8:1 *UWO J. Leg. Stud.* 4; K. Kinsinger, “Restricting Freedom of Peaceful Assembly During Public Health Emergencies”, 30:1 *Constitutional Forum* 19 (2021); K. Kinsinger, “Positive Freedoms and Peaceful Assemblies: Reenvisioning Section 2(c) of the *Charter*”, in D. Newman, D. Ross & B. Bird, eds., *The Forgotten Fundamental Freedoms of the Charter* (Toronto: LexisNexis Canada Inc., 2020) 377; N. Eziani, “Understanding Freedom of Peaceful Assembly in the *Canadian Charter of Rights and Freedoms*”, in Newman, Ross & Bird, *ibid.*, 351; R. Stoykewych, “Street Legal: Constitutional Protection of Public Demonstration in Canada”, (1985), 43:1 *U. Tor. Fac. Law. Rev.* 43.

Commission”), and its purpose is to inform the work of the Commission. The doctrinal framework that it develops and proposes represents the views of its author and not of the Commission. To achieve its purposes the discussion proceeds in three parts.

Part I provides textual and contextual perspectives on peaceful assembly and is divided into three sections. The first offers a brief historical account of public assembly and is followed by a short review of the key textual provisions, including s.2(c) of the *Charter*, that guarantee freedom of peaceful assembly. A third section provides a brief overview of the assembly clause in the First Amendment of the U.S. Constitution, and takes the form of a cautionary tale. That discussion provides the backdrop to the central objective of the paper, which is to propose a framework for interpreting s.2(c) of the *Charter*.

Part II is also divided into three sections that work in combination to build a framework for interpreting and protecting s.2(c). Identifying s.2(c)’s purposes is the first step because, as explained below, differentiating peaceful assembly from its companion guarantees of free expression and free association is an elemental step in the process. The purposes that are distinctive to s.2(c) are the cornerstone of the paper and the foundation for a doctrine of peaceful assembly under the *Charter*.

Once its values and purposes have been identified, the meaning and scope of s.2(c) can be addressed. As explained below, the proposal defines an assembly as a peaceful gathering of two or more persons for a communicative purpose. The government violates s.2(c) when it prohibits or regulates a gathering that falls within that definition. Of particular interest in interpreting the guarantee is the definition of “peaceful” assembly, and whether an assembly

remains peaceful until it becomes violent, or can fall outside the scope of the guarantee when it crosses a lower threshold of engaging in disruptive or unlawful conduct.

The third part of the analysis grapples with the crucial question of the nature, scope, and timing of reasonable limits on assemblies and gatherings. In addressing that task, the paradox is that an element of disruption is inherent in the concept of assembly, but what makes public gatherings powerful – especially in the form of demonstrations and protest movements – unavoidably invites regulation. Developing a doctrinal framework that can address the dilemma of simultaneously protecting and regulating disruption is no small task.

After outlining the details of a doctrinal framework for s.2(c), Part III concludes with reflections on the importance of this moment in the *Charter's* history, and the imperative that should be addressed, of invigorating s.2(c)'s peaceful assembly guarantee. Without clarity and a doctrinal framework of its own, s.2(c) is likely to remain in hiatus, staying in place as a stalled and even a failed *Charter* guarantee. Without purporting to provide all the answers, this paper aims to propel s.2(c) into the foreground and motivate debate about the role this guarantee plays in promoting and protecting the *Charter's* democratic objectives.

II. Background perspectives on freedom of assembly

A. A venerated tradition

If gatherings convene to serve any number of purposes or none at all, meeting with one another is an imperative of human behaviour, and assembling to form a collective presence in public is an age-old practice with deep roots in Britain, the US, and Canada. In charging a jury in 1839, Baron Alderson spoke of transmitting the right of assembly “unimpaired to posterity” and

declared that “the constitution of this country does not ... punish persons who, meaning to do that which is peaceable in an orderly manner,” are “only in error” in their views.⁸

History-defining movements are part of a tradition that values public assembly as a vital cultural practice of American democratic society. Before and from colonial times, public assembly was revered as a transformative agent of social and democratic evolution. Assemblies, gatherings, and movements have played a powerful and salutary role in propelling and shaping change, especially at critical moments in U.S. constitutional history.⁹ That history counts antebellum abolitionism and women’s suffrage among the 19th century movements of the disenfranchised that brought “a different lived experience” to the assembly clause, providing a “visceral reminder” of the importance of protecting that right.¹⁰ In addition, the history of assembly encompasses the rise of labour and other movements, as well as social, religious, political and cultural causes at a local level.¹¹ Even a brief account of this history must mention of insidious limits on freedom of assembly, like 19th century American laws that prohibited African Americans from congregating or attending gatherings, including for religious worship.¹²

⁸ Cited in T. Abu El-Haj, “The Neglected Right of Assembly”, 56 *UCLA L. Rev.* 543 (2009), at 566-67 (“Neglected Assembly”).

⁹ J. Inazu, “The Forgotten Freedom of Assembly”, 84 *Tulane L. Rev.* 565 (2010), at 570 (“Forgotten Assembly”)(exploring the pattern of assembly in six periods of American history, from the closing years of the 18th century to the mid-20th century).

¹⁰ J. Inazu, *ibid.* at 588 (also quoting Akhil Amar, *The Bill of Rights: Creation and Reconstruction*).

¹¹ “Streets remained important places for political, social, and, increasingly, ethnic gatherings into the late 19th century”. T. Abu El-Haj, “All Assemble: Order and Disorder in Law, Politics, and Culture”, 16 *J. of Constitutional Law* 949 (2014), at 969 (“All Assemble”).

¹² J. Inazu, “Forgotten Assembly”, *supra* note 9, at 584 (stating that these restrictions did not simply silence political dissent but were an assault on an entire way of life, “suppressing worship, education, and community among slave and free African Americans”). See also J. Hansford, “The First Amendment Freedom of Assembly as a Racial Project”, *The Yale L.J. Forum* 685, at 692-3 (Jan. 20, 2018).

The demonstrations sweeping the US in the 1950s and volatile 1960s included the Civil Rights movement, opposition to the Vietnam War, radical student and political protest, and the rise of women's and gay rights movements. The right of assembly reached an apex in the First Amendment jurisprudence in this period, but then quieted. Recent years have again exposed deep fractures in America's political and social fabric that provoked political protests, like Occupy Wall Street (OWS), Black Lives Matter, and many other movements.¹³ Nor has the rise and hegemony of internet technology dampened the impetus for individuals and groups to gather in physical space, as an act of solidarity, to foreground the needs and aspirations of communities. To the contrary, technology complements and enriches the traditional concept of assembly, and freedom of assembly now includes a concept of virtual or online assembly.¹⁴

Canada also has an enviable history of public engagement through assemblies, protests, and movements that includes signpost events such as the 1919 Winnipeg General Strike and Depression era riots.¹⁵ And, more than fifty years before the 2022 protest convoy, the Abortion Caravan of 17 women set out from Vancouver for Ottawa, where women "occupied" the prime

¹³ See Abu El-Haj, "All Assemble", *supra* note 11, at 957-68 (discussing OWS); Hansford, "Racial Project", *ibid.*; W. Smith, "Policing, Protest, and Rights", (2018), 32:3 *Public Affairs Q.* 185; O. Moulds, "Fracking the Bedrock of Democracy: The United States Policing of Protests Violates the Right of Peaceful Assembly under the ICCPR", (2021), 36:4 *AM U. Intl. Law Rev.* 887; P. Gillham, B. Edwards & J. Noaks, "Strategic Incapacitation and the Policing of Occupy Wall Street in New York City, 2011", (2011) 23:1 *Intl. J. of Research & Policy* 81; N. Winnett, "Don't Fence us in: A First Amendment Right to Freedom of Assembly and Speech", (2005), 3:2 *First Amend. L. Rev.* 465.

¹⁴ See *infra* III.B.d., Virtual or online assembly.

¹⁵ See M. Beare and N. Des Rosiers, "Introduction", in A. Deshman, M. Beare & N. Des Rosiers, eds., *Putting the State on Trial: The Policing of Protests During the G20 Summit* (Vancouver: UBC Press, 2014), at 3-9 (generally describing these historical protest movements).

minister's front lawn, led a rally of 500 women on Parliament Hill, chained themselves to chairs in the visitor's gallery, and shut down the House of Commons.¹⁶

In more recent times, demonstrations at political events and international summits have called police tactics into question.¹⁷ The uprising of Quebec students in 2011-12, styled the "Maple Spring", comprised a series of ongoing street demonstrations that led to "les manifs casseroles", when the city of Montreal joined in, banging kitchen utensils in solidarity, and legislation placing significant restrictions on street demonstrations.¹⁸ And, with engagement in more than twelve cities, the Occupy movement had a significant presence in Canada.¹⁹ In addition, rallies have coalesced around movements for PRIDE, Black Lives Matter, Idle No More, and the inquiry into Canada's murdered and missing Aboriginal women.²⁰ Aboriginal and

¹⁶ See K. Wells, *The Abortion Caravan: When Women Shut Down Government in the Battle for the Right to Choose* (Canada: Second Story Press, 2020).

¹⁷ See generally W. Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: UBC Press, 2000); Deshman, Beare & Des Rosiers, *Putting the State on Trial*, *supra* note 15.

¹⁸ To counter the wave of street demonstrations, the province of Quebec enacted Bill 78, *An Act to enable students to receive instruction from the postsecondary institutions they attend*, S.Q. 2012, c.12 (in force from May 18, 2012 to July 1, 2013). Among other things, Bill 78 required organizers to give notice to the police at least eight hours in advance, of any assemblies involving 50 or more participants). See A. Savard, "Quebec's Wave of Resistance: From the Maple Spring to the General Strike", <https://www.academia.edu/27136524/Quebecs_wave_of_resistance_From_the_Maple_Spring_to_the_general_strike>.

¹⁹ In Canada, the movement had a presence in at least 15 Canadian cities; see generally CBC News, "Occupy Canada rallies spread in economic 'awakening'" (13 October 2011), online: <<https://www.cbc.ca/news/canada/occupy-canada-rallies-spread-in-economic-awakening-1.1031793>>.

²⁰ See generally CBC News, "Canadians hold protests, vigils for black lives lost at the hands of police" (5 June 2020), online: <https://www.cbc.ca/news/canada/canadian-floyd-anti-racism-rallies-1.5599792> (Black Lives Matter); <<https://idlenomore.ca/about-the-movement/>> (Idle No More); "Vancouver rallies for missing, murdered Indigenous women", online: <<https://www.aljazeera.com/news/2022/2/14/vancouver-rallies-for-missing-murdered-indigenous-women>> (missing and murdered Indigenous women).

environmental blockades at Muskrat Falls in Labrador and Fairy Creek and Wet’suwet’en Nation territory in British Columbia have been mounted to protest and stop environmentally concerning economic activities, including logging and pipelines.²¹ Added to the list of public protests are innumerable gatherings that convened across the country, at different times and settings, to protest COVID-19 pandemic restrictions.²²

Even on the briefest of accounts, there is no question as to the pedigree of public assemblies and movements, or the pivotal they play today in shaping Canada’s social and democratic profile.

B. Textual guarantees

Freedom of peaceful assembly is constitutionally guaranteed by s.2(c) and is one the *Charter’s* four fundamental freedoms.²³ In addition, s.1(e) of the *Canadian Bill of Rights* protects freedom of assembly without any prescriptive requirement that it be peaceful in nature.²⁴ In this, the legal and constitutional status of free assembly in Canada aligns with a host of constitutional and human rights instruments that guarantee this entitlement.

²¹ See generally, CBC News, “Battle over Muskrat Falls”, (27 October 2016), online: <<https://www.cbc.ca/news/indigenous/muskrat-falls-what-you-need-to-know-1.3822898>>. Muskrat Falls is a hydroelectric project in Labrador. The Fairy Creek protests and blockade to prevent old-growth logging on Vancouver Island in B.C. are ongoing, since August 2020, as are demonstrations against the pipeline on traditional Wet’suwet’en Nation traditional territory in northwestern B.C.

²² See *infra* note 32 (listing some of the *Charter* decisions arising from these restrictions).

²³ The others are freedom of conscience and religion (s.2(a)); freedom of expression, including the press and media (s.2(b)); and freedom of association (s.2(d)).

²⁴ S.C. 1960, c.44, s.1(e) (guaranteeing “freedom of assembly and association”).

For instance, the First Amendment of the U.S. Constitution includes the “assembly clause”, which guarantees the “right of the people peaceably to assemble”.²⁵ Elsewhere, freedom of peaceful assembly is protected by Article 20 of the Universal Declaration of Human Rights (UDHR),²⁶ Article 21 of the International Covenant on Civil and Political Rights (ICCPR),²⁷ Article 11 of the European Convention on Human Rights (ECHR),²⁸ and Article 15 of the American Convention on Human Rights (ACHR).²⁹ As well, it is included in Article 8 of the International Covenant on Economic and Social Rights (ICESR) and Article 15 of the Convention on the Rights of the Child (CRC, Article 15).³⁰

Despite its roots in the text, s.2(c)’s guarantee of peaceful assembly was neglected and overlooked in the *Charter’s* first forty years, from 1982 to 2022. For most of this history, s.2(c) was rarely considered and barely mentioned in the jurisprudence.³¹ To some extent that changed when pandemic restrictions on gatherings were challenged under s.2, including s.2(c); in some instances, a breach was found and justified under s.1.³²

²⁵ The First Amendment also guarantees freedom of religion and freedom of speech, stating, in part, that “Congress shall make no law ... abridging the freedom of speech”.

²⁶ GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 art 20 [UDHR].

²⁷ 19 December 1966, 999 UNTS 171 art 21, (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

²⁸ 4 November 1950, 213 UNTS 221 art 11, (entered into force 3 September 1953) [ECHR].

²⁹ 22 November 1969, OAS 36 art 15, (entered into force 18 July 1978) [ACHR].

³⁰ 16 December 1966, 993 UNTS 3 art 8, (entered into force 3 January 1976) [ICESCR]; 20 November 1989, 1577 UNTS 3 art 15, (entered into force 2 September 1990) [CRC].

³¹ But see *Mounted Police Association of Ontario v Canada*, [2015] 1 S.C.R. 3, at paras 48, 64 (including s.2(c) in discussion of s.2’s other fundamental freedoms and s.2(d)).

³² See *Koehler v Newfoundland & Labrador*, 2021 NLSC 95 (considering the scope of s.2(c) and rejecting a claim that restrictions on entry to the province violated freedom of peaceful assembly); *Beaudoin v British Columbia*, 2021 BCSC 512 (finding a breach of s.2(c) but concluding that the province’s Gatherings and Events Order did not violate s.2(c)); *Gateway Bible Baptist Church et al. v Manitoba et al.*, 2021 MBQB 219 (finding that restrictions on

The starting point in addressing peaceful assembly's lack of stature in the *Charter* jurisprudence is the text itself. Freedom of peaceful assembly has independent status as one of s.2's cornerstone fundamental freedoms, and must be interpreted and enforced as such.³³ One problem is that s.2(c) has not been differentiated from s.2's other fundamental freedoms.

In *Ontario v Trinity Bible Chapel*, the Court rejected challenges to various COVID-related restrictions on religious gatherings, stating that the interests protected by other s.2 subsections – including freedom of assembly – were “subsumed by the s.2(a) analysis”.³⁴ To this the Court added that, “[t]here is *no value* added by repeating or repackaging the analysis under different constitutional headings,” because the “factual matrix underpinning the various *Charter* claims” was “largely indistinguishable”.³⁵ Leaving aside the point that violating all four of the *Charter*'s fundamental freedoms might constitute a form of “egregious constitutional harm”, the Court's unwillingness to consider each as an independent guarantee is troubling.³⁶

Though freedom of expression and freedom of assembly are not the same, it has been assumed that questions about expressive activity in public space should be addressed under

religious gatherings did not violate s.2(a)(c) & (c)); *Ontario v Trinity Bible Chapel*, 2022 ONSC 1344 (discussed below).

³³ During the drafting of the *Charter*, the government agreed with the recommendation to separate freedom of assembly and freedom of association “to ensure that they are looked upon as separate freedoms”. A. Dodek, ed., *The Charter Debates: The Special Joint Commission on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018), at 142 (*per* then Minister of Justice Chrétien).

³⁴ *Trinity Bible Chapel*, *supra* note 32, at para 115.

³⁵ *Ibid.* (emphasis added).

³⁶ *Ibid.* at para 114. See also *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 34 (not addressing freedom of expression or association because freedom of religion is “sufficient”); *R v Khawaja*, 2012 SCC 69 at para 66 (concluding that if s.2(b) is not infringed there is no infringement of s.2(a) or s.2(d)).

s.2(b).³⁷ In that way, the *Charter's* guarantee of expressive freedom evolved without aligning with s.2(c) and its concept of assembly. Meanwhile, an affinity between peaceful assembly and freedom of association was dampened by s.2(d)'s selective focus on labour relations issues.³⁸ Without being excluded, other forms of associational freedom have played a limited role in informing the interpretation of s.2(d).³⁹

Lost in the first forty years of *Charter* jurisprudence is consideration of peaceful assembly's distinctive values and objectives. Accepting that an assembly or gathering in public space may be engaged in expressive or associational activity, the point in setting the right of assembly apart from ss.2(b) and (d) "is the assembly itself".⁴⁰ Put another way, the assembly is, in its own right, "the constitutional event".⁴¹ In this it is instructive, in reflecting on s.2(c)'s lack of development, to take heed of First Amendment history because there and – even as it was celebrated – the right of assembly became invisible in the U.S. Supreme Court jurisprudence. The problem was that "[t]he rhetorical tributes to assembly in Supreme Court opinions and popular discourse overshadowed what was lacking": a "clear doctrinal framework" for adjudicating assembly clause cases.⁴²

³⁷ See discussion *infra* notes 59, 125.

³⁸ Section 2(c) and (d) both protect collective entitlements, and under s.2(c) the right attaches to the collective entity, or assembly itself, as well as to individuals who participate as members of the assembly. The s.2(d) jurisprudence has been enmeshed in labour issues from the start and is idiosyncratic as a result. See *infra* note 126.

³⁹ See, e.g., *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, and *Harper v Canada (Attorney General)*, 2004 SCC 33 (discussing s.2(d) in the context of federal election limits on third party spending).

⁴⁰ Abu El-Haj, "All Assemble", *supra* note 11, at 1033.

⁴¹ T. Zick, "Recovering the Assembly Clause", 91 *Texas L. Rev.* 375 (2012) at 398 ("Recovering Assembly").

⁴² J. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly*, (U.S.A.: Yale U. Press, 2012), at 61.

C. The First Amendment's assembly clause: a cautionary tale

The First Amendment was quiet until the 1919 World War I espionage cases, but evolved rapidly in the ensuing years. During the First Amendment's formative years, the US Supreme Court jurisprudence clearly linked and closely equated the speech and assembly clauses. An influential example is Brandeis J.'s concurring opinion in *Whitney v California*, which, in 1927, stated that, "without free speech *and assembly* discussion would be futile".⁴³ Though the two freedoms were only linked once before, following *Whitney* the Supreme Court endorsed that nexus in more than one hundred opinions.⁴⁴ Examples include *DeJonge v Oregon*, where Chief Justice Hughes described the right of peaceable assembly as "a right cognate to those of free speech and a free press" and equally fundamental.⁴⁵ And in *Thomas v Collins*, Justice Rutledge declared that the First Amendment's "indispensable democratic freedoms" have a "preferred place" in the constitutional scheme, and added that the right of assembly guards "not solely religious or political" causes but also "secular causes, great and small".⁴⁶

The assembly clause maintained its presence in the jurisprudence up to and through its high-water mark during the Civil Rights movement, when the US Supreme Court rendered several monumental decisions under the First Amendment.⁴⁷ For reasons that are doctrinal in the main,

⁴³ *Whitney v California*, 274 US 375 at 387 (1927) (emphasis added).

⁴⁴ Inazu, "Forgotten Assembly", *supra* note 9, at 597.

⁴⁵ 299 US 353 at 364 (1937).

⁴⁶ *Thomas v Collins*, 323 US 516 at 530-31 (1945). See also *NAACP v Alabama ex rel. Patterson*, 357 US 449 at 460 (1958) (confirming the close nexus between the freedom of speech and freedom of assembly).

⁴⁷ See, e.g., *Edwards v South Carolina*, 372 US 229 (1963); *Cox v Louisiana*, 379 US 536 (1965); *Brown v Louisiana*, 383 US 131 (1966); *Shuttlesworth v City of Birmingham*, 394 US 147 (1969).

the assembly clause atrophied and over time was subsumed in the speech clause.⁴⁸ As Inazu and others explain, First Amendment doctrine forged an inextricable link between the speech and assembly clauses but failed, in doing so, to differentiate and validate peaceable assembly as an independent, stand-alone constitutional right.⁴⁹

By the time s.2(c) was enacted, freedom of assembly had little or no profile in the First Amendment jurisprudence, and has not played a role in US Supreme Court decision making for more than thirty years.⁵⁰ In that evolution of doctrine, it was forgotten that “the right of assembly, like the right to petition, was originally considered central to securing democratic responsiveness and active democratic citizens”.⁵¹ That lapse has inspired a rich and urgent scholarship calling for a revival of the assembly clause to protect movements that bring the precarity of vulnerable communities to the forefront of public attention.⁵²

⁴⁸ Two developments contributed to the assembly clause’s attenuated status. First, the Court developed and recognized associational rights and a concept of expressive association. Unlike s.2(d) of the *Charter*, which expressly guarantees freedom of association, the text of the First Amendment protects freedom of assembly but not freedom of association, which was incorporated into the jurisprudence by judicial interpretation. Second, two doctrines became dominant under the speech clause; the first is the speech-conduct doctrine, which has adverse implications for the protection of actions undertaken by an assembly; and the second is the time, place, and manner doctrine, which provides a doctrinal construct for limits on free speech activities in public spaces. See *infra* note 95.

⁴⁹ In addition to Inazu, *supra* note 42, see Abu El-Haj, “Neglected Assembly”, *supra* note 8, at 589 (arguing that while the right of assembly protects collective action and collective public deliberation, freedom of speech protects individuality); Abu El-Haj, “All Assemble”, *supra* note 11, at 100 (stating that by treating assembly as a form of speech courts fail to understand the distinct qualities of assembly and why assembly should operate differently).

⁵⁰ Inazu, *Liberty’s Refuge*, *ibid.* at 62.

⁵¹ Abu El-Haj, “Neglected Assembly”, *ibid.* at 588.

⁵² See especially Abu El-Haj, “Neglected Assembly”, *ibid.*; “All Assemble”, *supra* note 11; and “Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly” (2015), 50:1 *Mo. L. Rev.* 961; J. Inazu, *Liberty’s Refuge*, *supra* note 42; “Forgotten Assembly”, *supra* note 9; “Virtual Assembly” (2013), 98:5 *Cornell L. Rev.* 1093; “Unlawful Assembly as Social Control” (2017) 64:2 *U.C.L.A. Law Rev.* 2; and T. Zick, *Speech Out of Doors*:

The cautionary tale for Canada is that the *Charter's* guarantee of peaceful assembly is at risk of being consigned to irrelevance. There it may languish indefinitely, as a meaningless and failed promise of the *Charter*. The protest movements of recent years, including the convoy protest and its implications for freedom of peaceful assembly, call for a change in that narrative. If not at this time, in these circumstances, then it is unclear when s.2(c) will assume a role in defining the *Charter's* fundamental freedoms. As the First Amendment demonstrates, the challenge is to differentiate peaceful assembly and doctrinalize the distinctive role it plays in advancing and promoting the *Charter's* democratic objectives.

III. Part III: Toward a conception of peaceful assembly under s.2(c) of the *Charter*

Section 2's fundamental freedoms, comprising the freedoms of conscience and religion (s.2(a)), expression and the press (s.2(b)), peaceful assembly (s.2(c)), and association (s.2(d)), are abstract in nature and pose two critical questions of interpretation. The first is conceptual or philosophic, and concerns the nature and scope of the entitlement. This contemplates an inquiry into how and why the *Charter* protects each of these fundamental freedoms. The second arises under the *Charter's* structural equation of breach and justification. Initially, the analysis considers

Preserving First Amendment Liberties in Public Places (New York: Cambridge U. Press, 2008); "Parades, Picketing, and Demonstrations", in A. Stone & F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford U. Press, 2021); "Recovering Assembly", *supra* note 41.

the guarantee and whether it has been violated, and then turns to s.1 and the question whether the violation is a reasonable limit that is justified in a free and democratic society.⁵³

A conception of s.2(c) comprises three vital elements: one, a foundation in the underlying values and purposes of a right of free and peaceful assembly; two, a definition of s.2(c) entitlement; and three, a principled framework for determining reasonable limits on peaceful assembly under s.1 of the *Charter*. Note that in the absence of a s.2(c) jurisprudence, the First Amendment of the US Constitution and international human rights guarantees can provide guidance in developing a conception of s.2(b).⁵⁴ Citing and discussing those sources does not alter the objective of aligning this proposal for s.2(c)'s interpretation with the principles and doctrines of the *Charter's* s. 2 jurisprudence.

A. Peaceful assembly's underlying values and purposes

Public assemblies and gatherings are a form of collective action undertaken in solidarity that – in the act of assembling – creates an embodiment or presence. If the concept is abstract, its realism is not. Images in Canada and around the world vividly and graphically attest to the

⁵³ Section 1 of the *Charter* guarantees its rights and freedoms, subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. *Charter*, *supra* note 5.

⁵⁴ These sources include General Comment No.37, (2020) on the right of peaceful assembly, Human Rights Committee, September 17, 2020, CCPR/C/GC/37; and European Commission for Democracy Through Law (“Venice Commission”), Guidelines on Freedom of Peaceful Assembly, 3rd ed., CDL-AD (2019)017rev. The Venice Commission is an advisory body of the Council of Europe, composed of constitutional law experts, and its role is to provide legal advice to member states. See also Clément Voule, Pedro Vaca, & Rémy Ngoy Lumbu, “Joint Declaration on Protecting the Right to Freedom of Peaceful Assembly in Times of Emergencies,” (15 September 2022), online: <<https://www.ohchr.org/sites/default/files/documents/issues/fassociation/2022-09-15/JointDeclarationProtectingRightFreedominTimesEmergencies15Sept2022.pdf>>.

raw, voluble and transgressive power of mass movements, protests and demonstrations. These dynamics pose risks and generate fears of disruption, disorder, and even chaos. Any theory of peaceful assembly for s.2(c) must answer those fears, but its underlying values must also be understood. Public assembly requires management, but must be valued for the role it plays in promoting collective participation in public democracy.

An interpretation of s.2(c) must begin by addressing peaceful assembly's underlying values and purposes. In principle, freedom of assembly works in concert with s.2's other fundamental freedoms, forming part of an interrelated system that serves core democratic functions. As such, it depends for its protection on overlapping rights, such as freedom of expression and association.⁵⁵ Assemblies invariably form in pursuit of a religious, expressive, or associational purposes, and will often be a "conduit" for the exercise of the *Charter's* other fundamental freedoms.⁵⁶ As stated in *Koehler*, the right to peacefully assemble furthers the other fundamental freedoms, protecting "the right of citizens to gather to express views concerning matters related to the functioning of a free society".⁵⁷

Gatherings engage in expressive activity, and s.2(b) and (c) are closely connected as a result.⁵⁸ The s.2(b) jurisprudence addresses some aspects of assembly, such as labour picketing, which receives a high degree of constitutional protection, and the concept of access to public

⁵⁵ T. Emerson, *The System of Freedom of Expression* (USA: Random House, 1970), at 286. See also General Comment No. 37, *supra* note 54, at para 9.

⁵⁶ Kinsinger, "Positive Freedoms and Peaceful Assembly", *supra* note 7, at 380.

⁵⁷ *Koehler v Newfoundland & Labrador*, *supra* note 32, at para 49.

⁵⁸ See Professor Moon's Background Paper on Freedom of Expression, commissioned by the POE Commission.

property for expressive purposes.⁵⁹ In addition, s. 2(b) and (c) are directly in interface in an assembly, because participants typically engage in a range of s.2(b) activities. Section s.2(b)'s definition of expression as “any attempt to convey meaning” is inclusive of verbal and non-verbal communication, and can encompass an array of movements – like parading, marching and picketing.⁶⁰ As explained below, the expressive activities of participants at an assembly are protected by s.2(b), but subject to the *Criminal Code*, human rights legislation, and other laws that place justifiable limits on expression.

As the collective enactment or embodiment of individual expressive activity, it follows that a s.2(c) assembly incorporates and advances values – like self-government, truth seeking, and self realization – that are entrenched in the jurisprudence.⁶¹ As well, an essential and defining feature of s.2(b) is its protection for unpopular, unconventional, and dissident points of view.⁶² In much the same way, the Supreme Court of Canada grounded s.2(d)'s guarantee of associational freedom in a conception of empowerment for those who join with others to elevate their voice and exercise transformative power.⁶³

⁵⁹ On labour picketing, see *RWDSU, Local 55 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156; *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733. On s.2(b) access to public property, see *City of Montreal v 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141.

⁶⁰ *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 at 968, and noting, at 969, that even parking a car in a reserved zone might be protected by s.2(b).

⁶¹ See *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577 at 765-67; *Irwin Toy*, *ibid.* at 976.

⁶² The *Charter* guarantees freedom of expression to ensure that “everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream”. *Irwin Toy*, *ibid.* at 968.

⁶³ *Mounted Police*, *supra* note 31 (stating, at para. 55, that s.2(d) “empowers groups whose members’ individual voices may be all too easily drowned out”, and, at para. 58, that banding together “empowers vulnerable groups and helps them work to right imbalances in society”, protecting “marginalized groups” and making possible a more equal society).

A capacity to empower unheard, marginalized voices is at the core of s.2(c), and these rationales apply with particular force to the right of assembly. As First Amendment scholar Thomas Emerson explained, assembly is “an essential technique for the propagation of new, minority, or unconventional opinion”, and the “indispensable instrument of virtually all minority movements.”⁶⁴ The phenomenon of a public assembly or gathering can leverage a message of protest or dissent, forcing the community to pay attention and become involved in redressing grievances.⁶⁵

These views are echoed in commentaries on the interpretation of international human rights guarantees. The ICCPR’s guarantee of peaceful assembly can and has been used to recognize and realize a wider range of rights, including economic, social and cultural rights, and is particularly important to marginalized individuals and groups.⁶⁶ The entitlement fosters “a culture of open democracy, enable(s) non-violent participation in public affairs, and invigorate(s) dialogues on issues of public interest”.⁶⁷ Echoing that conception, the Venice Commission’s Guidelines describe peaceful assembly as the “foundation of democratic, tolerant and pluralist society”, enabling “individuals and groups with different backgrounds to interact peacefully with one another, giving voice to minority opinions, and bringing visibility to marginalized or underrepresented groups”.⁶⁸

⁶⁴ Emerson, *Freedom of Expression*, *supra* note 55, at 287.

⁶⁵ *Ibid.*

⁶⁶ General Comment No. 37, *supra* note 54, at para. 2.

⁶⁷ *Ibid.*

⁶⁸ Venice Commission Guidelines, *supra* note 54, at para.1. Note also the Joint Declaration, *supra* note 54 (*underscoring* the importance of this right as an essential component of democracy and further *underlining* the importance of this right during emergencies; emphasis in original).

In these ways, s.2(c)'s guarantee of peaceful assembly aligns with s.2(b)'s underlying values and s.2(d)'s concepts of collective entitlement and empowerment. Rather than devalue it or render it redundant or superfluous, that conceptual alignment fortifies s.2(c): a degree of synchronicity with s.2's other freedoms complements and re-inforces peaceful assembly's status as an independent *Charter* guarantee. Shoehorning peaceful assembly into s.2(b) and relegating it to insignificance is therefore wrong in principle, because it defeats the intent and purpose of s.2(c). Although it shares values in common with ss.2(b) and (d), the *Charter's* guarantee of peaceful assembly is grounded in its own conception of freedom that is collective, spatial, and performative in nature.

Those distinctive values can be brought to the surface and inform a conception of peaceful assembly under the *Charter*. First, in comprising two or more individuals, an assembly is necessarily collective in nature. The Supreme Court of Canada acknowledged as much, defining assembly as a form of collective, not individual, action, and stating that the right of peaceful assembly is, by definition, a group activity incapable of individual performance".⁶⁹ The Court also confirmed that "[r]ecognizing group or collective rights complements rather than undercuts individual rights".⁷⁰ In principle, s.2(c) guarantees the right for people to come together and form a "way of speaking as a collective."⁷¹

Moreover, there is distinctive value in the assembly itself, as a form of communication. Thomas Emerson spoke of the "dynamic quality" of an assembly and its "important advantages

⁶⁹ *Mounted Police*, *supra* note 31, at para 64.

⁷⁰ *Ibid.* at paras 64, 65.

⁷¹ J. Butler, *Notes Toward a Performative Theory of Assembly ("Performative Assembly")* (USA: Harvard U. Press, 2015), at 155.

for effective expression that do not exist in any other form of communication.”⁷² For instance, a public assembly or gathering incorporates concepts of space and presence, or place. As Butler explains, “the critical expressive benefits of proximity and immediacy” inhere in these “embodied” places.⁷³ In her account, the power to gather “is itself an important political prerogative, quite distinct from the right to say whatever they have to say”.⁷⁴ In conceptual terms, an assembly is a “concerted bodily enactment”, in excess of what is said, that constitutes “a plural form of performativity”.⁷⁵ Challenging the assumption that “verbalization remains the norm for thinking about expressive political action” validates an assembly’s way of being present, whether by “[s]howing up, standing, breathing, moving, standing still” and engaging or not in other actions.⁷⁶ An assembly under these terms can have purposes as trivial as gathering to snap fingers together or as monumental as transformative change.⁷⁷

Movements can galvanize the condition of vulnerability, finding ways of “expressing and demonstrating precarity that importantly engage embodied action and forms of expressive freedom that belong more properly to public assembly”.⁷⁸ More plainly, public gatherings enable disadvantaged and disempowered groups and communities to forge a collective entity and leverage their voice. For instance, the Canadian movements and assemblies described in brief above are an exercise in public democracy, protecting “the people and their aspirations for

⁷² Emerson, *Freedom of Expression*, *supra* note 55, at 286.

⁷³ Butler, *Performative Assembly*, *supra* note 71, at 21.

⁷⁴ *Ibid.* at 9.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* at 18.

⁷⁷ Zick, “Recovering Assembly”, *supra* note 41, at 398 (stating that the First Amendment protects the right of individuals who assemble for the purpose of snapping their fingers, chanting in tongues, or simply showing solidarity or strength through numbers).

⁷⁸ Butler, *Performative Assembly*, *supra* note 71, at 15.

collective public deliberation and action on issues of public importance”.⁷⁹ As such, they engage the *Charter’s* democratic aspirations and objectives. In the words of Occupy Toronto protestors, the camp and “living in the space was the movement”, and it allowed participants “to experiment and learn about constructing a fair and equitable society”.⁸⁰ Those purposes are at the core of s.2(c)’s democratic functions.

To emphasize the central proposition, the act of assembling is the relevant constitutional event, and the value of it inheres in and attaches to the assembly, *qua* assembly.⁸¹ It is the assembly, both abstract in conception and infinitely varied in practice, that is protected by s.2(c). To subsume its distinctive expressive properties into a conception of expression under s.2(b) – even a broad one – misses the essence of this entitlement and disregards its status as a textually guaranteed *Charter* right. When the state prohibits, restricts or disperses an assembly, it violates s.2(c) of the *Charter*.⁸²

The next section returns to the text of s.2(c) to define the meaning of “peaceful assembly” and consider a test or standard to determine a breach or violation of the guarantee.

B. The nature and scope of peaceful assembly under s.2(c) of the *Charter*

⁷⁹ Abu El-Haj, “Neglected Assembly”, *supra* note 8, at 547.

⁸⁰ *Batty v City of Toronto*, 2011 ONSC 6862 at 26.

⁸¹ Zick, “Recovering Assembly”, *supra* note 41, at 398.

⁸² The state violates freedom of assembly when the focus of restrictions or regulations is the assembly itself. M. Kaminski, “Incitement to Riot in the Age of Flash Mobs”, 81 *U. Cin. L. Rev.* (2013), at 38. The analogy under the *Charter* is to s.2(d) and restrictions that regulate activity because it is collective in nature. *Dunmore v Ontario*, *infra* note 85.

1. The scope of the guarantee

As a latecomer to *Charter* interpretation, s.2(c) benefits from the jurisprudential groundwork in place. Early on, the Supreme Court of Canada proposed a generous and purposive interpretation of the *Charter's* rights and freedoms that led, under s.2, to a broad scope of entitlement and requirement that limits be justified under s.1. Like freedom of religion and freedom of expression, freedom of peaceful assembly should receive a generous interpretation that requires the state to justify most limits under s.1.⁸³

Meanwhile, s.2(d) presented more of a challenge because its enmeshment in labour union entitlements, like collective bargaining and the right to strike.⁸⁴ As already noted, s.2(c) is necessarily collective in nature, and aligns with s.2(d) in this. Though it took time, the Court eventually defined s.2(d) as a collective entitlement, and stated that the central inquiry in every case is whether the state precluded activity because of its associational nature, “thereby discouraging the collective pursuit of common goals”.⁸⁵ By analogy to s.2(d), the key issue under s.2(c) is whether the government discouraged the collective pursuit of a common purpose by restricting or prohibiting a public gathering or assembly.

⁸³ *Irwin Toy*, *supra* note 60 (setting a low threshold of breach for most s.2(b) issues); see also *Syndicat Northcrest v Amselem*, 2004 SCC 47 (adopting a generous definition of religion under s.2(a) and setting non-trivial or insubstantial interference as the threshold for breach).

⁸⁴ In *Reference re Public Service Employee Relations Act*, [1987] 1 SCR 313, 1 RCS 313 (“the *Alberta Reference*), the Court excluded collective bargaining and the right to strike from s.2(d) of the *Charter*; [1987] 1 S.C.R. 313. Years later that decision was overruled; see *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27, and *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4. With few exceptions, the jurisprudence continues to be dominated by labour relations issues.

⁸⁵ *Dunmore v Ontario*, 2001 SCC 94 at para 16.

A number of questions must be asked to define the scope of this guarantee and determine when freedom of peaceful assembly has been violated.

a. The meaning of assembly

Defined as a gathering of two or more persons, an assembly can take place spontaneously or by plan, in public, private and even virtual space. An assembly might ordinarily but not exclusively be public in nature. Under the First Amendment, the assembly clause presupposes gatherings that are public in nature, marshalling a presence that is accessible to – and in many situations unavoidable by – the public.⁸⁶ While General Comment No. 37 states that article 21 of the ICCPR protects peaceful assemblies wherever they take place, the Venice Commission Guidelines concentrate on assemblies that occur “in a publicly accessible space;” at the same time, the Guidelines acknowledge that other forms of assembly – like private meetings with no public audience – might attract some level of protection.⁸⁷

Though excluding private gatherings would align s.2(c) with its public, and democracy-affirming purposes, meetings that lack a public interface could engage the guarantee – for instance, when a meeting in private space projects a noisy presence into the public environment or otherwise interferes with public sensibilities (*i.e.*, the intrusive projection of light or images). And, though uncommon, it is not unprecedented for the state to regulate private gatherings. As discussed above, racist laws in the US banned gatherings of African Americans that, at the time,

⁸⁶ See T. Zick, *Speech Out of Doors*, *supra* note 52 (focusing attention on the “expressive topography” of the assembly clause in public places, as the critical venue of public deliberation, participation, and public citizenship); Abu El-Haj, “All Assemble”, *supra* note 11 (explaining the role of the outdoor assembly in “law, politics, and culture”).

⁸⁷ General Comment No 37, *supra* note 54, at para 6; Guidelines, *supra* note 54, at paras 12, 14.

were considered presumptively dangerous.⁸⁸ Finally, it is well known that the public/private dichotomy is analytically difficult; while an assembly might take place in public space that is privately owned, publicly owned space might be private in nature.

On balance, the scope of s.2(c) should not be limited to assemblies that are “public” in nature. A definition of assembly that would include all gatherings of two or more persons anywhere is unquestionably broad. It could be narrowed by addressing restrictions on non-public gatherings under s.2(d)’s freedom of association guarantee. Another option would be to align s.2(c) with s.2(a), and add a requirement that any violation of free assembly must be more than trivial or insubstantial.⁸⁹

Finally, the concept of an assembly is not limited to its concretization at a discrete time and place, but includes activities that are “integral” to the assembly, such as mobilizing resources, planning, preparing, and publicizing a gathering, and travelling to and from the assembly.⁹⁰

b. The purpose of an assembly

The next question is whether a s.2(c) assembly must have a purpose. Simply understood as a collection of two or more persons, “assembly” could encompass an unimaginable range of fortuitous and non-purposeful gatherings, including office workers who wait for the elevator and

⁸⁸ *Supra* note 12.

⁸⁹ *Amselem*, *supra* note 83.

⁹⁰ General Comment No. 37, *supra* note 54, at para 33. See also the Venice Commission Guidelines, *supra* note 54, at para 54 (including the planning, preparation, and publicity in its conception of the right).

queues of unlimited variety.⁹¹ On this, the First Amendment’s assembly clause once again has an interesting history. Though the words were eliminated from the draft, the clause originally guaranteed the right of the people peaceably to assemble “for a common good”.⁹² Though it is not a textual prescription, a “purpose” is included in some conceptions of peaceful assembly. General Comment No. 37 describes peaceful assembly under art. 21 of the ICCPR as the “non-violent gathering by persons for specific purposes, principally expressive ones”.⁹³ Along similar lines, the Venice Commission Guidelines are “primarily focused” on assemblies formed for a “common expressive purpose”, broadly conceived as “an emotion, idea, or opinion relating to matters of public concern”.⁹⁴ Under these definitions, what is expressive incorporates a wide range of conduct.⁹⁵

Likewise, a broad concept of communication under s.2(c) can accommodate the myriad ways an assembly might reveal and express its purpose.⁹⁶ Here, as well, s.2(c) can take its definitional lead from s.2’s other fundamental freedoms, particularly s.2(b)’s guarantee of expressive

⁹¹ In those instances, the gathering has no purpose beyond the task at hand, which is to catch the elevator, buy tickets for a movie, or attend an event.

⁹² J. Inazu, “Forgotten Assembly”, *supra* note 9, at 571-73 (detailing the drafting history of this clause).

⁹³ General Comment No. 37, *supra* note 54, at para 4.

⁹⁴ Guidelines, *supra* note 54, at para 12 & 42.

⁹⁵ The First Amendment’s speech-conduct distinction poses problems for the assembly clause. As Emerson stated, the US Supreme Court’s adoption of this distinction “removed a large segment of the right of assembly and petition, as well as other vital forms of expression, from any real protection under the First Amendment”. *Freedom of Expression*, *supra* note 55, at 297. Many others make the same point; see., e.g. M.Kaminski, “Inciting Riot”, *supra* note 82, at 36 (citing C. Edwin Baker and noting that the speech-conduct dichotomy “immediately relegates assemblies, *which are obviously conduct*, to a lesser constitutional status than speech); emphasis added).

⁹⁶ This could include finger snapping. Zick, “Recovering Assembly”, *supra* note 77.

freedom. *Irwin Toy*'s low threshold definition of expression – as any attempt to convey meaning – served the dual purposes of granting s.2(b) a broad interpretation and establishing the principle of content neutrality.⁹⁷ With an exception for violent forms of expression, this principle means that the scope of s.2(b) is egalitarian and extends to all expressive content. Whether expressive activity is offensive or repugnant does not affect its constitutional status under s.2(b).⁹⁸

Though all expressive content is *prima facie* protected, *Irwin Toy* added a caveat for violent forms of expression, which are excluded from s.2(b) and defined as “threats of violence or acts of violence.”⁹⁹ Under s.2(c), the caveat is textual in nature and excludes assemblies or gatherings that are not “peaceful” from the scope of the guarantee. This is s.2(c)'s most critical variable, because it raises the threshold question whether assemblies can be excluded because they are disruptive, or only lose the guarantee's protection when they engage in violent activities.

c. The meaning of peaceful assembly

A pivotal question under s.2(c) is whether an assembly is peaceful or not.¹⁰⁰ As a matter of definition, “peaceful” can mean “without violence” or “quiet and calm”, and from that perspective, its meaning has critical implications for the scope of s.2(c).¹⁰¹ The central question

⁹⁷ *Irwin Toy*, *supra* note 60 (defining expression as any attempt to convey meaning). *Irwin Toy* added a second step to the s.2(b) analysis – the purpose-effect test – that can narrow the scope of the guarantee in some, but not many, circumstances.

⁹⁸ If an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. *Ibid.* at 969.

⁹⁹ *R v Khawaja*, 2012 SCC 69 at para 70 (rejecting the proposition that s.2(b)'s exclusion is limited to acts of physical violence and stating that s.2(b) excludes threats and acts of violence).

¹⁰⁰ Note that there is no requirement of a peaceful assembly in the assembly clause or s.1(e) of the Canadian Bill of Rights.

¹⁰¹ *Cambridge Dictionary*, online: <https://dictionary.cambridge.org/dictionary/english/peaceful>

is whether an assembly is only non-peaceful when it poses a threat of, or engages in violence as a collective entity, or can also be excluded from s.2(c) because of disruptive or unlawful, but non-violent conduct.

Defining that criterion presents “acute interpretive difficulties” when applied to assemblies engaged in “civil disobedience and other nonconforming, but nonviolent activities.”¹⁰² An element of disruption is the essence of an assembly’s power and transformative potential. Emerson acknowledged that public assemblies can be “rough, aggressive and turbulent”, but added that “to exact a guarantee as a condition of assembly that no violation of law is forthcoming, is to eliminate the public assembly altogether”.¹⁰³ The challenge under s.2(c) is to constitutionalize an element of disruption – as part of s.2(c)’s democracy-affirming objectives – but only to a point.

As C. Edwin Baker explains, peaceful assembly is the right of people to use the “peaceful presence of their bodies” to interfere with others’ activities, because that interference is “part of the power of freedom of assembly”.¹⁰⁴ Accordingly, any theory that “multiple numbers causes bad things to happen” undercuts the point of having a textual guarantee of free assembly.¹⁰⁵ Disruption may be central to the “efficacy of public protest”, especially for groups and communities who are “otherwise politically marginalized.”¹⁰⁶ As General Comment No. 37 states,

¹⁰² Zick, “Recovering Assembly”, *supra* note 41, at 387.

¹⁰³ Emerson, *Freedom of Expression*, *supra* note 55, at 288.

¹⁰⁴ C. Edwin Baker, “Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations”, 78 *Nw. U. L. Rev.* 937, at 980 (1983).

¹⁰⁵ M. Kaminski, “Inciting Riot”, *supra* note 82, at 38 (paraphrasing Baker).

¹⁰⁶ Abu El-Haj, “Defining Peaceably”, *supra* note 52, at 980.

“[p]eaceful assemblies can in some cases be inherently or deliberately disruptive and require a significant degree of toleration”.¹⁰⁷

Without more, disruptive conduct does not render an assembly unpeaceful. That said, participants in assemblies are noisy, intrusive, and disruptive may also violate penal and regulatory laws. Most definitions of peaceful assembly address that problem by drawing a distinction between disruptive and even unlawful activity, and violence. According to the Venice Commission Guidelines, conduct that may “annoy or give offence,” and conduct that “temporarily hinders, impedes or obstructs the activities of third parties” are within the scope of the freedom.¹⁰⁸ Nor is the right compromised by pushing, shoving, and the disruption of vehicular or pedestrian traffic or daily activities.¹⁰⁹ As El-Haj maintains, the focus in defining peaceful or peaceably should be on the real risks of violence rather than on disorder and illegality.¹¹⁰

The Venice Commission Guidelines narrowly construe violence as “using, or overtly inciting others to use, physical force that inflicts or is likely to inflict injury or serious property damage where such injury or damage is likely to occur”.¹¹¹ Along similar lines, General Comment No. 37 states that violence under article 21 of the ICCPR entails the use of “physical force against others that is likely to result in injury or death, or serious damage to property”.¹¹² In other words, the interpretive commentaries on the international guarantees set a high threshold on this issue, defining an unpeaceful assembly as one that is violent.

¹⁰⁷ *Supra* note 54, at para 44.

¹⁰⁸ *Supra* note 54, at para 19.

¹⁰⁹ *Ibid.* See also General Comment No. 37, *supra* note 54, at para 15.

¹¹⁰ Abu El-Haj, “All Assemble”, *supra* note 11, at 1039.

¹¹¹ Venice Commission Guidelines, *supra* note 54, at para 51.

¹¹² General Comment No. 37, *supra* note 54, at para 15.

Short of violence, the question for s.2(c) is whether an assembly can lose the *Charter's* protection because it is disruptive. This is where the relationship between an assembly and its participants is important. An assembly is a collective entity and, in general, isolated acts of violence by individuals cannot be attributed to the assembly. As the US Supreme Court stated in *NAACP v Claiborne Hardware Co.*, the incidence of some violence in the course of a boycott campaign against white merchants – and the “ephemeral consequences of relatively few violent acts” – did not colour the “entire collective effort” with the “taint” of violence.¹¹³ Short of violence that is “manifestly widespread,” transgressions by participants do not define or compromise the assembly.¹¹⁴ Moreover, violence against participants in a peaceful assembly, whether by authorities or third parties, does not render an assembly unpeaceful.¹¹⁵

A violence threshold is high, but a scale-and-magnitude standard for determining when levels of disruption render an assembly unpeaceful may be problematic, because relatively low levels of disruption might be considered unpeaceful. In particular, a discretionary concept of disruption can place public gatherings and assemblies that advance unpopular causes at risk of being contained or dispersed, and its participants charged with relatively minor offences. On this, the structure of the *Charter* is important; limits on an assembly that is disruptive – but not unpeaceful – can and should be imposed under s.1.

¹¹³ 458 U.S. 886, at 933; *Claiborne* was decided under the First Amendment’s concept of associational freedom, and not its assembly clause.

¹¹⁴ General Comment No. 37, *supra* note 54, at paras 17, 19.

¹¹⁵ *Ibid.* at para 18. See also Venice Commission Guidelines, stating that the possibility of others joining an assembly – such as violent extremists – does not negate the right of those who remain peaceful, and nor does “sporadic violence or other punishable acts committed by others”. *Supra* note 54, at para 50.

To summarize to this point, the issue under s.2(c) is whether and how an assembly is conceptualized and protected *qua* assembly. Individuals who violate an assembly's purposes by committing criminal and other unlawful acts are accountable for their acts as individuals. The acts of participants do not taint the assembly or affect its constitutional status, unless and until transgressive acts become so manifest as to define the assembly. Though disruptive and even unlawful conduct does not compromise its status as peaceful in nature, an assembly that engages in or threatens acts of violence is no longer peaceful.¹¹⁶

A broad conception of s.2(c) is consistent with the guarantee's values and purposes, aligns with s.2(b)'s exclusion for violent forms of expression, and fits the structural framework of the Charter. It harmonizes with the interpretation of peaceful assembly under human rights guarantees, where what is peaceful includes unlawful conduct that does not threaten or devolve into acts of violence. Moreover and to emphasize, that conception of entitlement does not mean that an assembly's unlawful conduct cannot be limited. What it means, instead, is that such restrictions must be justified under s.1.

This is a critical issue for the Commission that will rest on an interpretation of s.2(c), as well as findings of fact on the nature, scope, and scale of the protest convoy's activities. It will be essential to know whether and to what degree the assembly endorsed or promoted violence, violent conduct, or threats of violence; to what degree individuals committed transgressive acts and whether unlawful acts were committed in furtherance of the assembly's purposes; and – all things considered – whether the convoy's activities were peaceful or non-peaceful under s.2(c).

¹¹⁶ Note that a threat of violence can arise in advance of or during an assembly.

This includes whether and when an assembly that was peaceful at the outset evolved into a gathering that was no longer peaceful in nature.

d. Virtual or online assembly

Conventionally understood, the concept of an assembly contemplates a physical gathering of individuals, in a space that is physical in nature. Now challenged by the hegemony of digital technology, that view has been revised to include virtual and online forms of assembly. Rather than displace it, digital connectivity facilitates collective forms of expression and complements traditional means of participating in public assemblies.¹¹⁷

Online space moves the concept of an assembly's presence beyond physicality. Those with physical or economic constraints on mobility can participate through the relatively low cost mechanism of online assembly.¹¹⁸ As the protest convoy and any number of public movements demonstrate, online platforms can be deployed to assist, augment, and enlarge the purpose and presence of an assembly.¹¹⁹ The UN Special Rapporteur on freedom of assembly and association noted the "power of digital technology in the hands of people looking to come together to

¹¹⁷ T. Zick, "Parades, Picketing, and Demonstrations", in Stone and Schauer, eds., *The Oxford Handbook of Freedom of Speech*, *supra* note 52; see also J. Inazu, "Virtual Assembly", *supra* note 52.

¹¹⁸ Inazu, *ibid.* at 1110.

¹¹⁹ See Professor Laidlaw's Background Paper for the POE Commission, titled "Mis- Dis- and Mal-Information and the Convoy: An Examination of the Roles and Responsibilities of Social Media". See also R. Teruelle, "Social Media, Red Squares, and Other Tactics: The 2012 Québec Student Protests", PhD. Thesis, Faculty of Information, University of Toronto (providing empirical evidence of the students' tactical use of social media, which enabled students and their supporters to demonstrate in the streets of Montreal for over 100 nights in a row).

advance democracy, peace, and development”.¹²⁰ Adding that “access to the internet and digital technologies” is a key aspect of “unique and creative modes of protest and organizing”, he concluded that freedom and access to technologies should be the rule, and limitations the exception.¹²¹ As noted above, an assembly’s integral activities – which include the planning, organization and dissemination of information about a gathering – are protected by s.2(c); this applies to online as well as offline activity.

International human rights instruments, such as the ECHR and ICCPR, acknowledge the internet’s role in facilitating and engaging assemblies, and incorporate virtual assembly in their concept of peaceful assembly.¹²² According to the Guidelines, the possibility of assemblies occurring wholly online cannot be ruled out.¹²³ Key issues for virtual assembly include blocking and denying access to the internet and social media, as well as state surveillance of online assembly participants.¹²⁴ Here, as well, online activities are protected by s.2(b) and subject to limits on expressive freedom that address the dissemination of hate propaganda or violation of human rights laws.

¹²⁰ Cited in Laura O’Brien & Peter Micek, *Defending Peaceful Assembly and Association in The Digital Age: Takedowns, Shutdowns, And Surveillance* (July 2020) at 12, online: <<https://www.accessnow.org/cms/assets/uploads/2020/07/Defending-Peaceful-Assembly-Association-Digital-Age.pdf>>.

¹²¹ *Ibid.* at 12, 13.

¹²² General Comment No. 37, *supra* note 54, at paras. 13, 34. Guidelines, *supra* note 54, at paras. 20, 45, 65-73. See also Joint Declaration, *supra* note 54 (*reaffirming* the important role played by the internet, social media and other information and communication technologies in providing space for individuals and groups to mobilize and to organize assemblies; emphasis in original).

¹²³ Guidelines, *ibid.* at para 45.

¹²⁴ Guidelines, *ibid.* at paras 69, 70. See also *supra* note 120.

In principle, s.2(c)'s definition of assembly does not require a physical gathering. Section 2(c)'s concept of peaceful assembly should include forms of online assembly, as well as online participation in a physical assembly or gathering by assisting in the organization or support of the physical assembly and its activities. A gathering in public space, and whether virtual or physical, constitutes an assembly.

e. A standard of breach

To summarise, s.2(c) extends to gatherings of two or more persons who form a peaceful assembly for a purpose that is broadly conceived as communicative in nature. The guarantee includes assemblies that are disruptive and engage in unlawful acts, but excludes assemblies that are not peaceful because they threaten to or commit violent acts. It sets a threshold for breach that focuses on the assembly, as a collective entity. The government violates s.2(c) when it prohibits or regulates a gathering that falls within this conception of peaceful assembly.

This definition is grounded in the distinctive values of free assembly and aligns with s.2(b)'s closely allied guarantee of expressive freedom. As such, s.2(c) co-exists with, and neither displaces or is displaced by other guarantees like s.2(b). A doctrinal framework to determine access to public property for expressive purposes is in place under s.2(b), and whether or how it interacts with s.2(c) must be addressed.¹²⁵ Section 2(c) also has affinity with s.2(d) because both are collective entitlements, and protected as such. Yet the distinctive assumption of the s.2(d)

¹²⁵ The question is whether s.2(b) doctrine that applies to expression applies to and potentially restricts access to public property for purposes of assembly under s.2(c). As a matter of first impression it does not seem sound, in principle, for s.2(b) doctrine to determine the scope of access to public space for s.2(c)'s related but distinctive purposes of peaceful assembly.

jurisprudence arise from a foundation in labour relations that led to a higher threshold for breach under that guarantee. Section 2(c) should be analogized to s.2(a) and (b) and given a generous interpretation that sets a relatively low threshold for breach.¹²⁶

The government can infringe s.2(c) in many ways that include prior restraint and notification schemes, orders pre-empting an assembly, dispersing a gathering, and punishing participants for their actions. Once interference with a peaceful assembly is established under these guidelines for s.2(c), the limits must be justified under s.1.

C. Reasonable limits on the freedom of peaceful assembly

Freedom of assembly presents difficult questions of regulation. Even when peaceful, public assemblies can be disruptive, intimidating, and upsetting to proximate – and often captive – communities. This complicates the analysis at both stages. As seen above, it informs the interpretation of s.2(c) and the meaning of a peaceful assembly. Under the approach mapped out above, most limits on an assembly, *qua* assembly, would be justified under s.1.

1. General principles

The s.1 analysis of statutory provisions that violate the *Charter* is governed by the *Oakes* test.¹²⁷ Rather than provide a formal analysis of the statutory provisions at issue in the inquiry –

¹²⁶ Section 2(d)'s "substantial interference" standard arose in the context of a right of access to a process of collective bargaining, and an affirmative duty on the part of government to engage in that process. For that reason, proposals to apply that standard under s.2(c) should not be followed. But see Alexander, "Exploring a More Independent Freedom", *supra* note 7, at 14-17 (proposing this test for s.2(c)); see also Kinsinger, "Positive Freedoms and Peaceful Assembly", *supra* note 7.

¹²⁷ *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

namely, s.19 of the *Act* and s.2 of the *EMR* or of others – this discussion identifies some key variables that arise in considering reasonable limits on assembly activities. This background paper does not address the issues that arise in policing public assemblies and movements in any detail.¹²⁸ Nor does it address questions about prior restraint and advance notification schemes, which are not at issue in this inquiry.¹²⁹

In this, principles and guidelines from other jurisdictions are not binding under the *Charter*, but can be persuasive, especially in the absence of a s.2(c) jurisprudence. For instance, the analytical framework that developed under the *ICCPR* and *ECHR* is similar to the key concepts of justification under the *Oakes* test. Under those guarantees, the critical elements of legality, necessity, and proportionality of restrictions correspond with the *Oakes* test and its requirements that *Charter* violations must be prescribed by law, address a pressing and substantial objective, and meet a standard of proportionality.¹³⁰ As noted, the preamble of the *Emergencies Act* acknowledges Canada’s responsibilities as a signatory to the *ICCPR*, as well as under the *Charter*.

Any discussion of reasonable limits on freedom of assembly – including the designation of secure zones and dispersal of a gathering – is fundamentally contextual. That said, the analysis should proceed under a framework of principle that addresses two types of restrictions: bans and content-based prohibitions, and proverbial “time, place and manner” restrictions. In general,

¹²⁸ On these issues, see Professor Diab’s Background Paper for the Commission, titled “The Policing of Large-Scale Protests in Canada: Why Canada Needs a Public Order Police Act”, among others.

¹²⁹ On this issue, see General Comment No. 37, *supra* note 54, at paras 70-73, and the Guidelines, *supra* note 54, at paras 112-24.

¹³⁰ See generally General Comment, *ibid.* at para 36 (outlining those requirements).

blanket bans that exclude or restrict an assembly because of its message or purpose are especially problematic. Other restrictions on the time, place or manner of an assembly must be proportionate and not unduly impair the freedom.

On the question of bans, the General Comment and Guidelines state that prohibiting an assembly is a measure of last resort that should only arise once less onerous restrictions are considered and tried.¹³¹ Blanket bans are considered an “excessive restriction” and “presumptively disproportionate” for that reason.¹³² Moreover, assemblies should not be banned in the capital city or all city streets; as well, designating perimeters around courts, parliaments, places of historical significance and other official buildings that are off limits for assemblies should be avoided, with any limits specifically justified and narrowly circumscribed.¹³³

Content neutrality is another important principle, and restrictions should not be based on the purpose of an assembly or the content of its message.¹³⁴ In particular, assemblies with a political message should receive a “heightened level of accommodation and protection”.¹³⁵ As discussed, an assembly that threatens or incites violence, or is based on a violent or criminally prohibited purpose (*i.e.*, hate propaganda), is not protected by s.2(c). Otherwise, and in principle, an assembly should not be prohibited, regulated, or dispersed because the state or surrounding community considers its purpose or message offensive. In this, the rules for expressive freedom

¹³¹ General Comment No.37, *supra* note 54, at para 37; Venice Commission Guidelines, *supra* note 54, at para 132. See also Joint Declaration, *supra* note 54, at para 2 (General Principles).

¹³² General Comment, *ibid.* at paras 32, 38; Guidelines, *ibid.* at para 133.

¹³³ General Comment, *ibid.* at paras. 55, 56.

¹³⁴ *Ibid.* at paras 22, 48 (stating that a contrary approach “defeats the very purpose of peaceful assemblies” as a potential tool of political and social participation”).

¹³⁵ *Ibid.* at para 32.

apply, and restrictions should not be used to “stifle expression of opposition to a government, challenges to authority ... or the pursuit of self-determination”.¹³⁶ In general, the use of flags, uniforms, signs and banners that contain symbols and messages – some or many of which may be offensive and upsetting – should not be restricted.¹³⁷ On this, s.2(c) aligns with s.2(b) and the distinction it draws between expression that is offensive and expression that is harmful. More generally, the principles outlined in the General Comment and Guidelines are consistent with the s.2(b) jurisprudence on blanket bans, content neutrality, offensive expression, and the exclusion of violent forms of expression from the *Charter*.

The General Comment and Guidelines impose positive duties on the state to facilitate and protect peaceful assemblies, including and especially controversial gatherings.¹³⁸ When an assembly annoys or offends others, the state may be obligated to protect an assembly’s organizers and participants.¹³⁹ The General Comment and Guidelines emphasize that access to the internet and social media should not be blocked during or before an assembly, when it may be critical to marshal support and publicize a gathering.¹⁴⁰ The Guidelines include a direction that law enforcement authorities should adopt a “human-rights based approach”, requiring

¹³⁶ *Ibid.* at para 49.

¹³⁷ *Ibid.* at para 51 (except where symbols are “directly and predominantly” associated with incitement to discrimination, hostility or violence).

¹³⁸ General Comment No. 37, *ibid.* at paras 23, 24 (stating that there are negative and positive obligations on the state before, during, and after an assembly, including positive duties to facilitate an assembly); Guidelines, *supra* note 54, at paras 74-89.

¹³⁹ Guidelines, *ibid.* at para 81.

¹⁴⁰ General Comment No. 37, *supra* note 54, at para 34; Guidelines, *ibid.* at para 70.

officers to be trained, to prioritize human rights, and to be aware of their duty to facilitate, enable and protect the right to freedom of peaceful assembly.¹⁴¹

2. Proportionality

Though the two are not synonymous, the permissibility of “time, place and manner” restrictions evoke the concept of proportionality, encompassing the range of variables that assist in determining whether limits on assemblies have balanced the right against regulatory interests in a proportional way. Proportionality is a central principle in *Charter* analysis under s.1, as well as under international human rights guarantees. In this context, time, place and manner is used descriptively, without endorsing or incorporating First Amendment doctrine, which is the source of this concept.¹⁴²

Although the context and setting are critical in regulating assemblies that vary radically in size, scale, purpose, duration and impact, some guidelines have developed. First, as to place, participants in general have the right to choose the location or route of an assembly in publicly accessible places.¹⁴³ Moreover, assemblies must be permitted to gather “within sight and sound of their target audience”, and should not be “relegated to remote addresses where they cannot effectively capture” the attention of an audience.¹⁴⁴ Restrictions on assembling in public space

¹⁴¹ Guidelines, *ibid.* at para 158, and paras 158-80.

¹⁴² *Supra* notes 48, 95 (criticizing the time, place and manner doctrine for freedom of speech and its application to questions about freedom of assembly). In brief, the US doctrine is contra-indicated because it accepts a speech-conduct distinction that is not designed to, and cannot protect freedom of assembly.

¹⁴³ Guidelines, *supra* note 54, at para 61.

¹⁴⁴ General Comment, *supra* note 54, at paras 22, 53, 55.

raise questions about the permissibility of “secure” or exclusion zones that exclude an assembly from public places or otherwise contain a gathering within a prescribed space.¹⁴⁵

The time and timing of an assembly can also pose regulatory challenges. Apart from the question whether certain assemblies are inappropriate at certain times are issues about an assembly’s duration. While an assembly must have a “sufficient opportunity” to manifest its views, a gathering of sustained duration like the Occupy movement in Canada raises proportionality issues about the merits of an assembly’s indefinite and even permanent appropriation of public space.¹⁴⁶ At a certain point – which, depending on the circumstances, may be earlier or later – the duration of an assembly may impose a disproportionate impact on other public interests.

Finally, the degree of disruption an assembly poses raises proportionality issues about the relative balance between enabling an assembly – which often comprises disadvantaged voices – to claim a venue for voicing its message or purpose, and the impact it has on its proximate community. While disruption is expected and must be accommodated as part of the entitlement, at some point the exercise of that right is outweighed by the legitimate interest in restoring the functions of public space prior to the assembly.

¹⁴⁵ On February 4, 2022, police created a “red zone” in Ottawa that restricted vehicle traffic, and that was followed by the secure zone under the *EMR* which, on February 17th created a zone regulating any access to roughly 3 square km. in downtown Ottawa. Note that the General Comment and Guidelines both frown on containment (or kettling) practices. See General Comment, *ibid.*, at para 84, and Guidelines, *supra* note 54, at para 217.

¹⁴⁶ *Ibid.* at para 54. See also Guidelines, *supra* note 54, at para 146 (stating that restrictions on the time or duration of an assembly must be based on the circumstances of the case, adding that in some cases the protracted duration of an assembly may be integral to the message or to the effective expression of that message).

3. Dispersal

The General Comment frowns on dispersal, stating that it is only permissible in exceptional circumstances, such as violence or clear evidence of an imminent threat of violence.¹⁴⁷ Where there is a high level of disruption – such as the extended blocking of traffic – an assembly can be dispersed when the disruption is “serious and sustained”.¹⁴⁸ In similar fashion, the Guidelines state that dispersal is appropriate when there is an imminent threat of violence, as well as when an assembly is unlawful because it violates criminal law and constitutes a serious violation of the rights of others.¹⁴⁹ Depending on the size, location and circumstances, dispersal might also be deemed necessary in the interests of public order or health.

4. A short note on statutory provisions

Statutory provisions in other provincial and federal laws might engage s.2(c)’s guarantee of peaceful assembly. The point of this discussion is not to list and analyze those laws, but more to note that the *Emergencies Act* and *EMR* are exceptional, but not singular, in raising questions about the regulation of assemblies and gatherings. This includes any number of pandemic restrictions on gatherings at the federal, provincial, and local levels of government to address the spread of COVID-19. Limits that may be reasonable must be justified as a violation – not only of s.2(a) or (b) – but also of s.2(c) and its guarantee of the right to assemble.

¹⁴⁷ *Ibid.* at para 85.

¹⁴⁸ *Ibid.*

¹⁴⁹ Guidelines, *supra* note 54, at para 179 (adding that, in this scenario, prosecuting demonstrators after the assembly is not a safer and more practicable alternative).

The *Emergencies Act* and *EMR* both engage s.2(c)'s guarantee of peaceful assembly. Section 19(1) of the *Act* authorizes the regulation and prohibition of a public assembly that “may reasonably be expected” to lead to a breach of the peace, and to designate and secure an undefined range of public spaces.¹⁵⁰ Section 2(1) of the *EMR* prohibits individuals from participating in a public assembly that may “reasonably be expected” to lead to a breach of the peace, and s.4(1) prohibits travel to an area in which a s.2(1) assembly is taking place.¹⁵¹ Section 5 prohibits individuals from asking for or providing property for use in a s.2(1) assembly.¹⁵² Finally, s.6(1) prescribes a number of places that are designated as protected and secured, including “any other place” that is not defined in any way other than ministerial designation, or discretion.¹⁵³ These provisions, potentially among others, raise issues about the permissibility of these limits on freedom of assembly and association.

In addition, there are *Criminal Code* offences that have implications for s.2(c). For instance, s.63(1)(a) prescribes that an assembly is unlawful when it causes “persons in the neighbourhood” to fear on reasonable grounds that the assembly “will disturb the peace tumultuously”.¹⁵⁴ A question that arises is whether “tumultuously” in this context requires an element of violence, or includes circumstances that have become “greatly agitated, confused or disturbed”.¹⁵⁵ Under the *Criminal Code*, an unlawful assembly is not punishable until it reaches

¹⁵⁰ s.19(1)(a) and (d); *supra* note 2.

¹⁵¹ *EMR*, *ibid.*

¹⁵² *Ibid.*

¹⁵³ Section 6(f), *ibid.*

¹⁵⁴ Under this definition, an assembly consists of three or more persons who have a common intent to carry out “any common purpose”. Section 63(1), *Criminal Code*, S.C. 1985.

¹⁵⁵ *Collins English Dictionary*, online

<https://www.collinsdictionary.com/dictionary/english/tumultuous> ; see also *Oxford Learners*

the point of riot and “begins to disturb the peace tumultuously”.¹⁵⁶ A definition of tumultuousness that includes agitation and confusion, for purposes of a breach of peace under s.64, raises concerns about the breadth of the offence and its implications for s.2(c).¹⁵⁷

Under s.63(1)(b), an assembly is also unlawful when it “needlessly and without reasonable cause” provokes others to breach the peace tumultuously.¹⁵⁸ The mere existence of some assemblies is provocative, without more, and can provoke a hostile reaction. As discussed above, the acts of third parties who breach the peace or commit acts of violence do not render an assembly unpeaceful.¹⁵⁹ And, at least under the international human rights guarantees, the authorities have an obligation to protect an assembly and its participants from third party groups or individuals who seek to undermine their exercise of constitutional rights.

Although the focus of the Commission – and this paper – is the *Emergencies Act* and *EMR*, both of which directly regulate public assembly, other provisions, under the criminal law and in other statutes, have implications for s.2(c)’s freedom of peaceful assembly.¹⁶⁰ An interpretation

Dictionary (defining tumultuous as 1. “very loud; involving strong feelings, especially feelings of approval; and 2. “involving a lot of change and confusion and/or violence”; https://www.oxfordlearnersdictionaries.com/definition/american_english/tumultuous; *Merriam-Webster Dictionary* (defining “tumultuous” as “1. marked by tumult: loud, excited, and emotional; 2. Tending or disposed to cause or incite a tumult; and 3. marked by violent or overwhelming turbulence or upheaval”; <https://www.merriam-webster.com/dictionary/tumultuous> .

¹⁵⁶ Section 64, *Criminal Code*.

¹⁵⁷ See M. Kaminski, “Inciting Riot”, *supra* note 82, at 57 (stating that a riot statute based on tumultuous conduct that rests on a risk of public alarm without requiring actual harm violates the assembly clause).

¹⁵⁸ Section 63(1)(b).

¹⁵⁹ Section 64, *Criminal Code*.

¹⁶⁰ The First Amendment scholarship analyzes the use of offences such as unlawful assembly and incitement to riot to punish those who participate in demonstrations. See, e.g., J. Inazu,

of s.2(c) in this review of the *Emergencies Act* and *EMR* can be of service in other settings where freedom of peaceful assembly has been engaged, but not analyzed or enforced due to the lack of an analytical framework for this *Charter* guarantee.

IV. Concluding thoughts

Social and political movements formed to advance and promote a variety of causes have commanded public attention in recent years. These movements provide an invaluable service to the democratic community, surfacing and even compelling a dialogue on questions of reform and social justice. Foremost of all – at least in point of time – is the 2022 protest convoy and occupation of the nation’s capital.

These movements unquestionably engage s.2(c) of the *Charter*, which protects freedom of peaceful assembly. Perhaps oddly, this guarantee has been ineffective, if not silent, in the first forty years of the *Charter’s* development. The rise of demonstrations and protest movements in recent years underscores this gap in the *Charter* jurisprudence, and calls for a correction in a narrative of *Charter* rights that has overlooked this guarantee. Despite its overlap with other fundamental freedoms, particularly s.2(b), freedom of peaceful assembly requires its own interpretation and doctrinal framework. The POE Commission is not a court of law, but has the opportunity to address s.2(c), consider the role peaceful assembly plays in public, democratic

“Unlawful Assembly”, *supra* note 52 (providing an extensive historical and contemporary analysis of unlawful assembly laws); Kaminski, *supra* note 82 (providing a comprehensive analysis of riot offences and proposing a model law).

discourse, and discuss the interpretation of this guarantee, including reasonable limits that are justifiable.

This paper offers assistance in that regard, principally by addressing the values and purposes of a right to assemble – distinct from freedom of expression and association – as well as by suggesting an interpretation of s.2(c) and proposing guidelines for determining the reasonableness of limits under s.1 of the *Charter*. The goal throughout has been to inform the work of the Commission and, in reaching beyond that objective, to explain why s.2(c) matters and – to be forthright – to advocate for this guarantee.

In the absence of a jurisprudence, s.2(c)'s interpretation is guided by the established principles of *Charter* interpretation, and informed, to the extent it is applicable, by the First Amendment tradition and authoritative commentaries on international guarantees. The paper endeavours to explain why s.2(c) should be invigorated and show how a framework of analysis can be developed. Engaging s.2(c)'s role is critically important, not only to validate the legitimacy and value of experiential, collective and public democracy, but also to create clarity – and principled guidelines for determining limits on assemblies that overstep the boundaries of s.2(c)'s protection.

Appendix A: Bibliography

POE Commission Background Paper on Freedom of Peaceful Assembly

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