Exploring a More Independent Freedom of Peaceful Assembly in Canada

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Exploring a More Independent Freedom of Peaceful Assembly in Canada

Abstract
There has been significant progress regarding the law on public demonstrations since the enactment of the Canadian Charter of Rights and Freedoms. However, the freedom of peaceful assembly, one of the four fundamental freedoms protected by section 2 of the Charter, is the least judicially explored freedom. Rather than undertake a free-standing freedom of peaceful assembly analysis, Canadian courts tend to subsume the analysis into freedom of expression. As illustrated by the increasingly frequent occurrence of demonstrations today, freedom of peaceful assembly is an emerging and ongoing issue in constitutional law. Accordingly, it is more crucial than ever that peaceful assembly law be developed and utilized in a manner consonant with the increasing frequency of demonstrations in today's society.

In this paper, the author undertakes a critique of the freedom of peaceful assembly analysis as currently applied by the courts and presents a doctrinal analysis aiming to establish potential features of a stand-alone freedom of peaceful assembly Charter analysis. In particular, the author addresses how Canadian courts should approach peaceful assembly as an independent freedom, in light of the judicial treatment of other freedoms in current jurisprudence.

Keywords
freedom of peaceful assembly, Charter jurisprudence, Constitutional Law, demonstrations, fundamental freedoms

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EXPLORING A MORE INDEPENDENT FREEDOM OF PEACEFUL ASSEMBLY IN CANADA

BASIL S. ALEXANDER*

INTRODUCTION

There has been significant progress regarding the law on public demonstrations since the Supreme Court of Canada’s 1978 decision in Dupond v Montreal (City of).1 In that decision, which predated the Canadian Charter of Rights and Freedoms (the “Charter”),2 the majority of the court was hesitant to afford constitutional protection to public demonstrations. Citing the “inarticulateness” of demonstrations, Beetz J. in his majority decision held that demonstrations fell short of becoming “part of language.”3 Thus, demonstrations did not attract protection as part of freedom of speech. Further, Beetz J. stressed that “[t]he right to hold public meetings on a highway or in a park is unknown to English law.”4 As a result, this decision effectively allowed for complete prohibitions on demonstrations in Canada because it upheld the constitutionality of a thirty-day prohibition of any assembly, parade, or gathering in Montréal.5

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1 [1978] 2 SCR 770 [Dupond].
3Dupond, supra note 1 at 797-98. Beetz J stated that demonstrations “are of the nature of a display of force rather than of that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse.” Ibid.
4Ibid at 797.
5Dupond, supra note 1 at 782-88, 790, and 792-98. This case was decided on a division of powers basis and with a limited evidentiary record (i.e., primarily uncontested city reports regarding the need for the impugned bylaw). Ibid at 788. The record today would need to be more substantial given the nature and requirements of Charter litigation.

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The enactment of the Charter “radically altered this perspective.”\textsuperscript{6} Subsections 2(b) and 2(c) of the Charter, the fundamental freedoms of expression and peaceful assembly, are now seen as “essential to the functioning of a free and democratic society.”\textsuperscript{7} All of the freedoms guaranteed by the Charter (e.g., freedom of religion, freedom of expression, freedom of peaceful assembly, and freedom of association, et cetera) protect “rights fundamental to Canada’s liberal democratic society.”\textsuperscript{8} In 1999, for example, a Québec municipal court held that “the right to peaceful protest is an essential tool in democracy to promote legitimate interests, raise public awareness, and influence governments.”\textsuperscript{9} A Québec superior court also recently stated that demonstrators’ access to public spaces (e.g., roads and parks) for the purpose of demonstrating is now protected in Canadian, American, and international law.\textsuperscript{10} However, even with this progress, it is still unclear how demonstrations are to be treated by the legal system and, specifically, how the law may protect them.\textsuperscript{11} In particular, it remains to be seen whether freedom of peaceful assembly should be further developed as an independent freedom in Canadian law.

Freedom of peaceful assembly is highly relevant to demonstrations. However, I argue that it is the least judicially explored freedom. Rather than undertake a free-standing freedom of peaceful assembly analysis, Canadian judges tend to examine related claims through a freedom of expression lens.\textsuperscript{12} This has resulted in the existence of little to no detailed analyses under subsection 2(c) in the modern jurisprudence. In particular, the lack of focus on peaceful assembly raises concerns regarding stagnation of the law and the effectiveness of peaceful assembly as an individual freedom to safeguard demonstrations. This paper argues that taking a free-standing approach to peaceful assembly law would better protect demonstrations by further developing and reforming critical legal issues, such as the scope of protected activities and state

\textsuperscript{7} Garbeau c Montréal (Ville de), 2015 QCCS 5246 at para 1 [Garbeau] [translated by author]. See also R v Singh, 2011 ONSC 717 at para 39.
\textsuperscript{8} Mounted Police Association of Ontario v Canada (Attorney General), 2015 SCC 1 at para 48 [Mounted Police].
\textsuperscript{9} R v Lebel, [1999] JQ No 4995 at para 83 (CM) [translated by author].
\textsuperscript{10} See generally Garbeau, supra note 7 at paras 120-56.

In some cases, courts themselves noted how the peaceful assembly issues are “subsumed” by the freedom of expression analyses ultimately completed. See e.g. Figueras v Toronto Police Services Board, 2015 ONCA 208 at para 78; and British Columbia Teachers’ Federation v British Columbia Public School Employers’ Assn, 2009 BCCA 39 at para 39, leave to appeal to SCC refused, 2009 CanLII 44624.
justification. In light of the frequency of recent “mass arrests” taking place even when
the majority of participants were not violent, Québec legal scholar Gabriel Babineau
emphasized the necessity of legal protections for demonstrators who remain peaceful.13
Similarly, Nathalie Des Rosiers noted that

[i]n reality, protest occurs along a continuum of aggression. … [T]here ought to be a legal framework that both reflects the different types of protest and offers a proportional response. … It is when protests disturb the day-to-day operations of the general population that constitutional protection is essential.14

As part of such improvements, courts should use and interpret the freedom of peaceful assembly independently rather than applying freedom of expression analyses. An independent approach would allow for a better articulation of peaceful assembly’s role in society as well as what peaceful assembly’s core protected elements are.

Correspondingly, this article has two purposes: (1) to critique the freedom of expression analysis currently applied by the courts when hearing peaceful assembly claims; and (2) to present a doctrinal analysis with the aim of establishing the groundwork for a better understanding of the potential merits and features of a standalone freedom of peaceful assembly Charter analysis. Ultimately, the aim is to achieve a more comprehensive understanding of the fundamental freedom of peaceful assembly and its related content as a free-standing freedom in Canada.

Toward these ends, this article focuses on how Canadian courts should approach peaceful assembly as an independent freedom in light of the judicial treatment of other freedoms. The paper first explores why peaceful assembly ought to be treated as an independent freedom. It then examines several important commonalities among the fundamental freedoms and the resulting implications for a separate peaceful assembly analysis. The article then focuses on how the constitutional scopes of the other three freedoms are defined and applied. Some key differences are identified, which affect how Canadian courts understand, analyze, and protect each freedom. Finally, the paper argues that the “substantial interference” test is a stronger method for examining peaceful assembly and developing its corresponding content, rather than the current freedom of expression methodology and framework. The “substantial interference” approach would allow for a more thorough understanding of which activities are and ought to be covered by the freedom of peaceful assembly. The conclusion briefly outlines some key considerations in developing the principles necessary to conduct “substantial interference” comparisons in the context of peaceful assembly.

13 Babineau stated that the peaceful aspect of assembly should be “closely linked” to the concept of violence. Babineau, supra note 11 at paras 1-4 [translated by author]. See also Alexander, supra note 11.
14 State on Trial, supra note 4 at 322. Des Rosiers discusses issues related to demonstration requirements, spontaneous demonstrations, communicating with police, police actions, and demonstrator anonymity. Ibid at 322-23.
I. PEACEFUL ASSEMBLY SHOULD BE INDEPENDENT FROM EXPRESSION

As noted above, courts currently subsume peaceful assembly analyses into those of freedom of expression. Namely, courts tend to view the impugned laws and the activities they interfere with through the lens of expression, rather than using a framework unique to peaceful assembly. This poses two problems for the coherent development of the freedom of peaceful assembly.

First, it makes peaceful assembly seem like a derivative of expression, as opposed to a free-standing freedom. While there is obvious overlap with freedom of expression, the Charter lists peaceful assembly separately, rather than as part of the group of protections included alongside expression. It is noteworthy that freedom of peaceful assembly is not explicitly included with “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication” as enumerated in subsection 2(b). There must be a purpose for this difference, especially since there is a presumption against tautology. The separation in drafting reflects that peaceful assembly is a unique collective and expressive activity that involves rationales and issues warranting distinction from those included in the Charter guarantee of freedom of expression. Freedom of peaceful assembly is undoubtedly deserving of a unique focus given its role in Canadian and other liberal-democratic societies, both historically and recently. Peaceful assembly should accordingly stand “as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.”

Second, it is difficult to develop the necessary content, analyses, and themes of peaceful assembly in a comprehensive manner if our courts continue to focus on applying well-settled freedom of expression law and corresponding justification analyses. As noted in Villeneuve c Montréal (Ville de), there are few authorities dealing in detail with the freedom of peaceful assembly as it appears in Canadian law. The 2015 Québec superior court case Garbeau c Montréal (Ville de) examines the related law in more detail than others. The broad and inclusive nature of the freedom of expression framework, which instead orients litigants and judges toward section 1 justification analyses, was designed for general expression purposes— not specifically for peaceful assembly.

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15 Charter, supra note 2, ss 2(b)(c).
17 See references supra note 4 and note 11.
18 Mounted Police, supra note 8 at para 49.
19 For further examples, see Batty v Toronto (City), 2011 ONSC 6862 at paras 76ff [Batty]; and Calgary (City) v Bullock (cob Occupy Calgary), 2011 ABQB 764 at paras 31ff [Occupy Calgary].
20 Villeneuve c Montréal (Ville de), 2016 QCCS 2888 at para 386 [Villeneuve] [translated by author].
21 See Garbeau, supra note 7.
Given the continued utility of demonstrations in today’s society for the expression of dissent, peaceful assembly warrants its own independent development. For example, in the United States, numerous demonstrations occurred during 2017 in response to a variety of issues, particularly following the election of President Donald Trump and his engagement with certain issues (namely race-related issues).

Similarly, demonstrations are a major part of Canadian history. Examples include the Winnipeg General Strike and demonstrations during the Great Depression. Demonstrations were and continue to be ideologically driven or targeted against bias and discrimination. They also frequently involve Indigenous issues or issues connected to global summits, such as the Toronto G20 Summit in 2010. Notably, several litigated cases arose recently in Québec, in part the result of greater demonstration activity by post-secondary education students after the Québec provincial government proposed a significant tuition increase in 2012. More recently, far right and counter demonstrations occurred in Vancouver and Québec City. These examples reflect the fact that freedom of peaceful assembly is an emerging, ongoing, and high-stakes issue in constitutional law. Accordingly, it is more crucial than ever that peaceful assembly law be developed and utilized in a manner consonant with the increasing frequency of demonstrations in today’s society.

II. KEY THEMES AND COMMONALITIES AMONG THE FUNDAMENTAL FREEDOMS

To understand how an independent peaceful assembly freedom should be shaped, it is useful to first examine some themes associated with the fundamental freedoms as well as their applicability to peaceful assembly. As indicated, section 2 of

24 See State on Trial, supra note 4 at 5-9.
25 Ibid at 9-11
26 See ibid at 5 and 11-14.
27 For more information, see Villeneuve, supra note 20 at paras 100ff; Québec (Ville de) c Bérubé, 2016 QCCM 122 at paras 62-88 and 122 [Bérubé], aff’d 2017 QCCS 5163; and Makela, supra note 11.

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the Charter guarantees four fundamental freedoms: freedom of religion (s. 2(a)), freedom of expression (s. 2(b)), freedom of peaceful assembly (s. 2(c)), and freedom of association (s. 2(d)). With respect to the general role of these four freedoms in Canadian society, Dickson J. made several oft-cited comments in R v Big M Drug Mart Ltd, a case regarding freedom of religion. For example, he noted that “a free society” aims at equal enjoyment of the freedoms, and that variability, rather than uniformity, is a key aspect of a “truly free society.” Significantly, he also stated that “[f]reedom can primarily be characterized by the absence of coercion or constraint” such that a person may “[act] of his [sic] own volition.”

One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

Dickson J. emphasized the freedoms’ focus on limiting coercion and constraint. Accordingly, it is not surprising that the freedoms generally impose negative obligations on government actors (i.e., not to interfere), rather than positive obligations (i.e., to actively protect, assist, or facilitate the freedoms), unless exceptional circumstances apply. Generally speaking, courts would likely interpret a free-standing freedom of peaceful assembly and its corresponding obligations on the state similarly, focusing largely on negative obligations.

While such a general approach would be appropriate for many issues related to peaceful assembly (e.g., whether and how people wish to assemble, and the variety of concerns that may result in assembly), the specific nature of the freedom of peaceful assembly is

29 Charter, supra note 2.
30 Big M Drug Mart, ibid at 336.
31 Ibid.
32 Ibid at 336-37.
33 See Delisle v Canada (Deputy Attorney General), [1999] 2 SCR 989 at paras 25-29 & 33; Dunmore v Ontario (Attorney General), 2001 SCC 94 at paras 19-29 (exception for legislative under-inclusion in the freedom of association context).
assembly likely calls for a deeper analysis respecting corresponding state and societal obligations. In particular, it is important for state obligations to be carefully laid out in the context of demonstration. Assemblies are collective actions that require physical space in order to be effectively carried out; however, the state often controls or regulates such location (e.g., spaces in front of or near government buildings, roads, and parks). Demonstrations are also often a means to express dissent to those in power. Further, the thrust of demonstrations is their disruptiveness or ability to draw attention. This necessarily involves interaction with law and regulatory enforcement as well as interactions with others’ rights, societal norms, and expectations. Special considerations relating to the state’s obligations ought to be applicable to government actors to ensure that peaceful assemblies can occur and are not prevented. This will require separate and more comprehensive analyses on behalf of the judiciary.

Moreover, the courts’ general reticence to impose positive obligations on the state in the Charter freedom context does not mean that the application of the fundamental freedoms is only characterized negatively. This is particularly true when considered from the perspective of potential claimants. For example, freedom of religion includes “the right to believe…what one chooses, to declare one’s beliefs openly, …to practice one’s religion in accordance with its tenets [and]…to teach and disseminate one’s beliefs.” While LeBel J. considered these elements to be “positive aspects” of the freedom of religion, they may only be viewed as positive from the perspective of claimholders. On the other hand, freedom of religion also includes “the right not to be compelled to belong to a particular religion or to act in a manner contrary to one’s religious beliefs”—an entitlement framed in the negative. Again, courts frame freedom of religion negatively, but in a manner that entitles claimholders rather than the government. The emphasis here is not on directing the state to refrain from constraining and coercing; rather, claimholders have the right to conduct activities and to be free from state constraint and coercion.

The freedom of association has been treated by courts in an analogous manner. It includes a negative prerogative not to associate (i.e., not to be part of a union or other group) as well as various positive elements, such as entitling persons to join with others in forming associations, to pursue constitutional rights, and “to meet on more equal terms the power and strength of other groups or entities.” Similarly, freedom of

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34 See e.g. State on Trial, supra note 4 at 322-23; Alexander, supra note 11.
35 Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village), 2004 SCC 48 at para 65, LeBel J dissenting [Congrégation]. See also Big M Drug Mart, supra note 29 at 336-37.
36 Congrégation, ibid at para 65.
37 Ibid [emphasis added, citation omitted]. See also Big M Drug Mart, supra note 29 at 336-37.
38 Mounted Police, supra note 8 at paras 41-42 & 65-66. However, section 1 of the Charter may justify an infringement of the entitlement not to be part of a union. See e.g. Lavigne v Ontario Public Service Employees Union, [1991] 2 SCR 211 at 281ff, 333ff, & 342.
expression entails a positive right to express oneself in numerous ways.\(^{39}\) It has also been interpreted as including a negative right, to \textit{not} be compelled to express something (e.g., “to say nothing or...not to say certain things”).\(^{40}\) These examples are not exhaustive, but they show how courts would and should use the claimant’s perspective to help interpret the scope of an independent freedom of assembly. The examples also illustrate how the content of each freedom becomes clearer and more practically concrete when viewed predominantly from a claimant perspective. It is likely that the courts would analyze, interpret, and apply freedom of peaceful assembly in a manner similar to that of the other fundamental freedoms, given the freedoms’ inherent syntactical and semantic similarities. For example, from a claimant perspective, there is a right to form or join a peaceful assembly or to choose not to do so, a peaceful assembly ought to be able to draw society’s attention and interest to issues, and, finally, peaceful assembly is a way to communicate with and influence those in power, particularly when there are limited or no means to effect change in other ways. As has been seen with the other fundamental freedoms, a free-standing freedom of peaceful assembly would also develop practically over time.

Notwithstanding a \textit{new} approach to applying freedom of peaceful assembly, it is well settled that courts are bound to use a generous and purposive approach in interpreting the \textit{Charter}.\(^{41}\) Courts determine the scope of application for a freedom such as peaceful assembly by analyzing its purpose “in light of the interests it was meant to protect.”\(^{42}\) Courts conduct this analysis by reference to the character and the larger objects of the \textit{Charter} itself, to the language chosen to articulate the specific right or freedom, to the historical objects of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the \textit{Charter}.\(^{43}\)

The \textit{Charter} must “be placed in its proper linguistic, philosophic and historical contexts.”\(^{44}\) That said, courts are instructed to conduct an “activity-based contextual approach” that looks at the “activity in question in its full context and history” when considering the fundamental freedoms.\(^{45}\) As will be discussed, the freedoms vary on


\(^{40}\) See e.g. \textit{Slaight Communications Inc v Davidson}, [1989] 1 SCR 1038 at 1048 & 1080 (reference letter with specified content justified under section 1).

\(^{41}\) \textit{Hunter v Southam Inc}, [1984] 2 SCR 145 at 155-56 [\textit{Hunter}]; and \textit{Big M Drug Mart, supra} note 29 at 344.

\(^{42}\) \textit{Big M Drug Mart, ibid.}

\(^{43}\) \textit{Ibid.} See also \textit{Mounted Police, supra} note 8 at paras 47-48.

\(^{44}\) \textit{Big M Drug Mart, supra} note 29 at 344.

\(^{45}\) \textit{Mounted Police, supra} note 8 at paras 47-48.
how their respective scopes are defined for the purpose of determining constitutional infringements. However, none of the freedoms are unlimited in terms of what they include, and the limiting factors inevitably inform courts’ decisions about what is included or excluded in the scope of each freedom. For example, although subsection 2(c) is the only explicitly qualified freedom (i.e., “peaceful assembly”), all of the other freedoms have been interpreted to exclude violence or injury from their scope. A religious practice may not injure others or their right to hold their own beliefs. Protected forms of expression likewise do not include those that are violent. Similarly, violent associational activities are not protected. In the case of the freedom of peaceful assembly, the modifier “peaceful” ultimately reinforces the approach already taken with respect to the other Charter freedoms. It should also be noted that Canada’s international obligations and related analyses may provide useful insights into how courts would approach and shape the much less litigated and still developing Charter freedom of peaceful assembly.

Moving forward, a key interpretive question is whether courts will focus on individual or collective rights in their independent analyses of peaceful assembly. While one of the functions of the Charter is “the unremitting protection of individual rights and liberties,” this does not mean that Charter rights do not have a collective dimension. In fact, in Mounted Police Association of Ontario v Canada (Attorney General), the Supreme Court of Canada made it clear that “the Charter does not exclude collective rights” and that “its s. 2 guarantees extend to groups.” In support of this perspective, the Court noted that “peaceful assembly is…a group activity incapable of individual performance.” The Court also cited additional examples in the expression, voting, and religion contexts, and it ultimately held that freedom of association protects three classes of group activities. The treatment of the fundamental freedoms by the Supreme Court of Canada in this case and others indicates that any approach to

46 See Charter, supra note 2, s 2 [emphasis added]. See also Villeneuve, supra note 20 at paras 386-90 (peaceful assembly has internal requirement of peaceful).
47 Big M Drug Mart, supra note 29 at 346.
48 Irwin Toy, supra note 29 at 970.
49 Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1 at para 107.
51 Hunter, supra note 41 at 155.
52 Mounted Police, supra note 8 at para 64 [emphasis added].
53 Ibid.
54 These consist of: “(1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.” Ibid at para 66.
peaceful assembly must recognize that “collective rights complement rather than undercut individual rights” and that “[b]oth are essential for full Charter protection.”

Thus far, this paper has focused on understanding how peaceful assembly would likely be interpreted in light of content and scope of issues common to all of the freedoms. However, fundamental freedom infringements are also inextricably subject to justification pursuant to section 1 of the Charter, the final step of most Charter analyses. In addition to the requirement that the limit be prescribed by law, the well-known R v Oakes test governs what is considered a justifiable infringement.

The past application of the Oakes test demonstrates the potential issues and considerations that would likely arise when considering whether peaceful assembly infringements are justified. For example, the regulation of roads in Québec and the reasons for such regulation have been found to be pressing and substantial objectives for a law limiting demonstrations on roads. Justification often turns on the later stages of minimal impairment and proportionality. It is thus not surprising that claims involving demonstrators who erect permanent structures or shelters have not been successful at these stages of the Oakes test. Municipal and superior courts in Québec have also found, in Bérubé and Villeneuve respectively, that section 1 justified a requirement for demonstrators to provide an itinerary in the form of a location or a route to assist police. Such a requirement was found to be minimally impairing, as notice was the only requirement; no authorization or permit was required, and the only lesser alternative was to provide no notice at all. These examples illustrate the kinds of issues that need to be proactively considered as part of developing the scope and content of an independent freedom of peaceful assembly.

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55 Ibid at para 65.
56 Charter, supra note 2, s 1.
57 Ibid, s 1.
59 In other words, whether there is “a pressing and substantial object” and whether “the means chosen are proportional to that object.” The latter includes a rational connection to the objective, minimal impairment of the affected right, and “proportionality between the deleterious and salutary effects.” Carter v Canada (Attorney General), 2015 SCC 5 at para 94 [Carter]. The Oakes test is the subject of extensive detailed commentary; this article does not review the test or its corresponding elements in further detail. For more information, however, see e.g. PW Hogg, Constitutional Law of Canada, 5th ed (Toronto: Carswell, 2007) (looseleaf) vol 2, ch 38.
60 Garbeau, supra note 7 at paras 210-14 (“security, the free movement of persons and goods on public roads and access to the buildings that surround them”) [translated by author].
61 See Batty, supra note 19 at paras 70-72 (Occupy Toronto case; infringement focus was on expression analysis); and Occupy Calgary, supra note 19 at para 12 (infringement of expression conceded).
62 Villeneuve, supra note 20 at paras 386-90; Bérbé, supra note 27 at para 133.
63 See Villeneuve, ibid at paras 140, 143-45, & 460-62; and Bérubé, ibid at paras 130-31. For clarity, notice could be provided to the last minute in these situations. Villeneuve, ibid at paras 143-45 & 460; and Bérubé, ibid at para 131.
For a discussion of the guidelines and the American law regarding permit and authorization system, see Garbeau, supra note 7 at paras 471-478.
Once the core aspects of an independent freedom of peaceful assembly are better known and described in jurisprudence, related infringements can be more properly considered in relation to these areas. For example, in the context of freedom of association, an exclusion of Royal Canadian Mounted Police (“RCMP”) members from collective bargaining was found to be unjustified. This result was defensible, because other police forces used collective bargaining, and the exclusion had the practical effect of preventing RCMP members from engaging in core activities associated with freedom of assembly. Complete prohibitions of core aspects should not be easily justified given the ensuing deleterious effects. The same principle would apply to core aspects of an independent freedom of peaceful assembly. It is also important to understand how different perspectives on what might constitute a potential infringement may or may not align with what constitutes the core constitutional content at law. For instance, from the demonstrators’ perspective, the 24-hour nature of the Occupy demonstrations was arguably their defining feature; any participating demonstrator would have seen limiting the hours as a practical ban. However, laws limiting the time and duration of demonstrations were viewed by courts as justified given the other interests involved and the presence of other alternatives. Had these cases involved an independent analysis of the freedom of peaceful assembly, the courts would have better considered what constituted the core aspects of the freedom when conducting both their infringement and justification analyses.

This section has outlined a number of the considerations that ought to influence an independent freedom of peaceful assembly, particularly in light of the commonalities and themes found among the other fundamental freedoms. However, more juridical attention must be devoted to defining the scope of such a freedom, especially since no Charter right or freedom is unlimited.
III. A KEY DIFFERENCE BETWEEN THE FREEDOMS—DEFINING THE SCOPE

Each of the fundamental freedoms—peaceful assembly aside—uses different approaches in defining the constitutional scopes of the freedom at law. This is understandable given the different issues at play and the variety of activities protected by each freedom. It is necessary to define the scope of these freedoms, since no Charter right is absolute, and each will inevitably interact with other rights—including those held by the modern political state. An understanding of how the courts interpret these scopes differently provides insight into the most beneficial approach to peaceful assembly over the long term.

The approach to freedom of religion, for example, focuses on what constitutes an infringement on the freedom. There are two parts to the test: first, whether a claimant “sincerely believes in a belief or practice that has a nexus with religion,” and second, whether the law or action at issue is a “more than trivial or insubstantial” interference with the claimant’s ability to act in accordance with his or her religious beliefs. A majority of the Supreme Court of Canada has held that a case-by-case examination is necessary to determine if such interference occurs. This is consistent with the variety of religious beliefs and practices for which constitutional protection could potentially be claimed. Furthermore, the interference must be such that it reasonably or actually threatens a religious belief or practice. If it does not threaten actual beliefs or conduct, it is a “trivial or insubstantial” interference. In other words, there must be some impact or effect of the impugned law for there to be protection under the Charter freedom of religion.

In contrast, freedom of expression takes a more expansive approach. If an activity “conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope” of the freedom. This indicates a broad and inclusive approach. The next step in the analysis addresses whether the purpose or the effect of the impugned government action restricts expression. Given the broad nature of the first step, and the reality that Charter litigation would not occur unless the second step was likely to be fulfilled (i.e., in practice, it is a relatively low infringement threshold), freedom of expression jurisprudence focuses largely on whether the infringing law can

68 See e.g. Operation Dismantle Inc v Canada, [1985] 1 SCR 441 at 450 & 488-90.
69 Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 32 [Hutterian Brethren].
70 Syndicat Northcrest v Amselem, 2004 SCC 47 at para 60.
71 Hutterian Brethren, supra note 69 at para 32.
72 See e.g. Mutani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6 (public school prohibited wearing of kirpan, even with conditions).
73 Irwin Toy, supra note 29 at 969, 978, 1005-06 & 1007.
74 Ibid at 970.
75 Ibid at 971, 978-79, 1005-06 & 1007.
be justified.  

When applicable, the Supreme Court of Canada has also distinguished between form and content as part of the expression analysis. Generally, all content is worthy of protection, but the method or location may not be. For example, the scope of freedom of expression is limited by the Supreme Court of Canada’s holding that violent expression and expression on private property are not protected by the Charter freedom. The Court similarly developed a test to determine whether expression on a particular government-owned property is covered by the freedom (e.g., public streets compared to private offices). However, the resulting restrictions on scope are relatively small compared to the overall breadth of the freedom. It should also be noted that even if method or location do not exclude a particular expression from protection, these factors may still ultimately contribute to the section 1 analysis.

Given the broad nature of this methodology, it is not surprising that Canadian courts conduct peaceful assembly analyses through an expression lens, or simply by importing the expression tests. Such an approach is understandable because peaceful assembly is, by nature, an expressive activity. However, this approach does not easily acknowledge the unique realities, motivations, and roles associated with peaceful assemblies, such as their collective nature, which differs from expression more generally.

Finally, the judicial approach to freedom of association focuses on “substantial interference,” which, although it seems similar to the freedom of religion approach, uses slightly different language. There are various activities protected by freedom of association, and courts will consider whether these activities and their corresponding

77 Montréal (City) v 2952-1366 Québec Inc, 2005 SCC 62 at para 60 [2952-1366]; Irwin Toy, supra note 29 at 969-70.
78 2952-1366, ibid paras 60-61 & 72; Irwin Toy, supra note 29 at 969-70.
79 2952-1366, ibid at paras 73-80. The key question is whether expression in the place conflicts with the purposes of the freedom (i.e., democratic discourse, truth finding, and self-fulfillment). Two factors are to be accordingly considered: the historical or actual function of the place; and whether other aspects of the place suggest that expression there would undermine the freedom’s values.
80 See e.g. 2952-1366, ibid at para 99; and R v Banks, 2007 ONCA 19 at para 133, leave to appeal to SCC refused, 2007 CanLII 37182.
81 See generally supra note 12. See also: Villeneuve, supra note 20 at paras 381–85, 397, 407–37; Batty, supra note 19 at paras 70-75; Occupy Calgary, supra note 19 at para 31; and Bérubé, supra note 27 at paras 110-16.
82 See e.g. OSCE/ODIHR Guidelines, supra note 50 at 15 & 17 (“1.2 Definition of assembly. … [T]he intentional and temporary presence of a number of individuals in a public place for a common expressive purpose” and “3.3 … Assemblies are held for a common expressive purpose and, thus, aim to convey a message” [emphasis added]).
83 Mounted Police, supra note 8 at paras 66–67 & 80. For example, protected classes of activities include the right to join with others and form associations, to pursue other constitutional rights, and “to meet on more equal terms the power and strength” of others. Accordingly, the freedom guarantees “the right of
rights have been substantially interfered with. Substantial interference takes place when “the intent or effect [of a law or an action] … seriously undercut[s] or undermine[s]” the key activity, such as in the context of collective bargaining. The courts’ inquiries are contextual and fact-specific, and the focus is on whether there has been or are likely to be significant adverse impacts. The inquiries usually focus on the importance of the affected matter and the extent to which it is impacted. Substantial interference is more likely if a central issue is the one affected. For example, in the collective bargaining context, the right to strike is vital; limiting association in a way that substantially interferes with such collective bargaining is, accordingly, a violation. However, in order for courts to apply this approach effectively, one must understand which core activities and corresponding rights are protected as part of the freedom. Such tenets took a number of years to develop in the association context.

IV. THE SUBSTANTIAL INTERFERENCE TEST IS BEST FOR PEACEFUL ASSEMBLY’S SCOPE

To better facilitate the development of peaceful assembly as an independent freedom, courts need to revise the default approach to its scope. The analyses used with respect to freedom of religion and freedom of association are compatible with freedom of peaceful assembly, given the freedoms’ general similarities. Freedom of religion and freedom of association are both more concerned with specifically examining activities and degrees of infringement, whether interference is “more than trivial or insubstantial” or “substantial” respectively. It is unclear whether the two standards are identical, or if there is a possibility that an infringement may fall between the two (e.g., it is higher than “more than trivial or insubstantial” but not high enough to reach “substantial”). However, the practical difference between these two standards may be minimal given how the analyses in fact play out in their respective contexts. As well, there is always a spectrum of infringement: even if the degree of infringement plays a limited role at the scope-defining stage, it will likely still play a role in the section 1 justification stage.

employees to meaningfully associate in the pursuit of collective workplace goals,” which includes a right to a collective bargaining process.

84 Health Services, supra note 50 at para 92. Potential examples include: “union breaking” laws or actions; bad faith actions; and unilaterally nullifying negotiated terms without any meaningful discussion and consultation process.

85 Ibid.

86 Ibid at paras 93-94.

87 Meredith v Canada (Attorney General), 2015 SCC 2 at para 52, Abella J dissenting; and Health Services, supra note 50 at paras 95-96.

88 Saskatchewan Federation of Labour v Saskatchewan, 2015 SCC 4 at paras 24-25. Abella J noted that if “one of the meaningful dispute resolution mechanisms commonly used in labour relations” were to be used instead in the context of essential services legislation, it would be more likely to be justified under section 1. Ibid at para 25.

89 For a general summary, see Mounted Police, supra note 8 at paras 30-66.
Such an approach also allows for and results in unique analyses and outcomes that better account for peaceful assembly’s unique features and character.

Given that this paper is concerned with the development of the legal principles underlying peaceful assembly, the lens of peaceful assembly itself indicates which approach is best. Accordingly, the substantial interference test offers more potential towards developing the freedom’s scope and content. This is particularly so because an independent freedom of peaceful assembly is more akin to freedom of association than freedom of religion. While both freedoms have collective aspects, religion’s approach makes sense in its own context, since there is a significant diversity of activities—within and varying across religions—that courts may need to analyze to determine whether there is constitutional protection. It is difficult for courts to develop a practical core of detailed, universal activities, as well as corresponding practice rights that would apply across all religions. More flexibility is needed, and most of the resulting limits occur as part of section 1 analyses. In contrast, there is a much narrower range of activities that warrant constitutional protection under the freedom of association. This is analogous to peaceful assembly, which is similarly limited in nature. A smaller range of protected activity allows for a narrower focus on precisely which activities and rights are central to the freedom. Consistent with the courts’ mandated purposive approach “to consider the most concrete purpose or set of purposes that underlies the right or freedom in question, based on its history and full context,”90 it follows that the courts should interpret a free-standing freedom of peaceful assembly in the latter manner.

Since scope aids in determining what precisely is protected by the freedom, the substantial interference test also allows for a stronger enunciation of the inherent core, for which there is constitutional protection. In turn, this may provide greater practical guidance regarding the Charter freedom’s scope and content. Judicial treatment of freedom of association illustrates how purposes become more understandable and enforceable when they become more concrete.91 A similar approach would be beneficial to a better understanding of peaceful assembly, such as where and how assemblies should occur.92 Guidance from the courts in this context may also be particularly helpful to police and other state actors who interact with demonstrators, given that such state actors usually deal with demonstrations on the ground and have significant powers that can be employed against demonstrators.93

90 Mounted Police, supra note 8 at para 50 [emphasis added by author].
91 For examples in the freedom of association context, see supra note 84 above.
92 For example, the OSCE/ODIHR Guidelines provide that, “as a general rule, assemblies should be facilitated within ‘sight and sound’ of their target audience.” OSCE/ODIHR Guidelines, supra note 50 at 17. This contrasts with the experience of the Toronto G20, as the meeting occurred at the Metro Toronto Convention Centre, but the official protest zone was some distance away on the north side of Queen’s Park.
93 For further discussion of these and related issues, see Alexander, supra note 11; and WW Pue, R Diab, & G Jackson, “The Policing of Major Events in Canada: Lessons from Toronto’s G20 and Vancouver’s
In addition, the threshold for “substantial interference” is higher by its nature than what is used now. As a result, if a finding of substantial interference to a claimant’s freedom to assemble peacefully is made, there is a stronger likelihood that the protected activity in question will survive section 1 justification analyses. The infringement would require a higher threshold than the lower threshold it is currently subject to under subsumed freedom of expression analyses. This is especially important because it would increase pressure on the state to come up with stronger justifications for such infringements. As indicated, demonstrations and potential corresponding state interventions and responses are more prevalent now than ever. This has been illustrated by, among other incidences: the Toronto G20 Summit; Idle No More demonstrations (and those inspired by other Indigenous issues); the Occupy movement; student protests in Québec; far-right and counter-demonstrations; and other protests elsewhere—including the United States. The successful certification of more and more Canadian class actions involving demonstration issues also reinforces the importance of developing this area. Courts are evidently becoming more willing to intervene to protect the rights of those whose freedom to assemble peacefully have been collectively denied or impeded.

In spite of this, there are two caveats worth noting. First, the substantial interference test is helpful only when coupled with an understanding of what content the interference is relative to. In other words, the substantial interference test tends to rely on articulations of core activities in defining the scope of each freedom. The association cases took decades to develop in this respect. In contrast, there is currently a relative dearth of peaceful assembly cases. While the lack of freedom of peaceful assembly jurisprudence initially appears to be a significant issue, there are methods to mitigate this concern. For example, many of the principles discussed in other areas of Charter jurisprudence (i.e., regarding freedom of association and expression) may inform the development of peaceful assembly, and are applicable by analogy. As well, the Guidelines on Freedom of Peaceful Assembly (the “Guidelines”) by the Organization for Security and Co-operation in Europe – Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Venice Commission provide an excellent base on which to develop the scope and build the content of Canada’s freedom of peaceful assembly.
Accordingly, this freedom will not be built from nothing.

Second, some may be concerned that the threshold of “substantial interference” has the effect of shifting the onus from the state, as part of justification, to the claimant, as part of the freedom’s scope and content. However, given the “leeway” currently afforded to state justification in contemporary freedom jurisprudence, as well as the nature of Charter litigation in general, it is unclear whether this shift has any real effect in practice. Both the claimant and the state must present their arguments and evidence, and regardless of who bears the burden or which issue—scope versus justification—the court will weigh more heavily in each case. There may be no real impact evident in practice. Most importantly, the nature of each individual case will likely determine what evidence is required more than any onus shift, and the Guidelines will likely help claimants meet some of their requirements. Finally, from a civil litigation perspective, it is often tactically better for claimants to set the initial characterization of issues rather than responding defensively to the government’s narrative. Demonstrator perspectives can thus better frame the issues from the beginning, which is beneficial for understanding and developing the content of an independent freedom of peaceful assembly.

CONCLUSION

Despite the relative lack of development of peaceful assembly as a free-standing Charter freedom, its independence has considerable potential. Accordingly, this article conducts some preliminary doctrinal steps in outlining a better approach to its analysis to help realize that potential in the Canadian context. In particular, courts ought to treat and develop freedom of peaceful assembly as an independent freedom instead of simply a form of expression. Commonalities among the fundamental freedoms provide some initial guidance regarding how courts should approach, interpret, and develop an independent freedom of peaceful assembly. Instead of using the freedom of expression framework—which seems to be the default at present—to determine scope and analyze peaceful assembly issues, courts should use the substantial interference approach of freedom of association. As indicated, its nature is closely akin to an independent freedom of peaceful assembly. Such an approach is also better suited to facilitate the

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96 OSCE/ODIHR Guidelines, supra note 50.
97 See e.g. Hutterian Brethren, supra note 69 at paras 35, 37, 55 & 67-71; Cf paras 143-49, 154, 156 & 173, Abella J dissenting.
98 In contrast, a criminal defence perspective may argue that it is better to have a lower threshold on what is considered interference, and leave the onus on the state. However, unlike criminal situations where legislatures and courts provide significant starting points, such as the Criminal Code and case law, peaceful assembly typically does not have such guidance. As well, since a claimant usually needs to prove his or her case on a “balance of probabilities” in such situations, rather than the lower standard of a “reasonable doubt” as in the case of the state, it is often tactically better to frame the issues from the beginning rather than in response to the opposing side’s characterization.
development of peaceful assembly’s content as a free-standing independent freedom.

While these theories are by no means comprehensive, this work sets the stage for the next key step: synthesizing and developing the key principles and content of the freedom of peaceful assembly. While this article has referred to some relevant materials that may be of assistance in this project (e.g., key Canadian cases and the Guidelines by the OSCE/ODIHR and the Venice Commission), such resources serve only as starting points. More comprehensive explorations are necessary. Many more questions remain unanswered. For example: what are the potential purposes and aims of demonstrations (e.g., political or broader), and how should they be incorporated as part of a constitutionally guaranteed freedom of peaceful assembly? Are there releases of societal frustration or similar aspects that should be better recognized? Is there a role for demonstrations of a longer duration, or even demonstrations that are permanent? How should these and other considerations interact with the realities of a post–9/11 environment? What are the experiences and approaches of other jurisdictions?

Among others, these questions illustrate the reasons why additional work is needed for the law of peaceful assembly to realize its full potential in Canada, especially given its fundamental role in society and its increased prevalence. Most crucially, a free-standing freedom of peaceful assembly needs to be developed in order to protect and benefit those people who may not otherwise be able to influence those in power.

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99 See e.g. Babineau, supra note 11.

100 For example, increased investigatory and detention powers, as well as monitoring tools. See e.g. State on Trial, supra note 4 at Part 2; C Forcense & K Roach, False Security: The Radicalization of Canadian Anti-terrorism (Toronto: Irwin Law, 2015); AP Sherwood, “The ‘State of Exception’ Today: 9/11’s Revolutionary Effect on Law, War and Bodies” (Paper delivered at Law: Stagnation, Evolution or Revolution?, Western Law’s Interdisciplinary Graduate Student Conference, Faculty of Law, Western University, 19 May 2017).