Charter: A Course

A podcast by the David Asper Centre for Constitutional Rights

S5E2 – Charter Section 2(C) – FULL TRANSCRIPT

Transcripts are auto-generated*

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Cheryl Milne:

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Hello, and welcome back to a new season of Charter a Course, a podcast from the David Asper Center for Constitutional Rights at the University of Toronto Jackman Law Faculty. I'm Cheryl Milne, your host, and the Executive Director of the Asper Center. In this fifth season, we continue our exploration of Canadian constitutional law, looking closely at the cases, arguments, and ideas that shape how the charter is interpreted and applied today, through conversations with leading scholars, litigators, and advocates.

We aim to unpack not just what the law says, but how it works in practice and why it matters. Each episode is co-produced by a Jackman Law Student, who helps shape the topic, connect with guests, and develop the questions for our conversations. Whether you're a law student, a practitioner, or simply interested in how rights and freedoms are understood in Canada, we hope this podcast offers insight, clarity, and perhaps a few new questions to consider.

Music:

Charter A Course, I will charter a course. If we can just get the country to trust us. Charter, a course, South, east, west, and north. And along the way we may find justice. Charter, a course, I will charter acourse. If we can just get the country to trust us.

Cheryl:

Today's episode focuses on Section 2C of the Canadian Charter of Rights and Freedoms, which guarantees everyone freedom of peaceful assembly. Although Canadians regularly

encounter assemblies in the form of marches, demonstrations, picket lines, occupations, and encampments, Section 2C has received little attention as an independent charter right.

Courts have often addressed protests through freedom of expression under Section 2B, leaving important questions about the distinct value of gathering together, the meaning of the word peaceful, and the role of physical space. These questions have become increasingly visible in disputes involving public demonstrations, university encampments, municipal spaces, injunctions, and policing. When does a disruptive protest remain peaceful? How should courts

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Balance assembly rights against property rights, safety access, and the rights of others, and what should happen before a court authorizes the removal of a protest. Joining us to discuss these issues is Professor Jamie Cameron, Professor Emerita at Osgood Hall Law School. Over the course of her career, she has taught and written extensively in constitutional law with a particular focus on the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada, and the freedom of expression and the press.

Professor Cameron has also been deeply involved in civil liberties advocacy. She served for many years as a director and vice president of the Canadian Civil Liberties Association, was a member of the board of directors of the British Columbia Civil Liberties Association, and currently serves on the CCLA's National Council. More recently, Professor Cameron has focused particular attention on freedom of peaceful assembly. She prepared a report on Section 2C for the Public Order Emergency Commission.

in twenty twenty two and has since written about protest convoys, university encampments, and the need for a distinct legal framework for Section Two C. Jamie, welcome and thank you for joining us.

Jamie Cameron:

Thank you so much, Cheryl, for giving me the opportunity to talk about freedom of peaceful assembly. It's a favorite subject of mine these days.

Cheryl:

So let's begin with sort of a puzzling question. Section two C expressly protects freedom of peaceful assembly, yet it has generated much less independent jurisprudence than freedom of expression under section two B. Why have courts so often resolved assembly disputes under section two B and what is lost when they take that approach?

(03:56.27)

Jamie:

Okay, well that's really a key question, isn't it? And I think the most important point is to look at what is lost when it's assumed that freedom of assembly can be addressed under freedom of expression. But before getting to that, I'd like to start by looking at how that happened. And I would begin with my own maya culpa, which is that like almost everyone else, I blithely ignored section two C of the Charter for the first thirty five or forty years of the Charter's existence myself.

And only came to it when I was on the research council for the Rouleau Commission looking at the Freedom Convoy issues. And I've thought about why we've overlooked Section 2C because it's a it's it's a bit puzzling because it is textually guaranteed by Section 2 of the Charter. I think I have some partial explanations. one is that I think that issues about assemblies or gatherings weren't really at the forefront.

when the charter first started to be interpreted and the jurisprudence began to evolve. And I'm also sort of wondering about whether the whether Section 2D and what happened to Section 2D might also be a bit of a factor. Because there, as as listeners might know, Section 2D, freedom of association, received a very restrictive interpretation early on in the charter. And it didn't really get going.

As its own independent guarantee until into the 2000s. And even then, it's pretty much restricted to labor relations issues. So it hasn't really given much energy to the Section 2's collective entitlements. And then a third thing that occurs to me is that in the beginning in particular, we in Canada looked quite a bit to the First Amendment tradition, and if you look there, you'll discover that there as well.

Freedom of peaceful assembly has been a non-factor in the jurisprudence. And so there was really nothing for us to look to to give us ideas about the importance of this guarantee. And then, after all, Section 2B was right there. And in the early years of the Charter, Section 2B was very much on the job. And over the years, the first almost 45 years of charter interpretation now, Section 2B developed a highly

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Evolved jurisprudence on issues of expressive activity in public spaces. So, Section 2C was very late to the game, and it only began to arise in conversation and even in litigation more in recent years with the n a number of very public demonstrations and gatherings that we saw in the years. I'm going to say since 2000, but certainly after 2010.

And when it began to come to courts, when issues about gatherings began to come to courts, I think that the judges found it easier to subsume or collapse freedom of assembly issues into section two B. And I think there was a certain tendency to think that Section 2C gatherings are just a plural of Section 2B individual freedom of expression. And indeed, some of the courts have said.

That nothing of value is added by looking separately or additionally at Section 2C. And that's an idea that I find quite troubling. And I begin by thinking, well, that has to be wrong, because Section 2C is a self-standing guarantee. It's textually guaranteed by Section Two of the Charter.

And it's not for nothing that freedom of peaceful assembly was included in the charter. It's not a throwaway guarantee. And so, as mentioned at the top, ever since the Rouleau

Commission, I've become sort of a self-appointed booster of Section 2C. And I start from the I start from the position that Section 2B and Section 2C are not the same. They're complementary.

But they're very different in what they protect. And so, Cheryl, if you'd like me, I can go on at this moment and talk about what I think Section 2C adds to the Charter's fundamental freedoms, because that's sort of indirectly an answer to your question of what is lost when we exclude a section two C or don't pay attention to Section 2C and roll assembly questions into Section 2B.

(08:46.348)

Cheryl:

Yeah, precisely. That's exactly what we want to know. Like it it it's there. It's it's written in the charter. We don't have a tendency to just ignore rights that are articulated. So so what why should it be treated as a distinct freestanding guarantee? And what, as you said, the flip side of what do we lose, it's what does it add?

Jamie:

Well, first of all, you know, assemblies are a plural of freedom of expression. And so from one point of view, freedom of peaceful assembly shares the underlying values that are so important to Section 2B's guarantee of expressive freedom. For instance, assemblies and gatherings about truth seeking and democratic self-government and self-realization, and the same kinds of values that

We rely on to secure strong protection for expressive freedom under Section 2B. But there's a value add to freedom of assembly, and that is that freedom of assembly is a collective entitlement. And what it adds is solidarity of voice. It allows individuals to join together and to leverage their democratic participation and enhance.

the underlying objectives of section two B through acts of collective performative communication. That was a bit of a mouthful, but basically what I'm suggesting is that there's something unique, distinct, and different that happens when you have an assembly

of individuals engaging in the same kinds of communicative acts generally that are protected by Section 2B. And

Assemblies and gatherings serve as a critical agent of can serve as a critical agent of change and an outlet for unheard voices. So we think of section two B as an individual right, though there are, I suppose, collective components in the protections for the media and press. But section two C and freedom of peaceful assembly is necessarily a collective right.

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And that's one significant difference between Section 2C and Section 2B. An assembly or gathering requires two or more persons. So it's necessarily and unavoidably a collective entitlement. But the other thing that is really important about assembly under section two C is that it's also necessarily spatial in nature.

So an assembly or a gathering takes place in space. And it can be virtual space too, but it takes place in physical or virtual, or I suppose you could even say in conceptual space. so an assembly cannot exist outside of some concept concept or aspect of space. And that's not true necessarily for section two B.

To the extent there's overlap between access to government property for expressive purposes under section two B and freedom of assembly under Section 2C, then Section 2B also relies on some element of access to space. But it's but under it's different under Section 2C because you can't have an assembly unless there is space for that assembly. And that's really important because.

Is an important point to take into account when you're thinking you can just do a Section 2B analysis to deal with Section 2C questions. Because, in my opinion, you can't. And then a last thing I'll point out about assemblies that I think is really important is that an assembly is also necessarily performative in nature. Now, listeners familiar with the Section 2B jurisprudence.

will know and remember that the definition of expression under section two B is incredibly broad. Anything, any attempt to convey meaning is prima facie expression for purposes of section two B. And so such a broad definition can include and extend to almost anything an assembly or a gathering can do. Assemblies and gatherings they shout, they march, they sing, they do

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they have encampments, they do and they even engage in all kinds of passive performative communication through silence or silent vigils and so on. So you you you can say that you don't need section C because Section 2B's definition of expression is broad enough to include anything that a gathering could do, but I'm gonna say this: that that there's something that is different and

Different and distinctive and calls for its own separate attention under the charter when a gathering engages in an acts of performative communication because again it's in the context of collective activity rather than individual expression. And so the key the key elements of a gathering from my point of view are that a gathering is collective in nature.

It requires space in order to engage in its communicative endeavors and that it engages in activity in a performative way. And you can use Section Two B's definition, but it doesn't do the concept of performative communication through collective solidarity, the justice that it is entitled to under Section Two C.

Cheryl:

It's really interesting the way you talk about the power of the collective, the space and the the location being important, but also how that the ability to affect change, which can be challenging to government in in a way that's more effective than one voice, and that coming together is an a key part of it. The other aspect of section two C is that the assembly must be peaceful. So that that word is there in that right. And so

You know, sometimes courts have treated serious disruption, blockades, or unlawful uses, and I'll put lost unlawful and sort of scare scare quotes in a sense, because they think it,

you know, that's where the a a debate could come into being in in terms of that spatial part of the the right that you talk about, but the use of public space as falling outside of that protection. So how should peaceful be understood?

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And why should an assembly remain protected even when it is noisy or obstructive?

Okay, so I mean this is the key question under section two C. And so as you've pointed out, Section Two C protects freedom, not freedom of assembly, but freedom of peaceful assembly. And so it's the it's the qualifier to the entitlement under section two C, and therefore it's a essential variable. And it's also a very difficult variable to address because from the one point from one point of view,

It is the purpose of gatherings and assemblies, not all of them, but many of them, to gain attention for their message through deliberately disruptive strategies. That's the point of many gatherings and demonstrations. But at the same time, that obviously pits their freedom to disrupt against the right of the general public not to be disrupted. And I suppose we could have no

Better illustration of that than the Freedom Convoy in Ottawa. Getting to the question of what peaceful means, the issue of disruption can be addressed in one of two places under the charter. It can be addressed under Section 2C, and the and Section 2C could be given an interpretation that excludes disruptive gatherings from the charter on the basis that a disruptive gathering is.

Not peaceful and therefore not protected by the charter. The other way to look at it is to read the meaning of peaceful and what is peaceful a little bit differently, to enlarge the scope of section two C and deal with the issue of disruption under Section 1. Because we know that reasonable limits can be placed on the exercise of rights under Section 2C, under Section 1, where it's justifiable to do so.

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My position on this is quite muscular, actually. and I I think it's right in principle, but it's also I know that it's a hard sell. In my view, peaceful under section two C means nonviolent. And essentially, what I say is that disruption up to the point of violence or threats of violence is prima facie or initially protected by section two C.

Because a gathering or assembly that is nonviolent under this view of section two C is peaceful for purposes of earning initial protection under the charter. And I say that reasonable limits can always be placed on disruptive gatherings under section one. And I will further and say that it's quite problematic to exclude disruptive gatherings from section two C.

Because as I've tried to emphasize, disruption is a great part of the value of many gatherings and demonstrations, not only to those who are involved in the demonstrations, but to our idea of democratic participation and democratic governance. And so to exclude gatherings and assemblies that are disruptive actually defeats some of the underlying value and purpose of this guarantee.

And that's a problem. The other problem is that boy, it puts you on a s bit of a slippery slope because many gatherings and assemblies that are uncomfortable could be considered disruptful, disruptive, excuse me, and therefore unpeaceful and excluded from the charter. But if we allow a sort of a broad conception of what is disruptive to

enter the definition of peaceful assembly under section two c again we could end up with a very very constrained idea of what is allowable as an assembly under section two c and I would go on to say all of this is unnecessary because the point of section one is to be the location in the charter analytically and structurally where reasonable limits are identified

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justified and placed on the exercise of the Charter's rights and freedoms. So again, I understand though that it rubs the wrong way for many, many people to suggest that an assembly or gathering that is highly disruptive could be considered protected by section two C of the Charter. The idea of what is disruptive is so broad and unconstrained that I I

Worry, I worry very, very deeply that it would be a mistake to allow disruption to enter into the definition of peaceful under section 2C. And I would also point out that certainly under section two B, we don't do any of that work in determining the scope of the entitlement. We don't allow content to enter into the enter into the definition of the entitlement.

And we don't allow things that bother us to be excluded from the scope of section two B because we understand that that from the very beginning in Irwin Toy versus Quebec, the court understood that to allow those kinds of content considerations to be taken into account at the top under section two B would place the guarantee of expressive freedom at risk of censorship and at risk of being diminished.

by an analysis that excludes unpopular and offensive views from the charter. So I say that the same thinking ought to apply under section two C and be contextualized to Section 2C's essential nature, which is to cause disruption. And so my view of Section 2C, I would argue, is consistent with the approach we've adopted to Section 2B. And I would say by extension,

even to section two A. I think section two D is a little bit different, but certainly under section two B, what's excluded is violence and nonviolent forms of expression. We should have a similar approach to section two C.

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Cheryl:

So just as you were saying though, that section two C as an express right under the section and it's articulated as doing some work, the word peaceful also is in that section, unlike section two B, which doesn't have a an equivalent stated modifier. So you're suggesting though that that word peaceful should, and and this is your framework, as should be very narrowly construed. We have, you know, a

history of I would say it's not completely analogous, but courts looking at the word peace in like the criminal law context, for example, of disturbing the peace and how that's always

been that seems to have been given quite a broad interpretation. So, your proposed framework rather than being like it it's your framework. It's not really settled Supreme Court doctrine, for example, is it?

Jamie:

No, and just to be clear, I mean, I'm out on my own on this. But I would also say, you know, if you look at you look at dictionary definitions, you can can it down to a choice between does peaceful mean not violent in nature, or does it mean calm and quiet in nature? If we were to choose the calm and quiet definition of peaceful for purposes of section two C, there wouldn't be much of Section Two C left.

Cheryl:

And most and many assemblies of people are are not quiet. Even the fun ones are not quiet.

Jamie:

I just I do also want to say something because it might I might not have the chance to say it anywhere else on this podcast. We we generally don't talk about assemblies in private space, but assemblies in private space can also be restricted and regulated by the state. It's just that we happen to be talking about public gatherings and the kinds of gatherings that that are disruptive and require thinking under section two C and Section One. But we ought to remember

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That as happened in COVID, the governments, various governments placed a lot of restrictions on gatherings in public spaces, private spaces, excuse me, and historically as well. There are some examples. So I just wanted to make sure I mentioned that. But getting back to your point, Cheryl, yes, this is very much my view. And I realized that it's it's a it would be a tough one for a court to adopt because it's very counterintuitive to say that a

gathering and we could take the Freedom Convoy as an example, at a gathering or demonstration or assembly of that kind, which was so so so disruptive is very difficult to say that it was definitionally peaceful for purposes of the Charter. It's a it's a a it's a hard point to get across and there also can be issues, evidentiary issues about

what actually is going on in an assembly because parts of the assembly might not be as peaceful as as other parts. So so these are very difficult questions, Cheryl.

Cheryl:

Well, with the the Freedom Convoy, and just for the sake of the listeners who may not remember as as vividly as we do, that that was a situation where people came in with big trucks and blocked off roads in downtown Ottawa near the the Parliament buildings but also no near many private residences and just honked their horns twenty-four-seven.

And caused other kinds of disruptions. So when we talk about the extreme example, it was a particularly extreme example, and those who were living nearby that were very, very upset by what was happening, without a doubt. And it's interesting that you talk though, I'm going to just jump back to something you said earlier about private space, because I want to talk a little bit about the University of Toronto and Doe case, where the court found that an encampment itself was peaceful.

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And that the university had not established that it was violent, or in this case there was also allegations of it being anti-Semitic. it was an encampment that was protesting what was happening in Gaza and and and so there was allegations that some of the things that were being said there are posters and and and some of the purposes of it were were also anti-Semitic. But it nevertheless the the court granted an injunction largely on the basis of the priv ate property aspects of it. So trespass.

and the university's loss of control and use of the the campus. What does the case tell us about the tension between the freedom of peaceful assembly and property rights?

Jamie:

Can I just backtrack for one second before entering that to say something more about the definition of peaceful assembly that I support.

Cheryl:

Of course.

Because you mentioned the honking of horns and various other things that happens during the Freedom Convoy. And when I say that peaceful assembly under Section 2C should at least initially protect gatherings as long as they do not engage in

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violence or threats of violence, I would include in that nonviolent, nonviolent but unlawful acts. So that I would even say that breach of noise bylaws and breach of parking regulations and those kinds of things do not compromise the status of an assembly as peaceful under Section 2C because the the thing as well is and it's it's very hard to conceptualize and separate

the assembly from the individuals who comprise it. And there's a point about that in the Toronto Encampment case as well that we could talk about. But certainly what happens when you have an assembly comprising individuals in law is that any individuals who engage in unlawful acts are responsible for their unlawful acts. Those unlawful acts do not become the unlawful acts of the assembly

Unless they are adopted by the assembly as part of its communicative message and its performative actions. So, I think it's important to always be thinking about well, what is the assembly? What are the rights that attach specifically to the assembly? And then what's going on with the individuals? What's going on with the individuals who are part of the assembly or just hanging around on the edges of the assembly?

potentially engaging in criminal activity and so on. It's a it's a messy situation for anyone to start to figure out. But anyway, I wanted to say that so that maybe we can come back to it. I don't know if that was helpful, but onto the UT encampment. The UT encampment was one of many, many, many across the country in that period. It was spring twenty twenty four. You you raise a really good point about the University of Toronto encampment.

Because it wasn't engaged in violence and didn't even engage in criminal behavior such as anti Semitic hate propaganda, but it was not protected by the court and the court granted an injunction that required the encampment to be dispersed. So, I'm just gonna add a little point in there that the

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I was certainly disappointed to see that the court could not discuss freedom of assembly, because it once again it all went through freedom of expression and the issues were trapped in the rubric of freedom of expression. But because it was because the Charter didn't apply that the judge said the encampment had no right to claim the exclusive use of university property for their purposes, because to do so excluded

Other members of the public and the university community from using that property and frustrated the university's rights as owner of the property. So, in other words, the members of the encampment, the encampment as an assembly, had no rights at all in answer to the university's property rights and the law of trespass. And what I find disappointing about that.

Is that and there was a technicality in the decision, but I am of the view, and this view is not shared by everyone, it might not even be shared by Cheryl, but I that the Charter should apply to universities in Ontario, and that's because of the nature of government regulation of expressive activity on Ontario campuses. And I think from my point of view, that's sufficient to

To require the universities to comply with Section 2 of the Charter, including Section 2C and Section 2B. So I think an opportunity was missed there to address that issue in a thoughtful way. But the other thing I would say about the University of Toronto decision is that in the alternative, I I believe that universities should, as a matter of principle and

their own volition. I believe that they should adopt principles and regulations that comply with the charter in relation to the use of public space on campus. And that these protocols should include freedom of peaceful assembly. I just sort of wonder when we're ever going to get it about the importance of expressive activity and gatherings on university

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property and the need for the need for those entitlements to be well regulated. And I would also say I'm not as hard driven or hard-bitten about these rights as may sound. What matters more to me, what matters a lot to me, is that there be a principle of a framework of legality, a framework of legality that lets everyone know

Precisely, well not precisely, because we can never be too precise, but let's in let's individuals and universities or individuals and Parliament Hill, whomever, lets them know what the boundaries are. What are the boundaries of public gatherings, and what are the circumstances in which limits can be imposed. The last thing I want to say about the encampment, I believe that the University of Toronto encampment was up for.

More than 50 days or close to 50 days before the injunction was granted. And I accept that there are limits to peaceful assembly. I would place them under section one rather than under section two C, but from my point of view, Section 2C guarantees an assembly or a gathering gathering a reasonable opportunity to communicate its message through collective action. So we could look at encampments across

the country, but even look just in Metro Toronto, the University of Toronto encampment had more than 50 days to communicate its message. And so they had through the way it worked out, not necessarily because it was legally conceded to them, but they had the opportunity to communicate their message. You look at York University, the encampment arrived on an late in the afternoon one day, and the next morning the police moved in.

And they were gone. That encampment did not have a reasonable opportunity to to communicate its message. So I am in favor of durational limits because some of these encampments present themselves as being indefinite or even permanent in nature. And I don't think that's something that section two C can can in principle promise to any gathering that is claiming the exclusive use of public property. It is a really key point.

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What is the duration of the assembly or gathering? And when is it when has the gathering had a reasonable opportunity to communicate its message? And when is it reasonable, therefore, for the government or the property owner to seek to place limits? Same thing goes for freedom convoy. I mean, it was a much shorter period, but it was very, very intense. So durational limits are perfectly okay, but they have to be justified under section one.

Cheryl:

So interestingly, I mean the court did in its granting its injunction still allowed protesters to demonstrate elsewhere on campus during the day, but they prohibited the camping, the structures, the blocked access, and overnight protests. So that's one aspect in which it was not done within the context of Charter rights, but it was still done within the context of what is reasonable. And as you were saying, the about whether the charter applies to universities.

And I was surprised that this didn't really take up more of the discussion in the case, was that the Ontario government had imposed on university campuses this obligation to have a freedom of expression policy, which I mean the University of Toronto had already and it it complied with that, but it was I mean within the context of ensuring that I think at the time more conservative voices were being elevated or allowed to to express themselves. But

When a university, municipality, or property owner seeks such an injunction, I mean you've sort of touched on this, but and you've talked about duration. What principles should guide the court in those circumstances?

Jamie:

Okay, let me just back up and say one more thing, if I could, about what you just mentioned in the judge's decision where he said, well, they can do this, they can do that, there's still a lot of room for them to engage in their communicative purposes. That's all well and good, but it's is not entirely right in principle from my point of view, because those concessions were not

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Sorry if concessions might not be the right word, but I'll call them concessions. Those concessions were not granted in the context of any recognition that there was an entitlement that had been the entitlement that was at stake. So it's more like it was gratuitous on the part of the court to allow the students to do this the the protesters to do this or to do that. It's not because they had a right to, but it's because it it seemed better to say that they could do something.

even though the university had absolute property rights, than to say that they could do nothing. And that's not satisfactory to me. But moving moving on to your question, and I'll just sort of answer it from a charter perspective, because if there's no charter rights or values, then there's nothing the assembly can claim. I think one of the things that is really important about an assembly, as I've said

stressed a fair bit is that it requires space it in order to engage its entitlement. And the entitlement belongs to the assembly. And so one of the the key thing the key entitlement that belongs to the assembly as a collective entity is the right not to be re unreasonably limited in its performative actions.

So that means it should not be unreasonably limited as to its location and size and duration and the nature of its performative activities. A really, really important one is that the assembly has a right not to be dispersed except as a last resort. And all these limits, potential limits on an assembly or gathering.

Are potentially reasonable and justifiable under section one, but the question in every case is contextual and the question in every case is evidentiary in nature. And so and it's very difficult in many in many kinds of charter situations to deal with the evidence of infringement and the evidence of justification, but it's particularly important.

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In the case of freedom of peaceful assembly, that limits be subject to evidentiary requirements under section one. It's very easy to you want to be careful that there is not too much of an tendency under section one to place restrictions on the basis of convenience to the public or

Lack of inconvenience to the public. I mean the idea of Section 2C is that the public is expected to withstand a certain amount of annoyance, irritation, inconvenience, and so forth when confronted by a legitimate assembly or gathering under Section 2C because

In the grand scheme of things, it's healthier for our democracy to allow those kinds of gatherings and demonstrations to go ahead than to shut them down and protect the public, members of the public, from seeing or hearing things that they would rather not have to deal with. So I feel quite strongly that there's a lot that can be done to regulate gatherings under section one.

but has to be done under a framework of principle that is anchored in a recognition of the distinctive values that collective performative gatherings bring to our democratic governance.

Cheryl:

You developed much of this framework in your twenty twenty two report for the Public Order Emergency Commission. and so and that was in relation to the Freedom Convoy. So what does that that w that particular assembly and demonstration teach us about the point at which protective disruption becomes serious interference with the rights of others? Because that's got to be part of that Section One analysis, does it not?

(41:34.51)

I mean, what I'd say about the Freedom Convoy is that let's be honest, we all saw it with our own two eyes that the point was reached. Now we could have a lot of different points of view about when it was reached. Was it on day one, was it on day eight, was it was it because of the horn honking, whatever. But I would say that for me, for me, the problem with the Freedom Convoy was that it descended into lawlessness.

Because there was no legal framework. There was little or nothing that set boundaries on what those who were participating in the Freedom Convoy could do. There was no sense that they had of what the limits were on what they could legitimately do. So they they took it to they took it to the end of what whatever they were able to do. And there was I by the same token, little or no capacity of

effective law enforcement on the part of the police. And, you know, I sort of I worry that we haven't learned very much from the Freedom Convoy. And I could be wrong, Cheryl, but I'm not aware that Parliament responded to the Rouleau Commission report, as I think it might be required to do under the Emergencies Act. And I think that freedom of peaceful assembly can only flourish in a way that benefits those who are participants in an assembly.

as well as the general public when there is a framework that established a framework that establishes rule of law standards for large scale demonstrations like the Freedom Convoy. That was an exercise in what should not have happened.

Cheryl:

Well, thank you very much, Jamie. is there anything else you want to add to the framework that we haven't actually got to? Cause I think this has given us a lot to think about in terms of the importance of section two C and on how it's been overlooked by the courts. And I think it comes into like there's there's lots of if you start to really think about it, lots of ways in which it could be used also with housing encampments, because there are some that may be have more of an expressive context.

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rather than just a survival context, there may be more of a wanting to come together for those with who are unhoused, for example. I mean, there are just some interesting things that you can start to think about if you were to to look at this section in a more expansive way.

Jamie:

Yeah, all I would say in conclusion is that Section two C is a big amorphous sort of mass right now, and it really needs to start taking on legal definition on a step by step basis because otherwise, as you say, anything and everything, as well as nothing, is in section two C. And that's not good for the charter or for anyone. And so I I look forward to

a stepwise kind of approach to section two C where we start to think about it and fill the guarantee out as best we can in a way that protects the entitlement and also allows its regulation in a reasonable way.

Cheryl:

Great. Thank you so much for for sharing your framework and your ideas about this section with us. Before you go, are there any upcoming projects or developments in the law of peaceful assembly that you would like to highlight for our listeners?

Jamie:

Well, I think myself and others are waiting to see whether the Supreme Court grants leave to intervene in the Emergencies Act decision from the Federal Court of Appeal. I mean, freedom of assembly did not play much of a role in the Freedom of Assembly didn't play much of a role (dog barking in background) either at the trial level or the appellate level, but there's hoping that it could at the Supreme Court of Canada if they decide to grant leave.

(45:28.847)

Cheryl:

Once again, thank you, Jamie, for joining us.

Jamie:

Thank you so much for having me.

Cheryl:

The final bark.

(45:41.208)

Cheryl:

Welcome back. In the first part of this episode, Professor Cameron helped us examine freedom of peaceful assembly and some of the legal questions raised by protest encampments. For this episode's practice corner, we are continuing that discussion with Harini Sivalingam, Director of the Equality Program of the Canadian Civil Liberties Association. The CCLA, as it's known,

has been active in defending freedom of peaceful assembly and has also worked on legal issues involving housing encampments where questions about public space, policing, displacement, and charter rights can overlap. Harini has been working with the Asper Center and an Asper Center fellow on a national resource tracking housing encampment litigation across Canada. Harini, welcome and thank you so much for joining us.

Harini Sivalingam:

Thank you for this important discussion.

Cheryl:

Before we turn to housing encampments, could you give our listeners a sense of the kinds of cases or interventions that CCLA has been involved in recently an under subsection two C of the Charter?

Harini:

Absolutely. So this really falls within the domain of my wonderful colleague Anais, who's the director of our fundamental freedoms program, who's been leading all of CCLA's advocacy to protect peaceful assembly and protest rights in Canada. in recent years, we've seen a number of efforts across Canada to restrict the right to protest and to suppress peaceful assembly.

(47:03.83)

In the name of protecting public safety. And so what my colleague has been highlighting is how the notion of public safety is being distorted to justify an ever growing limit on expressive rights, as if the state necessarily has to intervene as soon as a protest is seen by some as being disruptive or offensive. So, for example, CCLA is currently challenging the city of Vaughn's anti-protest bubble zone bylaws.

Which makes people liable for fines of up to $100,000 for just having participated in what some might consider disruptive yet peaceful protests near some social infrastructure. We're also involved in similar litigation in Alberta. At the federal level, CCLA has pushed back against Bill C-9. So this bill introduced new criminal code offenses that are so broadly and vaguely worded.

That they risk criminalizing protests, protesters participating in peaceful demonstrations. And of course, there's the ongoing challenge to the federal government's invocation of the emergencies act, which might make its way up to the Supreme Court of Canada. This challenge is not an endorsement of the Freedom Convoy protests of twenty twenty two. Rather, the CCLA's position is that existing laws could have and should have been used to address that situation.

And in that case, CCLA argued and both the federal court and the Federal Court of Appeal agreed that the government did not meet the legal threshold required to unlock the Emergency Act's act extraordinary powers. So taken together, these cases reflect some of the broader concerns we're seeing about the regulation of protests and the shrinking space for peaceful assembly in public spaces.

Cheryl:

We often think of protests as temporary gatherings and and we talked a little bit with Professor Cameron about duration when we talk about peaceful assembly. But encampments themselves can create a much more sustained presence in public space. That I think that's part of the disruption really. And how does that change the legal analysis under section of two C or does it?

(49:16.738)

Harini:

Yeah, so one I think one of the challenges here is that section two C issues have received relatively little judicial attention. And I don't know if this is something that Professor Cameron brought up, but

Cheryl:

We did. Yeah, we chatted about that. Yeah.

Harini:

Great. Yeah, so I won't go too much into that, but because of the strong expressive components of many forms of assembly cases are often argued and decided primarily under Section 2B of freedom of expression or when they intersect with religious freedoms under Section 2A. But one thing that CCLA is trying to do is push courts towards developing and systemically applying a standalone section two test whenever that right is invoked. And this is something that

We're hoping if the Supreme Court of Canada may opinion on if it agrees to hear the appeal in and the cross appeals in the Emergencies Act case. But going back to your question around the temporal analysis of Section 2C, I think it's important to recognize that protests aren't necessarily short-term events. Protests can be sustained forms of political expression intended to hold governments accountable over longer periods of time, right? So we saw that issue arise in the context of the Emergencies Act.

which was used to shut down an ongoing protest and assembly. And more recently, we saw attempts to suppress encampment protests on some university campuses concerning the conflict in Gaza. But more importantly, there's there is case law recognizing that Section 2C can protect camping in public parks as part of protest activity in the battle case in which CCLA was actively involved in. But this right, like charter protected rights, is not absolute.

(50:55.97)

But we feel that the limits on this right should really be analyzed at the justification stage in section one. So sustained protests can therefore have important impacts on the section two C analysis, but it cannot be the shortcut for justification of rights infringements. So the fact that a protest is, as you mentioned, disruptive, inconvenient.

Or unpopular does not by itself justify restricting the charter rights. And governments still have the obligation to demonstrate that the restriction is proportionate and that the objectives cannot reasonably be achieved through less rights-infringing means. And I think where this really intersects with longer duration protests is that we may be more tolerant of a protest that lasts for a few hours than one that occupies public spaces for weeks or months at a time.

the like the still in terms of the analysis of the charter right, the fact that a protest becomes more difficult for government or members of the public to so-called tolerate doesn't eliminate the charter protection or the underlying right, right? But it does make the section one analysis more important.

And I think that's where the law has to be careful not to equate inconvenience with constitutional harm, right? So peaceful protest is by its nature, as you mentioned, sometimes disruptive. And if only protests that receive meaningful constitutional protections are those that don't inconvenience anyone, then the right really becomes less largely symbolic and like less meaningful. So for example, if you hold a protest in your living room, you're not disrupting anyone.

But you're also not being heard by anyone, right? So from our perspective, disruption is part of that constitutional protection that's awarded to freedom of peaceful assembly, as long as obviously as long as those peace the assembly remains peaceful and non-threatening. So how much peaceful disruption is reasonable, I think it's best answered in that section one stage.

(52:51.086)

Cheryl:

It's not a very effective protest if nobody notices. So, housing encampments arise in a in a different context, but they also involve people occupying public space, often for very long periods of time. How should we think about the legal relationship between protest encampments and housing encampments? Where are they different or where do their charter concerns overlap?

Harini:

Yeah, so protest encampments very raised very strong section two B, Section Two C and two D issues. And depending on the nature of the protests, other charter rights, including Section Two A, may also be engaged. Whereas housing and survival encampments are different. for people who are unhoused, the encampment may not primarily be about expressing a political message. It may be, but that might not be the primary, like, you know,

Objective. it may be about having some place to sleep and meeting basic needs, right? As a result, these cases have primarily raised issues under section seven and section 15 of the charter. There are some important case laws illustrating this distinction. for example, in Abbotsford,

The court found that Section 2C was not infringed by measures restricting residents in public spaces by people experiencing homelessness. However, the same measures were found to infringe Section 7. So most unhoused encampment cases are really grounded in the Section 7 analysis. But while both kinds of encampments involve occupying public space, the underlying interests and the charter rights engaged can be quite different.

There at the same time, there can be significant overlap, particularly when people living in encampments are also engaging in in political expression or protest. For housing encampments, I think the, again, going back to section one, the minimal impairment and proportionality stages become really particularly important in the legal analysis. If a government says that its objective is to ensure that a public park remains, quote unquote, accessible for everyone.

(54:55.672)

For example, the question can't simply be whether removing an encampment advances that objective. The question really has to be whether there is a less infringing, rights infringing way of achieving that government objective, right? and those alternatives do matter because for a person that has nowhere else to go, an unhoused person that like has literally no no other place to to occupy.

removing them from an encampment isn't simply regulating their use of public space. It means that they have no place to sleep at night or in the daytime, right? There's also an important distinction between regulating an encampment and effectively criminalizing or prohibiting

People that are unhoused to occupy public space and to be present. Sorry, occupy is a bad word, but like be present and and be in these public spaces. If the government has not provided a viable alternative, then the justification for forcibly removing people who are unhoused becomes more difficult to assess. So I think here section one requires us to look at the real world impact of the government's responses, not just what it states as its objective, which is

like you know, often around public safety or the use of public spaces by by communities. and I think so, I don't want to go too on on this, but I think this is also where section 15 is increasingly important as well in on how encampment cases, if homelessness is recognized as an analogous ground, which a court rightly found in the Waterloo case, then the government's response to encampments has to be considered against this backdrop.

Of profound disadvantage experienced by people who are unhoused. And the whole issue around, like, you know, a facially neutral law, you know, that can have drastically unequal impact. So someone who has a home can comply with the prohibition that, you know, that sleeping in a park by going home, right? whereas people that are experiencing homelessness can't, right? And not to mention the disproportionate impact of housing insecurity on particularly marginalized groups like

(57:01.112)

based on intersecting grounds of discrimination like indigeneity, race, gender, gender identity, sexual orientation, disability.

Cheryl:

So it's interesting earlier you used the word occupy and said that it was a negative. But I think it's only because with that word the the connotation has is really associating that word with protest encampments. And but in fact people are occupying public spaces.

Harini:

I don't mean to sound that in a negative, right? Like, you know, like yes, we do we have the right, like public spaces are for the public. And we have the right to to be present and take up space in those in those spaces. So absolutely like no intention to make it seem like I have a negative connotation to it, but I did just wanna like, you know, in occupation of like, you know, and and and housing, like and and like, you know, permanency and temporal. I wanted to be a little cautious of of that that terminology.

Cheryl:

The the overlap seems especially important when someone is living in an encampment, but also expressing this political message about housing insecurity. So in that situation, how how do sections 2B and 2C, so we're talking about expression and peaceful assembly, intersect with 7 which is about life, liberty, and security of the person. And as you've mentioned, also section 15, the equality rights section. How do they all intersect? And do the courts tend to treat these rights as reinforcing one another or do they just separate them?

(58:31.158)

Harini:

Yeah. I think encampments are in many ways a visible representation and expression of the repeated failures of governments to address chronic poverty and homelessness, right? So I think the existence of encampments itself is expressive, right? And it is protest because they're the the by their survival mechanism is protesting

government policy failures to to hear them, hear their concerns, hear their voices, and take them for account, right? So there is certainly an expressive and political dimension to what is happening in that house encampment. And yes, these rights can intersect in very important ways, but I think the reality is in the in the in the eyes of the courts, they still tend to analyze charter rights.

in silos, right? And I don't think it's specific. This isn't unique to encampment litigation. it's across the board that charter rights are still by the courts looked at in silos. So section 2B and 2C have been raised in litigation involving unhoused encampments, but those claims have largely been subsumed by Section 7 analysis. And historically these cases have tended to focus on the right to life, liberty, and security of the person. with section 15

Also being raised, but also r receiving until very recently comparatively little attention. But I do think that's changing. I think the development of section fifteen jurisprudence is particularly significant. So I raised the the case of the Waterloo Unhoused Encampment case, and I think that was really significant and groundbreaking with respect

To engaging more directly with equality rights and the positions of people experiencing homelessness on intersectional grounds, right? So if I, as I said, if homelessness is recognized as an analysis ground, then courts have another constitutional framework for understanding what happens when governments regulate or remove encampments. And the question is it's no longer only about a person's security of the person's interest.

(01:00:34.338)

Which is super like, you know, important and and obviously like, you know, critical to to the issue of unhoused encampments, but also how other forms of their identities of of individuals but also groups are affected by this forced evictions and and relocation.

And we can also ask whether the government's response treats people experiencing homelessness in ways that reinforces those existing disadvantages, right? And I think this is important because homelessness is not simply an individual circumstance. We know that, right? It is connected to structural conditions of poverty, lack of affordable, accessible housing, lack of supports for for people with disabilities and inadequate social supports, right? and other forms of

systemic disadvantage around colonial systems of of governance and law. So when governments respond to homelessness primarily through this exclusion from public space and trying to displace again like these evictions and clearing encampments, it's just displacing the problem, right? From one location to another. They're really, you know, not addressing the underlying conditions that produce this.

Cheryl:

So your your discussion of some of these cases brings me to the database you've been developing with the Asper Center. So that this is a sort of a gathering of all of the cases from across the country that have been addressing, in particular, housing encampments. And can you just tell us a bit about what the gap is that this database is intended to fill and why is a national resource, which is what it will be a national resource for lawyers and advocates working in this area, what will it help?

Harini:

Yeah, so this idea of the encampment litigation database really grew out of p my participation in a working group organized by the BC Civil Liberties Association. And so this working group was lawyers and advocates working on housing encampment issues, coming together to share information and resources about litigation that they were involved in. And so people from like, you know, coast to coast to coast, right? We're were were meeting regularly, sharing information.

(01:02:37.868)

And what became clear from those meetings that I was attending is that although we had resources like Can Lee and other legal databases, there wasn't a central publicly accessible repository bringing together encampment-related jurisprudence across Canada. And so, like and and and and more importantly, like although you know we have Can Lee and like these free legal databases that have those resources, there wasn't anything that like would summarize the information and really importantly like be able to track

What are the trends? What are the like, you know, what is what is happening in this jurisdiction that's also happening in this jurisdiction? And what are the, like, you know, what where like, you know, where is what's the reasoning and the rationale that's stemming out of the courts, right? So we look to, I was looking at models such as climate litigation databases, which can help researchers and advocates identify developments and trends.

across the body of of of of case law, right? The jurisprudence. And the primary purpose of this database is to give lawyers and advocates a tool to identify those judicial trends and encampment litigation and ultimately like to help strengthen their legal advocacy, right? Like how do we build stronger legal arguments to advance like you know housing rights and the rights of unhealth people across the country. and we hope this will only be the first stage and the second stage of this project would involve

developing know your rights material so that information can be shared more directly with people with lived experiences of being unhoused to to really help them advocate, self advocate, but also know what their rights are and be able to really enforce them as well.

Cheryl:

So looking across the cases that you've collected so far, what trends are you seeing and what practical lessons should litigators keep in mind when working on these kinds of cases?

(01:04:28.77)

Harini:

Yeah, one of the more interesting things that we're seeing is a shift in the stage at which cases are being decided. So historic there's been relatively few encampment cases that made it to the merit stage, right? Most of the cases we've tracked in the database have involved injunctions or interim decisions. But increasingly we're seeing cases reach to the merit stage, and we're also seeing more cases moving through the appellate courts. And I think this shift is important because it means

Courts are increasingly having an opportunity to engage with substantive charter issues and remedies raised by encampments and the issues surrounding encampments, rather than resolving cases slowly on solely on an interim basis. And I think it'll be really interesting to see how this develops as more cases reach the appellate level and as the jurisprudence develops across.

Different jurisdictions. There may act eventually be a need, there may be a case that raises up to the Supreme Court of Canada to provide greater guidance on some of these reocurring constitutional questions. For litigators, I think one of the most important lessons is the value of paying attention to the broader body of jurisprudence. That's one of the reasons why we wanted to create the database in the first place, is to make it easier to see how courts across the country are approaching these issues.

And identify where the law is developing and where we need to like, you know, push it along a bit further.

Cheryl:

That's great. The Asper Centre is really proud and pleased to be part of this. Before we let you go, where can our listeners find the database and how can they stay up to date as the project develops?

(01:06:05.89)

Harini:

Yeah, so the encampment litigation database is still in development as we're recording this. so the final format isn't available yet. So, the goal is to create a searchable, publicly accessible website in partnership with the Asper Centre. And we're so excited to be partnering with you on this. we're aiming for a late fall launch, so we encourage listeners to look out for more information from CCLA and the Asper Centre as the project develops. So the database URL is encampment.caselaw.ca.

I do want to also thank think for supporting us in this project. We're so excited to work with the students in the working group group. And you know, we're really excited about this potential for this resource to help lawyers, advocates, researchers, and members of the public better understand the evolving law around housing encampments. and so thank you so much for for all the support.

It's been a great experience for the students. We've had for our listeners information, we've had a group of law students working over this past year on helping to gather all these cases, and then we placed another law student over the summer with CCLA to continue this project. So it's something that the Asper Center has been really pleased to support. We will provide where you can find it in the show notes once we're ready to launch. So look back to that.

I wanna thank you, Harini, for joining us and for sharing your perspective on these issues.

Harini:

Thank you again.

(01:07:35.128)

Cheryl:

Thank you for joining us for this episode of Charter Records. A big thank you to Professor Jamie Cameron for sharing her important insights on Section 2C of the Charter, and to Harini Savalingam of the Canadian Civil Liberties Association for joining us in the Practice Corner and bringing a practical perspective to these important issues. We'd also like to thank Jackman Law student Vivian Wu for assisting in the production of this episode. And as always, thanks to Tal Schreier for all of her work behind the scenes. Until next time.

Music:

Charter, a course, I will charter, a course. If we can just get the country to trust us. Charter, a course, southeast, west, and north. And along the way we may find justice. Charter, a course, I will charter a course. If we can just get the country to trust us. Charter a course, Southeast, West, and North and along the way we may find justice....

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