



March 9, 2020

VIA EMAIL

TO:

Premier Jason Kenney
307 Legislature Building
10800-97 Avenue NW, Edmonton, AB T5K 2B6

Rachel Notley
Leader of the Alberta New Democratic Party
5th Floor, 9820-107 Street, Edmonton, AB T5K 1E7

Regarding: Unconstitutionality of Bill 1, Critical Infrastructure Defence Act

I am writing to you on behalf of the British Columbia Civil Liberties Association (“BCCLA”) to strongly urge you and the Legislative Assembly of Alberta not to adopt Bill 1, the *Critical Infrastructure Defence Act*, introduced on February 25, 2020.

The BCCLA is Canada’s oldest civil liberties and human rights organization, founded in 1962. Our work is national in scope and we regularly call attention to and litigate on civil liberties and human rights concerns across the country.

We are unequivocally opposed to the *Critical Infrastructure Defence Act*, which proposes shockingly anti-democratic and unlawful state infringement on civil liberties and human rights. In introducing and justifying Bill 1, Premier Jason Kenney pointed to blockades in support of Indigenous rights, characterizing them as “lawless” and a “mockery of the principle of the rule of law.”¹ In the opinion of the BCCLA, the broad and vague *Critical Infrastructure Defence Act* is unlawful and makes a mockery of the rule of law. The Act offends *Charter*-protected rights, Constitutional rights, and Indigenous and Treaty rights. It infringes on fundamental democratic rights to protest and dissent, and will have a chilling effect on the civil liberties of all people and especially Indigenous people, workers, and activists across Alberta.

¹ Alberta Hansard, February 25, 2020 <https://search.assembly.ab.ca/isysquery/f557d0ea-6931-45ad-b40d-aead47089b4e/1/doc/>



The *Critical Infrastructure Defence Act* will severely limit and criminalize democratic participation by prohibiting people from entering various spaces deemed to be “essential infrastructure.” Bill 1 proposes to designate both public and private infrastructure as essential infrastructure, and creates offenses for trespassing, interfering with operations, and causing damage. Individuals could face fines of up to \$10,000 and \$25,000 for first and subsequent offences, as well as possible prison time of up to 6 months.

The *Critical Infrastructure Defence Act* is inconsistent with the *Canadian Charter of Rights and Freedoms* and the *Constitution of Canada*. If implemented, the Act would likely breach a number of *Charter* freedoms, constitutionally-protected rights, and division of powers under the *Constitution*, including:

- Section 2 (b): Freedom of thought, belief, opinion, and expression
- Section 2 (c): Freedom of peaceful assembly
- Section 2 (d): Freedom of association
- Section 7: Right to life, liberty and security of the person
- Sections 91 and 92: Division of federal and provincial powers
- Section 35: Aboriginal and Treaty Rights

Charter Rights

The proposed prohibition on trespass in the *Critical Infrastructure Defence Act* is ill-defined, stating that “No person shall, without lawful right, justification or excuse, willfully enter on any essential infrastructure,” where “essential infrastructure” includes railways, highways, telecommunication equipment, public utilities, mines, and pipelines, and unspecified buildings and structures. Where these overbroad and vague provisions encompass public infrastructure, they restrict freedom of expression, freedom of peaceful assembly, and freedom of association.

Canadian courts interpret *Charter* section 2 freedoms generously and take government infringements of these freedoms seriously. In *Mounted Police Association of Ontario v. Canada*, the Supreme Court of Canada held that section 2 freedoms, collectively, are fundamental to democratic society. The Court found that freedom of association is intended to protect individual rights against more powerful entities and includes a purposive right to join with others in order to



empower vulnerable groups and correct imbalances of power. In addition, the Supreme Court of Canada has held where the purpose of a government action is to restrict the content of expression, to control access to a certain message, or to limit the ability of a person who attempts to convey a message to express themselves, that purpose will infringe freedom of expression (*Irwin Toy Ltd v. Quebec*; *R. v. Keegstra*). The *Critical Infrastructure Defence Act* is a clear breach of *Charter* section 2 freedoms. Given the existence of available provisions in the *Criminal Code of Canada*, the overbroad and vague prohibition on trespass proposed in Bill 1, and Premier Kenney’s comments in introducing the Bill, it appears the Act is an attempt to specifically target, silence and criminalize those who dissent against government policies and actions. The right to dissent must be respected.

Given the threat of imprisonment, the *Critical Infrastructure Defence Act* would additionally engage section 7 of the *Charter*. Section 7 requires that laws and state actions that interfere with life, liberty, and security of the person conform to the principles of fundamental justice. The Act violates the principles of fundamental justice for several provisions’ overbreadth, gross disproportionality, and vagueness. First, “essential infrastructure” encompasses land on which such infrastructure is located *and* any land used in connection with the essential infrastructure. The latter could encompass large areas of the whole province, thus constituting an extremely overbroad and overreaching provision. Even if these key provisions are, in part, rationally connected to the Act’s purpose, they overreach and would capture conduct that bears no relation to the legislative objective (*Bedford v. Canada*). The Act also contains a provision to expand the definition of infrastructure into the future, which further widens the overreach. Second, the effect of the Act, including possible prison sentences, is grossly disproportionate to the Act’s objective.

Third, the proposed provision in the Act on what is prohibited trespass is incredibly vague and lacking in precision, which further offends the principles of fundamental justice. The doctrine of vagueness is intended to limit the enforcement discretion of state officials as well as to ensure fair notice (*Canadian Foundation for Children, Youth and the Law v. Canada*; *R. v. Nova Scotia Pharmaceutical Society*). In *Canadian Foundation for Children, Youth and the Law v. Canada*, the Supreme Court of Canada held:

“A law must set an intelligible standard both for the citizens it governs and the officials who must enforce it. The two are interconnected. A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for law enforcement officers and judges to determine whether a crime has been committed. This invokes the further concern of putting too much discretion in the hands of law enforcement officials, and violates the precept that individuals should be governed by the rule of law, not the rule of persons.”

Given the overbreadth, gross disproportionality, and vagueness of various proposed provisions in the Act and the implications for an individual’s liberty and security, the *Critical Infrastructure Defence Act* seriously and unjustifiably breaches section 7 of the *Charter*.



Constitutional Rights

The *Critical Infrastructure Defence Act* raises constitutional concerns with respect to federalism and division of powers outlined in sections 91 and 92 of the *Constitution*. Even under the ‘double aspect’ doctrine allowing for concurrent federal and provincial legislation, arguably, the *dominant* purpose of this Act – “in pith and substance” – and key provisions within it are aimed at regulating federal criminal law rather than provincial property. This raises the issue of the Act being a matter of federal jurisdiction and therefore *ultra vires* the province’s power.

The *Critical Infrastructure Defence Act* also constitutes a significant infringement on constitutionally-protected and inherent Indigenous and treaty rights. The numbered Treaties, including Treaties 4,6,7,8, and 10 in Alberta, are between the Crown and First Nations. Treaty rights include the right to use Treaty lands for specific purposes including economic activities such as trapping, hunting and fishing. These Treaty rights are recognized and affirmed by s. 35 of the *Constitution*. The broad and vague prohibitions on trespass in the *Critical Infrastructure Defence Act* infringe on Treaty members right to be on their Treaty lands.

The *Critical Infrastructure Defence Act* also infringes on Indigenous people’s right to gather across Alberta to express dissent to development projects that are violating their constitutionally-protected Indigenous rights and title. In a number of Supreme of Court of Canada cases, including *Delgamuukw v. British Columbia* and *Tsilhqot’in Nation v. British Columbia*, the Court has recognized that constitutionally-protected Indigenous rights and title includes the right to use, enjoy, benefit from, occupy and pro-actively manage the land. Further, Article 26 of the *UN Declaration of the Rights of Indigenous Peoples* stipulates “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or other-wise used or acquired.”

The BCCLA calls on you and the Legislative Assembly of Alberta not to adopt the unconstitutional *Critical Infrastructure Defence Act*. We strongly urge you to ensure that *Charter* rights to political speech and peaceful assembly are rigorously protected and that inherent and constitutional Indigenous and treaty rights are affirmed and upheld.

Sincerely,

A handwritten signature in black ink, appearing to read 'Harsha Walia', is written over a light grey horizontal line.

Harsha Walia
Executive Director