Response to Bill 100: Keeping Ontario Open for Business Act, 2022

An unnecessary and redundant expansion of police powers

Submitted by the Ontario Federation of Labour

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The Ontario Federation of Labour is the largest provincial labour federation in Canada. It represents one million workers and 54 affiliates.

Overview

Bill 100 does more harm than good. It should not be enacted.

Bill 100, while framed as a response to large-scale, disruptive, anti-government protests in Windsor and Ottawa, is actually a law with a dramatically broad scope. It can apply to activities in a wide range of locations across the province and will inevitably operate to substantially undermine freedom of assembly and association. Its significant penalties will chill speech, substantially interfere with meaningful collective bargaining, and damage efforts at Indigenous reconciliation.

There is also no need for this legislation. Police forces, municipalities, private infrastructure operators, and the Ontario government already have the tools necessary to address the types of disruptive activities Bill 100 is designed to target. Even if the scope of Bill 100 were restricted, there would still be no reason to enact it.

The Ontario Federation of Labour therefore urges the Standing Committee on Justice Policy to report to the House that Bill 100 not be adopted.

The Broad Scope of Bill 100

Bill 100 prohibits a wide range of activities in relation to “protected transportation infrastructure” (“PTI”). PTI is not limited to international land or water border crossing points with the United States, like the Ambassador Bridge. Rather, Clauses 1 and 17(1) of the Bill give Cabinet the power to designate any international airport and any other transportation infrastructure “that is of significance to international trade” as PTI. There is no mechanism for meaningful review of a decision by Cabinet to designate infrastructure.

While non-airport infrastructure can only be designated for 30 days at a time, there is no restriction on the ability of Cabinet to re-designate infrastructure indefinitely. In any event, a 30-day designation is more than enough time to cause serious harm to the civil rights of Canadians.

Clause 2(1) prohibits any person from “imped[ing] access to or egress from, or the ordinary use of protected transportation infrastructure” if this could reasonably be expected to disrupt economic activity, or interfere with health, safety, or well-being of members of the public.

The first component—impeding access, egress, or ordinary use—is exceptionally broad. It covers not only blockades and occupations, but also ordinary pickets and protests that are cornerstones of labour activism and free expression. Even lawful protests are designed to be, in some measure, disruptive. It is by disrupting the status quo that individuals and groups attract attention to an issue and engage with members of the public.

The second component of the prohibition does not provide any protection against these significant impacts. While ordinary protest activity should not interfere with health, safety, or the well-being of the public, it very frequently will “disrupt economic activity”. It is notable that the

legislation does not require a *significant* or *substantial* interference with economic activity. Any interference—no matter how transient or short-term—is enough to engage the prohibition.

Clause 2(3) provides for two exemptions to this general prohibition: activities that are "reasonably expected to be trivial, transient or minor in nature" and activities that "can easily be avoided by persons attempting to access, use or depart from the [PTI]".

These exemptions do not address the serious impacts that Bill 100 has on expressive and associational activity. Put simply, the entire point of protest—whether for a political cause, in aid of Indigenous sovereignty, or to further a labour action—is to cause some disruption. By demanding that such action be "trivial" or "easily… avoided", Bill 100 in effect imposes an obligation for those engaged in protest activity to doom themselves to failure.

This is an extreme measure that bears no relationship with the types of mass disruption that Bill 100 is ostensibly designed to prevent. It captures not only a radical anti-government movement's shutting down of Canada's main international land bridge with the United States, but also striking rail workers picketing train stations, or climate change activists leafletting at Pearson Airport.

Many of the activities that Bill 100 would prohibit are not just important to the political discourse; they are constitutionally protected. The *Canadian Charter of Rights and Freedoms* protects freedom of expression, assembly, and association.[1] In turn, freedom of association protects the right to collectively bargain, including the right to strike.[2]

Bill 100 explicitly targets this type of associational activity. Clause 2(2)(a) explicitly states that the prohibition on these activities applies not only to individual actions, but also to actions taken "in co-operation with others".

These prohibitions also risk severely damaging the process of reconciliation with Indigenous peoples in Canada. The OFL believes that promoting reconciliation must be a cornerstone not only of the trade union movement, but also of Canadian society as a whole. There cannot be a just society for working people in Ontario in the absence of addressing Canada's and Ontario's colonial legacies.

Bill 100's prohibitions directly target actions that Indigenous peoples, groups, and individuals resort to in order to defend their rights and territories, and to bring attention to the inequality, marginalization, and oppression their communities face. Allowing Bill 100 to stand fundamentally undermines the process of reconciliation by both chilling these types of activities and criminalizing Indigenous people for defending their rights.

Bill 100's Substantial Penalties

The penalties associated with Bill 100's prohibitions increase the problematic aspects of the legislation.

[1] *Charter*, ss. 2(b), (c), (d).
[2] *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245.

Under Bill 100:

- Police may arrest individuals who defy police demands to cease their protest activities;[3]
- Protestors may be prosecuted and fined up to $100,000 or one year in jail *for each and every day they engage in a protest*;[4]
- The Crown may seek a statutory injunction against protest activity;[5]
- Police may seize objects that are used by protestors, and may retain them at the expense of the owner;[6]
- The police may demand the surrender of driver's licenses and can suspend such licenses and seize license plates when vehicles are used as part of a protest.[7]

As discussed in more detail below, these powers are redundant. But the severe sanctions associated with minor protest activity can be severe. Individual union members may spend years in jail or be fined nearly a million dollars for participating in a week-long strike against an employer who happens to be based out of a PTI facility.

By simply threatening this type of significant penalty, Bill 100 serves to chill constitutionally protected activities. Even when a particular infrastructure location is not currently subject to Bill 100's prohibitions, there is always a risk that Cabinet will use its regulation-making power to designate an employer as PTI, and therefore effectively criminalize strikes and other protests.

Many people who would otherwise choose to engage in peaceful, lawful protest activity will simply be scared off by Bill 100. Even if not this Legislature's intent, this type of effect is itself unconstitutional.[8]

Bill 100 is Redundant and Unnecessary

Even if Bill 100 were amended to apply solely to the kinds of mass disruptive activities that were experienced in Ontario in January and February 2022, it should still not be enacted. This is because, as applied to these kinds of scenarios, Bill 100 is redundant. Federal, provincial, and municipal legislation applicable across Ontario already is able to address large-scale disruption to infrastructure.

Deterring and Removing Persons Interfering with Infrastructure

Engaging in the type of aggressive and disruptive activities that Bill 100 is ostensibly directed against is already illegal and can be addressed through existing police powers.

[3] Clause 13.
[4] Clauses 10(4), 11(1)(a).
[5] Clause 14.
[6] Clauses 3(4), 4(4), 5.
[7] Clauses 7-8.
[8] For cases addressing the constitutional consequences of statutes that impose expressive "chills", see, for example: *Klein and Law Society of Upper Canada (Re)* (1985), 50 OR (2d) 118 (Div Ct) at 151; *R. v Zundel*, [1992] 2 SCR 731 at 771-772, 777-778; *Iorfida v MacIntyre* (1994), 21 OR (3d) 186 (Gen Div.); *R. v. Vice Media Canada Inc*, [2018] 3 SCR 374 at paras. 27-29.

Any person who to obstructs, interrupts, or interferes with the lawful use, enjoyment, or operation of property—including infrastructure—is already guilty of the offence of mischief.[9] When the property in question has a value above $5,000—and infrastructure facilities would always meet this threshold—the crime is punishable by up to ten years in prison.[10]

Anyone found committing mischief can be arrested by a police officer[11] or a member of the public.[12] A police officer may arrest a person *before* they interfered with infrastructure if the office has reasonable grounds to believe that they were "about to commit" that offence.[13]

Following an arrest, a police officer can require the arrested person to enter into an undertaking, which can contain numerous conditions to prevent further interference with infrastructure. These include prohibiting communicating with co-accused, prohibiting the person from going to specified places (including the infrastructure), or even imposing house arrest.[14] Alternatively, the arrested person may be held for a bail hearing, where a judicial officer may order them released on similar or more onerous conditions, or detained pending trial.[15]

The use of criminal charges of mischief to property were used by police to resolve protest activities at the Ambassador Bridge and at Parliament Hill. Protest leaders are currently subject to strict bail conditions, or are detained pending their trials, and are unable to continue their previous activities.

Depending on the nature of the activity that interferes with infrastructure, there are numerous additional criminal charges that could apply, including:

- Disobeying an order of court;[16]
- Obstructing a peace officer;[17]
- Criminal harassment;[18]
- Uttering threats;[19]
- Counselling an offence;[20]
- Conspiracy to commit an indictable offence;[21] or
- Participation in activities of criminal organization.[22]

For specific types of infrastructure, additional laws may apply to prevent blocking or obstruction. At airports, it is an offence to operate a vehicle on the "landside" (i.e., in the non-flying area of

[9] *Criminal Code of Canada*, RSC 1985, c C-46, s 430(1)(c).
[10] *Criminal Code*, s. 430(3)(a).
[11] *Criminal Code*, s. 495(1)(a).
[12] *Criminal Code*, s. 494(1)(a).
[13] *Criminal Code*, s. 495(1)(a).
[14] *Criminal Code*, ss. 498(1)(c), 501(3)(d), (e), (g).
[15] *Criminal Code*, s. 515.
[16] *Criminal Code*, s. 127(1).
[17] *Criminal Code*, s. 129.
[18] *Criminal Code*, s. 264.
[19] *Criminal Code*, s. 264.1.
[20] *Criminal Code*, s. 22.
[21] *Criminal Code*, s. 465(1)(c).
[22] *Criminal Code*, s. 467.11.

an airport) anywhere other than the road or parking area, and individuals may not park a vehicle outside of a parking area or stop a vehicle in a manner that obstructs traffic.[23] Walking, standing, driving, or otherwise causing any obstruction in the "movement area" of an airport (i.e., where aircraft move on the surface) is prohibited.[24] These provisions would apply to any vehicle blocking access or interfering with the use of an airport.

Interrupting Third Party Support

Where third parties finance extended disruptions of infrastructure, the Attorney General can apply to court to restrain the use of their funds. If the Attorney General shows that there are reasonable grounds to believe that funds constitute "offence related property", the Court may prohibit any person from disposing of or dealing in any way with the property.[25] This applies even to funds or other property situated outside of Canada.[26]

The Attorney General of Ontario used this power to obtain an order cutting off crowdfunding platforms from providing financial assistance to the convoy protesters in Ottawa.

Provincial law also permits civil forfeiture of property that is acquired, directly or indirectly, in whole or in part, as the result of unlawful activity (i.e., any offence under any provincial or federal law). This would include money or other support given to individuals or groups as a result of illegally blocking access to infrastructure.[27]

Removing Property Being Used to Block Infrastructure

Existing laws provide powers to order or require the removal of objects blocking infrastructure.

Under the *Highway Traffic Act*, a police officer may remove and store any vehicle or debris on a road that is impeding the normal or reasonable movement of traffic, if it is reasonably necessary to do so to ensure the orderly movement of traffic.[28]

In exercising their duty to protect life and property, police have a common law power to tow vehicles that are reasonably believed to be in violation of provincial traffic laws when it is reasonable to do so. Individuals who act to prevent this from occurring can be prosecuted for the criminal offence of Obstruct Police.[29]

Injunctive Relief

Courts have broad powers to issue injunctions to prohibit activity that interferes with the use of infrastructure.

Courts have a general equitable jurisdiction to prohibit interference with infrastructure in appropriate circumstances. This power is regulated under ss. 101-102 of the *Courts of Justice Act*. The Courts also have the power to enjoin violations of municipal by-laws under s. 440 of

[23] *Traffic on the Land Side of Airports Regulations*, SOR/2006-102, ss. 7(1), 9(1), (2).
[24] *Canadian Aviation Regulations*, SOR/96-433, s. 301.08(a).
[25] *Criminal Code*, s. 490.8(3).
[26] *Criminal Code*, s. 490.8(3.1).
[27] *Civil Remedies Act, 2001*, SO 2001, c 28, Part II.
[28] *Highway Traffic Act*, RSO 1990, c H.8, s. 134.1.
[29] *R. v. Waugh* (2010), 251 CCC (3d) 139 (Ont CA) at paras. 25-35; *Criminal Code*, s. 129.

the *Municipal Act, 2001*, which inevitably includes rules prohibiting obstructions of infrastructure located within municipalities.

These provisions can provide effective remedies for both public officials and private persons faced with obstructions causing them significant injury. Both provisions were used with success to resolve the blockade at the Ambassador Bridge in 2022.[30]

The OFL stresses that it is important not to bypass these existing injunction powers with the new provisions in Bill 100. Section 102 of the *Courts of Justice Act*, which regulates injunctions in labour disputes, reflects a careful balance between the interests of those seeking injunctions and the rights of trade unions and their members. The important protections afforded by s.102 of the *Courts of Justice Act* would be eroded by Bill 100's prohibitions permitting injunctions.

Conclusion

The OFL recognizes that protecting transportation infrastructure can be an important public objective. However, Bill 100 goes too far by imposing broad prohibitions that target constitutionally protected conduct and backs it with draconian penalties. It threatens to chill free speech and associational activities of a range of civil society groups, trade unions, and Indigenous peoples.

This is reason enough to vote against Bill 100. But in addition, it is also entirely unnecessary. Even if the Bill only targeted the mass disruptions that it is intended to address, it would give the police no new or unique tools. All of the conduct that ostensibly animated Bill 100 is already illegal; the police and the courts already have the tools to deal with them. These provisions are at best redundant, and at worst, draconian and unconstitutional.

Bill 100 is a bad law. The OFL urges the committee to report back to the House that Bill should not be enacted.

Cope343

[30] See *Automotive Parts Manufacturers' Association v. Boak*, 2022 ONSC 1001 (CanLII). The municipal bylaw in question prohibited idling vehicles for more than three minutes at a time.