

Freedom to Protest *Does* Exist, but By-law P-6 Should Not.

“The Charter [of Rights and Freedoms] protects the right to free expression, but there is no right to protest”

- *Sergeant Jean-Bruno Latour, Montreal police spokesperson, speaking in La Presse on 23 March 2013*
[1]

The above statement was not made by a North Korean general. Nor does it date back to the early 20th century. Rather, it was made two days ago by the official spokesperson of the Montreal police and was reported in the pages of *La Presse*.

The statement makes two things clear:

1. We have entered an era in which the police, even absent any action by elected leaders, feel entitled to dictate the scope of our fundamental freedoms.
2. As jurists, we have a responsibility to react.

The statement comes in the wake of three recent would-be demonstrations, all of which police effectively shut down before they got off the ground despite the absence of any violence or wrongdoing. Police arrested nearly 500 people, targeting not only students, but also professors, workers, mothers, fathers, and at least one panda.

How are police justifying their actions? By relying on By-law P-6, which was amended at the same time as Bill 78, and which includes the following provision:

2.1. The exact location and itinerary, as the case may be, of an assembly, parade or other gathering must be disclosed, prior to the event, to the director of the Service de police or to the officer in charge.

Every assembly, parade or gathering for which the location or itinerary has not been disclosed, or that does not take place at the disclosed location or in accordance with the disclosed itinerary is deemed an assembly, parade or gathering held in violation of this by-law.

This provision does not apply where the Service de police, for the purposes of preventing breaches of the peace, public order and safety, demands that the disclosed location or itinerary be changed.

The by-law also provides that:

3.2. No person who participates in or attends an assembly, parade or gathering on public property may cover their face without a reasonable motive, namely using a scarf, hood or mask.

Penalties are also indicated:

7. Any person who contravenes this by-law is guilty of an offence and is liable:

(1) for a first offence, to a fine of \$500 to \$1,000;

(2) for a second offence, to a fine of \$1,000 to \$2,000;

(3) for a subsequent offence, to a fine of \$2,000 to \$3,000.

Last year, when Bill 78 was enacted as Law 12, it met widespread criticism, including from the opposition in the National Assembly and from the Barreau du Quebec, both of whom argued that it violated fundamental freedoms, including the freedom of expression. Now that the former opposition party has come to power, it has repealed nearly all of Law 12's provisions, including the following:

16. A person, a body or a group that is the organizer of a demonstration involving 50 people or more to take place in a venue accessible to the public must, not less than eight hours before the beginning of the demonstration, provide the following information in writing to the police force serving the territory where the demonstration is to take place:

(1) the date, time, duration and venue of the demonstration as well as its route, if applicable; and

(2) the means of transportation to be used for those purposes.

When it considers that the planned venue or route poses serious risks for public security, the police force serving the territory where the demonstration is to take place may, before the demonstration, require a change of venue or route so as to maintain peace, order and public security. The organizer must then submit the new venue

or route to the police force within the agreed time limit and inform the participants.

In our opinion this provision violates the freedoms guaranteed by both *Charters* [2]. Nevertheless we recognize that it is still less restrictive than section 2.1 of the Montreal by-law. This municipal provision applies even to groups of less than 50 people and gives police unfettered discretion to modify a march route “for the purposes of preventing breaches of the peace, public order and safety” without having to demonstrate how the location or planned route constitute a serious risk to public safety.

The relevant penalties section in Law 12 read as follows:

26. Anyone who contravenes section 3, the first paragraph of section 10, section 11, the second paragraph of section 12 or section 13, 14, 15, 16 or 17 is guilty of an offence and is liable, for each day or part of a day during which the contravention continues, to a fine of \$1,000 to \$5,000.

However, the fine is

(1) \$7,000 to \$35,000 if the offence is committed by a senior officer, an employee or a representative, including a spokesperson, of a student association, a federation of associations or an association of employees, by a senior officer or a representative of an institution, or by a natural person who is the organizer of a demonstration; and

(2) \$25,000 to \$125,000 if the offence is committed by a student association, a federation of associations, an association of employees or an institution, or by a legal person, a body or a group that is the organizer of a demonstration.

The fines prescribed by this section are doubled for a second or subsequent offence.

Thus, the fines are similar to those in By-law P-6, at least as they apply to individuals.

When the provisions of Law 12 were repealed and the previous government’s tuition fee hike was abolished, Pauline Marois, head of the PQ government, declared: “These two decisions mark a return to peace and the restoration of rights and freedoms.” [3] The Quebec Premier evidently believed Law 12’s provisions, including the requirement that the demonstration routes be pre-authorized by the police and the empowerment of police to dictate the place a demonstration was to be held were inconsistent with “right and freedoms.”

It follows that the government must believe that By-law P-6, written in nearly identical language, whose restrictions are even more stringent, is also inconsistent with these rights and freedoms. And yet, when asked to comment on the hundreds of recent arrests under the by-law, the same government’s Minister of Public Security reacted as follows:

“While maintaining that it was better to address questions about this issue to the Montreal Police Service (SPVM), Jacqueline Aubé noted it was to be expected that people had been arrested, given that no route had been provided by demonstration organisers.” [4]

It is striking that the same government which a few months ago argued such a requirement contradicted basic rights and freedoms, now feels the present situation is to be expected, especially as no proceedings were brought under Law 12.

Let us now remind them that it is no more to be expected now than it was in September 2012. On the contrary, it is a catastrophe.

In a free and democratic society, it is not “to be expected” that peaceful protestors are arrested by the

hundreds using “kettling” techniques and mounted police – effectively impairing freedom of movement for hours – as recently occurred in Montreal. Such police tactics are more worthy of totalitarian regimes.

Permit us to formally remind Sergeant Latour that the right to protest is protected by both the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter*. The right to protest falls under two fundamental liberties in these Charters: freedom of expression and freedom of peaceful assembly.

In effect, as the Barreau du Québec highlighted in a statement at the time of P-6’s enactment: “The combined effect of freedom of expression and freedom of peaceful assembly results in protection of the content of the message by freedom of expression, while the mode (or form) of expression, in this case a collective demonstration in the streets, receives additional protection as it is safeguarded not only by the freedom of expression, but also by the freedom of peaceful assembly.” [5]

Limits imposed on these freedoms must be justifiable within the framework of a free and democratic society. They must be adopted to serve a pressing and substantial purpose, they must be reasonable, proportionate, and impair as little as possible the freedoms in question. Yet it is clear to us that P-6’s provisions cannot meet these criteria. As we’ve recently seen, they completely prevent peaceful protest for reasons of convenience and lead to unprecedented repression, absent any identifiable danger to public safety or other important purpose. It is important to note that though By-law P-6 was amended in May 2012, it had not generally been used to shut down protests until the three recent demonstrations in March 2013.

On 23 March 2013, the police explained its recent actions in the *Journal de Montréal* as follows:

“ ‘The population has had enough of demonstrations,’ said a police source interviewed by QMI Agency on Saturday. ‘People are asking us to put a brake on these demonstrations as quickly as possible.’ ” [6]

This statement appears to indicate the police are not claiming to need march routes in advance in order to supervise demonstrations and to ensure they remain peaceful. It appears, rather, that police are responding to requests from people who are tired of demonstrations. This is consistent with the statement by Sergeant Latour, who believes (wrongly in our opinion), that the right to protest no longer exists. Upon reflection, these statements give reason to fear the worst: that P-6 is in fact being used to dissuade people from protesting. It is equally surprising to hear the police tell us they are reacting in this way to respond to demands from the population, without specifying who made such a request, nor why it should take precedence over others’ fundamental freedoms guaranteed by the Canadian constitution and the *Quebec Charter of human rights and freedoms*. The police, we note again, are not elected, yet seem ready to interfere in political decision-making. In a municipal context in which transparency is becoming increasingly required, such an exercise of police discretion is, to say the least, worrying.

At the same time, even if some demonstrations can be planned in advance, and lend themselves to a degree of co-ordination, others are entirely spontaneous. Take the examples of employees mobilising as part of a labour dispute or a sudden factory closure, of citizens interrupting candidates with questions during an election, or of people taking to the streets to bang pots and pans in residential neighbourhoods in response to escalating social crisis. Demonstrations can occur in reaction to current events, or may aim to surprise. Yet P-6’s restrictions have the consequence of effectively prohibiting all of these spontaneous gatherings. Furthermore, even if routes are communicated, this provides no guarantee against violence, nor does failure to communicate a route bring about a situation that will lead to violence. We need only look, by way of example, at the overwhelming majority of demonstrations that result in little or no violent acts, as was the case with the “*casseroles*” protests.

For these reasons, we insist on P-6's immediate repeal. In our opinion, this by-law, as drafted and implemented, violates the freedom of expression and freedom of peaceful assembly and is not justified within the context of a free and democratic society. The police already have a broad range of legal tools at their disposal to prevent violence. Repressing peaceful protest is not a justifiable priority in 2013.

We also reiterate our demand for a public inquiry into these police actions, especially in light of recent statements by the police, which appear to position them as playing an increasingly political role. It is long overdue for civil society to regain control of the situation.

Sibel Ataogul, labour lawyer and president of the Association of Progressive Jurists
Finn Makela, lawyer, professor of law, and director of the common law and transnational law programs at the University of Sherbrooke
Me Denis Poitras, criminal defence lawyer
Me Véronique Robert, criminal defence lawyer

This text is signed by the authors above and in the name of the Association of Progressive Jurists

[1] <http://www.lapresse.ca/actualites/dossiers/conflit-etudiant/201303/22/01-4633847-intervention-policiere-rapide-a-la-manifestation-du-22.php> [translation].

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11; *Charter of human rights and freedoms*, RSQ, c C-12.

[3] <http://www.ledevoir.com/politique/quebec/359624/droits-de-scolarite-marais-annule-la-hause-mais-maintient-la-bonification-des-prets-et-bourses> [translation].

[4] <http://www.lapresse.ca/actualites/dossiers/conflit-etudiant/201303/23/01-4634110-arrestations-de-masse-quebec-solidaire-interpelle-marais.php> [translation].

[5] Statement of the Barreau du Québec to the president of the president of the Commission de la sécurité publique, 16 May 2012, <https://www.barreau.qc.ca/pdf/medias/positions/2012/20120516-masques.pdf> [translation].

[6] <http://www.journaldemontreal.com/2013/03/23/la-police-dit-repondre-aux-demandes-du-public> [translation].