

The Peter A. Allard School of Law

## Allard Research Commons

---

Faculty Publications

Allard Faculty Publications

---

2009

### The Gap in Canadian Police Powers: Canada Needs 'Public Order Policing' Legislation

W. Wesley Pue

*Allard School of Law at the University of British Columbia, pue@allard.ubc.ca*

Robert Diab

Follow this and additional works at: [https://commons.allard.ubc.ca/fac\\_pubs](https://commons.allard.ubc.ca/fac_pubs)



Part of the [Civil Rights and Discrimination Commons](#), and the [Constitutional Law Commons](#)

---

#### Citation Details

W Wesley Pue & Robert Diab, "The Gap in Canadian Police Powers: Canada Needs 'Public Order Policing' Legislation" [forthcoming in 2009].

This Working Paper is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

## **The Gap in Canadian Police Powers: Canada Needs “Public Order Policing” Legislation**

W. Wesley Pue

Nathan T. Nemetz Professor of Legal History,

Faculty of Law, UBC

and

Robert Diab

Capilano University

Prior to the Vancouver-Whistler 2010 winter Olympics, debate unfolded about the cost, nature, and extent of security measures to be employed at the Games. Staging the Olympics would clearly challenge the resources, tact, imagination, and abilities of police and security officials. Over and above the normal issues related to crowd control and safety associated with events such as Stanley Cup finals, fireworks displays, or other major public events, globally noteworthy spectacles such as the Olympics provide an unmatched opportunity for any group wishing to seize international media attention to leverage significant exposure through boisterous demonstrations, disruption of events, grandstanding, or, if so inclined, violence and property damage.

Surprisingly, policing authorities in Canada lack specific statutory authorization to take measures that might be thought necessary to their mission. Although the established choreography of public order policing in Canada has come to include the erection of security fences in public areas, the creation of designated “protest areas,” restricted access to public space, police surveillance, and *searches without*

*cause*,<sup>1</sup> such measures intrude massively into the ordinary freedoms that law-abiding subjects enjoy.

Although they may be desirable or even necessary at events of this nature, no Canadian legislature has ever expressly conferred such powers on the policing authorities outside of the context of international intergovernmental conferences (more on this below).<sup>2</sup> The common law does not accord such powers to state officials in the absence of an empowering statute.

A second-order question arises too: which policing measures would, *if authorized by statute*, pass constitutional muster? We are not there yet, however. The absence of statutes empowering police and

---

<sup>1</sup> The RCMP have created an “Integrated Security Unit” to deal with the 2010 Olympics. As of the summer of 2009, the ISU has not made its security plan public, but a number of details have been noted in the media. The ISU will close the Dunsmuir and Georgia Viaducts near BC Place and General Motors Place, and “security zones” will be erected around both venues. These zones may cover significant portions of public space, including the seawall walkway around False Creek. Jeff Lee, “2010 Olympic Traffic Plans Pose Challenge for Everyone,” *Vancouver Sun*, November 25, 2008, <http://communities.canada.com/vancouver/blogs/insideolympics/archive/2008/11/25/2010-olympic-traffic-plans-pose-challenge-for-everyone.aspx>. The RCMP have sought bids for the supply of forty kilometres of “electronically monitored security fencing” for use around twenty-five Olympic venues. Damian Inwood, “Mounties Looking for Bidders to Supply Security Fencing,” *The Province*, January 17, 2008, <http://www.canada.com/theprovince/news/story.html?id=ae09ad7f-d82f-4ac8-a1a4-091c01716613>. The ISU’s Community Relations Group has consulted with activist groups about “possible protest zones sanctioned by police.” Rod Mickleburgh, “Olympic Security Boss Puts Protesters on Notice,” *Globe and Mail*, January 23, 2009, <http://www.theglobeandmail.com/servlet/story/RTGAM.20090123.wbcolympicsecurity23/BNStory/National/?page=rss&id=RTGAM.20090123.wbcolympicsecurity23>. The RCMP also plan “to install hundreds of closed-circuit television cameras for security... [at] both athletic and public celebration venues.” “Vancouver Olympics Security Cameras Raise Privacy Concerns,” CBC Television, May 12, 2008, <http://www.cbc.ca/canada/british-columbia/story/2008/05/12/bc-olympic-security-cctv.html>. (All sites accessed July 20, 2009.)

<sup>2</sup> In July 2009, Vancouver City Council enacted an omnibus “2010 Olympic and Paralympic Winter Games Bylaw” in order to fill the legal void around public order policing. This purports to authorize a number of practices relating to security including closure of streets and other public spaces, the use of airport-style security checkpoints at certain sites; searches of persons and bags (without reasonable cause or warrant); video surveillance; and restrictions on the use of signage, megaphones, and other methods of expression. The by-law seeks to authorize some but not all of the security tactics that may be used at the Olympics, putting them under municipal control. See <http://vancouver.ca/ctyclerk/cclerk/20090721/documents/a4.pdf> (access on July 20, 2009). A by-law cannot take the place of public order policing legislation however: its vires is unclear, its scope limited and its reach is confined to one municipality only.

guiding their conduct at major public events is triply unfortunate. First, the police are put in an untenable situation when they are called upon to undertake complex and important tasks in a legal vacuum. Police are *entitled* to direction from the legislature. Second, from the perspective of legality, a crisis of principle arises. Because the legislature has not spoken, police officials are forced to make up their own guidelines as they go. Developed without legal authorization and secretly, without any form of public review, they lack the quality of law. Third, citizens are left in a legal limbo, their rights affected by police actions that cannot be measured against any publicly disclosed standard. Core rights of assembly, expression, and protest are all compromised. So too are the rights of businesses, homeowners, and ordinary citizens to go about their routine activities without interruption. If such infringements are indeed both necessary and constitutionally justifiable, they need, first, to be authorized by law.

For these reasons, Canadian provinces and territories should adopt some form of “Public Order Policing legislation.” Such laws would authorize the creation of police exclusion zones, providing principled and explicit guidance to their proper extent and duration. Criteria could be established guiding who would be allowed admission to “secure” areas (workers, business owners, homeowners, emergency medical personnel, security officials, journalists, and others?), specifying decision-making processes, establishing principles of compensation for those who suffer financial injury as a result of the creation of security perimeters, setting out “notice” requirements, and so on. If entry to otherwise public space is to be permitted only following airport-style searches, then explicit statutory authorization would both give comfort to security officials and clarify the limits of their authority for citizens.<sup>3</sup> Attempts to side-step the issue by “deeming” public property to be private (e.g., property of the International Olympic Committee,

---

<sup>3</sup> The Commission for Public Complaints against the RCMP recently ruled alcohol searches at public events to be improper:

<http://www.theprovince.com/cars/Watchdog+rules+Victoria+police+Canada+liquor+searches+lawful/1437260/story.html> ; <http://www.cpc-cpp.gc.ca/nrm/nr/2009/20090327-eng.aspx> (accessed July 20, 2009). Despite this, Vancouver Police continued to search for unopened alcohol during the summer 2009 Fireworks displays in that city, provoking a complaint from the British Columbia Civil Liberties Association: <http://rightscity.org/police/2009/07/28/bccla-lodges-police-complaint-after-unlawful-searches-reported-at-fireworks/> (accessed August 3, 2009)

APEC, the IMF, a hockey league or a fireworks organization) for short periods of time would amount to unseemly and colourable attempts to end-run Canadian constitutional foundations.

### Values at Stake

Blanket prohibitions of protests combined with surveillance and a significant security presence produce orderly events. No such measures are or can be contemplated, however, in Canada. Liberal democracies avoid such behaviour as a matter of principle. Free peoples enjoy the freedom of movement, the freedom of expression, and the freedom to express themselves in the company of like-minded people — freedom of assembly. Although recognizably akin to the “rights” protected by the *Canadian Charter of Rights and Freedoms*,<sup>4</sup> the constitutional centrality of such principles precedes the Charter.<sup>5</sup> These rights emerge from centuries of constitutional development that Canada shares with the United Kingdom, the United States, and other common law countries. Core Canadian values were emphasized by BC premier Gordon Campbell during a press conference at the Beijing games and in a context in which rather different notions of state power prevailed: “In Canada we will be open to opportunities for people to express whatever views they have,” he said. “There will not be opportunities to break the law, [but] we will make sure there will be full and equal expression throughout the 2010 Olympics.”<sup>6</sup>

---

<sup>4</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereafter the *Charter*].

<sup>5</sup> The pre-*Charter* origin of constitutional protection for free expression, for example, registers strongly in Madam Justice L’Heureux-Dubé’s reasons delivered in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, [1991] S.C.J. No. 3 [hereafter *Commonwealth of Canada*], wherein pre-*Charter* authorities, including the following, are cited: *Switzman v. Elbling*, [1957] S.C.R. 285; *Reference re: Alberta Statutes*, [1938] S.C.R. 100; *Boucher v. The King*, [1951] S.C.R. 265; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455.

<sup>6</sup> “Campbell fires back at Chinese critics,” Jeff Lee, *Vancouver Sun*, August 12, 2008, <http://www.canada.com/vancouvernews/story.html?id=c6c8fea0-740a-4026-8b03-09b8a3f1389b> (accessed July 20, 2009).

Values and interests come into conflict where public order is at issue. One group's right to assembly necessarily interferes with another's freedoms. Speaking loosely, disturbance of the "peace" is to some degree a necessary incident of public protest. Even the most peaceable multitude can seem intimidating and noisy. The presence of crowds impedes access to public and private property, and the peaceable enjoyment of land or other property may be disrupted. Large gatherings obstruct passage, inhibiting, to a degree, the freedom of movement of others. Moreover, even the most law-abiding crowd can provide cover for hooligans, vandals, troublemakers, and individuals intent on criminal assault or worse. Important as they are, the rights of assembly, movement, and protest are not unqualified. They can — and should — be balanced against other important public needs. The balancing should be steered by law, directed by statute. The alternatives of chaos or unilateral police usurpation of powers that are not theirs are equally unpalatable.

## Part 2: Limits of Public Order Policing Power in Canada

At large public gatherings, police commonly erect fences or barricades to channel the movement of people, close off entire areas of public space, and issue police passes allowing entry to selected individuals. Knowing that they lack statutory authority, Canadian policing officials have hoped, falsely, that such powers can be derived from the ancient duties of peace officers to protect life and property, preserve peace, and prevent crime. Their hope is unfounded as such an outcome would require an untenable extrapolation of a limited, though ancient, police power.

The leading authority, *R. v. Knowlton*,<sup>7</sup> was decided in the Supreme Court of Canada a generation ago. The case arose from a modest policing incident when the premier of the Soviet Union, Alexey Kosygin, visited Edmonton in the early 1970s. He had been attacked by an unarmed man while walking on Parliament Hill with Prime Minister Pierre Trudeau. Although Kosygin was quickly rescued by the

---

<sup>7</sup> *R. v. Knowlton*, [1974] S.C.R. 443 [hereafter *Knowlton*].

prime minister,<sup>8</sup> officials realized that the minor incident could have turned out very differently if the attacker had been armed or more determined. Fearful of the possibilities, Edmonton police created a security zone around a downtown hotel for the Soviet premier's itinerary. The security perimeter generally followed the hotel's property lines but also obstructed a small portion of the sidewalk on an adjacent public street. E.J.N. Knowlton told police that he intended to walk along that portion of the sidewalk in order to take pictures and that he viewed the barricade as an unlawful interference with his right to move freely on a public street. Upon breaching the perimeter, he was arrested and charged with obstructing a peace officer.

Provincial Court Judge Rennie acquitted Knowlton, reasoning that, in the absence of statutory authority, the police could not so interfere with a law-abiding citizen: "[T]he police at the relevant time were not enforcing any provisions of the Criminal Code, or any by-law or other law and ... therefore they were not acting in the execution of their duty...."<sup>9</sup> On appeal, a unanimous bench of the Supreme Court of Canada<sup>10</sup> agreed that police power does not float free of common law and statute. The court accepted that the police had interfered with the "liberty of the appellant," including his undoubted legal "right to circulate freely on a public street,"<sup>11</sup> but upheld police action in the *particular* circumstances. The trial judge had not properly taken into account the ancient common law duty of "constables" to preserve the peace and to prevent crime, duties imported into the Canadian *Criminal Code* and into legislation governing police forces across Canada. The common law authority was explicitly extended to Alberta's police under section 3 of the *Alberta Police Act* (1971),<sup>12</sup> which stated that police had the power to "perform all duties that are assigned to police officers" in relation to preserving the peace, preventing

---

<sup>8</sup> John McKay, "Trudeau Left Indelible Impressions with Everyone He Touched, Even Reporters," Canadian Press October 1, 2000.

<sup>9</sup> As cited in *Knowlton*, at 445.

<sup>10</sup> Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon, and Laskin JJ.

<sup>11</sup> *Knowlton*, at 446.

<sup>12</sup> c. 85.

crime, and apprehending offenders who may lawfully be taken into custody.<sup>13</sup> Given the earlier assault on the Soviet premier, the court thought it reasonable for police to seek to guard against further disturbance of the peace or criminal assault. In the particular circumstances, obstruction of a small stretch of sidewalk represented a reasonable instance of the general authority of constables to preserve the peace, prevent crime, protect public safety, preserve order, and prevent offences against provincial laws. The court also thought it proper for police to screen people passing through a security barricade, to selectively bar some individuals from entry to the *private property* within the barricade, and to issue “passes” for those who were able to satisfy police as to their backgrounds, intentions, and objectives.

Mr. Justice Fauteux’s words do not offer virtual *carte blanche* to police officers to do whatever they want, provided only that they seek to preserve the peace and prevent crime. Such a proposition is entirely untenable. When, after all, would police officers acting in good faith *not* be motivated by a desire to preserve the peace and prevent crime? The severest and most intrusive conceivable measures could pass this test, yet no such unlimited police licence was, is, or could be part of Canadian law. The *ratio decidendi* of *Knowlton* — its binding principle — was a good deal narrower than words taken out of context might suggest. The public’s freedom of movement had been (1) minimally restricted, (2) for a limited time, and (3) over an inconsequentially small area of public street directly adjacent to consensually policed private property — and in circumstances where there was clearly good reason to fear an assault on a controversial visiting statesman.

Nearly thirty years later similar issues arose during the 2001 Quebec City Summit of the Americas conference. The judge in *Tremblay c. Québec (Procureur général)* described the background to the case:

The authorities have set up a substantial security barrier around the third Summit of the Americas, which Quebec City will host for three days beginning on Friday April 20<sup>th</sup>, to protect the 34 participating heads of state, their delegates and the general public. Among other measures, in the

---

<sup>13</sup> *Knowlton*, at 447.



Upper Town there will be a fenced security perimeter which may only be entered by certified persons (dignitaries, journalists, Summit employees and police officers) as well as residents, workers, businessmen and civil servants holding a pass issued by the RCMP.<sup>14</sup>

M. Tremblay, a Montreal lawyer, took the view that, absent express statutory restrictions, he and other law-abiding citizens had a right to move freely within Canada and to make a personal, peaceful protest in front of the Quebec Congress Centre. Police officials failed to grant him a “pass” permitting entry to the walled zone. Tremblay sought a permanent injunction, alleging that the barricades interfered with his rights under the *Charter*. He asked that the barrier be removed or that a full-access pass be issued to him.

Although the case turned on an analysis of general police powers, the question of the extent of police authority was approached through a *Charter* analysis, not through an assessment of their statutory or common law powers. This misstep profoundly distorted the analysis. It was clear that the intended police action at the Summit of the Americas would inhibit conventional freedoms, including those of peaceful protest and freedom of expression,<sup>15</sup> and his lordship thought that the arrangements could only be upheld under section 1 of the *Charter*. As in *Knowlton* (which went uncited), no statute expressly authorized the actions taken by police.

Mr. Justice Blanchet noted that rights may be limited by a “rule of law” within the meaning of section 1. Citing the Supreme Court of Canada’s decision in *Cloutier v. Langlois*,<sup>16</sup> Blanchet J. took the view that police conduct interfering with rights could be justified so long as it is necessary for carrying out a statutory duty and provided that it is reasonable, “having regard to ... the importance of the public

---

<sup>14</sup> *Tremblay c. Québec (Procureur général)*, [2001] J.Q. no. 1504, para. 1, per Gilles Blanchet J [hereafter *Tremblay*]. The ruling is translated into English in W. Wesley Pue, “Trespass and Expressive Rights,” *The Ipperwash Inquiry* (2007), at 52–77 (Appendix), [http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/research/pdf/Pue.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Pue.pdf) (accessed July 20, 2009).

<sup>15</sup> *Tremblay*, para. 63.

<sup>16</sup> [1990] 1 S.C.R. 158 [hereafter *Cloutier*].

purpose served by the interference.”<sup>17</sup> He then looked to the duties imposed upon police officers under section 18 of the *Royal Canadian Mounted Police Act*,<sup>18</sup> sections 2(b) and 6 of the *Security Offences Act*,<sup>19</sup> and section 2 of the *Criminal Code*.<sup>20</sup>

The general legal principle established in *Cloutier v. Langlois* is more limited, however, than Blanchet J.’s gloss allows. That case dealt with the legality of a police “frisk search” incidental to arrest — circumstances wildly different from the zoning of a city. Madam Justice L’Heureux-Dubé, for the court, crafted a two-stage approach to police powers. First, does statute or common law impose a particular duty on peace officers? The standard here is demanding. The duty must be “clearly identified.” It must have been historically recognized by the courts.<sup>21</sup> Second, only *after this threshold is crossed* does another stage of inquiry become relevant: which invasions of individual rights are *necessary* for that duty to be fulfilled? It is only infringements that are, strictly speaking, necessary for well-established police duties to be fulfilled that can be taken as reasonably implied by the initial grant of power, authority, or duty. This is a demanding test. The interference with rights must be both necessary and calibrated reasonably in relation to the nature of the liberty interfered with, taking all competing public interests into account.

The ruling in *Tremblay* skated quickly over difficult questions relating to the general scope of police duties and *necessarily* ancillary police powers. The relevant portions of each of the statutes that Blanchet J. looked to are in fact expressed in broad terms of the sort that would not normally be construed as authorizing significant violations of ordinary freedoms and liberties. Section 18 of the *RCMP Act*, for example, enumerates a number of duties on peace officers of a general nature, including preserving the peace, preventing crime, and enforcing the law. The language of this section has deep historical roots in

---

<sup>17</sup> *Cloutier*, at 181.

<sup>18</sup> R.S. c. R-9 (R-10).

<sup>19</sup> R.S. c. S-7 (1984, c. 21, s. 56).

<sup>20</sup> R.S. c. 34 [hereafter *Criminal Code*].

<sup>21</sup> *Cloutier*, para. 50.

the common law (“all duties that are assigned to peace officers in relation to the preservation of the peace”)<sup>22</sup> but was not thoroughly analyzed in *Tremblay*.<sup>23</sup>

The *Security Offences Act*, for its part, serves to delineate the boundary between federal and provincial jurisdiction in certain areas. It establishes the primacy of the federal government by assigning responsibility to the federal attorney general to “conduct proceedings” and “exercise all the powers and perform all the duties and functions assigned by or under the *Criminal Code* to the Attorney General” with respect to both security offences (as defined in the *CSIS Act*) and offences against “internationally protected persons” (IPPs).<sup>24</sup> Nothing here creates a new police power. On the contrary, the duties of RCMP officers are expressly said to be those of “peace officers.”

When we turn to the *Criminal Code*, it is apparent that a profound misunderstanding of the phrase “internationally protected persons” infects the *Tremblay* decision. The term found its way into Canadian law so as to give domestic expression to obligations under long-standing principles of international law, designed to protect individuals engaged in diplomacy from harassment. In international law, the long-standing principle finds expression in the 1973 *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons*.<sup>25</sup> The category of “internationally protected person” includes heads of state, heads of government, ministers of foreign affairs, and representatives or officials of either a state or certain types of international organizations, as well as their families, and the *Criminal Code* speaks of categories of individuals “entitled, pursuant to international law, to special protection from any

<sup>22</sup> See too section 9 of the *RCMP Act*, R.S., 1985, c. R-10, which also emphasizes that “the powers, authority, protection and privilege” of RCMP constables are those of a “peace officer.”

<sup>23</sup> In *Vancouver (City) Police Department v. British Columbia (Police Complaint Commissioner)*, [2001] B.C.J. No. 1405; 2001 BCCA 446 (BCCA) (“the Doern Case”), para. 20, Madam Justice Southin emphasized, *obiter*, that peace officers, unlike soldiers in Her Majesty’s forces, are generally not entitled to rely on defences of superior command for unlawful conduct: “I do not myself consider that authorities on the responsibility of senior officers of Her Majesty’s forces for the conduct of the troops under their command are apposite in issues relating to peace officers. A peace officer’s individual duty is to see that the Queen’s peace is maintained and that those who breach it, whether they be other peace officers or civilians, are brought to account.”

<sup>24</sup> See sections 2(a) and (b) of the *Security Offences Act*.

<sup>25</sup> <http://www1.umn.edu/humanrts/instreet/inprotectedpersons.html> (accessed July 20, 2009).

attack on [their] person, freedom or dignity....”<sup>26</sup> Confusion has arisen from wording requiring the protection of the “person, freedom or dignity” of IPPs, and “dignity” turns out to be the rub. Peace officers and government officials have sometimes incorrectly taken this to mean that visiting dignitaries should be shielded from exposure to the very sorts of discomfiting free expression that democratic countries cherish.<sup>27</sup> In giving statutory expression to long-standing principles of international relations, Canada’s Parliament cannot be presumed to have intended to create a new Constitution-trashing offence relating to “dignity.”<sup>28</sup>

The statutes reviewed in *Tremblay*, in other words, provide no legal grant of authority for the erection of barriers, for the zoning of public space, or for limiting mobility, constraining — or relocating — free speech, interfering with businesses, impeding access to homes, or establishing a system of “passes” that might have conferred lawful authority on the security arrangements in place for the Summit of the Americas. His lordship, in effect, *presumed* that such authority derived, somehow, from these statutes and skated too quickly past the fundamental question of statutory authority. Mr. Justice Blanchet proceeded to the conventional two-part *Charter* analysis. First, were *Charter* rights infringed? Second, if so, was the infringement “demonstrably” justifiable in a free and democratic society so as to be lawful under a section 1 analysis? There was no question on the first. The measures taken had “the effect of limiting to a great extent two of the fundamental freedoms guaranteed by section 2 of the *Charter*, namely

---

<sup>26</sup> See the definition of “internationally protected person” in section 2 of the *Criminal Code*.

<sup>27</sup> For example, Obiora Okafor, “The 1997 APEC Summit and the Security of Internationally Protected Persons: Did Someone Say ‘Suharto’?,” in *Pepper in Our Eyes: The APEC Affair* (Vancouver: UBC Press, 2000), ed. W. Wesley Pue, 185–96.

<sup>28</sup> Section 424 of the *Criminal Code* specifies punishments for individuals who threaten offences against international persons that would violate other sections of the *Criminal Code*. The listed sections are 235 (murder), 236 (manslaughter), 266 (assault), 268 (aggravated assault), 269 (assault causing bodily harm), 269.1 (torture), 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party, or causing bodily harm), 273 (aggravated sexual assault), 279 (kidnapping), 279.1 (hostage taking), and 431 (attack on premises, residence, or transport of internationally protected persons).

freedom of expression and freedom of peaceful assembly.”<sup>29</sup> Nonetheless, he upheld the arrangements under a section 1 analysis as demonstrably justifiable in a free and democratic society. Recall, however, that section 1 authorizes certain infringements of rights only if they are “prescribed by law.” Thus, we return to the puzzle that logically precedes a *Charter* analysis: where is the legal source for the powers exercised? Although the ruling is somewhat cryptic in this regard, it seems that Mr. Justice Blanchet found the answer either in the historical duties of peace officers to preserve the peace and prevent crime (*RCMP Act*) or in the international obligation to protect the “person, freedom, or dignity” of internationally protected persons. It has been seen, however, that the second adds little. Thus, *Tremblay* turned on the historical obligations of constables. The same grounds, in other words, as those relied upon by the Supreme Court of Canada in *Knowlton*: actions taken as necessarily incidental to ordinary police powers. Yet here we are dealing with the zoning of a large area of public space in Quebec City, not with a sliver of sidewalk adjacent to a privately owned hotel in Edmonton.

So enormous an extrapolation of the *Knowlton* principle cannot be good law. It bears noting that the *Tremblay* ruling emerged from less than optimal circumstances. Had Blanchet J. granted interlocutory relief, he would have dismantled security plans only days before a major international meeting that was certain to encounter massive protest. His lordship enjoyed neither the luxury of time nor the benefit of full argument and evidence. Although leave to appeal to the Supreme Court of Canada was refused, little can be read into this denial with respect to the court’s view on the substantive matters.

The authority of police to create zones of exclusion either as an incident of the general and ancient duties of constables or under specific statutory authorization has never been established in the courts. The only case that comes close involves a ruling by a court of first instance, rendered in extraordinary circumstances and without the advantage of a full hearing.

#### The Peace Officer’s Duty to Preserve the Peace and Prevent Crime

---

<sup>29</sup> *Tremblay*, para. 102.

*Tremblay* cannot be taken to be good law. The ruling marks an enormous extension in scale from the virtually *de minimus* restrictions at issue in *Knowlton*. Whereas *Knowlton* involved exclusion primarily from private property and from a very small portion of an adjacent public street for a short period of time, the security zone in *Tremblay* was massive, circumscribed by a fence several kilometres long, encompassing an important urban centre, surrounding homes and businesses without the consent of property owners, blockading many public streets, and policed aggressively for a period of several days. The measures taken in *Knowlton* had little impact on public rights of expression or assembly and minimal impact on the freedom of movement along public ways. Private property rights were not unilaterally violated in *Knowlton* as they were in *Tremblay*.

Moreover, Canadian constitutional history and practice point in other directions. The creation of large “no-go zones” by officials acting on their own initiative in the absence of explicit statutory authority tilts a long way toward an arbitrary system of government.

Finally, although the concept of ancillary police powers has been applied with some frequency in Canadian law, the circumstances of its application have always been limited and precise. The doctrine typically applies where there are questions about when police may search persons, effects, vehicles, or premises,<sup>30</sup> or detain a person for short periods for investigation,<sup>31</sup> and so on. No reasonable analogy would permit the extension of the present ancillary powers doctrine in Canada to authorize *Tremblay*-style police measures.

### The Ancillary Police Powers Doctrine

---

<sup>30</sup> For example, *R. v. Griffith*, [2003] A.J. No. 312, 2003 ABPC 46 (Fradsham, Prov. Ct. J.); *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.); *R. v. Feeney* (1997), 115 C.C.C. (3d) 129; *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.); leave to appeal to S.C.C. dismissed, [1997] S.C.C.A. No. 571; *R. v. Sharpe*, [2002] B.C.J. No. 1219; 2002 BCSC 213 (Shaw J.); *R. v. Davis*, [2004] A.J. No. 64; 2004 ABCA 33 (Alberta Court of Appeal); *R. v. Godoy* (1998), 131 C.C.C. (3d) 129 (S.C.C.), [affirming] (1997), 115 C.C.C. (3d) 272 (Ont. C.A.).

<sup>31</sup> For example, *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52, rev’g (2002) 169 C.C.C. (3d) 272, 2002 MBCA 121; *R. v. Greaves*, [2004] B.C.J. No. 1953, 2004 BCCA 484 .

The leading authority on ancillary police powers is *Dedman v. The Queen*.<sup>32</sup> That case deals with a *Charter* challenge to random police stops carried out as part of an anti-impaired-driving program in Ontario. Police would ask a driver for his or her licence and proof of insurance and, while doing so, take the opportunity to note the condition of the driver. The central issue before the court was whether police had the power to briefly detain *randomly selected* motorists. Ontario's *Highway Traffic Act* conferred authority to stop vehicles and inspect licences, and both the act and the *Criminal Code* authorized the taking of breath samples in proper circumstances.<sup>33</sup> The difficulty in *Dedman* arose because the stop-check scheme rested on a ruse: the initial stops were random and the demand to see the licence merely a ploy designed to generate reasonable grounds to demand alcohol testing. In exercising a power given for one purpose, the police put it to an unauthorized use. The court was unanimous in finding that the powers granted could not be validly exercised for a purpose other than that specified in the act. The court concluded that the scheme of stop-checks was not authorized by statute. The majority of a divided court held that the scheme's interference with the *qualified* right of licensed drivers to "circulate in a motor vehicle on the public highway"<sup>34</sup> was permitted as a necessary extension of common law police powers in the *particular* context of traffic control.<sup>35</sup>

In so concluding, the majority applied a modified version of the test of police powers set out in *R. v. Waterfield*.<sup>36</sup> Mr. Justice Le Dain's adapted "Waterfield test" asks first whether the activity in question "fell within the general scope of the duties of a police officer under statute or common law" and then

---

<sup>32</sup> [1985] 2 S.C.R. 2 [hereafter *Dedman*].

<sup>33</sup> The *Criminal Code* explicitly authorizes them to demand breath samples when the "officer reasonably suspects that a person who ... has care or control of a motor vehicle... has alcohol in his body..." (excerpts from s. 234(1) of the *Criminal Code*, as cited by Le Dain J. in *Dedman*, para. 49).

<sup>34</sup> *Dedman*, per Le Dain J., para. 68.

<sup>35</sup> "It has been held that at common law the principal duties of police officers are the preservation of the peace, the prevention of crime, and the protection of life and property, from which is derived the duty to control traffic on the public roads." *Dedman*, per Le Dain J., para. 68.

<sup>36</sup> *R. v. Waterfield*, [1963] 3 All E.R. 659, at 661–62, as cited in *Dedman*, per Le Dain J., para. 66. The *Waterfield* test had been accepted as authoritative in the Supreme Court of Canada in *R. v. Stenning*, [1970] S.C.R. 631, and in *Knowlton*.

whether “a particular interference with liberty is an unjustifiable use of a power associated with a police duty.”<sup>37</sup> The second stage of inquiry has three parts:

- (1) The interference with liberty must be necessary for the carrying out of the *particular police duty*
- (2) and it must be reasonable, having regard to the nature of the liberty interfered with
- (3) and the importance of the public purpose served by the interference.<sup>38</sup>

Mr. Justice Le Dain found in this case that “the seriousness of the problem of impaired driving” was sufficient to show the necessity of the program (stage 1) and to demonstrate the importance of the public purpose served by it (stage 3). Although stop-checks clearly interfered with liberty, the interference was short and the inconvenience caused “slight.”<sup>39</sup>

In other cases, the Supreme Court of Canada has reviewed the general principles governing ancillary police powers in relation to wiretaps, police entry to residences, and searches upon arrest. As in *Dedman*, the approach of the court in each situation has been cautious, stopping far short of creating a sort of plenary police power to do *anything* that might reasonably be expected to protect property or life or to prevent crime.

In *Reference re: Judicature Act (Alberta), s.27(1)* (the “Wiretap Reference”),<sup>40</sup> the court had to decide whether *Criminal Code* provisions authorizing a wiretap also authorized police to enter private property to install the needed equipment. Mr. Justice Estey, for the majority, found that it did. As in *Dedman*, the ancillary police power in question was narrow and closely related to an elaborate statutory arrangement surrounding the particular interferences with liberty.

---

<sup>37</sup> *Dedman*, per Le Dain J., paras. 68, 69.

<sup>38</sup> *Ibid.*, per Le Dain J., para. 69 (emphasis and paragraph breaks added).

<sup>39</sup> *Ibid.*

<sup>40</sup> *Reference re: Judicature Act (Alberta), s. 27(1)*, [1984] 2 S.C.R. 697.



In *R. v. Godoy*,<sup>41</sup> the Supreme Court of Canada had to decide whether a forced entry into a home in response to a dropped 911 call was justifiable under the *Dedman-Waterfield* test. Chief Justice Lamer, for a unanimous bench, held that the common law police duty to protect life is “engaged whenever it can be inferred that the 911 caller is or may be in some distress.”<sup>42</sup> This duty may require an intrusion, but, in Chief Justice Lamer’s view, “the intrusion must be limited to the protection of life and safety.... The police authority for being on private property in response to a 911 call ends there. They do not have further permission to search premises or otherwise intrude on a resident’s privacy or property.”<sup>43</sup> Again, the ancillary police power extrapolated from common law duties is narrowly circumscribed in terms of time, place, and persons.

*Cloutier v. Langlois* dealt with the scope of police powers of search on arrest. As in other cases, a generalized “reasonableness” test was insufficient to support the asserted police power. Madam Justice L’Heureux-Dubé, for the court, concluded that searches on arrest are legal if they are conducted in pursuit of a valid objective and use only such constraint as is “proportionate to the objectives sought and the other circumstances of the situation.” Valid objectives of a search include looking for an object that “may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused.”<sup>44</sup> No more.

In *R. v. Edwards*, the Alberta Provincial Court extended the doctrine of ancillary police powers to allow for a very limited sort of spatial zoning.<sup>45</sup> Upon leaving a bar, two brothers in that case found their car behind a temporary police barricade created as police investigated a suspected homicide. When officers at the scene refused the brothers’ access to their car, the two became verbally aggressive and were arrested for causing a disturbance. Absent any statutory authority preventing individuals from accessing

---

<sup>41</sup> *R. v. Godoy*, [1999] 1 S.C.R. 311; [1998] S.C.J. No. 85 [hereafter *Godoy*].

<sup>42</sup> *Godoy*, para. 16.

<sup>43</sup> *Godoy*, para. 22.

<sup>44</sup> *Cloutier*, paras. 61, 62

<sup>45</sup> *R. v. Edwards*, [2004] A.J. No. 68, 2004 ABPC 14, Allen, Prov. Ct. J., para. 1 [hereafter *Edwards*].

personal property that, through no fault of their own, has become “part of a temporary crime scene,” the question was whether police had the right to prevent the brothers from simply driving away.

Provincial Court Judge Allen considered the scope of the ancillary powers of police, in particular the common law duty to detect crime and bring offenders to justice.<sup>46</sup> Judge Allen concluded that the importance of a murder investigation, the possible forensic relevance of the particular vehicle, the temporary nature of the inconvenience, and the necessity of securing the crime scene in order to preserve evidence all led to the conclusion that the actions of the police were necessarily incidental to their general duty to apprehend offenders and prosecute crime.<sup>47</sup> This case resulted in recognition of a police “zoning” of sorts but one severely limited in space, time, and application.<sup>48</sup> The need here arises in a situation akin to an emergency that could not have been planned for in advance and in which no less intrusive options are available. The policing of well-anticipated public events bears no comparison.

In sum, in the absence of express statutory authority, the leading Canadian authorities on the ancillary police power provide no support for the proposition that police “zoning” of public space is an acceptable means of crowd control.

#### Statutory Authority for Public Order Policing?

---

<sup>46</sup> *Edwards*, para. 36.

<sup>47</sup> *Edwards*, para. 48.

<sup>48</sup> Cf. Pace J.A.’s judgment (for the court) in *R. v. Williams (N.S.C.A.)*, [1986] N.S.J. No. 138, which dealt with the question of the lawfulness of police traffic control measures imposed during a tall ship event in Halifax. Although it might be construed as authorizing a police zoning issue of sorts, the judgment was limited in its application to the qualified liberty of driving. The police power to give directions to drivers (including telling them not to drive down a particular street) was held to be authorized by the *Nova Scotia Motor Vehicle Act*, which required drivers to obey the instructions of police officers: “Clearly, the legislation intended in enacting Section 74(1) that directions would be given by peace officers in the general execution of their duty under the Act, otherwise there would be no necessity in imposing a general duty to obey.” Alternatively, he thought that, “even if the implied authority was not contained in the Act, I would uphold the conviction on the grounds that it fell within the general scope of duties of a police officer to protect life and property by the control of traffic and the direction by the officer was reasonably necessary and justifiable under all of the circumstances.”

The *Foreign Missions and International Organizations Act* (1991)<sup>49</sup> was amended in 2002 to provide the RCMP with “primary responsibility to ensure the security for the proper functioning of any intergovernmental conference in which two or more states participate, that is attended by persons granted privileges and immunities under this Act.”<sup>50</sup> The act also authorizes the RCMP to “take appropriate measures, including controlling, limiting or prohibiting access to any area to the extent and in a manner that is reasonable in the circumstances.”<sup>51</sup> Assuming that such a broad and imprecise provision might withstand constitutional challenge, it could conceivably provide legal authority for operations like those challenged in *Tremblay*. Where, however, there is no intergovernmental conference of the sort that the act seeks to protect, the act can have no applicability. Indeed, the express creation of a new police power here confirms that such powers do not exist free of statutory authorization. The statute has no applicability outside of its specific context.

The federal *Emergencies Act*<sup>52</sup> authorizes similar measures but only during a “public order emergency.” In that event, the governor in council, on reasonable grounds and where necessary for dealing with the emergency, may prohibit a public assembly, ban travel within a specified area, or constrain the use of property.<sup>53</sup> These powers have never been invoked and are not a suitable foundation for policing large public events.

---

<sup>49</sup> S.C. 1991, c. 41.

<sup>50</sup> S.C. 2002, c. 12, s. 10.1(1).

<sup>51</sup> S. 10.1(2).

<sup>52</sup> R.S.C. 1985, c. 22 (4th Supp.).

Similarly, it is remotely possible that powers contained in provincial emergencies legislation such as Ontario’s *Emergency Management Act* (R.S.O. 1990, c. E.9 Amended by: S.O. 1999, c. 12, Sched. P, ss. 3–5, 7–9; S.O. 2002, c. 17, Sched. C, s. 10; S.O. 2002, c. 4, ss. 2–5, 7–16; S.O. 2003, c. 1, s. 14) could be brought into play in some public policing contexts. Section 7.1(2), for example, permits the executive to “temporarily suspend the operation of a provision of a statute, regulation, rule, by-law or order of the Government of Ontario” and to “set out a replacement provision” during the period of the emergency. These extraordinary powers could, of course, only be lawfully deployed in truly extraordinary circumstances.

<sup>53</sup> S. 19(1).

Sections 63 to 68 of the *Criminal Code* prohibit causing a disturbance or creating an unlawful assembly or a riot and give police specific powers in relation to those prohibitions. An unlawful assembly involves a common purpose that causes fear among others that the persons gathered may “disturb the peace tumultuously.” A riot is “an unlawful assembly that has begun to disturb the peace tumultuously.” Section 67 allows a “justice, mayor or sheriff” or a deputy, when satisfied that a riot is in progress, to “command silence” and read a proclamation that commands participants “peaceably to depart ... on the pain of being guilty of an offence for which, on conviction, they may be sentenced to imprisonment for life.” Rarely used,<sup>54</sup> these provisions provide some evidence of what was considered justifiable in a free society in the decades before adoption of the *Charter*. Police are given authority to “disperse or arrest” individuals who do not comply with the section 67 proclamation,<sup>55</sup> licence to use as much force as is necessary and reasonable “to suppress a riot,”<sup>56</sup> and immunity from civil or criminal proceedings arising “by reason of resistance.”<sup>57</sup> Note, however, the relatively rare and particular circumstances that must obtain before these powers are authorized.

### Property Rights and Protest

What of the rights of property owners — including municipalities and governments — to limit access to their property? The general rule, based on the tort of trespass, is that they may do as they wish with their land and that they enjoy an unconstrained right to prohibit access to individuals or groups.<sup>58</sup> Private property owners do not need to be concerned with balancing their desires against the countervailing interests of the wider community in the exercise of freedom of assembly, movement, or speech. The

---

<sup>54</sup> Among a few other cases, the *Riot Act* was read by the mayor of Penticton during 1991. *R. v. Loewen* (1992), 75 C.C.C. (3d) 184.

<sup>55</sup> S. 33, *Criminal Code*.

<sup>56</sup> S. 32, *Criminal Code*.

<sup>57</sup> S. 33 (2), *Criminal Code*.

<sup>58</sup> See, for example, Philip Osborne, *The Law of Torts*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2003), Chapter 4, “Intentional Torts,” Part D, “Intentional Interference with Land: Trespass to Land.” Property rights can be protected by self-help (using such force as is necessary and reasonable in the circumstances), injunctive relief, or action for damages.

property rights of public authorities, however, are a different matter. They are bound both by the values of common law constitutionalism and by the written constitution.

The seminal authority in this respect is the Supreme Court of Canada's judgment in *Committee for the Commonwealth of Canada v. Canada*.<sup>59</sup> The case arose at Montreal's Dorval airport, which, at the time, was owned by the federal government. In March 1984, the respondents, members of the Committee for the Commonwealth of Canada, were stopped by the RCMP when they sought to disseminate information at the airport. Airport management took the view that the committee's actions were in violation of the *Government Airport Concession Operations Regulations*,<sup>60</sup> which prohibited any advertising or solicitation in the airport.<sup>61</sup> The matter went to court when the respondents sought a declaration that their fundamental freedoms had been violated. The court unanimously held that the respondents' freedom of expression had been improperly infringed.

The Government of Canada argued that government property becomes a sort of "Charter-free zone" through the magic of ownership rights, with the result that constitutional protections for freedom of expression, freedom of assembly, and the like could be circumvented as an incident of the control of property. Chief Justice Lamer and Mr. Justice Sopinka rejected the government's "absolutist approach to the right of ownership," noting that restricting the right of freedom of expression "solely to places owned by the person wishing to communicate" would have the effect of denying "the very foundation of the freedom of expression."<sup>62</sup> Although the court split three ways in approach, the justices were unanimous in their rejection of the government's property rights argument.

The principal difficulty became one of determining where and how to draw the line between appropriate regulation of government-owned spaces and improper interference with constitutionally protected rights. The court focused on the interplay between section 2(b) of the *Canadian Charter of*

---

<sup>59</sup> *Supra* note 5.

<sup>60</sup> SOR/79-373.

<sup>61</sup> *Commonwealth of Canada*, per L'Heureux-Dubé J., para. 50.

<sup>62</sup> *Commonwealth of Canada*, per Lamer C.J., para. 15.

*Rights and Freedoms* and section 1's limitations. The entire court viewed the government's privileges as a property owner as constrained by public rights. Each of the judgments sought to balance expression against the appropriate need to regulate public space (recall that this was done formally under statute and delegated legislation in this case) and recognized that a sliding scale of protections attaches to different places in different circumstances. Even sites to which a high degree of expressive liberty attaches could be regulated for reasons such as the maintenance of law and order.<sup>63</sup> All of the justices took the view that constitutional protection of liberty of expression would attach most strongly to the types of public property traditionally associated with expressive activities: public expression in streets and parks and analogous places is *prima facie* entitled to a high level of constitutional protection of freedom of expression.<sup>64</sup>

*Commonwealth of Canada* clearly establishes that government property ownership cannot in and of itself provide exemption from constitutional protections. Regulation of government property by means of legislation directed at limiting violence, ensuring the effective functioning of public facilities, protecting safety, and so on is acceptable. But attempts to limit public discourse, to control what people can say or who can speak, are another matter. In evaluating the appropriateness of government regulation of expressive activity, the courts are alive to the fact that there should be more rigorous scrutiny of government regulation directed at controlling the content of speech than at regulating only the "time, place, and manner" of expression.<sup>65</sup>

The appropriateness of attempts to regulate expression, assembly, or movement on government property has been considered by the courts on a number of occasions since. Incompatibility of function was held to permit staff to evict a protester from government offices at the end of the working day in *R. v.*

---

<sup>63</sup> *Commonwealth of Canada*, Lamer C.J., para. 22. A similar approach was reaffirmed by the Supreme Court of Canada in *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, para. 74.

<sup>64</sup> *Commonwealth of Canada*, Lamer C.J., paras. 3, 5, 9, 14; McLachlin J., paras. 224, 225, 227, 256; L'Heureux-Dubé J., para. 141; La Forest J., para. 45.

<sup>65</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

*McBain*,<sup>66</sup> while the removal of structures from Parliament Hill was upheld in *Weisfeld v. Canada*<sup>67</sup> — but only on a section 1 analysis. Although the line between an exercise of management right over property (please stand to the right when you line up) and regulation that must be accomplished by means of legislation is somewhat unclear, it seems likely that large-scale infringements of public rights would be justifiable only if authorized by legislation capable of withstanding constitutional scrutiny.

Two recent Ontario cases addressed the intersection between the protection of public property by means of the ordinary law of trespass and constitutionally protected rights. In *R. v. Behrens*,<sup>68</sup> charges were laid under Ontario's *Trespass to Property Act* against individuals who entered the grounds of the Ontario legislature ("Queen's Park") to participate peacefully and lawfully in a protest against government policies. They had been banned, however, from the grounds by the speaker as a result of an earlier protest at which they had poured water-soluble stage blood on the building. Had this been private property, all the elements of the offence under the *Trespass to Property Act* would have been made out. Applying all three *Commonwealth of Canada* tests, Quon J.P. concluded that the speaker's initial ban had been justified "since the expressive activity is not the type of expression protected by section 2(b)." The government's interest in preserving public buildings for the benefit of the public is a reasonable limitation that justifies keeping specific individuals away from public property. It bears noting only that the speaker of the legislature is no ordinary government functionary. The peculiarity of a situation that invokes parliamentary privilege is not easily translated to other circumstances.

Similar circumstances arose in less rarefied spaces in *R. v. Semple*.<sup>69</sup> The defendants were charged under the provisions of Ontario's *Trespass to Property Act* for entering the grounds of Toronto City Hall despite being banned from doing so. At the relevant time, a memorial that they had been

---

<sup>66</sup> *R. v. McBain*, [1992] A.J., No. 515, 129 A.R. 352 (Alta. Prov. Ct.)

<sup>67</sup> *Weisfeld v. Canada*, [1995] 1 F.C. 68, [1994] F.C.J. No. 999; Federal Court of Canada — Court of Appeal (Mahoney, Linden, and McDonald JJ.A.).

<sup>68</sup> *R. v. Behrens*, [2001] O.J. No. 245, Ontario Court of Justice, Provincial Offences Court — Toronto, Ontario, Quon J.P.

<sup>69</sup> *R. v. Semple*, [2004] O.J. No. 2137, 2004 ONCJ 55, Ontario Court of Justice, Knazan J.

attending had segued into a demonstration in support of the homeless. The issue was whether the City of Toronto's rights as a property owner were outweighed by constitutional protections contained in the *Charter*. Knazan J. found that peaceful entry into the square was a form of expression and that the City of Toronto's notice under the *Trespass to Property Act* had the effect of violating *Charter* rights<sup>70</sup> that in the circumstances could not be justified under the terms of section 1.<sup>71</sup>

In sum, public bodies do not enjoy the unfettered prerogatives of ownership of private property owners. Attempts by public authorities to restrict expression or assembly under the guise of "property management" will be subject to constitutional challenge. A high level of scrutiny attaches to spaces such as public parks, public streets, and sites that hold special symbolic meaning in relation to particular expressive activities. These are precisely the sorts of spaces that police will seek to "zone" during the Olympics.

### Part 3: Public Order Police Legislation from Other Jurisdictions

Legislatures in both the United Kingdom and Australia have recognized that ordinary civil liberties should not be compromised by police action without specific statutory authority. Statutes passed in those two countries demonstrate that statutory guidelines can clarify the power and role of police and establish a better balancing of liberty and security than can be attained by policing officials acting without statutory guidance.<sup>72</sup>

---

<sup>70</sup> *R. v. Semple*, para. 34: "[T]he decision of the Supreme Court in *Committee for Commonwealth* leads to the conclusion that the notices of prohibition in this case, by prohibiting all activity, entitle the defendants to the protection of s. 2(b). The act of entering the square meets the broad interpretation of Justice L'Heureux-Dubé. The expression meets the middle ground of Justice McLachlin ... because the attendance at the square, which is a focus of demonstrations and civic activity, promotes the participation in social and political decision-making up to the point where it would become violent, disruptive and unprotected. Similarly, up to [that] ... point ... it meets the narrowest of the three tests set by Chief Justice Lamer...."

<sup>71</sup> *R. v. Semple*, para. 59.

<sup>72</sup> For a further example of public order police legislation in a common law jurisdiction, see also the *Regulation of Gathering Act*, 1993, Republic of South Africa, No. 205 of 1993.



The United Kingdom's *Public Order Act* of 1986 and the *Criminal Justice and Public Order Act* of 1994 provide illustration.<sup>73</sup> The *Public Order Act* defines a range of offences, including "riot," "violent disorder," and "affray." It sets out rules for the staging of demonstrations or protests ("processions and assemblies") and imposes the requirement for notice to be given to police of the date, time, and area of the proceeding. If, however, a chief of police has a reasonable belief that, "because of the particular circumstances" existing in a district or area, police powers under the act would be insufficient to prevent "serious public disorder," he or she can apply for an order prohibiting the protest or assembly.<sup>74</sup> Alternatively, a chief officer can allow the protest or assembly with conditions as to place, duration, and number of people who may attend, so long as the conditions seem necessary to prevent "disorder, damage, disruption or intimidation."<sup>75</sup>

The *Criminal Justice and Public Order Act* amends the earlier act, creating new public order categories of "disruptive trespassers" and "trespassory assemblies" and the new offence of "aggravated trespass."<sup>76</sup> This occurs when a person trespasses on land and does something to intimidate or disrupt others carrying on lawful activities. Reflecting long-standing common law freedoms, the act specifically excludes "highways and roads" from the definition of land. A trespassory assembly is any assembly of persons on land to which the public has either no right of access or a limited right and is conducting itself in a manner that a chief police officer reasonably believes "may result — (i) in serious disruption to the life of the community, or (ii) where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, in significant damage to the land, building or monument."<sup>77</sup> In this case, the officer must apply to a council of the district for an order prohibiting the

---

<sup>73</sup> Acts U.K., 1986, c. 64; 1994, c. 33.

<sup>74</sup> S. 13.

<sup>75</sup> S. 14.

<sup>76</sup> See Part V of the act.

<sup>77</sup> S. 14A.

assembly for a specific period of time, which may not exceed four days and five miles from the specified location.<sup>78</sup>

The New South Wales *APEC Meeting (Police Powers) Act 2007* is more far-reaching in scope though limited in duration. It deals specifically with the creation of exclusion zones and the scope of police powers with respect to them.<sup>79</sup> The primary concepts of the act are those of the “APEC Security Area” and the “APEC period,” both defined terms, with detailed maps provided in a schedule. Police could exercise certain powers within the APEC Security Area, which included a “declared area” (the neighbourhood surrounding the buildings and sites at issue) and a “restricted area” (the buildings and sites themselves). The APEC period lasted only from August 30 to September 12, 2007.

The act authorized police to take a number of measures that would otherwise have been unlawful. It permitted “check points, cordons or roadblocks” to stop vehicles or persons attempting to enter or move through the APEC Security Area and to conduct warrantless searches. Police could also seize anything on a list of “prohibited items,”<sup>80</sup> including spray-paint cans, chains, flares, and other flammables. Without notice, police could also close roads in the Security Area, but for only the “shortest possible period” and for limited purposes, including the safety of persons travelling to meetings and the protection of property.

The act also created the offence of entering a “restricted area” without “special justification” (a defined term). This could include the need “to be in (or pass through) the area for the purposes of [a] person’s employment, occupation, profession, calling, trade or business or for any other work-related purpose ....”<sup>81</sup> The act created even wider police powers. A person alleged to have obstructed police or damaged property during the APEC period was subject to a rebuttable presumption against the granting of bail. Other sections provided for the use of force by persons assisting police and for maintaining a list of

---

<sup>78</sup> S. 14A(6).

<sup>79</sup> [http://www.austlii.edu.au/au/legis/nsw/repealed\\_act/ampa2007252/index.html#s1](http://www.austlii.edu.au/au/legis/nsw/repealed_act/ampa2007252/index.html#s1) (accessed July 20, 2009). The act was repealed shortly after the event.

<sup>80</sup> Part 3 of the act.

<sup>81</sup> S. 37.

“excluded persons.” The act immunized the state from liability for nuisance with respect to anything done in the exercise of powers under the act.

It is unclear whether the powers allocated to police under the *APEC Meeting Act* would be appropriate in British Columbia or would survive a *Charter* challenge under the proportionality requirements of a section 1 analysis. The New South Wales legislation does, however, starkly underline the need for explicit statutory authorization to be granted in order to authorize seemingly prudent security precautions. The government of New South Wales demonstrated integrity and courage in establishing clear guidelines for the policing of a major event. It is telling that in Canada police officials claim similar powers de facto without cover of legislation.

## Conclusion

There is a clear need for legislation that would explicitly grant policing authorities the powers that they need in order to lawfully ensure the safety of the public during large public events.<sup>82</sup> The need for security measures to be taken in advance of these occasions is not open to serious question. But our analysis has shown that there is no foundation in Canadian law for the types of proactive and preventative common-sense policing that is increasingly common in events of this magnitude. Legislation is needed to fill the gap. Although their exact contours need to be mapped out through legislative processes, many of those powers will prove to be both unusual and intrusive. Without meaning to endorse the particular way in which a balance has been struck in either the United Kingdom or New South Wales, the examples set in those two jurisdictions point to both the necessity and the possibility of legislation that will address this gap in Canada.

---

<sup>82</sup> The *Access to Abortion Services Act*, R.S.B.C. 1996, c. 1, may serve as an important precedent for those drafting public order police law in British Columbia. Section 5 of the act gives the executive the power to establish an access zone around an abortion clinic “for the purpose of facilitating access to abortion services” and establishes a framework for the exercise of that power. The scheme withstood a challenge under section 2(b) of the *Charter* in *R. v. Spratt*, 2008 BCCA 340.

