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Police Powers, Trespass and Expressive Rights Under the Canadian Constitution

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Trespass and Expressive Rights

By. W. Wesley Pue

... the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

- *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 164, per Wilson J.

Paper prepared for The Ipperwash Inquiry, The Honourable Sidney B. Linden, Commissioner, established by the Government of Ontario on November 12, 2003, under the *Public Inquiries Act* to inquire and report on events surrounding the death of Dudley George, shot during a protest by First Nations representatives at Ipperwash Provincial Park in 1995.

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Introduction

This paper investigates the authority of police, acting on their own initiative or at the request of others, to exercise control over individuals or groups of people who have assembled for the purpose of expressing their views on matters of concern to them. It involves a review of issues arising with respect to both the sorts of measures that might be taken proactively in order to bar people from entry to particular areas at particular times, and the sorts of reactive measures that may be taken to remove people from a particular place after they are already there.

A recent incident serves to give texture to the otherwise abstract legal issues.

The Summit of the Americas, 2001

In the spring of 2001 two senior citizens of respectable demeanor and remarkable life-long accomplishments were tear-gassed by police as they walked together through Quebec City. The couple was on a public street and fully complying with the law when this happened. They had traveled from a small community north of Toronto in order to observe the “Summit of the America’s” conference. They had been enjoying a summer’s day in the midst of a good-humoured and peaceable, though perhaps sometimes boisterous, street life. Although the event had generated sizable “anti-globalization” protests, the two seniors, were distinctly not of the rent-a-mob ilk. Neither was “the sort” to provoke trouble with authorities and neither, in fact, opposed globalization. One of them, the Honorable Sinclair Stevens, explained:

There aren't many people in this country who view free trade as positively as I do. As industry minister in the Mulroney government, I participated in the 1985 Shamrock Summit that set the stage for our trade agreement with the United States. I was even responsible for replacing the Foreign Investment Review Agency with Investment Canada, a welcome mat for our partners to the South.

There also aren't many people who view the maintenance of law and order as a higher priority than I do.¹

¹ Sinclair Stevens, “A police state in the making”, *The Globe and Mail*, Tuesday, April 24, 2001.

Mr. Stevens, is a member of Her Majesty's Privy Council. He had served as a Progressive Conservative Member of Parliament from 1972 to 1988, as President of the Treasury Board, and as minister of Regional Industrial Expansion in the government of Prime Minister Mulroney. He was one of the architects of the North American Free Trade Agreement.²

On learning that police had erected a "security" fence designed to create a large no-go zone in central Quebec City, Mr. Stevens and his wife, Noreen, had set off to explore. They at first found the sight of a police riot squad stationed behind the fence to be unthreatening albeit daunting to behold ("helmets, masks, shields and assorted elaborate weapons"). Further on however - and well away from the security zone - their conversations with peaceful protesters were interrupted by the "eerie drumming" of police riot sticks being beaten against their shields. Mr. and Mrs. Stevens moved aside as police advanced and as protesters sat passively on the road. From near at hand they witnessed police fire "tear gas canisters directly at those sitting or standing on the road". The gas spread until the Stevens' too suffered its effects: "I never thought I would ever see this kind of police-state tactic in Canada." The next day, however, they witnessed more aggressive police behaviour:

This time, we walked along the fence until we reached the gate at René Lévesque Boulevard, where a great crowd had gathered.... I was asked for an interview by a CBC crew but, before we could begin, dozens of tear gas canisters were fired, water cannons were sprayed and rubber bullets began to hit people nearby. Three times, I felt I could not breathe, my eyes were sore and all I could do was run. In the bedlam, my wife and I were separated for almost three hours. She said she had almost passed out from the gassing.

... This government, and some reporters, like to brand the Quebec City demonstrators as "hooligans." That is not fair. I talked to dozens of them, mostly university students, aged about 20. They came to Quebec, not to have "a good time," as some suggest, but to express their well-thought-out views on a subject that is important to them, to all of us.

² See: <http://www.ic.gc.ca/cmb/welcomeic.nsf/ICPages/HistoryMinisters>

I may not have agreed with their position, but I sure believe in their right to express it. The police had no cause to violently suppress it.

Some will say that a handful of demonstrators got out of hand and forced the police to take collective action. I can't agree. The police action in Quebec City, under orders from our government, was a provocation itself -- an assault on all our freedoms.³

Legal Issues

Large scale public policing events such as this raise important issues:

- 1) Under what lawful authority do police erect fences or barricades so as to create police exclusion zones?
- 2) By what right and under what circumstances are police entitled to use force in clearing people off public streets?
- 3) How do basic civil liberties including the right to move freely about public streets, the right of free expression, and the right of assembly intersect with the need to preserve the peace, protect life and property, and prevent crime?

These questions go to the core of what it means to live in a free society governed in accordance with the principles of constitutionalism, liberal democracy, and the rule of law. Core values are at stake *whenever* the police act against protesters. This is not, however, because we approve of any particular protest movement. Rather, constitutional liberty is founded on freedom of movement, freedom of expression, and the freedom to express oneself in the company of like-minded people – freedom of assembly. Although each of these sound like “rights” of the *Canadian Charter of Rights and Freedoms* (1982) sort, their constitutional importance precedes the Charter and is greater than it.⁴ They have

³ Stevens, “police state”, *Op. Cit.* If Mr. Stevens’ suspicion that police responded to *political* directives from the government were correct, an important cornerstone of civil liberties - the principle of non-partisan policing - was severely corroded. See W. Wesley Pue, “Policing, the Rule of Law, and Accountability in Canada: Lessons from the APEC Summit”, in W. Wesley Pue, ed., *Pepper in Our Eyes. The APEC Affair* (Vancouver: University of British Columbia Press, 2000); Pue, “The Prime Minister’s Police? Commissioner Hughes’ APEC report” 39(1) *Osgoode Hall Law Journal*, 2001, 165-185.

⁴ The pre-*Charter* origins of constitutional protection for free expression, for example, registers strongly in Madam Justice L’Heureux-Dubé reasons delivered in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, [1991] S.C.J. No. 3, wherein pre-*Charter* authorities including the following are cited: *Switzman v. Elbling*, [1957] S.C.R. 285; *Reference Re Alberta*

emerged from centuries of constitutional development that Canada shares with the United Kingdom, the USA, and other liberal democracies. Just as it is possible to have bad laws, so too legislation or state action may be technically “Charter-proof” in the sense of being so constructed as to be effectively immunized from court challenge *and yet still be offensive* to core constitutional values. Eminent USA jurist Benjamin Cardozo viewed freedom of expression as “the matrix, the indispensable condition, of nearly every other form of freedom”,⁵ while Canadian Supreme Court Justice L’Heureux-Dubé has pointed out that

[t]he alternatives are particularly frightening. History is replete with examples of entrenched groups which have sought to maintain their elevated station by suppressing emerging and challenging new thoughts and ideas. Stifling opponents by revoking their right to express dissent and disenchantment may have produced desired results in the short run, but ultimately all such attempts led to insurrection and rebellion. As Brandeis J. proclaimed in *Whitney v. California*, 274 U.S. 357 (1927), at pp. 375-76, such oppressive endeavours are incompatible with the democratic vision which inspired the United States Constitution and the rights enunciated therein:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.⁶

It is important to recognize, too, their character as *values*, as opposed to *rules*, habituated behaviour, or sociological facts. Values operate in juxtaposition to each other and are infrequently entirely in agreement one with another. The values of a free and democratic society do not all run in one direction. One value might be hard to reconcile

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.

⁵ Cardozo J., for the United States Supreme Court in *Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327, as cited by Madam Justice L’Heureux-Dubé, *Commonwealth of Canada*, para. 62.

⁶ *Commonwealth of Canada*, per L’Heureux-Dubé, para. 70.

with other, *equally genuine*, societal values. In recognition of the complexity attaching to such matters section 1 of the *Canadian Charter of Rights and Freedoms* prescribes that “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” These simple words have provided much grist for the lawyerly mill. The common law, for its part, has for centuries engaged in similar deliberative exercises in evaluating the extent of liberty.

Values come into conflict and legal rules lack precision in the area of public protest. One person’s right to assembly necessarily interferes with another person’s freedoms. Speaking loosely, some disturbance of the “peace” occurs almost as a necessary incident of public protest. Access to public and private property is impeded, and the peaceable enjoyment of land or other property is not infrequently disrupted. Any large gathering creates an obstacle to passage for others who would otherwise enjoy a less inhibited freedom of movement. This is true for individuals who, for example, might wish to walk through a public square jammed full of protesters and also for competing groups whose desire to express *their* views publicly, effectively, and in large numbers cannot be fulfilled at the same place and time as others. Moreover, crowds, even overwhelmingly law-abiding ones, can provide cover for hooligans, vandals or trouble-makers and, perhaps, for individuals intent on criminal assault or worse. Though officials cannot be allowed to trump civil rights merely by incanting “security”, Canadian law does not hold that valued liberties can *never* be limited in the cause of security.

Issues such as these have frequently arisen in the context of so-called “anti-globalization” protests and in circumstances involving assertions of aboriginal rights claims. The most fully documented event in recent decades was the 1997 meeting of the leaders of Asia Pacific Economic Co-operation economies in Vancouver. The event generated a modestly large protest, strong police action, enormous media commentary, political reaction, litigation, scholarship, and an inquiry by the Commission for Public Complaints against the RCMP.⁷ It was unique not so much for what happened on the day

⁷ Commission for Public Complaints Against the RCMP, RCMP Act -- Part VII Subsection 45.45(14), *Commission Interim Report Following a Public Hearing Into the Complaints regarding the events that took place in connection with demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver, B.C., in November 1997 at the UBC Campus and Richmond*

but because some individuals who felt aggrieved were able to muster the resources needed to demand an accounting. Most often, protesters lack the resources or stamina necessary to pursue even their most deeply-felt sense of grievance. Because prosecutors usually drop ill-conceived charges there is typically no possibility for either judicial review or other independent oversight of police or government actions in such circumstances.

“Authorized By Law”

A common policing tactic at major events and demonstrations is to erect fences or barricades designed to channel the movement of people while enclosing certain sites or territory behind a sort of “police exclusion zone”. Surprisingly, such measures are normally taken in the absence of any explicit statutory authority. The operating assumption has been that they are permitted as powers necessarily incidental to long-established duties of peace officers to protect life and property, preserve the peace, prevent crime, and apprehend offenders. The first important legal question to be addressed is the extent of the common law police powers that lie behind this sort of police tactic.

R. v. Knowlton

The leading authority on these matters arose when a very modest policing event found its way before the Supreme Court of Canada a quarter century before Vancouver’s APEC summit. The incident before the Court in *R. v. Knowlton*,⁸ occurred in Edmonton during a visit by the Soviet Union’s Premier Kosygin. Earlier in his Canadian tour Mr. Kosygin had been attacked by an unarmed man while walking on Parliament Hill with Prime Minister Trudeau. Although quickly rescued by the intervention of the Canadian Prime Minister,⁹ officials realized that the minor incident could have been something quite different had the attacker been armed, more determined, more powerful, or more vicious. Fearing a recurrence, Edmonton police created a security zone of sorts around a downtown

detachments of the RCMP (Ottawa: CPC RCMP, 31 July 2001); W. Wesley Pue, “The Prime Minister’s Police?,” *Op. Cit.* ; W. Wesley Pue, “Executive Accountability and the APEC Inquiry: Comment on ‘Ruling on Applications to Call Additional Government Witnesses’” (2000) 34 *UBC Law Review*, 335-344; W. Wesley Pue, “The Rule of Law, APEC, & Canada” 56 (2) *The Advocate* (March, 1998) 217-220; W. Wesley Pue, Feature “Who sent in the police?” *Times Higher Education Supplement* (October 16, 1998, 18-19); W. Wesley Pue, “Why the APEC allegations are so serious” *Globe and Mail*, October 5, 1998; Pue, *Pepper in Our Eyes*, *Op. Cit.*

⁸ *R. v. Knowlton*, [1974] S.C.R. 443

⁹ John McKay, “Trudeau Left Indelible Impressions With everyone he touched, even reporters” (Can. Press, Sun., Oct. 1, 2000), http://cgi.canoe.ca/CNEWSTrudeauNews/01001_trudeau6-cp.html

hotel to be visited by the Soviet Premier. Only individuals authorized by police were allowed to enter the hotel property. As part of their efforts to secure the site, however, police also obstructed a small portion of the sidewalk on an adjacent public street. E.J.N. Knowlton took the view that this amounted to an unlawful police interference with his right to move freely on a public street:

The police had cordoned off an area in front of the entrance of a hotel where Premier Kosygin of the U.S.S.R. was to make a short stop. The appellant indicated to two constables that he wanted to take pictures and stated that he wished to proceed along that part of the sidewalk which was in the cordoned off area. Because of the appellant's forceful insistence on his right to enter that area, he was warned that if he did, he would be arrested. He refused to take heed of this warning and pushed his way between two constables. He was then arrested.¹⁰

The case was heard because charges of obstructing a peace officer were pressed. Though it is generally imprudent to confront police officers in these ways, Knowlton had good reason for thinking as he did. Provincial Judge J. Rennie acquitted him on the grounds that

the police at the relevant time were not enforcing any provisions of the Criminal Code, or any by-law or other law and that therefore they were not acting in the execution of their duty and that therefore the accused could not have been obstructing them and therefore not guilty of the offence of obstruction. Finding as I do there was not any law being enforced the accused could not have been found committing an offence so as to justify an arrest without a warrant and therefore the charge is dismissed.¹¹

The learned trial judge had in effect based his decision on the foundation stone of the Canadian constitution. The classic formulation of the principle of the rule of law was provided by Albert Venn Dicey in his *Law of the Constitution*:

.... no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every

¹⁰ Knowlton, headnote.

¹¹ as cited in Supreme Court of Canada judgment.

system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.¹²

In Dicey's language we might say that Judge Rennie's judgment was based on the finding that there had been no "distinct breach of law". To the extent that police sought to punish Knowlton for doing something that was both generally permissible and *in the particular circumstances* not expressly forbidden under any common law rule or statute, their actions would be unlawful – well beyond the bounds of Canadian constitutionalism.

In the Supreme Court of Canada Chief Justice Fauteux, for a unanimous bench,¹³ acknowledged the principle that police power does not float free of common law and statute. He accepted the fact that the police had interfered with the "liberty of the appellant" including his undoubted legal "right to circulate freely on a public street".¹⁴ Even while confirming these general principles, however, the Court upheld police action *in the particular circumstances*. The reason was that the trial judge had not properly taken into account the ancient common law duties of "constables" to preserve the peace and to prevent crime, duties which are imported into the Canadian *Criminal Code* and legislation governing various police forces across Canada. Chief Justice Fauteux pointed to the *Alberta Police Act*:

Section 26(1) of the Alberta Police Act (1971), c. 85, assigns to a member of a municipal police force, within the limits of the municipality, all the powers and duties of a member of the Provincial Police Force under Part I of the Statute. Section 2(1) of Part I provides for the establishment of a Provincial Police Force "... for the preservation of peace, order and public safety, the enforcement of law and the prevention of crime ...". And section 3(1) of Part I states, in part, that:

3. (1) Every member of the Alberta Provincial Police has the power and it shall be his duty to
 - (a) perform all duties that are assigned to police officers in relation to

¹² Albert Venn Dicey, *Introduction To The Study Of The Law Of The Constitution* (8th Edition), 1914, Chapter 4, p.

¹³ Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

¹⁴ *Knowlton*

- (i) the preservation of peace,
- (ii) the prevention of crime and of offences against the laws in force in Alberta, and
- (iii) the apprehension of criminals and offenders and others who may lawfully be taken into custody.¹⁵

In light of 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 a key passage Mr. Justice Fauteaux explained:

... these official authorities were not only entitled but in duty bound, as peace officers, to prevent a renewal of a like criminal assault on the person of Premier Kosygin during his official visit in Canada. In this respect, they had a specific and binding obligation to take proper and reasonable steps. The restriction of the right of free access of the public to public streets, at the strategic point mentioned above, was one of the steps--not an unusual one--which police authorities considered and adopted as necessary for the attainment of the purpose aforesaid. In my opinion, such conduct of the police was clearly falling within the general scope of the duties imposed upon them.¹⁶

The Court's view, in sum, was that the police obstruction of a small stretch of sidewalk was permissible under 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, and to issue "passes" for those who were able to satisfy police as to their background, intentions, and objectives. On the facts however this amounts to little more than saying that police can refuse entry to private property if that is the wish of the owner. The only purpose a person could have had for going beyond the police barricades in *Knowlton* – apart, perhaps, from positioning oneself slightly better for the purposes of taking a picture, as Mr. Knowlton contended - was to enter onto the private property of the hotel.

¹⁵ *Knowlton*

¹⁶ *Knowlton*

Taken at its widest, and out of the context of the facts which were before the Court, Mr. Justice Fauteux's words might seem to imply a virtual *carte blanche* for police officers to do whatever they want, whenever they want, to whomever they want - provided only that the objective of their otherwise offensive behaviour fits within extraordinarily wide parameters. When, after all, would police officers resorting to unusually severe measures *not* claim to be acting for reasons related to preserving the peace, preventing crime, and so on? No such unlimited police licence was, is, or *could* be part of Canadian law. Such an arrangement would place Canada under a "system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint". The binding part of the reasoning in the *Knowlton* case - its *ratio decidendi* - was a good deal narrower. The public's freedom of movement had been restricted only in marginal fashion, for a limited time, over a small area of public street, and in circumstances where there was clearly good reason to fear an assault on a controversial visiting statesman.¹⁷ Though Chief Justice Fauteux he did not elaborate, the passage just cited emphasizes the specific duty to Kosygin, the limited "strategic point" of the public street that was barricaded, and the necessity of the action taken.

Tremblay c. Québec

Nearly thirty years later, the relationship between the ancient duties of constables and the equally ancient liberties of free speech, free assembly, and free movement came to be judicially considered in the rather different circumstances of the policing operation observed by Sinclair and Noreen Stevens during the Quebec City Summit of the America's conference. The background to *Tremblay c. Québec (Procureur général)* [2001] J.Q. was summarized by Mr. Justice Gilles Blanchet as follows:

¹⁷ "On Sunday, October 24, 1971, Premier Kosygin of the U.S.S.R., was to visit the City of Edmonton as part of his official visit to Canada and, on the occasion, was to make a short stop at the Chateau Lacombe Hotel. Police Sergeant Grandish ... had been assigned to security duties in the area surrounding the entrance to the hotel. For this purpose and with the assistance of 25 Police Officers, he cordoned off, as instructed by his superiors, an area in front of the entrance of the hotel, which included part of the sidewalk on the south side of Macdonald Drive. At one point, prior to the impending arrival of Premier Kosygin, Sergeant Grandish was called by two constables posted on the south side of the sidewalk. There he met the appellant who had indicated to the two constables that he wanted to take pictures and stated that, to that end, he wished to go down Bellamy Hill, proceeding along that part of the sidewalk which was in the cordoned off area."

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 20th, to protect the 34 participating heads of state, their delegates and the general public. Among other measures, in the 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.¹⁸

M. Tremblay, a Montreal lawyer, took the view that, as a law-abiding citizen he had a right to move freely within Canada and, specifically, to make a personal, peaceful, protest in front of the Quebec Congress Centre. When the police failed to grant him a “pass” permitting entry to the walled zone, Tremblay “took an action for a permanent injunction in which he alleged that the security perimeter for the Summit will interfere with his rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms. Through a motion for an interlocutory injunction, he asked, firstly, that the security barrier be removed or, subsidiarily, that a pass be issued giving him access to the site throughout the event.”¹⁹

The case raised a number of complex issues relating to the law of injunctions, police powers, statutory interpretation, the common law powers of police, fundamental freedoms, and the *Canadian Charter of Rights and Freedoms*. These matters were considered in proceedings for an interlocutory injunction heard just days before one of the largest public protests and largest intergovernmental summits ever to occur in Canada. Although Mr. Justice Blanchet did not cite *Knowlton* in his reasons for decision, the case turned on an analysis of general police powers.

Mr. Justice Blanchet framed the question of the legal authority for police to engage in such a large urban zoning and pass-issuing enterprise through a *Charter* analysis. As 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,²⁰ his Lordship thought that that the arrangements could only be upheld under section 1 of the

¹⁸ *Tremblay c. Québec (Procureur général)* [2001] J.Q. para. 1. (See Appendix for an English translation provided by Diane G. Cameron, Attorney 4700 Bonavista Ave., Suite 206 Montreal, Quebec H3W 2C5)

¹⁹ *Tremblay*, para. 2

²⁰ *Tremblay*, para. 63

Charter.²¹ As in *Knowlton*, there was no statute expressly authorizing the actions taken by police. The threshold question, approached here through a *Charter* analysis, was identical to the central issue in the *Knowlton* case: did general police duties provide legal authority for the actions taken by police. If not, the police would have been guilty of an enormous array of criminal offences, quite apart from their effects on the *Charter* rights of Canadians. Mr. Justice Blanchet's approach was as follows:

69. As a general rule in such matters, Canadian case law is to the effect that a limit on the rights and freedoms may be authorized by a "rule of law", within the meaning of section 1, not only in the case where it is expressly provided for by statute or regulation, but also when it results by necessary implication from the terms of a statute or regulation or from its operating requirements or results from the application of a common law rule [*R. v. Twain (sic)*, [1991] 1 S.C.R. 933; *R. v. Thompsen (sic)*, [1988] 1 S.C.R. 640; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158.]. In the case of both a police initiative and a specific statute or regulation, the legitimacy of the infringement of a fundamental right is related to the goal sought:

"The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference." [*Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 181].

70 In this case, the Court cannot disregard the duties imposed on the RCMP under section 18 of the Act establishing it [Royal Canadian Mounted Police Act, R.S. chap. R-9 (R-10)], read in conjunction with sections 2 b) and 6 of the Security Offences Act [R.S., chap. S-7 (1984, ch. 21, s. 56)] and with section 2 of the Criminal Code [R.S. chap. 34], which defines which persons enjoy international protection.

²¹ Section 1 reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

71 Moreover, from a practical point of view, the approach suggested by the Interveners would amount to systematically prohibiting the application of the justification test in section 1 of the Charter to any police initiative of a preventive nature. This would be tantamount to admitting that, even in circumstances justifying it in the opinion of everyone, no emergency protection measure taken by the police would be constitutionally acceptable if it included an even minor limit on the fundamental freedoms of a single person.

These brief passages traverse difficult terrain. The general legal principle upon which his Lordship relies is quoted from the *Cloutier v. Langlois*²² (a case dealing with the rather different circumstances of the legality of a police “frisk search” incidental to arrest). In that case Madam Justice L’Heureux-Dubé, for the Court, explained the relevant principles:

In determining the exact scope of a police power derived from the common law, this Court often had recourse to considerations of principle, and the weighing of the competing interests involved (*Eccles v. Bourque*, [1975] 2 S.C.R. 739, *Dedman v. The Queen*, [1985] 2 S.C.R. 2, and *R. v. Landry*, [1986] 1 S.C.R. 145). Competing interests are important factors in determining the limits of a common law power. When the power in question comes into conflict with individual freedoms, it is first necessary to decide whether the power falls within the general scope of the duty of peace officers. This duty, clearly identified, must historically have been recognized by the courts as tending to promote the effective application of the law. Secondly, the Court must determine whether an invasion of individual rights is justified. In this regard, Le Dain J. in *Dedman* defined what he meant by “justifiable use of the power” in question (at p. 35):

The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.

²² *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 [1990] S.C.J. No. 10

It is therefore necessary in this second stage to determine whether an invasion of individual rights is necessary in order for the peace officers to perform their duty, and whether such an invasion is reasonable in light of the public purposes served by effective control of criminal acts on the one hand and on the other respect for the liberty and fundamental dignity of individuals.²³

Thus, a two-stage approach to police powers emerges. First, does statute or common law impose a particular duty on peace officers? The standards required at this stage are demanding. The duty must be “clearly identified” and established as having been historically recognized *by the courts*. Only after this threshold is passed does the second stage of inquiry become relevant: what invasions of individual rights are necessary in order for that duty to be fulfilled? This too 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 as against the competing public interest that is at stake. Only invasions of individual rights that are strictly speaking necessary in order for well established police duties to be fulfilled can be taken as reasonably implied by the initial grant of power, authority, or duty whether the source of that power is traced to statute or common law origins.

The ruling in *Tremblay*, skated rather more quickly than one might have hoped over difficult questions relating to the general scope of police duties and necessarily ancillary police powers. In addressing these issues the ruling made reference to three statutes: the *RCMP Act*, the *Security Offences Act*, and the *Criminal Code*. The relevant portions of each is expressed in broad, general terms of the sort that would not normally be construed as authorizing significant violations of ordinary freedoms and liberties. As regards the *RCMP Act*, Mr. Justice Blanchet referred only to section 18, the relevant portions of which are as follows:

18. It is the duty of members who are peace officers, subject to the orders of the Commissioner,

(a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be

²³ *Cloutier*, per L’Heureux-Dubé, para. 50

employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody; ...

(d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.²⁴

Although this section defines the powers, duties, and privilege of police in language which has deep roots in the history of common law policing (“all duties that are assigned to peace officers in relation to the preservation of the peace”), it was not subjected to any thorough analysis in the *Tremblay* ruling.²⁵ The oversight is unfortunate: it is these terms of art that distinguish and define the character of police duties. Their status as “peace officers” confers upon them a constitutional role which can only be understood properly if interpreted against the backdrop of case law developed over centuries. Police occupy a public office properly understood to be “independent” of political control (in the proper constitutional law and administrative law sense), and with public responsibilities that take priority over even the explicit directions of their superiors.²⁶

For its part, the *Security Offences Act* (R.S. 1985, c. S-7) merely establishes boundaries between federal and provincial jurisdiction. It accords primacy to the Federal Government in certain matters 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

²⁴ the other clauses deal with service of warrants and escort of prisoners.

²⁵ See too, section 9 RCMP Act, which also emphasizes that “the powers, authority, protection and privilege” of RCMP constables are those of a “peace officer”: “Every officer and every person designated as a peace officer under subsection 7(1) is a peace officer in every part of Canada and has all the powers, authority, protection and privileges that a peace officer has by law until the officer or person is dismissed or discharged from the Force as provided in this Act, the regulations or the Commissioner's standing orders or until the appointment of the officer or person expires or is revoked.”

²⁶ 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 upon 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.”

protected persons” (IPPs).²⁷ On the policing side, RCMP officers are assigned “primary responsibility to perform the duties that are assigned to peace officers in relation to any offence referred to in section 2” and the Solicitor General of Canada is empowered to enter into agreements with provincial governments to facilitate co-operation between the RCMP and provincial police forces in relation to these matters.²⁸ There is nothing here that grounds a new sort of police power. Indeed, the duties of RCMP officers are expressly said to be those of “peace officers”.

Some confusion arising from a misunderstanding of the phrase “internationally protected persons” is reflected in the *Tremblay* decision. The term is incorporated in Canadian law in furtherance of obligations under long-standing principles of international law including the 1973 *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons*.²⁹ The category includes heads of state, heads of government, ministers of foreign affairs, and the representatives or officials of either a state or of certain types of international organizations, as well as their families.³⁰ The public

²⁷ s. 2 Security Offences Act:

2. Notwithstanding any other Act of Parliament, the Attorney General of Canada may conduct proceedings in respect of an offence under any law of Canada where
(a) the alleged offence arises out of conduct constituting a threat to the security of Canada within the meaning of the Canadian Security Intelligence Service Act, or
(b) the victim of the alleged offence is an internationally protected person within the meaning of section 2 of the Criminal Code,
and for that purpose the Attorney General of Canada may exercise all the powers and perform all the duties and functions assigned by or under the Criminal Code to the Attorney General.

²⁸ Security Offences Act:

6. (1) Members of the Royal Canadian Mounted Police who are peace officers have the primary responsibility to perform the duties that are assigned to peace officers in relation to any offence referred to in section 2 or the apprehension of the commission of such an offence.

(2) To facilitate consultation and cooperation in relation to the carrying out of the duties assigned to the Royal Canadian Mounted Police under subsection (1), the Solicitor General may, with the approval of the Governor in Council, enter into arrangements with the government of a province concerning the responsibilities of members of the Royal Canadian Mounted Police and members of provincial and municipal police forces with respect to the performance of duties assigned to peace officers in relation to any offence referred to in section 2 or the apprehension of the commission of such an offence.

²⁹ http://www.unodc.org/unodc/terrorism_convention_protected_persons.html

³⁰ s. 2 Criminal Code:

internationally protected person" means

(a) a head of state, including any member of a collegial body that performs the functions of a head of state under the constitution of the state concerned, a head of a government or a

policy motivation is clear: international diplomacy would suffer tremendously if diplomats and state officials were subject to harassment connived in or perpetrated by other states. The statutory recognition of Canada's obligations to internationally protected persons does not, however, create new sorts of offences.³¹ The source of confusion arises, no doubt, because the obligation is said to involve protecting the "person, freedom or dignity" of IPPs. "Dignity", it turns out, is the rub. Peace officers and government officials have sometimes incorrectly taken this to mean that visiting dignitaries should be shielded from any exposure to the very sorts of discomfiting free expression that democratic countries cherish, celebrate – and grant constitutional protection to.³²

Although Mr. Justice Blanchet thought that the security barrier and consequential measures had "the effect of limiting to a great extent two of the fundamental freedoms guaranteed by section 2 of the Canadian Charter of Rights and Freedoms, namely freedom of expression and freedom of peaceful assembly",³³ he upheld the arrangements under a section 1 analysis. Although the ruling is somewhat cryptic in this regard, it seems that the

minister of foreign affairs, whenever that person is in a state other than the state in which he holds that position or office,

(b) a member of the family of a person described in paragraph (a) who accompanies that person in a state other than the state in which that person holds that position or office,

(c) a representative or an official of a state or an official or agent of an international organization of an intergovernmental character who, at the time when and at the place where an offence referred to in subsection 7(3) is committed against his person or any property referred to in section 431 that is used by him, is entitled, pursuant to international law, to special protection from any attack on his person, freedom or dignity, or

(d) a member of the family of a representative, official or agent described in paragraph (c) who forms part of his household, if the representative, official or agent, at the time when and at the place where any offence referred to in subsection 7(3) is committed against the member of his family or any property referred to in section 431 that is used by that member, is entitled, pursuant to international law, to special protection from any attack on his person, freedom or dignity;

³¹ Section 424 of the Criminal Code, for example, 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), 431 (attack on premises, residence, or transport of internationally protected persons)

³² eg., Obiora Okafor, "The 1997 APEC Summit and the Security of Internationally Protected Persons: Did Someone Say 'Suharto'?" in Pue, ed, *Pepper*, 185-196.

³³ *Tremblay*, para. 102

first stage of that analysis – identifying limits “prescribed by law” – was found to be satisfied in one or both of:

- 1) the historic duties of peace officers respecting the preservation of the peace, the prevention of crime and of offences against the law or the apprehension of Criminals (RCMP Act);
- 2) the international obligation to protect the “person, freedom, or dignity” of internationally protected persons.

As has been seen however the second adds little to the first. Thus, it turns out that the zoning of a large area of Quebec City as a “no-go” area by police was upheld on essentially the same grounds as those relied upon by the Supreme Court of Canada in *Knowlton*: actions taken as necessarily incidental to the quite ordinary police obligations to preserve the peace, prevent crime, etc.

It is doubtful that, in so extending the *Knowlton* principle, *Tremblay* represents good law. Certainly, the context in which it arose – an application for interlocutory relief which would have had the effect of dismantling existing security plans only days before a major international meeting certain to be met with enormous public protests – was not the ideal forum for a full review of the many complex matters raised. Leave to appeal to the Supreme Court of Canada on a number of questions including “*Whether the learned motions judge erred in deciding that actions of police officers, invoking the residual common law duty to keep the peace, can constitute a limit `prescribed by law`*” was refused but little can be read into this regarding the Court’s view on the substantive matters at issue. As things played out, the particular matters were rendered moot before the Court had even considered the leave application. Moreover, the original applicant for an injunction (*Tremblay*) did not participate in the appeal, creating an odd situation wherein any appeal would have been carried forward by intervenors only.³⁴ The appeal, if it had been heard, would have been akin to a private reference on a pure question of law.

Canadian law is thus left uncertain in at least 4 respects:

³⁴ *Tremblay v. Quebec (Attorney General)* [2001] S.C.C.A. No. 231 Supreme Court of Canada File No.: 28579 On Appeal From The Superior Court Of Quebec Filed: April 20, 2001. S.C.C. Bulletin, 2001, p. 876. Submitted To The Court: June 11, 2001. S.C.C. Bulletin, 2001, P. 1090. Dismissed With Costs: July 12, 2001 (without reasons). S.C.C. Bulletin, 2001, p. 1286. Before: L’Heureux-Dubé, Arbour and LeBel JJ.

- 1) to what extent is the creation of police exclusion zones permitted as an incident of the general police duty to keep the peace, prevent crime, and apprehend criminals?
- 2) What other sources of authority exist to permit police or government authorities to create exclusion zones or to clear streets or other public areas of protesters?
- 3) What limits, if any, do constitutionally protected rights such as those contained in the Charter, flowing from constitutional recognition of first nations rights, and so on, impose on the exercise of these powers in particular circumstances?
- 4) What is the effect, if any, of Canada's international obligations?

The Peace Officer's Duty to Preserve the Peace & Prevent Crime

It seems likely that Mr. Justice Blanchet erred in finding large police exclusion zones of the sort created in Quebec City to be authorized under the general duties of common law peace officers. Certainly, no previous case goes anywhere near so far.

First, *Tremblay* 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 kilometers long, encompassing an important urban centre, surrounding homes and businesses, blockading many public streets, and policed aggressively for a period of several days. The latter encompassed a much larger physical space, involved much longer duration, and affected much larger numbers of people. Moreover, in *Tremblay*, unlike *Knowlton*, police and several governments, operating without explicit statutory authorization, had created an elaborate bureaucracy that operated complex – though unpublicized - protocols through which authorities screened workers, inhabitants, and others for eligibility for police “passes” of one sort or another. In all, this makes for an astonishing extrapolation from the comparatively modest police power said to be incidental to common law police duties in *Knowlton*.

Moreover, the nature or character of the rights affected is significantly different in the *Tremblay* situation. 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. Mr. Knowlton could move from one part of the city to another and could have stood across the street with friends holding signs or shouting slogans had he wished to do so. Moreover, *Tremblay* – style zoning impacts on private property rights, a category of right that was entirely unhindered in the *Knowlton* situation. Enclosing homes or businesses behind police barricades amounts to a partial “taking” or expropriation of the property’s use for the period of time the barricades are up.

Third, Canadian constitutional history and practice point in other directions. The creation of large “no-go zones” by officials acting of their own initiative in the absence of explicit, precise, clear, and definite statutory authority tilts a long way towards an “arbitrary system of government”. Moreover, common law constitutionalism has long recognized the importance of free access to public spaces. Madam Justice McLachlin, concurring, in *Committee for the Commonwealth of Canada v. Canada*, cited approvingly from an earlier USA case, *Hague v. Committee for Industrial Organization*:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.³⁵

It would be odd, to say the least, if an “immemorial trust” were subject to being overridden in the absence of precise statutory authorization on the assumption that it has always been an incidental consequence of the ancient duties of peace officers to preserve the peace and prevent crime. As was noted by Chief Justice Dickson in another case,

.... To find that arbitrary police action is justified simply because it is directed at the fulfilment of police duties would be to sanction a dangerous exception to the supremacy of law. It is the function of the legislature, not the courts, to authorize arbitrary police action that would otherwise be unlawful as a violation of rights traditionally protected at common law.³⁶

³⁵ *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), at pp. 515-16, as cited in *Commonwealth of Canada*, per Lamer, C.J., para. 14, McLachlin J., para. 225 and L’Heureux-Dubé, J. para 138.

³⁶ *R. v. Dedman*, [1985] 2. S.C.R., 2; [1985] S.C.J. No. 45, per Dickson C.J., dissenting, para. 25.

Fourth, 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. Most typically, the doctrine has been invoked with regard to questions such as the circumstances in which police may search persons, effects, vehicles, or premises,³⁷ detain a person for short periods in order to facilitate an investigation,³⁸ and so on. The question that arises, then, is whether the ancillary powers doctrine as it has been developed in Canada to date is properly understood as extending by analogy to authorizing *Tremblay*-style police measures. It is to this line of authorities that I now turn.

The “Ancillary Police Powers” Doctrine

R. v. Dedman

The leading authority, *R. v. Dedman*, arose when an Ontario driver challenged random police stops carried out as part of an anti-impaired driving programme (designated as “Reduce Impaired Driving Everywhere, or “R.I.D.E.”). Its operations were described by Chief Justice Dickson as follows:

The aim of the R.I.D.E. program in Ontario is to reduce impaired driving by detecting the impaired motorist and deterring others from driving after drinking. The police go to a location where they believe there has been a high incidence of impaired driving or alcohol related accidents. Motorists passing through this location are requested, on a random basis, to pull over and stop. Police officers ask the driver for a valid driver's licence and proof of insurance and they note the condition of the vehicle and the driver. The demand for a licence and proof of insurance is made for the purpose of initiating conversation with the ultimate goal of allowing the police to detect the drinking driver whom they might otherwise be unable to detect. R.I.D.E. officers are equipped with approved road-side screening devices to permit them to make demands for breath samples, pursuant to s. 234.1 of the

³⁷ 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.)

³⁸ 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

Criminal Code, if they form the requisite grounds during their conversation with the driver.³⁹

Though the case is properly understood as dealing with ancillary police powers extrapolated from the common law duties of peace officers, the existence of abundant statutory authority conferring powers very like the police used as part of the R.I.D.E. programme was pivotal to the decision. The central issue was whether police had the power to briefly detain *randomly selected* motorists as part of this road safety initiative. Police had clear, explicit, statutory authority to stop vehicles, to inspect licences, and, in proper circumstances, to demand that motorists submit to breathalyzer tests.⁴⁰ Ontario's *Highway Traffic Act* provided that "[e]very operator of a motor vehicle" was required to surrender his or her drivers licence "for reasonable inspection upon the demand of a constable". The same Act conferred express power on police officers "in the lawful execution" of their "duties and responsibilities" to "require the driver of a motor vehicle to stop..."⁴¹ The difficulty in *Dedman* arose because police admitted that the stop-check scheme rested on a ruse: the initial stops were random and the demand to see the licence 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. Insofar as their statutory powers were concerned they acted, in effect, with colorable intent. Mr. Justice Le Dain for the majority explained that:

... even assuming ... that a power to stop a motor vehicle in order to demand surrender of a licence for inspection arises by implication from the terms of s. 14 of The Highway Traffic Act, ... it is a power that must be exercised for the purpose indicated in s. 14. It cannot be validly exercised for another purpose, using the purpose indicated in s. 14 as a subterfuge or pretext. In this case, it is clear ... that while the police officer asked the appellant for his licence, the true purpose of the signal to stop was not to

³⁹ *R. v. Dedman*, [1985] 2. S.C.R., 2; [1985] S.C.J. No. 45, para. 2., per Dickson C.J., dissenting

⁴⁰ The *Criminal Code* explicitly authorized them to demand breath samples where 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.)

⁴¹ excerpts from s. *The Ontario Highway Traffic Act* as cited by Le Dain J., (for majority) in *Dedman*, para. 60, 63.

demand surrender of the licence for inspection but rather to determine whether there were grounds for a reasonable suspicion that the appellant had alcohol in his blood.... I am, therefore, of the opinion that s. 14 of The Highway Traffic Act did not provide statutory authority for the signal to stop in the present case.⁴²

The Supreme Court was unanimous on this point.⁴³ The majority considered the issue akin to one of *vires* because police “only act lawfully if they act in the exercise of authority which is conferred by statute or derived as a matter of common law from their duties.”⁴⁴ Chief Justice Dickson, for the minority, stressed that it is “a fundamental tenet of the rule of law in this country that the police, in carrying out their general duties as law enforcement officers of the state, have limited powers and are only entitled to interfere with the liberty or property of the citizen to the extent authorized by law... Absent explicit or implied statutory authority, the police must be able to find authority for their actions at common law. Otherwise they act unlawfully.”⁴⁵ Though divided as to the outcome, the full bench agreed on the central importance of the principle of the rule of law: police authority is circumscribed, and no police action is lawful unless it is manifestly authorized by statute or at common law.

If the R.I.D.E. programme was not authorized explicitly or by necessary implication under either statute or common law, it would amount to an unlawful exercise of power. All seven Supreme Court of Canada justices agreed that, *in the particular circumstances*, the scheme of stop-checks were unauthorized under any applicable legislation. The minority also considered it to be beyond the scope of common law police powers (as given statutory expression in Ontario’s *Police Act*⁴⁶). The majority opted for a middle-ground of sorts. Mr. Justice Le Dain adopted the view that the stop-check programme’s interference with

⁴² *Dedman*, per Le Dain J., para. 62.

⁴³ Dickson, C.J., dissenting, agreed with the majority on this issue: para. 10.

⁴⁴ *Dedman*, per Le Dain J., para. 58.

⁴⁵ *Dedman*, per Dickson C.J., dissenting, para. 12.

⁴⁶ Section 55 of the *Police Act*, R.S.O. 1970, c. 351: “The members of police forces appointed under Part II, except assistants and civilian employees, are charged with the duty of preserving the peace, preventing robberies and other crimes and offences, including offences against the by-laws of the municipality, and apprehending offenders, and laying informations before the proper tribunal, and prosecuting and aiding in the prosecuting of offenders, and have generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables.” as quoted *Dedman*, per Le Dain J., para. 64

the *qualified* right of licensed drivers to “circulate in a motor vehicle on the public highway”⁴⁷ was permitted as a necessary extension of common law police powers in the *particular* context of traffic control.⁴⁸ In contrast to the “ordinary right of movement of the individual” (a “fundamental liberty”) the “right” to drive about freely on public roads was of a different character. It was “a licensed activity that is subject to regulation and control for the protection of life and property.”⁴⁹ In that particular context, the majority accepted that certain powers are “inherent in the execution of a police officer’s duty” or “ancillary powers” which “enable the police to perform such reasonable acts as are necessary for the due execution of their duties.”⁵⁰

In reaching their conclusion the majority sought to apply the test of police powers set out by Mr. Justice Ashworth in *R. v. Waterfield*:

In the judgment of this court it would be difficult ... to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was *prima facie* an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty. Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited. To cite only one example, in *Davis v. Lisle*,

⁴⁷ *Dedman*, per Le Dain J., para 68.

⁴⁸ “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.

⁴⁹ *Dedman*, per Le Dain J., para 68.

⁵⁰ Dickson J., (dissenting) in *The Wiretap Reference*, [1984] 2 S.C.R. 697, and Leigh, *Police Powers in England and Wales* (1975), p. 33, as cited in *Dedman*, [1985] 2. S.C.R., 2; [1985] S.C.J. No. 45, per Le Dain J., para 67.

[1936] 2 All E.R. 213; [1936] 2 K.B. 434, it was held that even if a police officer had a right to enter a garage to make inquiries, he became a trespasser after the appellant had told him to leave the premises, and that he was not, therefore, acting thenceforward in the execution of his duty, with the result that the appellant could not be convicted of assaulting or obstructing him in the execution of his duty.⁵¹

In Canada, the “Waterfield test” is applied in two stages:

- 1) “whether the random stop fell within the general scope of the duties of a police officer under statute or common law”⁵²
- 2) “whether a particular interference with liberty is an unjustifiable use of a power associated with a police duty”⁵³

Or, more crudely :

- do the police have a power? and
- should they have used it?

As far as the first stage of the test goes, the majority had no doubt, on the particular facts of the case – including the statutory background, the highly regulated nature of driving, and previous case law establishing the right of police officers to control traffic, - that random stops such as that involved in the R.I.D.E. programme “fell within the general scope of the duties of a police officer to prevent crime and to protect life and property *by the control of traffic*. These are the very objects of the R.I.D.E. program....”⁵⁴ It is worth pausing here to note that it would be a serious misreading of these passages to interpret them as suggesting that *anything* police officers do within reason and with the intent of preventing crime, protecting life, or protecting property would pass the first stage of the *Waterfield* test.⁵⁵

⁵¹ *R. v. Waterfield*, [1963] 3 All E.R. 659, at 661-662, as cited in *Dedman*, [1985] 2. S.C.R., 2; [1985] S.C.J. No. 45, per Le Dain J., para 66. The *Waterfield* test had previously been accepted as authoritative in the Supreme Court of Canada in *R. v. Stenning*, [1970] S.C.R. 631; *Knowlton v. The Queen*, [1974] S.C.R. 443.

⁵² *Dedman*, per Le Dain J., para 68.

⁵³ *Ibid.*, para 69.

⁵⁴ *Ibid.*, para 68 (emphasis added).

⁵⁵ This was the position of the Government of Canada in promoting Bill C-35 (*An Act to amend the Foreign Missions and International Organizations Act*) in February 2002: “Government Response To The Twelfth Report Of The Standing Committee On Foreign Affairs And International Trade

This clearly is not what the Supreme Court of Canada intended: their comments are grounded in the very particular context of traffic regulation in which a complexly overlapping web of common law and statutorily-imposed duties and powers defines citizen-police relations. The part one hurdle was cleared after a careful, legally precise, analysis of both the common law and statutory duties of police. As Doherty J.A. explained in a subsequent case,

The law imposes broad general duties on the police but it provides them with only limited powers to perform those duties. Police duties and their authority to act in the performance of those duties are not co-extensive. Police conduct is not rendered lawful merely because it assisted in the performance of the duties assigned to the police. Where police conduct interferes with the liberty or freedom of the individual, that conduct will be lawful only if it is authorized by law. That law may be a specific statutory power or it may be the common law.⁵⁶

But, always, there must be clear legal authorization for police power.

The second part of the *Waterfield* test does however take us near to a general “reasonableness” standard: was it “reasonably necessary”, in all the circumstances of the particular situation, for the police to deploy these powers in such a way as to interfere with the liberty of an individual?⁵⁷ It bears emphasis, if only because the point was very nearly overlooked in *Tremblay*, that this is the second part of a two-stage test: we do not get to an inquiry into the “reasonableness” of police action unless the particular action has already been found to fall within the general duties of police officers. “Reasonableness” does not provide a method by which to avoid the need for a careful legal and historical analysis of police powers. When we do approach the “reasonableness” of an interference with liberty the standard is rigorous. It is evaluated with reference to necessity vis-à-vis the police duty and a balancing scales in which the cost to individual liberty is weighed against other public purposes. This second stage of inquiry was described by Mr. Justice Le Dain as coming in three parts:

(Security at Intergovernmental Conferences)” http://www.psepc-sppcc.gc.ca/Publications/Policing/C35_e.asp

⁵⁶ *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), at p. 493-4, per Doherty J.A.

⁵⁷ *Dedman*, per Le Dain J., para 69, quoting the test as set out in *Johnson v. Phillips*, [1975] 3 All E.R. 682.

- 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.”⁵⁸

On the particular facts before the court Mr. Justice Le Dain found that “the seriousness of the problem of impaired driving” was sufficient to show the necessity of the R.I.D.E. program (stage 1) and to demonstrate the importance of the public purpose served by it (stage 3). Weighing heavily on the other side, stop-checks clearly interfered with liberty, causing both inconvenience and psychological distress to innocent drivers. These concerns were not sufficient to render the police actions unlawful in this particular case however because of the character of driving as “a licensed activity subject to regulation and control in the interest of safety”, the limited psychological distress that innocent drivers would in fact be subjected to, the “relatively short duration” of the police stops, and the “slight inconvenience” involved.⁵⁹

The Supreme Court of Canada has reviewed the general principles applicable to the interpretation of statutes or common law doctrine relating to ancillary police powers in other significant decisions dealing with wiretaps, police entry to residences, and searches of individuals placed under arrest. As in *Dedman*, the approach of the Court in each situation was 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 prevent crime. In all cases the first stage of the *Waterfield* – style enquiry is pursued carefully against the doctrinal history of common law policing and with painstaking attention to the canons of statutory interpretation.

Wiretap Reference & Lyons v. The Queen

In *Reference re: Judicature Act (Alberta)*, s.27(1) (the “Wiretap Reference”),⁶⁰ the court dealt with two questions referred by the Alberta Government:

The Alberta Government ... referred two questions to the Alberta Court of Appeal raising the issues of (1) whether, in Part IV.1 of the Criminal Code,

⁵⁸ *Ibid.*, per Le Dain, J., para 69 (emphasis and paragraph breaks added).

⁵⁹ *Ibid.*

⁶⁰ *Reference re: Judicature Act (Alberta)*, s. 27(1) [1984] 2 S.C.R. 697 (*Wiretap Reference*)

Parliament intended by necessary implication to empower police officers to enter private property to install listening devices when they act under an authorization to intercept private communications and (2) whether a judge may expressly authorize such entry when he grants an authorization for an interception of private communications.⁶¹

Although, the Court of Appeal answered both in the negative Mr. Justice Estey's majority opinion answered both questions in the affirmative, relying on his own reasoning in *Lyons v. The Queen*.⁶² In the *Wiretap Reference* and *Lyons* the problem of statutory interpretation arose because Criminal Code provisions creating a scheme for judicial authorization of wiretaps and other bugging equipment did not "expressly authorize entry by the officers into the premises" so as to allow the installation of the equipment. After reviewing available technology, Mr. Justice Estey concluded that "all forms of eavesdropping (other than passive acoustic eavesdropping by means of parabolic and other like microphones) entail either the personal entry into the premises by the interceptor or his collaborators for the purpose of installing equipment; or the invasion of the premises in question by directing at those premises energy in the form of electromagnetic waves."⁶³ The question, simply, was whether the statutory grant of authority to intercept private communications by means of *specified* sorts of equipment necessarily implied the authority to surreptitiously enter private premises in order to install and maintain that equipment. The majority of the court took the view that the authority to use specific equipment that required installation necessarily implied the authority to install it: Parliament would otherwise have acted in vain. Mr. Justice Estey's approach to statutory interpretation was straightforward:

Intrusion into privacy is an obvious and inevitable concomitant of an authorized crime detection procedure. Explicitness is a requirement before legislation may properly be found to be intrusive of these basic rights. However, the need to express the obvious is not present in the canons of statutory interpretation.⁶⁴

⁶¹ (*Wiretap Reference*) 697 (headnote)

⁶² *Lyons v. The Queen*, [1984] 2 S.C.R. 633

⁶³ *Lyons*

⁶⁴ *Lyons*

As in *Dedman*, the court found an ancillary police power of sorts by necessary implication. As in *Dedman*, it did so narrowly and in the context of an extensively elaborated statutory arrangement surrounding the particular interferences with liberty. Even in this context, powerful dissenting judgments in both *Wiretap Reference* and *Lyons* cautioned against too readily reaching the conclusion that infringements of important liberties are impliedly authorized.⁶⁵

R. v. Godoy

In *R. v. Godoy*⁶⁶ police officers responded to a “911” emergency telephone call which had been disconnected before the caller spoke. Godoy answered the door and assured the police officers that there was “no problem”. When officers asked if they could come in to the residence he tried to close the door. The police made a forced entry and discovered Godoy’s spouse beaten and sobbing in the bedroom. She informed the officers that Godoy had hit her. He was acquitted at trial on charges of resisting arrest and assaulting a police officer, on the basis that the original entry had been unlawful, rendering “all subsequent actions of the police, including the arrest of the appellant ... illegal.”⁶⁷ The Supreme Court of Canada grappled with the question of whether the forcible entry into the home, clearly “a prima facie interference with a person's liberty and property”⁶⁸ was justifiable under the *Waterfield* test as elaborated in *Dedman*. Chief Justice Lamer, for a unanimous bench, took it that the common law duties of peace officers (as incorporated in Ontario legislation) included “the ‘preservation of the peace, the prevention of crime, and the protection of life and property’.”⁶⁹ The Court understood the intent of the 911 emergency telephone system as being to provide a means whereby people in distress can seek immediate assistance. Hence, the police duty to protect life is “engaged whenever it can be inferred that the 911 caller is or may be in some distress, including cases where the call is disconnected before the nature of the emergency can be determined.”⁷⁰ Chief Justice Lamer thought “it is reasonable, indeed imperative, that the police assume that the caller is

⁶⁵ The Charter was not considered in either case.

⁶⁶ *R. v. Godoy* [1999] 1 S.C.R. 311; [1998] S.C.J. No. 85

⁶⁷ *Godoy*, para. 5.

⁶⁸ *Godoy*, para 13.

⁶⁹ *Godoy*, para. 15

⁷⁰ *Godoy*, para. 16.

in some distress and requires immediate assistance”⁷¹ when a 911 call is dropped. Pranks and mistakes apart, a 911 call signals precisely urgency, distress and a need for immediate assistance. Given the very real possibilities of intimidation, hostage-taking, domestic violence, incapacitation (and hence inability to answer the door), and the like, the court feared that the call for assistance and the police duty to protect life could be rendered nugatory if a police response could be deflected merely by an unanswered door or the assurance that there is “no problem” offered by whoever happens to their call.

... the importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller. The public interest in maintaining an effective emergency response system is obvious and significant enough to merit some intrusion on a resident's privacy interest. However, ... that the intrusion must be limited to the protection of life and safety. The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required. 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.⁷²

Again, we find that the ancillary police power extrapolated from common law duties is very narrowly circumscribed. In furtherance of their general duty to protect life, a *specific* cry for help produces a *specific* police duty to ascertain clearly the extent to which help is needed by the individual who placed the call. The emergency call in effect operates as an invitation to police to enter premises and the invitation can only be withdrawn by the individual who issued it – a matter about which the police must have great confidence before they turn away. The ancillary power is narrow, specific as to time, place, and persons, and does not give rise to any wider police investigatory powers.

Cloutier v. Langlois

In *Cloutier v. Langlois*,⁷³ mentioned in passing above, the Supreme Court of Canada upheld a police frisk search incidental to arrest. The Court adopted a two-fold approach:

⁷¹ *Godoy*, para. 16.

⁷² *Godoy*, para 22.

⁷³ *Cloutier v. Langlois*, [1990] 1 S.C.R. 158

first, was there a police power to search a lawfully arrested person? Secondly, what was the scope of that power?

As in other cases, a generalized “reasonableness” test does not serve to ground the asserted police power. Madam Justice L’Heureux-Dubé, for the Court, approached the first question with great care by means of an exhaustive review of the common law from the nineteenth century to the present. She concluded that the power to search exists “as a simple corollary of arrest” under Canadian law and that

the police have a power to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him. The common thread in this line of authority is the objective of guaranteeing safety and applying the law effectively.⁷⁴

The more difficult questions in *Cloutier* did not surround the existence of a common law police power to search individuals placed under arrest. That much was well established. Rather, the question was about the scope or limits of that power in particular circumstances. Here – not in the first stage of the test - the Supreme Court of Canada resorted to a balancing test of sorts. Even where the *general* authority of police is well established it is important to assess the reasonableness of the police action in the particular circumstances “in light of the public purposes served by effective control of criminal acts on the one hand and on the other respect for the liberty and fundamental dignity of individuals.”⁷⁵ The court emphasized the importance of individual freedoms:

For centuries the common law has spearheaded the protection of individual freedoms. The concept that a person and his home are inviolable has been gradually set up in the face of the potential abuse of power by the State. In the early seventeenth century the common law had already held “[t]hat the house of everyone is to him as his castle and fortress” (Semayne's Case (1604), 5 Co. Rep. 91a, 77 E.R. 194). Similarly, an invisible “fortress” was built bit by bit around each subject of the Empire and gradually any interference with individual freedom was seen as *prima facie* unlawful, the representatives of the State having the burden of

⁷⁴ *Cloutier*, para 49

⁷⁵ *Cloutier*, para 50

establishing a legal basis for their actions: "no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice" (*Eleko v. Officer Administering the Government of Nigeria*, [1931] A.C. 662 (P.C.), at p. 670). This fundamental role of guardian of freedom and property continued and expanded with the advent of the Charter (*R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 164, per Wilson J.): "Thus, the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence".⁷⁶

When, on the particular facts, the freedom and dignity of the individual was balanced against the public interest in the safe and effective enforcement of law, the frisk search in *Cloutier* was found to be acceptable. The reasons, Madam Justice L'Heureux-Dubé explained, were its "relatively non-intrusive" nature of the search, lack of physical force, short duration, and the unavailability of any less intrusive alternative that would meet the basic need of ensuring police safety.⁷⁷ Searches on arrest are legal if they are conducted in pursuit of a valid objective and using only of 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".⁷⁸

R. v. Edwards

In *R. v. Edwards* the Alberta Provincial Court extended the doctrine to allow for a very limited sort of spatial zoning. That case arose when two brothers returned to their car from a local bar and found it behind a temporary police barricade.

... the police were investigating a homicide where a body had been located. The police put a yellow tape across the area where the homicide had taken place and officers were posted to prevent access to the area. The Edwards vehicle was parked

⁷⁶ *Cloutier*, para 55

⁷⁷ *Cloutier*, para 58.

⁷⁸ *Cloutier*, paras. 61, 62

in the crime scene area. The officers denied the Edwards brothers access to their vehicle. The Edwards brothers demanded access to their vehicle.⁷⁹

The brothers became loud and verbally aggressive in their dealings with the police, and were eventually arrested for causing a disturbance. Because “there is no particular statute granting police the power to prevent individuals from accessing personal property that has the misfortune of becoming part of a temporary crime scene” the question arose as to whether police had the right to prevent the brothers from simply going to their vehicle and driving off. Provincial Court Judge Allen looked to the ancillary powers of police, beginning with the observation that the common law duties of police extend to keeping the peace, preventing crime, protecting property, detecting crime and bringing offenders to justice.⁸⁰ 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.⁸¹ In the result, this case resulted in recognition, through the ancillary power doctrine, of a police “zoning” of sorts. It is however a “zoning” severely limited in space, time, and application.⁸² Moreover, the need arises in a situation akin to an emergency which could not have been planned for in advance and in which no less intrusive options are unavailable.

⁷⁹ *R. v. Edwards* [2004] A.J. No. 68, 2004 ABPC 14, Allen, Prov. Ct. J., para. 1.

⁸⁰ *Edwards*, para. 36

⁸¹ *Edwards*, para. 48.

⁸² Pace J.A.’s judgment (for the court) in *R. v. Williams* (N.S.C.A.) [1986] N.S.J. No. 138 dealt with the question of the lawfulness of police traffic control measures imposed during a Tall Ship event in Halifax. Though 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.”

In sum, the leading Canadian authorities on the ancillary police power do not support the proposition that, absent express statutory authority, police “zoning” of public space is an acceptable means of crowd control. The following categories of authority would seem to provide alternative possible groundings for legal power to exclude individuals or groups from land on which they wish to be present for the purposes of expression or to force the dispersal of people who have already gathered for these purposes:

- 1) specific statutory authority given in defined situations such as that found in the Foreign Missions Act and the Emergencies Act.
- 2) the “riot act” provisions of the Criminal Code.
- 3) the authority of land-owners (including municipalities and the Crown) to prohibit trespass or remove trespassers.
- 4) court-ordered injunctions.

Specific Statutory Provisions

Foreign Missions and International Organizations Act

The *Foreign Missions and International Organizations Act* 1991, c. 41 was amended in 2002 to include the following provision:

- 10.1 (1) The Royal Canadian Mounted Police has the 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 and to which an order made or continued under this Act applies
- (2) For the purpose of carrying out its responsibility under subsection (1), the Royal Canadian Mounted Police may 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.⁸³

Assuming this broad and imprecise provision is capable of withstanding constitutional challenge, it might provide legal authority for operations something like challenged in

⁸³ S.C. 2002, c. 12, s. 5

Tremblay, but only in the specific circumstances of international meetings. Given its limited applicability, it need only be noted here.

Emergencies Act

The Federal *Emergencies Act*⁸⁴ also authorizes similar measures:

19. (1) While a declaration of a public order emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency:
- (a) the regulation or prohibition of
 - (i) any public assembly that may reasonably be expected to lead to a breach of the peace,
 - (ii) travel to, from or within any specified area, or
 - (iii) the use of specified property;
 - (b) the designation and securing of protected places;
 - ...
 - (e) the imposition
 - (i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or
 - (ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,
- for contravention of any order or regulation made under this section.

⁸⁴ *Emergencies Act* R.S.C. 1985, c. 22 (4th Supp.)

⁸⁴ 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 "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

These powers have never been invoked since the *Emergencies Act* replaced Canada's former *War Measures Act*. For this reason and because they lie exclusively in the federal domain they are noted here in passing only.⁸⁵

“Riot Act”

Disorderly crowds are nothing new. Anglo-Canadian law has provided legal means permitting their dispersal for centuries through measures making it unlawful to cause a disturbance⁸⁶ or prohibiting unlawful assembly and riot, amongst others. The *Criminal Code* contains the following provisions:

63. (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they

(a) will disturb the peace tumultuously; or

(b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.

(2) Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose.

....

⁸⁶ *Canadian Criminal Code*, R.S.C. 1970, c. C-34, s. 170 provides:

175. (1) Every one who

(a) not being in a dwelling-house, causes a disturbance in or near a public place,

(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,

(ii) by being drunk, or

(iii) by impeding or molesting other persons,

(b) openly exposes or exhibits an indecent exhibition in a public place,

(c) loiters in a public place and in any way obstructs persons who are in that place, or

(d) disturbs the peace and quiet of the occupants of a dwelling-house by discharging firearms or by other disorderly conduct in a public place is guilty of an offence punishable on summary conviction.

The meaning of “disturbance” was discussed by the Supreme Court of Canada in *R. v. Lohnes*, [1992] 1 S.C.R. 167; [1992] S.C.J. No. 6

64. A riot is an unlawful assembly that has begun to disturb the peace tumultuously.

65. Every one who takes part in a riot is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

66. Every one who is a member of an unlawful assembly is guilty of an offence punishable on summary conviction.

67. A person who is

(a) a justice, mayor or sheriff, or the lawful deputy of a mayor or sheriff,

...

who receives notice that, at any place within the jurisdiction of the person, twelve or more persons are unlawfully and riotously assembled together shall go to that place and, after approaching as near as is safe, if the person is satisfied that a riot is in progress, shall command silence and thereupon make or cause to be made in a loud voice a proclamation in the following words or to the like effect:

Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business on the pain of being guilty of an offence for which, on conviction, they may be sentenced to imprisonment for life.

GOD SAVE THE QUEEN.

68. Every one is guilty of an indictable offence and liable to imprisonment for life who

...

(b) does not peaceably disperse and depart from a place where the proclamation referred to in section 67 is made within thirty minutes after it is made;

These provisions are the origin for the common expression “reading the riot act”. They set out a miniature code, of sorts, mediating the line between lawful and unlawful assembly⁸⁷

⁸⁷ *Rex v. Patterson*, [1931] 3 D.L.R. 267, at 274 per Middleton J.A.: “No matter how worthy the cause, or how clear the right to be asserted may be, our law requires the worthy cause to be

(defined by reasonable fear of tumultuous⁸⁸ disturbance of the peace), a process by which assembled individuals can lawfully be ordered to leave places they are normally entitled to be (the reading of a proclamation in specified form by a court official – a sheriff - or by a magistrate – a justice or the mayor), expanded police powers, and a significant immunity for police officers. Only occasionally used,⁸⁹ these provisions provide lawful authority where it would otherwise be absent, and provide some evidence of what was considered justifiable in a free society in the decades before the adoption of the *Charter*. Police are given extraordinary powers and obligations in relation to suppressing a riot including authority to “disperse or arrest” individuals who do not comply with the section 67 proclamation,⁹⁰ licence to use or to order the use of as much force as is necessary and reasonable “to suppress a riot”,⁹¹ and immunity from civil or criminal proceedings arising “by reason of resistance”.⁹² The extraordinary character of the riot act provisions was described by Harvey, C.J.A., in *R. v. Jones & Sheinin*:

If an unlawful assembly goes a step further and proceeds to do what the persons in the neighbourhood fear it may do, viz., "disturb the peace tumultuously" it has become a riot (s. 88) and the punishment for a rioter is 2 years but that is not all that is involved in it. In the case of a riot by twelve or more persons, any sheriff, mayor or justice, who has notice of it is legally bound to do what is commonly spoken of as "read the riot act" in other words he has to call on them to disperse (s. 91) and if they fail to disperse within 30 minutes they are guilty of an offence for which they may be sent to prison for life, (s. 92), but that is not the worst, for equally if they do not

advocated and the right to be asserted in a peaceable way, and not by riot and tumult. The provision of the Code prohibiting unlawful assemblies is for the purpose of drawing the line between a lawful meeting and an assembly, either unlawful in its inception, or which is deemed to have become unlawful either by reason of the action of those assembled, or by reason of the improper action of others having no sympathy with the objects of the meeting.

⁸⁸ 28 In *R. v. Brien* [1993] N.W.T.J. No. 116, Mr. Justice de Weerd of the Northwest Territories Supreme Court explained that “The words "tumultuous" and "tumultuously" are derived from the noun "tumult", which connotes actual or threatened force and violence in addition to any public disorder, confusion and uproar: *R. v. Lockhart* (1976), 15 N.S.R. (2d) 512 (C.A.) at p.529. “

⁸⁹ Amongst 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.

⁹⁰ s.33 *Criminal Code*

⁹¹ s. 32 *Criminal Code*

⁹² s. 33 (2) *Criminal Code*

disperse the officer mentioned is legally bound to cause their arrest for which purpose he is entitled to call to his assistance whom he will, and if in the endeavour to arrest or disperse them any of the rioters are killed such killing is excused, (s. 93), and moreover if the sheriff or other officer fails in his duty he is liable to be imprisoned for 2 years, (s. 94), and if any one called in to assist fails to render such assistance he also is guilty of a crime and may be punished by one year's imprisonment. (S. 95).⁹³

In practical terms it seems that, assuming the necessary legal criteria are met, individuals can be arrested and charged for public order offences including unlawful assembly without the need to “read the Riot Act”. This would seem to suggest that the use of military-style force (whether baton charges, tear gas, pepper spray, rubber bullets, water cannon, or bullets) directed at a crowd *as such* (rather than at lawbreaking individuals in the crowd) is not lawful in the absence of express statutory authority. This point is reinforced, albeit somewhat obliquely, in Madam Justice Southin’s judgment in *Doern*⁹⁴ quoting from a ruling of British Columbia Police Complaint Commissioner Don Morrison:

I am also mindful of an article in *Police*, Vol. 22 at pp. 40-41, entitled “Dampen their Ardour”:

The question that the court will ask is, 'Was the person struck doing something at the moment he was struck that necessitated such force being applied?' Hitting out indiscriminately at anyone in striking distance probably would not persuade the court that force was 'reasonable'. Yet, hitting out indiscriminately is what a baton charge amounts to and no amount of verbal gymnastics will alter the fact.

Property Rights & Protest

Common Law of Trespass and Trespass Legislation

It is unusual for the “riot act” or any other special measures to be invoked as means of controlling protest. Given this and the fact that the “ancillary powers” doctrine seems an insecure foundation for even the most obviously desirable policing measures, it remains to consider the rights of property owners – including municipalities and governments – to

⁹³ *R, v.. Jones & Sheinin*, 57 C.C.C. 81, per Harvey C.J.A.

⁹⁴ *Vancouver (City) Police Department v. British Columbia (Police Complaint Commissioner)* [2001] B.C.J. No. 1405; 2001 BCCA 446 (BCCA) (“the Doern Case”), para 19.

limit the access of individuals or groups to the property they manage. The general rule is that property owners may do as they wish with their land. This includes the right to exclude individuals or groups from entry in the first place or ordering those present off when they are no longer welcome. The common law protects this plenary right through the tort of trespass,⁹⁵ supplemented now by a quasi-criminal prohibitions such as those contained in Ontario's *Trespass to Property Act*:

2. (1) Every person who is not acting under a right or authority conferred by law and who,

(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than \$2,000.

Colour of right as a defence

(2) It is a defence to a charge under subsection (1) in respect of premises that is land that the person charged reasonably believed that he or she had title to or an interest in the land that entitled him or her to do the act complained of.⁹⁶

Private property owners generally do not need to be concerned with balancing their desires against the countervailing interests of the wider community in freedom of assembly, movement, or speech when making determinations as to who to allow onto their land and under what conditions.⁹⁷ The general rule here is that "Trespass to Land does not require

⁹⁵ See, for example, Philip Osborne, *The Law of Torts* (2nd. 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.

⁹⁶ R.S.O. 1990, c. T.21, s. 2 (1).

⁹⁷ *Commonwealth of Canada*, para. 218, per McLachlin, J

the landholder to have a good reason or indeed any reason to exclude a person from his property” though some qualification may arise even with respect to private property in cases such as shopping malls, where the owner’s general invitation to the public to enter gives something of a “public” character to an otherwise “private” place.⁹⁸

Constitutional Values & Public Property Ownership

This is somewhat uncertain as the leading case pre-dates the *Charter*.⁹⁹ What is not in the least speculative is that the property rights of public authorities must be exercised in a fashion consonant with the public law values by which they are bound including those of both common law constitutionalism and the written constitution. Though the core rights relating to the management and control of publicly owned property are analogous to those associated with private property,¹⁰⁰ the character of the owner as a public entity imports constitutional duties and obligations that do not exist in the purely private realm. The difficulty with respect to public property lies in discerning the appropriate boundary line, in any particular situation, between competing public interests (efficiency of government operations and freedom of expression, for example).

Committee for the Commonwealth of Canada v. Canada

The seminal authority in this respect is the Supreme Court of Canada’s judgment in *Committee for the Commonwealth of Canada v. Canada*.¹⁰¹ The case arose at Montreal’s Dorval airport at a time when all major Canadian airports were owned by the Federal Government. Madam Justice L’Heureux-Dubé explained the factual background which provoked the respondents to seek a declaration that their fundamental freedoms had been violated:

⁹⁸ Osborne, *Law of Torts* (Op. Cit.)

⁹⁹ *Harrison v. Carswell*, [1976] 2 S.C.R. 200

¹⁰⁰ Although control over property is an incident of ownership, the means by which public ownership rights are exercised is frequently set out in statute, bylaw or regulation. Ontario’s *Park Regulations*, for example include the provision:

32. (1) The superintendent may open or close a provincial park, or any portion thereof, to the public by the erection of signs or other suitable means, for the purpose of,

(a) preventing overcrowding of the park facilities;
(b) dealing with a fire, flood or other emergency situation;
(c) public safety;

(2) The superintendent may order an evacuation of a provincial park or any portion thereof during a fire, flood or other emergency situation. (R.R.O. 1990, Reg. 952, s. 32).

¹⁰¹ *Commonwealth of Canada, op. cit.*

On March 22, 1984, respondents Lépine and Deland, respectively the Secretary and Vice-President of the Committee for the Commonwealth of Canada, went to Montréal International Airport at Dorval to promote knowledge of their group and their political goals, and to recruit members. Equipped with portable placards, advertising leaflets and magazines, they walked through the first floor of the terminal. They approached travellers and other passers-by, and while they were informing them about the goals of the group and soliciting membership, an R.C.M.P. officer stopped them and asked that they cease their activities. They objected, at which point the officer took them to the assistant manager of the airport, who advised them that political propaganda activities such as those in which they were engaged were unauthorized pursuant to the *Government Airport Concession Operations Regulations*, SOR/79-373, which prohibited any advertising or solicitation in the airport.¹⁰²

The disposition of the case turned in part on a construction of the relevant section of the *Government Airport Concession Operations Regulations*, and in part on an assessment of the rights of the Government of Canada to inhibit exercises of expression on public property. All seven justices sitting on the case – Lamer C.J., and La Forest, L’Heureux-Dubé, Sopinka, Gonthier, Cory, and McLachlin JJ. – took the view that the respondents’ freedom of expression had been improperly infringed. Despite this unanimity of outcome the case produced multiple judgments.

The Government of Canada had argued that government property became a sort of “Charter Free zone” through the magic of ownership rights, with the result that constitutional protections such as freedom of expression, and freedom of assembly, could be circumvented as an incident of the control of property. Its position was summarized by Madam Justice McLachlin as being:

that there is no constitutional right to use any of its property for purposes of public expression. Only with its permission and where it considers it appropriate should individuals and groups be permitted to speak and demonstrate. The government submits that as the owner of all such

¹⁰² *Commonwealth of Canada*, per L’Heureux-Dubé J., para. 50.

property, it has the absolute right to exclude the use of the property for public expression if it chooses. It relies on the fact that the owners of property are generally entitled to control who enters on it and how it is used, a right which extends to the right to control expression on their property. The Crown, it contends, should be placed in no worse position than a private property owner.¹⁰³

This position is astonishing: the state owns Parliament Hill, public squares, parks, legislature grounds, and most of the other sites historically associated with and most suited to demonstrations, rallies, or protests. The position asserted by the Government of Canada would have rendered important *Charter* rights nugatory. Chief Justice Lamer and Mr. Justice Sopinka rejected the Government's "absolutist approach to the right of ownership" outright, 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."¹⁰⁴ They emphasized "the special nature of government property" vis-à-vis public rights and fundamental freedoms.¹⁰⁵ To similar effect, Madam Justice L'Heureux-Dubé said:

If the government had complete discretion to treat its property as would a private citizen, it could differentiate on the basis of content, or choose between particular viewpoints, and grant access to sidewalks, streets, parks, the courthouse lawn, and even Parliament Hill only to those whose message accorded with the government's preferences. Such a standard would be antithetical to the spirit of the Charter, and would stultify the true import of freedom of expression.¹⁰⁶

Similarly, McLachlin J. rejected "the Crown's argument that the government *qua* proprietor has the absolute right to prohibit and regulate expression on all property which it owns" because it:

... is belied by a venerable tradition which supports the view that some types of state-owned property are proper forums for public expression. The right

¹⁰³ *Commonwealth of Canada*, per McLachlin J., para. 220.

¹⁰⁴ *Commonwealth of Canada*, per Lamer C.J., para 15.

¹⁰⁵ *Commonwealth of Canada*, per Lamer C.J., para 14

¹⁰⁶ *Commonwealth of Canada*, per L'Heureux-Dubé J., para 119

of free speech has traditionally been associated with streets and by-ways and parks -- all government property. To accept the Crown's argument would be to restrict the freedom guaranteed by the Charter to limits much narrower than those with which it has traditionally been associated. Little would remain of the right. Its purpose -- to permit members of society to communicate their ideas and values to others -- would be subverted.¹⁰⁷

Although the court split three ways with no clear majority for any formulation of approach, the justices were unanimous in their rejection of the Government's property rights argument. The principle difficulty became one of determining where and how to draw the line between appropriate regulation of government owned spaces on the one hand and constitutionally protected rights on the other. The court focused on the interplay between section 2(b) of the *Canadian Charter of Rights and Freedoms* and section 1's limitations. Section 2(b) protects "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". Section 1 sets out that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". One presumes from the tenor of the judgments that sections 2 (a) ("freedom of conscience and religion"), 2 (c) ("freedom of peaceful assembly"), and 2 (d) ("freedom of association"), the protections contained in the *Canadian Bill of Rights*,¹⁰⁸ and the long-recognized common law freedom of movement would have weighed to similar effect had the facts required a consideration of these broader constitutional protections.

Members of the court differed principally on the question of how best to approach the balancing of interests that is so obviously required. Madam Justice L'Heureux-Dubé adopted the position that all government property should, *prima facie*, be open to free expression.¹⁰⁹ On her approach the necessary balancing of interests would have been displaced entirely to the point of a section 1 analysis.

¹⁰⁷ *Commonwealth of Canada*, per McLachlin J., para 224

¹⁰⁸ *Canadian Bill of Rights*, S.C., 1960, c. 44 protects "freedom of speech" (s. 1 (d)) and "freedom of assembly and association" (s. 1 (e))

¹⁰⁹ Though even she acknowledged some limits: *Commonwealth of Canada*, per McLachlin J., para 230

The Chief Justice was of the view that a test of compatibility with function was needed to determine whether a particular property was of the sort to which section 2(b) rights should attach:

I am of the view that when a person claims that his freedom of expression was infringed while he was trying to express himself in a place owned by the government, the legal analysis must involve examining the interests at issue, namely the interest of the individual wishing to express himself in a place suitable for such expression and that of the government in effective operation of the place owned by it.¹¹⁰

Section 2 (b), his Lordship said, was to be construed as subject to the limitation that “A person who is in a public place for the purpose of expressing himself must respect the functions of the place and cannot in any way invoke his or her freedom of expression so as to interfere with those functions.”¹¹¹ Both the opportunity for expression and the forms of expression that are acceptable on state properties were, the Chief Justice concluded, “circumscribed at least by the very function of the place.”¹¹² Examples of unprotected forms of expression were said to include shouting in a library, picketing in the middle of a busy highway, blockading a bridge,¹¹³ and hogging the floor at a municipal assembly.¹¹⁴

¹¹⁰ *Commonwealth of Canada*, per Lamer C.J., para. 10

¹¹¹ *Commonwealth of Canada*, per Lamer C.J., para. 18,. Some qualification on this formulation seems necessary. In *Health Employers Assn. of British Columbia v. H.E.U.*, 2004 CarswellBC 699, 100 C.L.R.B.R. (2d) 161, para. 84, the British Columbia Labour Relations Board pointed out, “the requirement that an expressive activity be ‘compatible with the function of the place’ where it occurs is fundamentally incompatible with McIntyre J’s conclusion in *Dolphin Delivery* that labour picketing is expressive activity protected by s. 2(b). As noted by McIntyre J., the purpose of all picketing is to put economic pressure on the entity being picketed by disrupting its operations (persuading workers not to work, suppliers not to supply, consumers not to buy, clients not to attend, etc.). Accordingly, if the scope of expressive activity protected by s. 2(b) were to exclude those activities which interfered or were incompatible with the operations or functions of the place where they took place, then all picketing would be excluded from the scope of s. 2(b). This is clearly not the law as established by the Supreme Court of Canada in *Dolphin Delivery* and subsequent decisions.”

¹¹² *Commonwealth of Canada*, para. 19, per Lamer C.J.

¹¹³ During the period between *Commonwealth of Canada* being heard in the Supreme Court of Canada and the judgment coming down, the “Oka crisis” of 1990 involved significant bridge blockades in the Montreal commuting area: http://archives.cbc.ca/IDD-1-71-99/conflict_war/oka/

¹¹⁴ This was very nearly the situation that came up in: *R. v. Marcocchio*, [2002] N.S.J. No. 193, 2002 NSPC 7 Nova Scotia Provincial Court Ross Prov. Ct. J.

McLachlin J., for her part, rejected the “compatibility with function” test as too uncertain in application, but agreed that the heavy lifting involved in sorting out protected from unprotected expression should not all be left to a section one analysis. For reasons of legal clarity and also because of “pragmatic considerations” she chose to employ a “threshold test” founded on a “definitional” approach focused on the “values and interests at stake” rather than looking to “the characteristics of particular types of government property” in determining the applicability of section 2 (b) rights in particular circumstances¹¹⁵: “The state should not be obliged to defend in the courts its restriction of expression which does not raise the values and interests traditionally associated with the free speech guarantee.”¹¹⁶ One indicator of places to which section 2 (b) protections should extend is a “tradition or designation” of a place as being “dedicated to public expression for purposes of discussing political or social or artistic issues”.¹¹⁷ When the concurrences are taken into account Madam Justice L’Heureux-Dubé’s judgment stood alone, three justices adopted the position articulated by McLachlin J.’s, and three adopted that of Lamer C.J.¹¹⁸

Spatial Hierarchies of Place

Although the Court divided as to approach there was consensus that the constitution limits Government attempts to regulate as an incident of property ownership. There was consensus too that some balancing process was needed at some stage of judicial review in order to distinguish appropriate from inappropriate regulation of expression on government property. The outcome of each of the different approaches was a balancing test of sorts that produced a sliding scale of protections attaching to different sorts of place in different sorts of circumstances. Even sites to which a high degree of expressive liberty attached in principle could be regulated for reasons such as the maintenance of law and order.¹¹⁹ 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. The entire court thought that public expression in streets and parks – and analogous places - are prima facie entitled to a high level of constitutional protection of

¹¹⁵ *Commonwealth of Canada*, per McLachlin J., para 239

¹¹⁶ *Commonwealth of Canada*, per McLachlin J., para 229

¹¹⁷ *Commonwealth of Canada*, per McLachlin J., para 250

¹¹⁸ the court divided with Lamer C.J., Sopinka and Cory JJ. favouring one formulation and McLachlin, La Forest and Gonthier JJ. favouring the other.

¹¹⁹ *Commonwealth of Canada*, Lamer C.J., para. 22.

freedom of expression.¹²⁰ Professor Harry Kalven's formulation was endorsed by both Chief Justice Lamer and L'Heureux-Dubé, J:

... in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.¹²¹

Madam Justice L'Heureux-Dubé's judgment implied a spatial hierarchy, emphasizing the importance of access "to sidewalks, streets, parks, the courthouse lawn, and ... Parliament Hill...";¹²² and also places – such as "... Bus, train and airport terminals"¹²³ - that have evolved so as to become "functionally equivalent to other public thoroughfares, and should therefore be on the same constitutional footing as streets and parks."¹²⁴ The importance of such places lies in the ease with which large numbers of people can be approached and the relatively minor inconvenience that normally results. The symbolic significance of a place also affects the weight to be given to speech rights at particular locations:

... While the symbolism of a courthouse lawn or Parliament Hill is self-evident, streets and parks have also acquired special significance as places where one can have access to and address his or her fellow citizens on any number of matters. This distinctive attribute does not accrue to a street or a park merely because of its designation. A park has no intrinsic value as a public arena; it only obtains this characteristic because the public chooses to frequent parks.¹²⁵

Though some categories of space may in general lack symbolism it is possible for particular places to acquire heightened symbolic significance for particular causes that is not shared by other, seemingly similar, places within the category (park, street, historic site, etc.). In such cases a heightened constitutional protection may attach.

¹²⁰ *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, para. 45.

¹²¹ Harry Kalven, Jr., "The Concept of the Public Forum: *Cox v. Louisiana*", [1965] *Sup. Ct. Rev.* 1, at pp. 11-12 as cited per Lamer C.J., para.3; per L'Heureux-Dubé J., para. 139

¹²² *Commonwealth of Canada*, per L'Heureux-Dubé J., para. 119

¹²³ *Commonwealth of Canada*, per L'Heureux-Dubé J., para. 153

¹²⁴ *Commonwealth of Canada*, per L'Heureux-Dubé J., para 149.

¹²⁵ *Commonwealth of Canada*, per L'Heureux-Dubé J., para 154

Conversely, all justices viewed some government property as ill-suited to public expression. Madam Justice McLachlin asserted that the historical and philosophical rationales for permitting public property to be used for expressive purposes did not extend to certain types of site:

... There is no historical precedent, whether in England, the United States or this country, for extending freedom of expression to purely private areas merely because they happen to be on government-owned property. Freedom of expression has not traditionally been recognized to apply to such places or means of communication as internal government offices, air traffic control towers, publicly-owned broadcasting facilities, prison cells and judges' private chambers. To say that the guarantee of free speech extends to such arenas is to surpass anything the framers of the Charter could have intended.¹²⁶

Notion of “Public Forum”

Although the Supreme Court of Canada looked to USA “public forum” law for guidance, “public forum” doctrine as such was rejected as being too ponderous to be useful, overly “nominalistic” in approach, overly reliant on formulistic reasoning and rigid categorizations, and being ill-suited to the framework of Canadian constitutionalism.¹²⁷ Each member of the court found the criteria set out in the Attorney General of Ontario’s brief to be helpful. Madam Justice L’Heureux-Dubé commented:

... when designing “made in Canada” criteria for determining what places are to be considered public, I am of the view that we should selectively draw upon some of the American specifications, without importing them wholesale. As stated, the A.G.O. has suggested that we employ the term “public arena” to avoid confusion with the American terminology, and has also offered certain factors to be considered when inquiring as to whether a given place qualifies. The proposed determinants include:

1. The traditional openness of such property for expressive activity.

¹²⁶ *Commonwealth of Canada*, McLachlin J. para. 227

¹²⁷ *Commonwealth of Canada*, per L’Heureux-Dubé J., para. 145, McLachlin J., para. 238, Lamer J., para. 9

This criterion is not a sine qua non as in the U.S. Absence of tradition would not preclude the declaration of a public arena, as the other factors may very well yield the same conclusion.

2. Whether the public is ordinarily admitted to the property as of right.

3. The compatibility of the property's purpose with such expressive activities.

If the activity interfered with the property's purpose, it would be less likely to be justified. Properties with multiple purposes would be problematic under this criterion.

4. The impact of the availability of such property for expressive activity on the achievement of s. 2(b)'s purposes.

5. The symbolic significance of the property for the message being communicated.

This is a contextual criterion, linking the property with the purpose or cause of the demonstration.

6. The availability of other public arenas in the vicinity for expressive activities.

A property would be more open to activities if no other property was available.

I find these criteria very valuable. While they are not meant to be dispositive in any given case, they do provide useful guidelines.¹²⁸

Impermissible Trespass on Public Property

Whatever the difficulties of application, *Commonwealth of Canada* clearly establishes that government property ownership cannot in and of itself provide exemption from constitutional protections. This is not, however, to say that government regulation of property is never legitimate. Regulation as property owner/manager that is 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

¹²⁸ *Commonwealth of Canada*, per L'Heureux-Dubé J., paras 147-148.

say or who can speak is another matter. A distinction is generally drawn based on the extent to which regulation is directed at controlling the content or the consequences of expression¹²⁹ and, at the stage of a section one analysis, the tests set out in the *Oakes* test.¹³⁰ 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 to controlling the content of speech than that which is directed to regulating only the “time, place, and manner” of expression.¹³¹ The courts are also alive to the possibility of colourable state intent lurking behind acceptable forms: regulation of content can be achieved by means of restrictions that on their face go only to time or manner, while restrictions on forum or place “may have as their purpose either the controlling of content, or the avoidance of the consequences of expression regardless of its content.”¹³²

It follows from the fact that the right in question is constitutionally guaranteed as fundamental in our society that it should be trenched on no more than is clearly necessary and justified. Only if certain conditions are established can a limit on a fundamental right or freedom be justified. First, the state should be required to demonstrate a compelling reason for the limitation. Second, the limit on the right should not go beyond what is necessary to achieve that objective -- it should not be overbroad, and should contain sufficient safeguards to ensure that as the law is applied, the right in fact will not be infringed more than necessary. This latter danger may occur, for example, if too much discretion is granted to administrators [page247] charged with applying the limit or law in question.¹³³

R. v. McBain and Weisfeld v. Canada

The appropriateness of various attempts to regulate expression, assembly, or movement on government property has been considered by the courts on a number of

¹²⁹ *Commonwealth of Canada*, per McLachlin J., para. 244.

¹³⁰ Sufficiently important legislative objective; proportionality between infringement and the ends sought (rational connection; minimal impairment; reasonable balance between rights infringed and importance of objective sought); *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, per Dickson C.J., pp. 768-69.

¹³¹ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

¹³² *Commonwealth of Canada*, per McLachlin J., para. 244.

¹³³ *Commonwealth of Canada*, per McLachlin J., para. 269

occasions. 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. McBain*,¹³⁴ while the removal of structures from Parliament Hill was upheld in *Weisfeld v. Canada*¹³⁵ - but only on a section 1 analysis.

In that case a “Peace Camp” consisting of shelters and tables and set up as a protest against USA cruise missiles testing was removed by authorities under an order in council prohibiting camping, sleeping, or erecting structures on any public work without Ministerial approval. Linden J.A., for a unanimous court, deemed the Camp, structures and all, to constitute “expression”:

... expression goes beyond words. People may choose to amplify or dramatize their messages in many ways: a sandwich board, a soapbox, a megaphone, a flag, a banner, a placard, a picture, a petition, all can be used to convey a message or to assist one in conveying a message more effectively. These "props" are part and parcel of the manner in which one chooses to express oneself and are as deserving of protection as the words used to convey the meaning. The Peace Camp structures and the tables used are, therefore, included in the concept of expression.¹³⁶

He concluded that none of the three approaches in *Committee for the Commonwealth of Canada* removed the Camp from the protection of section 2 (b) of the *Charter*. As Madam Justice L’Heureux-Dubé’s approach was to include all government property, her test was easily met. Chief Justice Lamer’s test was met because the existence of the camp or placing “a tent on Parliament Hill” was not “incompatible with the function or purpose of that forum”. Finally, “[u]nder the approach advocated by McLachlin J., there is clearly a link between the principle of participation in social and political decision-making which underlies our constitutional protection of freedom of expression and the use of the grounds in front of Parliament to effect such participation.” Because “none of the inherent limitations within the scope of freedom of expression operate in this case so as to take the

¹³⁴ *R. v. McBain*, [1992] A.J., No. 515, 129 A.R. 352 (Alta. Prov. Ct.)

¹³⁵ *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.)

¹³⁶ *Weisfeld*, per Linden J.A., para. 30.

appellant's conduct outside the protected sphere”,¹³⁷ it was necessary to assess whether the infringements of freedom of expression were allowable as limits “prescribed by law” and “demonstrably justifiable in a free and democratic society”. The court concluded that the Government’s exercise of its common law rights against trespass and public nuisance were on the facts sufficient to meet the requirement that limits be “prescribed by law”. On the particular facts it found pressing and substantial objectives as well as a rational connection between those objectives and the impugned measures. The Trial Judge accepted evidence relating to government concerns about the site’s state symbolism, and matters of safety, health, maintenance, security, and aesthetics:

62 “There was evidence ... that the presence of the shelter on the grounds of Parliament Hill constituted a danger. There was a potential fire hazard due to the employment of open-flame cooking and lighting. There was a potential health hazard due to the absence of appropriate sanitary facilities and to the infestation of the shelter with insects. The shelter interfered with the proper maintenance of the grounds of Parliament Hill.... The shelter also imposed an additional burden on the security forces responsible for the security of the Parliament Buildings....

63 In addition to these safety, health, maintenance and security concerns, ... One of the Government's legitimate objectives in this case was to keep the Hill in a clean and aesthetically pleasing condition....

64 A final government objective which can be identified is that of preventing the damage that the permanent presence of the Peace Camp could have on the symbolic importance of Parliament Hill. ... Parliament Hill is a powerful symbol of Canada, representing our democratic tradition both to its citizens

¹³⁷ *Weisfeld*, per Linden J.A., para. 40.

and residents, as well as to the millions of visitors who come to this country each year. As the seat of our federal system of government, the Parliament Buildings and the grounds upon which they are situate deserve respect and admiration from all Canadians. The care and management of these, the most important institutions of our democratic society, is vested in the Government and the Department of Public Works. Their objective is to maintain these symbols in a manner which accords with their importance as political institutions and in a condition to be enjoyed by all Canadians.¹³⁸

As the government made no attempt to prevent the appellant from talking to people, handing out literature, or displaying a banner on Parliament Hill, the Court considered the impairment of rights to be minimal and, hence, constitutionally permissible.

R. v. Behrens

Two recent Ontario cases also 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*¹³⁹ Quon, J.P. considered a case in which individuals were charged under Ontario's *Trespass to Property Act* when they entered the grounds of the Ontario legislature ("Queen's Park") in order to participate peacefully and lawfully in a protest against government policies. They had previously been banned from the grounds by the Speaker as a consequence of an earlier protest during 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 fully made out. The question raised was simply whether their rights of expression, protest, and assembly "trumped" the Speaker's ban or vice versa. Applying all three *Commonwealth of Canada* tests Quon J.P. concluded that the initial Speaker's 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 on

¹³⁸ *Weisfeld*, per Linden J.A., para 62-64..

¹³⁹ *R. v. Behrens*, [2001] O.J. No. 245 Ontario Court of Justice, Provincial Offences Court - Toronto, Ontario, Quon J.P.

keeping certain individuals away from public property. This limit is necessary to prevent further vandalism to public buildings and to stop the activities of people who believe defacing public property conveys a message.” Section 2 (b) protections do not extend to “[v]andalism, willful destruction, defacement and destruction of property”.¹⁴⁰ Nonetheless, Quon, J.P., held that, through the protections provided by the *Charter*, the Speaker’s ban as ineffective to prevent them from coming onto the property to peacefully take part in a demonstration.¹⁴¹

R. v. Semple

Similar circumstances arose in *R. v. Semple*.¹⁴² In that case the defendants were charged under the provisions of Ontario’s *Trespass to Property Act* for entering the grounds of Toronto City Hall, from which they had been banned. At the time they were attending a memorial for a homeless man which segued into a demonstration in support of the homeless. The issue was simply whether the City of Toronto’s prerogative as a property owner was outweighed by constitutional protections contained in the *Charter*. Knazan, J. found peaceful entry into the square to be a form of expression and that the effect of the City of Toronto’s notice under the *Trespass to Property Act* was to violate their *Charter* rights.¹⁴³ In the circumstances this could not be justified under the terms of section 1.¹⁴⁴

Summary and Defences to Trespass

¹⁴⁰ *R. v. Behrens*, [2001] O.J. No. 245 Ontario Court of Justice, Provincial Offences Court - Toronto, Ontario, Quon J.P. para 63, 64.

¹⁴¹ *R. v. Behrens*, [2001] O.J. No. 245 Ontario Court of Justice, Provincial Offences Court - Toronto, Ontario, Quon J.P. para. 86: “Peacefully means, not committing acts of violence, not endangering the safety of others, not damaging government property, and includes not unreasonably obstructing the public’s use and benefit of Queen’s Park.” The accused were subsequently convicted on charges arising from the same events on the grounds that the Speaker’s actions were within the realm of Parliamentary privilege and hence not subject to *Charter* review: *R. v. Behrens*, [2004] O.J. No. 5135; 2004 ONCJ 327 (Ont. Court of Justice), Bovard J. (Judgment: December 20, 2004).

¹⁴² *R. v. Semple*, [2004] O.J. No. 2137, 2004 ONCJ 55, Ontario Court of Justice, Knazan J.

¹⁴³ *R. v. Semple*, para. 34: “... the 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...”

¹⁴⁴ *R. v. Semple*, para 59.

In sum, private property owners generally have the right to exclude individuals or groups from access to their property, or to admit them subject to such terms or conditions as they may wish. The management of government property, however, is constrained by public law considerations including the requirements of the *Canadian Charter of Rights and Freedoms*. Where matters of freedom of expression, freedom of assembly, or freedom of movement¹⁴⁵ are concerned, the government cannot rely upon its property interest to “trump” its constitutional obligations. Any restrictions on such rights under the guise of “property management” are subject to legal challenge where they will meet with careful judicial scrutiny to ensure constitutional propriety. Although Canadian law does not follow USA “public forum” doctrine, the Canadian constitution calls for heightened scrutiny in the case of public parks and public streets, analogous locations such as bus stations or airports, and sites which hold special symbolic meanings in relation to the particular expressive activity at issue.

Where government entities seek to control access to public property through trespass law the ordinary rules relating to “colour of right”, and lawful “right or authority” operate both independently of and in conjunction with constitutional rights. (discussed further below).

The Use of Injunctions to Constrain Protest

One efficient way to constrain, channel, or prevent protest is through the use of injunctive relief. Where courts are willing to issue injunctions in the form of instructions to the public at large to keep out of particular areas, the policing task is simplified. Everyone entering the area can be arrested without more, and the complicated “remedy” provided by a criminal law conviction is replaced with the much more straight-forward one of contempt of court. Injunctions operate like special legislation conferring wide powers on those who obtain them and stripping important rights from those caught out by them.

MacMillan Bloedel Ltd. v. Simpson

British Columbia’s so-called “war in the woods” has been fertile ground for legal innovation in this area. The “war” was played out during the 1990s environmentalists attempted to halt logging operations at one site after another. In *MacMillan Bloedel Ltd. v.*

¹⁴⁵ The *common law* right of freedom of movement should not be confused with the much narrower *Charter* protections of inter-provincial mobility rights.

Simpson,¹⁴⁶ a reasonably typical fact situation provided the raw material for an important legal innovation. Protesters repeatedly blocked roads to prevent logging trucks from leaving the old growth logging sites of Clayoquot Sound. When the provincial Attorney General refused to enforce the criminal law against environmental protesters the logging company sought a remedy through the civil courts: “it brought an action to restrain the protesters from blocking the roads ... It named as defendants ... [several individuals and] "John Doe, Jane Doe and Persons Unknown", seeking damages for trespass, nuisance, intimidation, interference with contractual relations and conspiracy, as well as injunctive relief.”¹⁴⁷ The next day an interim (ex parte) order was granted, “enjoining `all persons having notice’ of the order from impeding MacMillan Bloedel's logging operations” on a particular site. Through a series of further court applications the order was reshaped to expand its geographical coverage, and adding arrest and detention provisions. It was converted into an interlocutory injunction which in turn was increased in coverage. This was followed by a further interim injunction of one year’s duration (later extended) covering still more territory.¹⁴⁸ The order under consideration on appeal to the Supreme Court of Canada took the form of an interim injunction prohibiting named individuals and “‘John Doe, Jane Doe and Persons Unknown’ and `all persons having notice of th[e] Order’ from engaging in conduct which interfered with MacMillan Bloedel's operations at specified locations”.¹⁴⁹ Protesters were ordered to stay at least fifteen feet back from the roadway and peace officers were “authorized to arrest and remove any person who the peace officer has reasonable and probable grounds to believe is contravening or has contravened the provisions of this order”.¹⁵⁰ Hundreds of people who were not named as defendants on the Statement of Claim were arrested and convicted under these orders with penalties for contempt ranging as high as \$3,000 in fines and jail terms up to 60 days.¹⁵¹ It seems that MacMillan Bloedel had no serious intent of pursuing the main action on which the injunctions were premised.¹⁵²

¹⁴⁶ *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, [1996] S.C.J. No. 83

¹⁴⁷ *MacMillan Bloedel*, per McLachlin J., para. 3

¹⁴⁸ *ibid.*, para. 4

¹⁴⁹ *Ibid.*, para. 5.

¹⁵⁰ *Ibid.*, para. 6.

¹⁵¹ *Ibid.*, para. 7.

¹⁵² *Ibid.*, para. 9.

The appellants alleged that this amounted to “government by injunction’ aimed at suppressing public dissent”.¹⁵³ It was asserted that “private parties cannot use the courts to curtail the activity of members of the public because private litigation is confined to named, identifiable parties”. They asserted that violations of the law should be left to the ordinary law: the Attorney General could “prosecute under the criminal law or seek an injunction in the public interest.”¹⁵⁴ It was argued too that “courts do not have the jurisdiction to make orders binding on non-parties” and, hence, that unnamed members of the public could not be charged with contempt for violating the Court’s orders.¹⁵⁵ The Supreme Court of Canada rejected both arguments. The existence of a possible criminal remedy does not preclude parties from pursuing civil actions and, illogical though it at first appears, injunctions are enforceable against third parties provided only that they have notice of the terms of the court order, that its application is clear, and its terms not unfair or overly broad.¹⁵⁶ A lingering concern (shared by Wood, J.A. in dissent in the B.C. Court of Appeal) that the injunctions were improper because it is wrong “to use private litigation for the sole purpose of obtaining an injunction to constrain public action” did not persuade the Supreme Court of Canada.¹⁵⁷ The equitable remedy of an injunction would fill the “gap” in circumstances in which the Attorney General, for political reasons, refused to act “in such a way as to provide the required protection to citizens injured by the conduct of others”.¹⁵⁸ In lay terms, the case for the necessity of injunctive relief had been made out.¹⁵⁹

As a full Supreme Court of Canada bench unanimously adopted these views, there is no doubt as to their authority in Canadian law. The very peculiar circumstances bear emphasis. First, a civil action had been properly commenced and there was no suggestion that the ordinary requirements relating to the grant of interlocutory injunctions had not been

¹⁵³ *Ibid.*, para. 13.

¹⁵⁴ *Ibid.*, para. 14.

¹⁵⁵ *ibid.*, para. 22.

¹⁵⁶ *ibid.*, para. 36.

¹⁵⁷ *ibid.*, para. 32.

¹⁵⁸ *ibid.*, para. 35.

¹⁵⁹ Williamson J. in *Alliford Bay Logging (Nanaimo) Ltd. v. Mychajlowycz*, [2001] B.C.J. No. 937, 2001 BCSC 636, para. 14, interpreted *MacMillan Bloedel Ltd. v. Simpson* as meaning being restricted to the situation of a “gap”: in the following manner: “if the Attorney General does not ensure that the obligation to uphold the law is fulfilled, assuming other requirements are met the injunction should issue. But I take it as well that the converse would be true. If there were no gap presumably the injunction would be unnecessary and would not issue.”

met.¹⁶⁰ A clear private right was being repeatedly interfered with through mass civil disobedience (road blockades). Most unusually, the Attorney General had refused outright to enforce the law. Moreover, the terms of the injunctions issued were clearly and carefully drafted, drawn up in such a way as to accord wide latitude to the rights of assembly, expression, and movement of protesters. These rights were limited as little as possible while still protecting the logging company's undoubted legal right to conduct its operations.

Public Rights Injunctions

Although the matter of constitutional freedoms arises in many cases where injunctions are sought they come into particularly clear focus in situations where the Attorney General seeks to obtain an injunction in order to assert or protect public rights. In such cases the courts properly seek to ensure that their coercive power is not improperly invoked in violation of either constitutional rights or the spirit of the ordinary law. Hasty resort to injunctive relief should not be permitted to circumvent workable but inconvenient statutory schemes set up to resolve precisely the sorts of issues the injunction seeks to redress. Not surprisingly, courts have proven unenthusiastic to rush through the door opened by British Columbia's "war in the woods".

A.G. Ontario v. Ontario Teacher's Federation

Analogous issues were addressed in *Ontario (Attorney General) v. Ontario Teachers' Federation*.¹⁶¹ In that case, involving a labour dispute, Mr. Justice McPherson emphasized

The courts have consistently held that a public rights injunction, brought by the Attorney General to restrain an alleged statutory breach, will only be granted in exceptional cases, and in particular where:

¹⁶⁰ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17, per Sopinka and Cory, JJ., for the court, para. 43, summarizing the: "three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."

¹⁶¹ *Ontario (Attorney General) v. Ontario Teachers' Federation*, 36 O.R. (3d) 367; [1997] O.J. No. 4361 Ontario Court (General Division) MacPherson J.

- (a) there is repeated flouting of the law following determinations of illegality by the body entrusted with making those findings, or there is a serious and established risk to public health and safety
- (b) the court is satisfied that the alleged breach of law is clear; and
- (c) the enforcement provisions of the statute in question have proven ineffective.

A.G. British Columbia v. Sager

In *British Columbia (Attorney General) v. Sager*,¹⁶² British Columbia's Attorney General sought to prevent protesters from obstructing work to expand a parking lot on public land at Vancouver Island's Cathedral Grove Park. The Attorney General began an "action alleging trespass and seeking damages against 50 Jane Does and 50 John Does" and brought an application for a "restraining order preventing any persons with notice of the order from entering on the Land."¹⁶³ The case squarely raised the question of the need to exhaust other remedies before seeking injunctive relief. The British Columbia *Land Act* provided both enforcement mechanism and penalty:

The Land Act contains a statutory penalty for trespass where notice is given. Under s. 59(1), if a person does anything that is an offence specified in s. 60 the Minister may, on notice to that person, require the person to cease the unauthorized occupation of the Crown land. Notice may be given by posting it on the Crown land if the person is unknown. The maximum penalty for non-compliance with the notice is \$1,000, and may be imposed multiple times. In all cases, a public officer can initiate legal action against a trespasser, and under the Land Act penalties include fines of up to \$20,000 and jail terms of up to six months. The plaintiff has not provided notice in the form set out in the Land Act and has not utilized the enforcement provisions in the Land Act.¹⁶⁴

Quijano J. canvassed authorities dealing with the use of injunctions, pointing to the increasing reluctance of the British Columbia Courts to be drawn into granting injunctive

¹⁶² *A.G.(B.C.) v. Sager*, [2004] B.C.J. No. 1114, 2004 BCSC 720, Quijano J.

¹⁶³ *ibid.*, para 5.

¹⁶⁴ *ibid.*, para 12

relief when other, less draconian, remedies had not been exhausted. In one case, McEwan J. “refused to grant the interlocutory injunction restraining the illegal occupation of a certain residence owned by the regional district. He held that the order sought was not a civil claim at all but a form of ad hoc criminal law which had the effect of relieving the Attorney General and the police of investigative and prosecutorial functions in matters they deem politically, or otherwise, sensitive, and handing them over to the Court, the effect being to translate “what are apparently offences against public order ... into attacks on the court's authority.”¹⁶⁵ The defendants in *Sager* asserted, likewise, that the Attorney General was acting in such a fashion as to circumvent the statute “and subvert the courts processes in order to reach an expedient result.”¹⁶⁶ Madam Justice Quijano considered “a Jane Doe/ John Doe injunction” inappropriate in light of the fact that a full set of remedies and procedures was provided for under the *Lands Act*. Despite the obvious need to ensure compliance with the law, she emphasized the countervailing public interest “in ensuring that individuals are not denied due process under existing legislation solely on the grounds that it would be expedient or convenient to do so.... an injunction is a powerful remedy which may transform a dispute between a citizen and the government into a dispute between the citizen and the court and it is not to be used as a first choice remedy except in extraordinary circumstances.”¹⁶⁷

Aboriginal Claims and “Colour of Right”

A peculiar question arises with respect to criminal offences involving property, trespass and injunctions in the specific context of aboriginal protest. In many cases what would otherwise seem to be merely a matter of political protest takes on a different character because aboriginal peoples are uniquely able to claim interest in or ownership of land which to all external appearances seems to belong to public authorities or (possibly) others. “Colour of Right” works as a defence to certain criminal charges and in analogous situations. Thus, in Part XI of the Criminal Code, dealing with “Wilful And Forbidden Acts In Respect Of Certain Property”, a defence is provided by section 429 (2), which

¹⁶⁵ *A.G.(B.C.) v. Sager* para 24, discussing and citing *Central Kootenay (Regional District) v. Jane Doe* (2003), 228 D.L.R. (4th) 252 (B.C.S.C.). McEwan J.

¹⁶⁶ *ibid.*, para 25

¹⁶⁷ *ibid.*, para 32.

provides that “No person shall be convicted of an offence under [specified sections] ... where he proves that he acted with legal justification or excuse and with colour of right.”

As has been seen, “colour of right” typically also operates as a defence to prosecution under provincial trespass legislation. A person cannot possibly trespass on their own land and, hence, cannot have *intended* to trespass on another’s land if they believe themselves entitled to be there. Ontario’s *Trespass to Property Act*, for example, provides that the defence applies if a person “reasonably” believes “that he or she had title to or an interest in the land that entitled him or her to do the act complained of.”¹⁶⁸ Mr. Justice Josephson observed in *R. v. Penna*:

The colour of right defence involves a lack of mens rea. Generally, colour of right is "an honest belief in a state of facts (or law, as discussed below) which, if it existed, would be a legal justification or excuse": *R. v. Penashue* (1991), 90 Nfld. & P.E.I.R. 207 (Nfld. Prov. Ct.). The criminal activity must be based on an actual mistake, rather than simple ignorance, "advertence rather than not thinking at all": D. Stuart, *Canadian Criminal Law: A Treatise* (Carswell: Scarborough, 1995) at 308.¹⁶⁹

The belief, however implausible, operates as a defence so long as it is honestly held. Thus, in *R. v. Marion* an acquittal was entered on trespass charges on the basis of the accused’s claim of “colour of right” even where “their asserted belief in their colour of right ... might seem to be more hope than belief”.¹⁷⁰ As the criminal law standard (proof beyond reasonable doubt) applies, the defendant’s credible assertion sufficed to tip the scales against conviction. The question concerns the defendant’s honest belief, not actual ownership or entitlement to use property.¹⁷¹

¹⁶⁸ R.S.O. 1990, c. T.21, s. 2 (1).

¹⁶⁹ *R. v. Pena* [1997] B.C.J. No. 1405 (British Columbia Supreme Court, New Westminster, British Columbia) Josephson J., para 5.

¹⁷⁰ *R. v. Marion* [1998] O.J. No. 2317 Ontario Court of Justice (Provincial Division) Merredew Prov. J. June 5, 1998, para. 53.

¹⁷¹ “Colour of Right” normally operates as a variation of a defence based on mistake of fact. Despite the general principle that mistake of law is no defence, it also seems to operate in some circumstances where the mistaken conclusion is based on assumptions as to the state of the law. See *R. v. Pena*, supra.; *R. v. Howson*, [1966] 3 C.C.C. 348 (Ont. C.A.), *Lilly v. The Queen* (1983), 5 C.C.C. (3d) 1 (S.C.C.); *R. v. Drainville* (1991), 5 C.R. (4th) 38 (Ont. Prov. Ct.); *R. v. Potts*, [Q.L. [1990] O.J. No. 2567] (Ont. Prov. Ct.); *R. v. Penashue* (1991), 90 Nfld. & P.E.I.R. 207 (Nfld. Prov.

To similar effect, in *R. v. Potts*¹⁷² “colour of right” operated as a defence when Chief Gary Potts of the Teme-Augama Anishnabai nation was charged with mischief for obstructing construction of a roadway through what were said to be Crown lands. The Teme-Augama Anishnabai nation claimed title to the lands, viewing the road construction as “a symbol of the virtual rape of their lands”.¹⁷³ At the time, however, their claim to title had however been rejected by the Ontario Courts up to the level of the Court of Appeal. Moreover, the Teme-Augama Anishnabai had failed to secure an injunction to prevent construction and, in fact, had been themselves enjoined from interfering. Judge Fournier concluded that, because of the “ample rulings emanating from the Supreme Court of Ontario...” Chief Potts would fail an “objective test”. Nonetheless, following *R. v. Ashini*,¹⁷⁴ the court considered colour of right from an aboriginal viewpoint in assessing the credibility of the Chief’s testimony as to his state of mind:

From a purely objective point of view... and on the basis of ... Canadian law standards and concepts ... Chief Gary Potts could not be said to have any semblance of "colour of right". But from an appropriate "subjective" point of view, having regard to his knowledge and belief which ... were based not only on some layman's appreciation of the legal system ... but also ... founded on his knowledge of ... aboriginal traditions, the answer is not so readily attainable!

.... He testified that it was his "total belief" that in spite of all these previous Court rulings, after the Supreme Court of Canada had granted leave to appeal, they must have done so in recognition that there were flaws in the lower Court decisions and rulings. He noted that it was his firm belief, that it was now the Province of Ontario, which was violating its very own legal system, by insisting that the road go ahead while the Native claim to lands was awaiting disposition at the Supreme Court level.....

Ct.). (In fact, questions about title to property involve a factual conclusion as to a legal set of arrangements.)

¹⁷² *R. v. Potts* [1990] O.J. No. 2567, Fournier, Prov. Div. J.

¹⁷³ *ibid.*

¹⁷⁴ *R. v. Ashini*, (1989) 2 C.N.L.R. 119, Judge Igloliorte.

.... Mr. Potts, Chief of the Teme-Augama Anishnabai People, could perhaps be very much mistaken in his reasoning processes as they involved very sensitive issues, and yet still be honest.¹⁷⁵

Despite what the court said was “a certain degree of unreasonableness in his belief when objectively considered”, Chief Potts was acquitted on the basis of “colour of right”.¹⁷⁶

The defence is subject to severe limitations, however. Chief Potts’ acquittal was based on his belief that the grant of leave to appeal by the Supreme Court of Canada signaled that the *Canadian* legal system would ultimately uphold his peoples’ claim to aboriginal title, and that the Province was violating its own legal system. Of course, it means no such thing as lawyers would understand the matter, but that is not the relevant standard. The standard of honest belief having been met, the outcome had to be acquittal. The case, however, sets the bar high for those who would run the defence, despite the courts willingness to consider an aboriginal point of view in assessing an accused’s subjective state of mind.¹⁷⁷ The standard remains that of colour of right under Canadian and Provincial law.

In *R. v. Pena*¹⁷⁸ Mr. Justice Josephson considered whether the defence should have been left to the jury on charges arising from British Columbia’s 1995 “Gustafsen Lake” standoff. The incident arose from circumstances where First Nations sovereignists overstayed their welcome on privately owned land at the conclusion of a Sundance ceremony. Members of the group made numerous statements explaining their sense of entitlement from a sovereignist point of view and denying the authority of both Canadian

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

¹⁷⁷ *R. v. Billy*, [2004] B.C.J. No. 2355; 2004 BCSC 1474 (B.C.S.C.) Cole J., para 29:

“Chief Potts believed that his Band’s aboriginal title gave them the right to establish a roadblock in spite of a Court of Appeal decision saying that that title did not exist and an injunction prohibiting the roadblock. The result in Potts turned on the critical issue of Potts’ ‘total belief’ that because the Supreme Court of Canada had granted leave to appeal the Court of Appeal decision, the Supreme Court of Canada had acknowledged flaws in the lower court’s decision. In his view, he was not breaking the law; he respected the ‘rule of law’. Under the circumstances, he thought that the law was not settled.”

¹⁷⁸ *R. v. Pena* [1997] B.C.J.

governments and the courts.¹⁷⁹ In assessing the relevance of a “colour of right” defence in these circumstances, Josephson J. derived a three-fold test from previous authorities:

1. The accused must be mistaken about the state of a private law, not a moral right.
2. That law, if it existed, would provide a legal justification or excuse.
3. The mistaken belief must be honestly held.¹⁸⁰

On the particular facts the defence failed by a wide margin. In fact, no serious attempt had been made to demonstrate that the defendant’s believed their actions to be compatible with Canadian law. As a result the evidence introduced in support of the defence did not have sufficient “air of reality” to warrant leaving the question to the jury. Mr. Justice Josephson came to three factual conclusions that were fatal to the defence:

.... All the evidence is to the effect that the accused were well aware that the registered owner of the land was Mr. James or his company. There is no evidence of anyone asserting a belief that anyone else was the owner of that land, as recognized by the laws of this Province.

... There is no evidence that any accused harboured an honest mistake about the laws of this country as they exist, whether public or private, only a belief as to what the law should be if it were to reflect what they believed to be their just cause.

There is no evidence to the effect that during the period in the Indictment any accused held a belief as to a right of occupation of the land for certain purposes, such as spiritual purposes.¹⁸¹

The contrast between these accused and Chief Potts – who credibly affirmed his belief in the rule of law and his confidence in the processes then underway in the Supreme Court of Canada – is palpable.

¹⁷⁹ *R. v. Pena* [1997] B.C.J. para 20:

- a) "Bruce Clark has challenged even the whole colony of B.C., and their presence in native lands."
- b) "Native nations have the right to sovereignty, free of any colonial regimes and restrictions."
- c) "All unceded territory shall be left unmolested and undisturbed."
- d) "B.C. [doesn't] have the right to set up government here in the province."
- e) "Domestic laws don't apply in this situation here...they cannot charge us in any way because we are a sovereign people."

"We are standing on sovereign territory of the Shuswap nation."

¹⁸⁰ *R. v. Pena* [1997] B.C.J. para 22

¹⁸¹ *R. v. Pena* [1997] B.C.J. paras 23-25.

Similarly, in two cases arising from aboriginal protests about developments at British Columbia's "Sun Peaks" ski resort, a "colour of right" defence failed on what are essentially credibility grounds. In both *R. v. Billy*¹⁸² and *R. v. Sauls*,¹⁸³ the accused believed themselves to have been breaking Canadian law at the relevant times. This, by definition, is fatal to a colour of right defence, even where unresolved issues of aboriginal entitlement lurk in the background. Whereas Chief Potts believed the Government of Ontario, its agents, and, thus, the police to have been violating Canadian law, no understanding entered the minds of the accused in *Billy*. They blockaded a road that had been a provincial highway for 20 years, not a road being newly constructed over traditional lands. Moreover, the "colour of right" defence would have failed on credibility grounds even in the absence of an admitted intent to flout the law. In striking contrast to *Potts*, none of the accused had attempted "to prove either aboriginal title to the lands or that the lands are Reserve lands."¹⁸⁴ Although it is important for courts to consider an aboriginal perspective on the question of land rights there was, on the facts before the court in *Billy*, neither legal recognition of the entitlement nor a process under way by which to establish it in the courts: "an aboriginal right does not exist merely because it has been asserted to exist. There must be some basis for a belief in the existence of aboriginal title beyond a bare assertion."¹⁸⁵ In the particular circumstances of the case, the failure of the accused to seek legal redress cast doubt on the reasonableness of their purported belief in the legality of their actions and, hence, on their credibility. It bears emphasis that the test is the honesty of belief, *not* the existence of parallel proceedings to establish title. Aboriginal entitlement to land varies tremendously from place to place. What is reasonably to be inferred where a public highway has existed without legal challenge for two decades might be quite different from inferences reasonably drawn about credibility in other circumstances.

Similar issues were replayed in *R. v. Sauls* where, again, the defence of colour of right failed when each of the accused expressed their disregard for Canadian law: "... the accused did not honestly hold any mistaken belief as to the status of the law. They

¹⁸² *R. v. Billy*, [2004] B.C.J. No. 2355; 2004 BCSC 1474 (B.C.S.C.) Cole J.

¹⁸³ *R. v. Sauls*, [2002] B.C.J. No. 3083, 2002 BCPC 638, Sundhu Prov. Ct. J.

¹⁸⁴ *ibid.*, para 3, citing from the decision of Dohm, P.C.J., under appeal.

¹⁸⁵ *R. v. Billy*, [2004] B.C.J. No. 2355; 2004 BCSC 1474 (B.C.S.C.) Cole J., para. 11.

disagree with the law and do not feel bound by it, they chose not to comply with it.”¹⁸⁶ Again, the defence would have been on insecure ground even without the admissions. Neither title nor constitutional matters were issues in the trial.¹⁸⁷ Moreover, it seemed that the accused acted without the endorsement of either Band Council or traditional elders.¹⁸⁸ Their particular protest choreography employed battle fatigues, disguise, “aggression, intimidation, and inflammatory language”¹⁸⁹, all of which tended to suggest deliberate violation of the law rather than its opposite. From the viewpoint of the Canadian legal system and taken all together, this transformed their behaviour to a form of deliberate civil disobedience, at best.

In the context of aboriginal rights, then, the “colour of right” defence exists on a narrow ledge between mere assertion of entitlement at one extreme and full judicial or state recognition on the other. However deeply held, a belief that sounds in a moral position or political viewpoint outside of Canadian law will not anchor “colour of right”. At the other end of the spectrum, the defence, simply, is not needed. The terrain between these two poles is vast in areal extent but legally limited and somewhat unpredictable. Because both the history of colonial encounters and the particularities of aboriginal entitlement in particular places is varied, generalization is dangerous.¹⁹⁰ So too, changing judicial recognition of aboriginal entitlement and kindred obligations on the part of the state, such as the duty to consult, may move the baseline of rights on which “colour of right” defences can plausibly be founded.

Summary & Conclusion: Regulating Activities on Public Land

The power of authorities to regulate protest, expression, assembly, and freedom of movement on public land, thus, raises a number of thorny issues. Public authorities and public land are bound to comply with the Canadian Constitution, including the *Charter of Rights and Freedoms* and other forms of rights protection. Thus, ordinary management

¹⁸⁶ *R. v. Sauls*, [2002] B.C.J. No. 3083, 2002 BCPC 638, Sundhu Prov. Ct. J., para. 61.

¹⁸⁷ *Sauls*, para. 61.

¹⁸⁸ *Sauls*, para. 38.

¹⁸⁹ *Sauls*, para. 62.

¹⁹⁰ In *Relentless Energy Corp. v. Davis*, [2004] B.C.J., No. 2359, 2004 BCSC 1492, Satanove J., denied an interim injunction to restrain interference with an access road: “The defendants are not mere protesters who have no colour of right to set up their camp. They are not First Nations alleging aboriginal rights of a general and unspecific nature. These defendants are beneficiaries under Treaty #8 and holders of pre-existing validly issued traplines.” (para 22)

prerogatives are constrained to the extent that significant issues of constitutional entitlement arise. These most ordinarily lie in the field of expressive rights but might, conceivably, be relevant in to other sorts of protected rights including those relating to aboriginal entitlement.¹⁹¹

Thus, whereas it may be quite appropriate to regulate the period of time for which individuals can camp on public property or to set rules about noise levels, sanitation, and so on at public campsites, all such regulation must be sensitive to the countervailing public policy which seeks to protect core freedoms. Though few complications arise with respect to ordinary users of public property, constitutional considerations come into play as the use at issue moves from “ordinary” to expressive or from the realm of individual rights to aboriginal entitlement. Though each is relevant to the important balancing tasks that arise, none of ancillary police powers, the law of trespass, or the law of injunctions provides an easy “end-run” around the need for state authorities to respect both common law liberties and constitutionally protected rights.

¹⁹¹ Egs., sections 25 and 33 of the Constitution Act, 1982:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Appendix

English Translation of

Tremblay c. Québec*

*Translator: Diane G. Cameron, Attorney 4700 Bonavista Ave., Suite 206
Montreal, Quebec H3W 2C5

Indexed as:

Tremblay vs. Quebec (Attorney General)

Between

Marc F. Tremblay, Plaintiff-Applicant, and
the Attorney General of Quebec, as representative of
the Quebec Police, the Department
of Public Security and the Government of
Quebec, the Attorney General of Canada, as representative
of the Royal Canadian Mounted Police, the
Solicitor General of Canada and the federal Department of Foreign
Affaires and International Trade (Hemisphere Summit
Office and Summit Office) and the Government of Canada,
Quebec City and the Quebec City Police Department,
Defendants-Respondents, and Constance Clara Fogal and
The Defence of Canadian Liberty Committee/
Le Comité de la liberté canadienne (*sic*), c/o Rocco
Galati, Galati, Rodrigues, Axevedo & Ass., Attorneys,
Intervenants

[2001] J.Q. No. 1504
No. 200-05-014848-019

**Superior Court of Quebec
District of Quebec City
Gilles Blanchet J.**

Heard: April 9 and 10, 2001.
Rendered: April 18, 2001.
(104 paras.)

Area of law:

Interlocutory injunction – rights and freedoms.

Attorneys:

Marc F. Tremblay, personally
Claude Gagnon (St-Laurent, Gagnon), for the Attorney General of Quebec
René Leblanc and Claude Joyal, for the Attorney General of Canada
Michel Vézina (Boutin, Roy), for Quebec City
Rocco Galati (Galati, Rodrigues, Azevedo & Associates), for the

Intervenants

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SUMMARY AND CONCLUSIONS

REASONS FOR THE JUDGEMENT ON THE MOTION FOR AN INTERLOCUTORY INJUNCTION

¶ 1 **GILLES BLANCHET J.**— 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 20th, to protect the 34 participating heads of state, their delegates and the general public. Among other measures, in the 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.

¶ 2 The applicant, a lawyer domiciled in Montreal, is claiming on his own behalf the right to enter the security zone and move about freely therein, throughout the term of the Summit to [Translation] “conduct an individual and peaceful demonstration in front of the Quebec City Convention Centre” [See Note 1 below]. As his request for a pass was denied, he took an action for a permanent injunction in which he alleged that the security perimeter for the Summit will interfere with his rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms [See Note 2 below]. Through a motion for an interlocutory injunction, he asked, firstly, that the security barrier be removed or, subsidiarily, that a pass be issued giving him access to the site throughout the event.

Note 1: Applicant’s Motion for an Interlocutory Injunction, para. 2.

Note 2: Part 1 of the Constitution Act, 1982 (Schedule B of the Canada Act 1982 (1992) U.K., c. 11).

¶ 3 Intervenant Constance Clara Fogal, a lawyer practicing law in British Columbia, is the director of a non-profit organization called "The Defence of Canadian Liberty Committee/Le Comité de défense de la liberté canadienne", whose main purpose is to promote the goals, objectives and well-being of Canadian citizens and their constitutional rights. In particular, the organization’s mission is to ensure, through legal action if necessary, that the rule of law and the supremacy of Parliament and the Constitution are maintained, and more particularly with respect to the civil liberties of all Canadians.

¶ 4 At the beginning of the hearing, in a separate preliminary decision, the Court allowed as a conservatory measure the intervention of Ms. Fogal and the organization she represents, authorizing both of them to join with the Applicant to assist him, aid his motion and support his allegations. (Art. 209 C.C.P.)

FACTS

The Summit of the Americas [See Note 3 below]

Note 3: Most of the information in the “Facts” section respecting the Summit of the Americas and the Hemisphere Summit Office come from the Summit web site: "ameriquescanada.org", various extracts of which the Applicant cites and produces as Exhibits R-1, R-2, R-3, R-4 and R-6.

¶ 5 Over the last decade, Canada has participated in two major events bringing together the democratically elected heads of state from 34 countries in North America, Central and South America and the Caribbean. The first Summit of the Americas was held in Miami (U.S.A.) in 1994. At the second Summit, held in Santiago, Chile in 1998, the adoption of an action plan based on four themes: (1) economic integration, (2) democracy and human rights, (3) education, (4) poverty and discrimination, was announced. On April 19, 1998, at the closing of the event, it was announced that the representatives of the western hemisphere had chosen Canada to host the third Summit of the Americas.

¶ 6 On December 4, 1999, Prime Minister Chrétien announced that the third Summit would be held in Quebec City from April 20 to April 22, 2001.

The Hemisphere Summit Office

¶ 7 Canada's Department of Foreign Affairs and International Trade, in charge of the matter, set up the Hemisphere Summit Office (HSO), the task of which was to coordinate various events to be held in the country over a two-year period. From 1999 to 2001, Canada would be the host of six large hemisphere activities, the culmination of which would be the Quebec City Summit in the spring of 2001. These activities are:

- The XIIIth Pan American Games (Winnipeg, July 23 to August 8, 1999);
- Conference of Spouses of Heads of State of the Americas (Ottawa, September 29 to October 1, 1999);
- Americas Business Forum (Toronto, November 1 to 3, 1999);
- Meeting of trade ministers of the Free Trade Area of the Americas (FTAA) (Toronto, November 3 and 4, 1999);
- Organization of American States (OAS) General Assembly (Windsor, June 4 to 6, 2000)
- The third Summit of the Americas (Quebec City, spring 2001).

¶ 8 For each of these events, the role of the Summit of the Americas Office, answering to the HSO, was to plan, organize and supervise. More specifically, it was responsible for coordinating consultations between non-profit groups, the private sector, the provinces and the principal municipalities to set up a schedule of activities, participation and the collection of money. It was also responsible for coordinating inter-departmental and inter-governmental policies during the preliminary stages and throughout the activities.

The 2001 Quebec City Summit

¶ 9 At the 2001 Quebec City Summit, three priorities were to guide discussions between the heads of state: (1) strengthening democracy, (2) creating prosperity and (3) realizing human potential. Under the second of these priorities, creating prosperity, the Summit organizers included on the agenda the negotiation of a “Free-Trade Area of the Americas” (FTAA). According to Marcel Belleau, UQAM researcher associated with the Raoul-Dandurand Chair of Strategic and Diplomatic Studies, such negotiation was one of the main goals of the upcoming Summit [See Note 4 below], which placed the highly controversial issue of globalization at the centre of the event.

Note 4: Affidavit of Marcel Belleau, par. 15.

¶ 10 In the most recent issue of the magazine *L'Actualité* [See Note 5 below], journalist Pierre Cayouette summarizes as follows the main issues surrounding globalization:

Note 5: April 15, 2001 edition, "One Step, One Continent", part of a report entitled "Should We Be Afraid of the FTAA?", on page 23.

[Translation]"The democratically elected heads of state in North America, South America, Central America and the Caribbean, with the exception of Cuba, represent a market of 800 million consumers and a combined gross domestic product (GDP) of \$11 trillion. These countries have agreed to progressively eliminate tariff and non-tariff barriers and all measures which limit trade of goods, services and capital between them. No later than 2005, according to the schedule they have set up, the leaders will have created a free-trade zone from Anchorage, Alaska to Tierra del Fuego."

¶ 11 Then the commentator describes the controversy in the following terms:

[Translation]"The FTAA will guarantee prosperity for all signatories, from Haiti to the United States, according to its proponents. Its critics are worried, however. (...) They fear that the new free-trade agreement will eventually allow the private sector to intervene in activities historically reserved for governments. Their greatest concern involves the “services” area, such as education and health, which would become “markets” open to competition by local or foreign private companies. They predict that, within the next few years, American healthcare companies will be doing business in Quebec or elsewhere in America, without being restricted by laws or regulations."

¶ 12 Since the announcement that the Summit would be held in Quebec City, several international economic meetings have been the stage for at times violent confrontations between the police and factions or groups opposed to increased globalization.

¶ 13 In only two years, the economic summits held in Seattle, Cologne, Washington, Windsor, Calgary, Prague, Montreal, Nice and Davos were the setting for confrontations which derailed them to varying degrees. For example, the ministerial conference of the World Trade Organization (WTO), held in Seattle in November 1999, and the meeting of the International Monetary Fund (IMF) and the World Bank, held in Prague in September 2000, were the target of massive demonstrations ranging from peaceful to more violent by organized groups of demonstrators.

¶ 14 All these economic meetings, most of which brought together ministerial and administrative delegations, have never united in one place as many heads of state as the Quebec Summit will: over one hundred political figures having international protection under Canadian law, including 34 heads of state, several accompanied by their families and dignitaries from their respective countries. In all, 9,000 participants, including ambassadors, representatives of hemispheric organizations and delegates from various sectors of society from invited countries, will attend.

Security

¶ 15 The section respecting security measures on the Summit Office web site, under the heading “Information for citizens”, begins as follows:

[Translation] "For the Summit of the Americas, the choice of security measures takes into account the sometimes violent events experienced during recent similar international summits."

¶ 16 And continues as follows:

[Translation]"The police base their work on two goals:

- to provide complete security for everyone—delegates, visitors and residents;
- to minimize as much as possible the adverse effects on people's lives, their movement and the democratic expression of individuals and groups.

¶ 17 Of all the protection measures adopted for the Summit, the setting up of a security perimeter is without a doubt the most spectacular and the most controversial. The Summit web site discusses it as follows:

[Translation] "For the duration of the Summit, a fenced-in security area, with controlled access points, will surround Old Quebec City and an adjacent area. It is normal procedure when planning security measures of this scope. The main purpose of the security zone is:

- to control the movement of crowds to official sites;
- to protect people and property in the area in question."

¶ 18 For access inside the barrier and to official sites throughout the Summit, two separate procedures have been set up: a "pass" for residents, workers, merchants and civil servants, and "accreditation" reserved for delegates, journalists, employees and police officers.

¶ 19 The RCMP, the Quebec Police, the Quebec City Police Department and the City of St. Foy Department of Public Security, combined under an operations committee for the maintenance of order, will oversee together the safety of participants and others during the Summit. This represents over 6,000 police officers, 3,200 of whom are RCMP. These police organizations work together but each one is given a specific role relating to its usual responsibilities. Accordingly, the RCMP is responsible for security for heads of state and official delegations during their stay in Canada. The RCMP also looks after accreditation of Summit participants.

Steps by the Applicant

¶ 20 Although he does not belong to any of the categories of persons eligible to enter the site during the Summit, the Applicant wishes to be authorized to do so to demonstrate "individually and peacefully". On January 29, 2001, when he telephoned the Quebec City Police Department to obtain a permit, an officer, Lieutenant André Tanguay, told him that no demonstration would be authorized within the security perimeter. The same day, the Applicant nevertheless filled in a demonstration permit application which he sent by fax with a letter addressed to Lieutenant Tanguay (R-8) in which he wrote, among other things:

[Translation] "The demonstration I would like to carry out is individual and peaceful. The purpose of my demonstration is not to prevent in any manner whatsoever the holding of the Summit, to prevent anyone from entering the Convention Centre or any other place or to disturb the peace or interfere with the movement of the various dignitaries or other people attending the Summit of the Americas."

¶ 21 On January 31st, two days after his fax was sent, the applicant received a letter from Lieutenant Tanguay (R-9) by return fax informing him that his request had been sent to the operations committee for the maintenance of order (RCMP, QMP, QP and QCPD), which would analyze it and which should be able to answer it by February 28th. The day before this deadline, February 27th, Lieutenant Tanguay sent the Applicant by mail a letter (R-10) which reads as follows:

[Translation] "Dear Mr. Tremblay,

We are writing further to our letter dated January 31, 2001.

Your application does not fall within municipal by-laws. As a result, we are unable to allow it.

Yours very truly,

¶ 22 Before receiving this correspondence, which was delayed due to a postal code error, the Applicant spoke by telephone to Lieutenant Tanguay, who suggested he contact the RCMP to obtain a pass.

¶ 23 The same day, February 28th, the Applicant telephoned the RCMP, where a Ms. Brongel, in charge of communications, told him that passes for the Summit are reserved for residents, merchants and workers who carry out their activities or live within the perimeter. When he asked to whom he could write at the RCMP to make his request official, Ms. Brongel referred him to Sergeant Jean Lemieux, to whom he sent a letter the same day in which he essentially repeated his letter dated January 29th to the Quebec City Police Department. When he filed his injunction proceedings on March 20, 2001, he had still not received an answer to his letter to Sergeant Lemieux, whom he had unsuccessfully attempted to reach by telephone on March 5th.

ALLEGATIONS OF THE PARTIES

The Applicant

¶ 24 In his action, the Applicant attacks the constitutional validity of the unusual security measures set up for the Quebec City Summit. The security perimeter and prohibited access for persons not residing or working on the site infringes certain rights and freedoms guaranteed by the Canadian Charter, namely "the right to free movement, freedom of expression and of peaceful assembly" and "the right to be presumed innocent" [See Note 6 below]. In the motion for an interlocutory injunction filed with his request for a permanent injunction, he is asking the Court to order the Respondents:

Note 6: Supra, note 1. The Applicant cites in particular sections 2 b), 2 c), 6 (2) a), 7 and 11 d) of the Canadian Charter of Rights and Freedoms.

[Translation]- "not to build and/or install the Perimeter;
- to immediately cease installation of the Perimeter;
- not to prevent demonstrations, including that of the Plaintiff-Applicant near places where the Summit of the Americas will take place, and in particular in front of the Quebec City Convention Centre;"

¶ 25 Subsidiarily, if his main conclusions are not allowed, the Applicant is asking that an interlocutory injunction be issued ordering the Respondents, and in particular the RCMP, to issue [Translation] "a pass in the name of the Plaintiff-Appellant for the duration of the Summit of the Americas, allowing him to enter inside the Perimeter and thus demonstrate". The injunction sought would also order the Respondents, the Quebec Police and the Quebec City Police Department in particular, [Translation] "to allow the Plaintiff-Appellant free and unrestricted movement in public places located within the Perimeter".

The Intervenants

¶ 26 In their formal intervention proceedings, the Defence of Canadian Liberty Committee and its director, Constance Clara Fogal, limited themselves to supporting the principal and subsidiary demands of the Applicant. In the notes and authorities of their lawyers, however, it was suggested that the Court provide for a certain number of middle ground measures intended to provide more guidance for police control on the Summit site, including:

- (c) any such other acceptable proposal, coming from the Respondents, subject to the approval of the Court on the submissions and response of the parties, keeping the following rights and interests of the Applicants intact:
 - (i) entry into the zone not be restricted by accreditation and passes;
 - (ii) that a substantial minimum number of citizens be allowed entry per day in proportion to the Summit attendees;
 - (iii) that once entered, movement is not restricted save for security corridors on roads used to transport to Summit sites and security corridors to the access points; provided that,

the security corridors in (iii) above, not be so designed as to remove the visual and audio range between the dissenters and the Summit attendees.

¶ 27 Although they did not form part of a formal contestation, the suggestions contained in the notes and authorities of the Intervenants might nonetheless have to be taken into account, as they propose a middle ground between the extreme options open to the Court, namely fully granting the motion in its main conclusion or dismissing it outright.

The Respondents

¶ 28 As the motion was contested verbally, the position of the Respondents is found in their affidavits and the notes and authorities of their attorneys. Essentially, their position is that, in view of the principles governing a motion for an interlocutory injunction in constitutional matters, the Applicant and the Intervenants are not entitled to the remedy sought.

¶ 29 On the one hand, the evidence offered at this stage is not sufficient to establish the necessary appearance of right or the existence of a material issue to be decided. The contested security measures do not constitute an infringement of the rights and freedoms guaranteed by the Charter, which are not absolute, and they can at any rate *a priori* be justified in a free and democratic society, given the security requirements dictated by the importance and size of the event. Also, if there is in fact a material issue to be decided, the balance of convenience, considered with a view to the public interest, requires that the entire motion be dismissed.

DISCUSSION AND DECISION

¶ 30 In its main motion for a permanent injunction, the applicant specifically seeks the continuance of the orders in the conclusions of his motion for an interlocutory injunction, namely the elimination of any security barrier around the Summit site, with the right for anyone to freely move about therein in order to demonstrate or, subsidiarily, the issuing to him of a pass giving him access to the site for the same purposes. In fact, under both the principal heading and the subsidiary heading, the only substantive conclusion of the motion reads as follows:

[Translation] "Issue a permanent injunction to the same effect as the interlocutory injunction;"

¶ 31 It should be recalled that the Quebec City Summit is only held over a three-day period, from April 20 to 22, 2001, after which the request for a permanent injunction will have no practical effect and its only goal would be to obtain, after the fact, a declaration that a security fence set up by the police was unlawful.

¶ 32 In theory, no rule of law opposes the issue of an interlocutory injunction order, the final and irrevocable effect of which would deprive of any practical effect the request for a permanent injunction, as is the case each time the remedy sought relates to a specific event which is imminent and defined in time. To reach this result, however, the Applicant must successfully pass the three-stage test established by the case law in this matter.

Interlocutory Injunction and the Charter of Rights

¶ 33 In *RJR-MacDonald inc. v. Canada (Attorney General et al)* [See Note 7 below], the Supreme Court of Canada recalled in the following terms the general rules applying to an interlocutory injunction:

Note 7: [1994] 1 S.C.R. 311, p. 335.

"Metropolitan Stores [See Note 8 below] adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."

Note 8: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110.

¶ 34 A more in-depth study of the *Metropolitan Stores* decision (cited above), rendered in 1987, shows that the first stage must take the form of a preliminary and provisional evaluation of the merits of the dispute. This exercise consists in asking whether the party asking for the injunction is able to establish a sufficient appearance of right or, according to a more recent formulation, to convince the Court of the existence of a serious issue to be decided, as opposed to a request which is purely frivolous or vexatious.

¶ 35 The leading cases of *RJR-MacDonald* and *Metropolitan Stores*, moreover, introduce two additional elements which the Court must take into account in its analysis of a motion for an interlocutory injunction based on the alleged infringement of rights guaranteed by the Charter.

¶ 36 It follows from these decisions that, on the one hand, in constitutional matters, an interlocutory injunction and stay of proceedings should not be granted unless the public interest is taken into consideration in deciding on the balance of convenience, at the same time as the interest of the private litigants.

¶ 37 On this issue, in *RJR-MacDonald* (cited above), the Court held on page 344:

"It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups."
(Emphasis added)

¶ 38 The second aspect specific to interlocutory motions based on the Charter involves the first stage of the analysis, namely the search for an appearance of right or a material issue to be decided. This aspect of the issue warrants a word of explanation.

¶ 39 Basing himself on *RJR-MacDonald* (cited above), at pages 335 to 338, the Attorney General of Canada insists on the rule that the Court, whether or not a matter involves the Charter, should avoid entering into an in-depth analysis of the merits of the request at the preliminary stage of a motion for an interlocutory injunction. In this part of the *MacDonald* decision, Sopinka and Cory JJ., speaking for the Court, observe that:

"Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted."

¶ 40 This comment of the Court seems to be in keeping with the specific perspective of validating the lessening of the burden of proof of the Applicant for an interlocutory injunction in a Charter case already proposed by the *American Cyanamide* [See Note 9 below] and *Metropolitan Stores* [See Note 10 below] cases. Sopinka and Cory JJ. also add, on page 338:

Note 9: (1975) 1 All E.R. 504.

Note 10: (1987) 1 S.C.R. 110.

"Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable."
(Emphasis added)

¶ 41 However, under the principle requiring a brief analysis of the right alleged at the interlocutory stage, Sopinka and Cory JJ. make an important distinction, which is clearly relevant to this case. On page 338, they state:

" Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial."
(Emphasis added)

¶ 42 Circumstances justifying the application of the exception are rare, but when they occur, as in the case before us, a court must conduct a more in-depth examination of the merits of the case. It is not a question, however, of subjecting the arguments of the parties to the exhaustive analysis required at the stage of the hearing on the merits, as only a full trial will allow this to be done with a reasonable degree of certainty. Moreover, if the analysis by a judge allows him to identify at least one material issue to be decided, he must, at the second and third stage of the analysis, "take into account the expected results on the merits" [See Note 11 below].

Note 11: RJR-MacDonald, supra note 7, at page 339.

1) Appearance of Right (or material issue to be decided)

¶ 43 The Court will now deal with the request of the Applicant in view of the specific rules set out above. Thus, at the first stage of the analysis, the search for an appearance of right or a material issue to be decided, we must first question the very existence of an infringement of or limit on any of the fundamental rights alleged and then, where applicable, ask in what way the Respondents may, at the hearing on the merits, show that the restrictions or infringements identified are reasonable or justified "in a free and democratic society".

(a) Existence of an infringement of the Charter

¶ 44 As we have seen, the motion argues that the security arrangements for the Summit infringe three fundamental rights guaranteed by the Charter: (1) the right to free movement, (2) the right to be presumed innocent and (3) the right to freedom of expression and peaceful association.

(i) Right to free movement

¶ 45 Section 6 of the Charter is under a specific heading, “Mobility Rights”. Sub-section (2) states that:

" Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- a) to move to and take up residence in any province; and
- b) to pursue the gaining of livelihood in any province.

¶ 46 This provision is not relevant to this case. Its purpose is to grant all Canadians and residents rights resulting from the fact that they belong to a single country [See Note 12 below] and it only contemplates discrimination based on the province of origin [See Note 13 below].

Note 12: *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591.

Note 13: *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.

¶ 47 Strictly speaking, in the particular circumstances of this case, the right to freedom of movement claimed by the Applicant could be based on section 7 of the Charter, the first sub-section of which guarantees everyone “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. It has been held that the guarantee of freedom found in this provision could be infringed when persons wishing to attend a sports event were prevented by strikers who had blocked entrances to the facility where the event was being held [See Note 14 below]. Note that, in that case, the Charter could be invoked because the local police had approved the picket line protocol.

Note 14: *Ogden Entertainment Services v. U.S.W.A., Local 450*, (1998), 159 D.L.R. (4th) 340 (Ontario), (1998) 52 C.R.R. (dd) 347 (Appeal dismissed at C29462 June 1, 1998, 38 O.R. (3d) 448).

¶ 48 Beyond the apparent analogy one could make between that case and the one before us, there are fundamental distinctions between them on the facts, and in particular those affecting justification of the limit imposed on freedom of movement. We will return later to this concept which calls for the justification test set out in section 1 of the Charter.

(ii) Right to be presumed innocent (s. 11 d) and 7)

¶ 49 As indicated by the very wording of section 11 d), and as confirmed by the extracts of the Oakes case [See Note 15 below] on which the Applicant relies (pages 119 and 120), the presumption of innocence guaranteed by the Charter is intended for persons charged with or accused of an offence, which is not the case here. Moreover, nothing in the motion or in the evidence suggests that the pass requested by the Applicant was denied because it was assumed that he would participate in an offence which had been or would be committed in connection with the Summit of the Americas.

Note 15: [1986] 1 S.C.R. 103.

¶ 50 In short, if the security fence set up by the Summit authorities infringes the rights and freedoms of the Applicant himself or any other Canadian citizen, it does not infringe the right to be presumed innocent guaranteed by section 11 d) of the Charter.

(iii) Freedom of expression

¶ 51 Section 2 of the Canadian Charter of Rights and Freedoms gives special status to the four so-called “fundamental” freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly;
- d) freedom of association.

¶ 52 With rare unanimity, since the adoption of the Charter as an integral part of our Constitution, the Supreme Court has continually insisted on the importance of the courts jealously protecting freedom of expression, on which the foundations of a truly democratic society are based.

¶ 53 On page 172 of *Committee for the Commonwealth of Canada v. Canada* [See Note 16 below] L'Heureux-Dubé J. writes:

Note 16: [1991] 1 S.C.R. 139.

"The liberty to comment on and criticize existing institutions and structures is an indispensable component of a "free and democratic society". It is imperative for such societies to benefit from a multiplicity of viewpoints which can find fertile sustenance through various media of communication."

¶ 54 She adds:

“The alternatives are particularly frightening. History is replete with examples of entrenched groups which have sought to maintain their elevated station by suppressing emerging and challenging new thoughts and ideas. Stifling opponents by revoking their right to express dissent and disenchantment may have produced desired results in the short run, but ultimately all such attempts led to insurrection and rebellion.”

¶ 55 On page 182, she cites with approval the following comment of Cory J., then with the Ontario Court of Appeal, in *R. v. Kopyto* [See Note 17 below]:

Note 17: (1987) 24 O.A.C. 81, at pages 90-91.

“... it is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint.”
(Emphasis added)

¶ 56 Referring to the caustic tone of the words attributed to Respondent Kopyto, declared guilty of contempt of Court for suggesting that the police and the courts were not independent of each other, Cory J. added:

Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public, to the need for reform, and to suggest the manner in which that reform may be achieved.”
(Emphasis added)

¶ 57 In *Irwin Toy Ltd. v. Quebec (Attorney General)* [See Note 18 below], Dickson C.J. observed that:

Note 18: [1989] 1 S.C.R. 927.

“Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such

protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual."
(Emphasis added)

¶ 58 In this case, none of the Respondents question the fundamental, although not absolute, nature of the freedoms guaranteed by section 2 of the Charter, so it seems pointless to discuss this principle further.

¶ 59 The Attorneys General of Canada and Quebec suggest, however, that, due to the particular function given during the Summit to a specific area of Quebec City, the freedom of expression which would normally be allowed would not apply during the event, given the security requirements dictated by the situation. In the opinion of the Court, this consideration related to the function of the premises involves another aspect of the debate. It does not seem relevant at this preliminary stage of the analysis, which consists of determining whether we are faced with any restriction of a fundamental right, the justification of which restriction in view of section 1 must be appreciated at a later stage of the proceeding.

¶ 60 The streets, sidewalks and areas in the Upper Town of Quebec City have always been public places, where any citizen should be able to express himself by any means available to him, unless doing so infringes a valid legislative or regulatory provision. For three days, beginning on Friday, April 20th, the politicians have decided to hold on this public territory, rather than on government property, a huge economic international relations operation, bringing together in the downtown core the heads of state of 34 countries in the three Americas, an unprecedented event in Canada.

¶ 61 Well before similar summits held in Seattle and Prague, in particular, the very scope of the proposed event suggested the need for tight security measures which, for a few days, would significantly disrupt the daily life of citizens.

¶ 62 We should note that it is not up to the Court to make a value judgement on the advisability of the site chosen for the third Summit of the Americas, nor on the economic, social or political stakes inherent in the negotiation of a Free Trade Area of the Americas (FTAA), chosen as the main theme of the upcoming Quebec City Summit. At this stage, the issue is only whether, by setting up a tight security perimeter around a large area of Quebec City, the authorities could rightly or wrongly infringe in any manner the exercise of a fundamental freedom guaranteed by the Charter.

¶ 63 The Court categorically answers this question in the affirmative with respect to freedom of expression and peaceful assembly, hence the need to now conduct a serious, although not exhaustive, analysis of the factors which could justify the limit in question based on section 1 of the Charter.

(b) Justification based on section 1 of the Charter

¶ 64 In *R. v. Oakes* [See Note 19 below], the Supreme Court set out the principle that any restriction on the exercise of a freedom guaranteed by the Charter must meet two criteria to remain within "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" [See Note 20 below].

Note 19: (1986) 1 S.C.R. 103, 50 C.R. (3d) 1.

Note 20: Section 1 of the Charter.

¶ 65 Firstly, the intended goal of the limit must be "important enough" to contravene a constitutional guarantee. Also, the means chosen to reach such goal must be reasonable and their justification shown according to the so-called "proportionality" test, which has three components: (1) the presence of a rational connection between the proposed measure and the goal to be reached, (2) the search for a limit which, despite its necessity, limits freedom of expression "as little as possible" and (3) proportionality between the effects of the proposed measure and the goal identified as "important enough" to limit freedom of expression [See Note 21 below].

Note 21: *Op. cit.*; see to the same effect *R. v. Edwards Brooks & Art Ltd.*, [1986] 2 S.C.R. 713, 30 C.C.C. (3d) 385, 55 C.R. (3d) 193 and *Irwin Toys Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

¶ 66 In a case brought only a few months after *Oakes* (cited above), the Supreme Court reformulated the rule for the sole purpose of specifying that, at the last stage of the test, a court asked to decide on the request must assess the proportionality not only between the harmful effects of the measure taken and the goal pursued, but also between the harmful effects and the beneficial effects of that same measure. [See Note 22 below] This nuance, as we can see, introduces into the proportionality test of section 1 the notion of "balance of convenience", until then reserved for the third stage of the required analysis for interlocutory injunctions.

Note 22: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

¶ 67 Thus, as section 1 of the Charter gives the authority the burden of proving that its infringement of a guaranteed right is justified in a free and democratic society, it is useless to repeat the examination of the balance of convenience at the third stage of the examination of the motion for an injunction if the authority could meet this test at the first stage, which consists of determining whether the Applicant could show an appearance of right or the existence of a material issue.

¶ 68 In the case at bar, one of the arguments of the Intervenants suggests that, to meet their burden of proof under section 1, the Respondents should not only show that the disputed security measures are reasonable limits which can be demonstrably justified in a free and democratic society, but also that such measures are expressly prescribed or authorized in a law or regulation. This reasoning is based on the expression "rule of law" used in the wording of section 1, and on certain extracts from the notes of Wilson J. in *McKinney v. University of Guelph* (1990) 3 S.C.R. 229, on page 386 [See Note 23 below].

Note 23: See the notes and authorities of the Intervenants, page 21.

¶ 69 As a general rule in such matters, Canadian case law is to the effect that a limit on the rights and freedoms may be authorized by a "rule of law", within the meaning of section 1, not only in the case where it is expressly provided for by statute or regulation, but also when it results by necessary implication from the terms of a statute or regulation or from its operating requirements or results from the application of a common law rule [See Note 24 below]. In the case of both a police initiative and a specific statute or regulation, the legitimacy of the infringement of a fundamental right is related to the goal sought:

Note 24: *R. v. Twain (sic)*, [1991] 1 S.C.R. 933; *R. v. Thompsen (sic)*, [1988] 1 S.C.R. 640; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158.

"The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference." [See Note 25 below].

Note 25: *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 181.

¶ 70 In this case, the Court cannot disregard the duties imposed on the RCMP under section 18 of the Act establishing it [See Note 26 below], read in conjunction with sections 2 b) and 6 of the Security Offences Act [See Note 27 below] and with section 2 of the

Criminal Code [See Note 28 below], which defines which persons enjoy international protection.

Note 26: Royal Canadian Mounted Police Act, R.S. chap. R-9 (R-10).

Note 27: R.S., chap. S-7 (1984, ch. 21, s. 56).

Note 28: R.S. chap. 34.

¶ 71 Moreover, from a practical point of view, the approach suggested by the Interveners would amount to systematically prohibiting the application of the justification test in section 1 of the Charter to any police initiative of a preventive nature. This would be tantamount to admitting that, even in circumstances justifying it in the opinion of everyone, no emergency protection measure taken by the police would be constitutionally acceptable if it included an even minor limit on the fundamental freedoms of a single person.

¶ 72 That said, we will see here to what extent section 1 might justify an infringement of the freedom of expression and peaceful assembly by the building of a security fence in the Upper Town of Quebec City.

(i) The "important enough" goal

¶ 73 The Quebec City Summit of the Americas is the biggest international political event ever organized by the government of Canada. It is part of the discussions and multilateral reports which form an essential aspect of this country's foreign policy and a crucial tool for promoting its values and interests. The 9,000 Summit participants include not only heads of state, diplomats and other dignitaries, but also over 2,500 Canadian and foreign journalists and support staff from all types of media around the world: the written press, official news agencies, radio and television.

¶ 74 Although it is unnecessary for the moment to take into account the concerns of the police in view of the worldwide controversy surrounding the principle of free trade, to which we will return, we must make the following observation: the scope of the event alone requires the Canadian authorities to set up, jointly with the province and Quebec City, measures to ensure not only the physical and material safety of participants and the population, but also the proper conduct of Summit activities, for three days only.

¶ 75 At this stage, the unusual size of the Quebec City Summit of the Americas leads us to conclude in the existence of an "important enough" goal to justify the authorities infringing certain fundamental freedoms, although we must now examine the relative proportionality of such infringements according to the test suggested by the Supreme Court in the Oakes case (cited above).

(ii) The choice of reasonable and justifiable means

¶ 76 As we saw above, the Court must assess the authority's decisions from three points of view: (1) the presence of a rational connection between the proposed measure and the goal to be reached, (2) the search for a limitation which, despite its necessity, is the "least possible" and (3) the proportionality between the positive effects of the proposed measure, the goal to be reached and the negative effects of that same measure.

Rational connection between the measure and the goal

¶ 77 The recent experiences in Prague and Seattle, among others, have clearly shown that in the current context of the opposition to globalization, the holding of a large-scale economic summit unfortunately requires that the area in which the invited delegates will have to move be closed in by a tight security perimeter. The principle is to avoid as much possible a potentially explosive confrontation between the police and a group of demonstrators among which there are some bad apples who cannot be unmasked and controlled.

¶ 78 We will see below, when we analyse the proportionality of the security measures, the contemporary particularities of maintaining order at international meetings involving economic issues.

¶ 79 In Quebec City, because of the particular topography of the area, the number of participants and the fact that the meeting sites and lodging areas are spread out, a significant area of the Upper Town, including the Old City, must be included in the perimeter. For the same reasons, we cannot exclude from the area throughout the event the many people who live or work there, hence the need to provide for, in addition to the already significant amount of local traffic, the safe movement of around thirty foreign delegations whose convoys will use over 400 official vehicles, not to mention an equal quantity of emergency vehicles, those of the police, taxis, support vehicles, those of suppliers and, lastly, those of residents and merchants.

¶ 80 According to Henri Dion, the RCMP superintendent in charge of the Summit, the number of people who will move within the perimeter each of the three days of the event is estimated to be 32,000. The possible number of demonstrators at the Summit was estimated a few weeks ago to be 20,000 and, according to recent news reports, this estimate could be very conservative, as was the case for the Seattle summit in 1999.

¶ 81 In this context, there is no doubt that there is a rational connection between the adopted measures and the goal to be reached. That said, did the authorities try to limit as much as possible the constraints imposed by the security perimeter on the population in general and, in particular, on all citizens who, like the Applicant, wanted to demonstrate peacefully at such an important political event as the third Summit of the Americas?

So-called “minimal” infringement

¶ 82 Other than the significant inconvenience which results for residents and merchants in the area, the security perimeter ensures that citizens wishing to merely attend the event or demonstrate peacefully are kept back a good distance from the centre of activity. In the particular case of the demonstrators, the measure makes any visual or auditory communication with the people they would like to reach, namely the 34 heads of state participating in the negotiation of the FTAA, impossible.

¶ 83 The Director General of the Summit of the Americas Office, Denis Ricard, was appointed to this position in January 2000, his role being to guide and coordinate the action of around 250 permanent employees whose duties affect the entire organization, operational support and logistics surrounding the holding of the Summit. It is a very complex matter, the smallest ramifications of which extend well beyond what the average citizen might reasonably imagine for an event of this nature.

¶ 84 Through the Office, the Department of Foreign Affairs and International Trade has developed or participated in setting up various measures to accommodate the interest and lobby groups concerned about the issues raised at the Summit. These measures include:

- The existence of alternative sites for demonstrations;
- Invitations to the Summit of approximately 60 representatives of interest and lobby groups;
- Financial contributions to seminars, workshops and public meetings;
- Financial contributions to other artistic and cultural groups;
- Mechanisms for consultations and the exchange of information;
- Creation of an international press centre.

¶ 85 Three visible sites, outside but near the perimeter, could receive thousands of demonstrators, namely the Parc des Amériques, Montmorency Park and the Parc du Grand Théâtre de Québec. Moreover, the "People's Summit", which is currently making the headlines and to which the federal government has directly and indirectly made substantial contributions, is no doubt the most concrete example of the efforts made by the government to reduce as much as possible the negative effect inherent in the building of a security perimeter around the Summit site.

¶ 86 Naturally, all these measures cannot make up for the impossibility of peaceful demonstrators getting close enough to the site to be seen and heard by the heads of state and their delegations. They will, however, facilitate access of these groups to the free and complete expression of their points of view regarding free trade and their claims related to the FTAA negotiating process.

¶ 87 In view of the entire body of evidence, these parallel measures, although not perfect, are sufficient to allow us to conclude that in the choice and implementation of means to ensure the safety of everyone during the Summit and the success of this important political event, the organizers used tangible efforts to minimize the harmful effects of these measures on the fundamental freedoms of citizens and, in particular, on the exercise of their constitutional right to freedom of expression and peaceful assembly.

The proportionality test

¶ 88 The Court must now assess, taking into account considerations related to the public interest, the proportionality not only between the harmful effects of the measures adopted and the goal pursued, but also between the harmful and beneficial effects of those same measures [See Note 29 below].

Note 29: Op. cit. note 22, page 20.

¶ 89 In the logistics underlying the adoption of adequate security measures, the Summit Office and the operations committee for the maintenance of order had to deal with a phenomenon, the true scope of which no one apparently suspected when Quebec City was chosen as the site of the third Summit of the Americas. It was a growing and increasingly planned opposition against the globalization of markets and, more specifically, against the negotiation of a Free Trade Area of the Americas (FTAA), the main goal of the Summit.

¶ 90 Everywhere around the world, even outside the territory of the three Americas, the most diverse lobby groups, as well as a multitude of individuals or small, more or less organized, groups, are preparing to converge on Quebec City on April 20 to 22. Most of them want to demonstrate peacefully and passively to show their opposition to globalization or call for greater transparency of governments in the negotiation process. Others, relatively numerous and well organized, propose to use non-violent means but means designed to make the Summit fail or to prevent it from being conducted smoothly.

¶ 91 Finally, for a very limited number of demonstrators, the issue of free trade is only one excuse among many to create a disturbance. They pose a serious problem for the police, as they usually spread out in a crowd of peaceful demonstrators or observers whom they use as a shield to vandalize everything around them and provoke the police lines by throwing all sorts of stones and projectiles from far away.

¶ 92 In a televised report on an American news station entitled "Four Days in Seattle" [See Note 30 below], produced in the wake of the serious riots which literally derailed the

last WTO ministerial conference, we clearly see the devastating effect this type of strategy can cause in a diverse crowd. Confronted with an apparently hostile and raging rabble, the police advance and come face to face with the first rows of the group, where the assault seems to be coming from, and the confrontation begins. However, the true hard-hitters are rarely there, but concealed behind a human sea which hides and protects them.

Note 30: Exhibit IPGQ-1.

¶ 93 In the confusion, in the eyes of those in the first rows, the violence, lack of judgement and unfairness of the police seem clear. The peaceful observers protest and try to argue with police officers who have too much to handle and fear for their own safety, and who are therefore unable to do their duty.

¶ 94 Inevitably, in the ensuing confusion things escalate and the confrontation takes a turn for the worse. This is what happened at the Seattle summit, where they were only expecting 20,000 of the some 50,000 demonstrators who suddenly invaded an insufficiently protected downtown core. This is also what happened at the Prague meeting in September 2000, where the authorities opted for the almost total absence of measures limiting the access of citizens to the perimeters of the site where the event was held.

¶ 95 Faced with these possibilities, revealed for months on the Internet and in the media around the world, how was the Office of the Summit of the Americas going to manage the situation?

¶ 96 As a security perimeter seemed essential, could it not be limited to a smaller portion of Quebec City? Or, as the Intervenants suggest, could a formula not be proposed under which a certain number of demonstrators, subject to a quota or by prior selection, would be authorized to cross the perimeter every day to speak or demonstrate? The Court believes that these questions, submitted a few days before the official opening of the Quebec City Summit, must be answered in the negative, due to the requirements of safety and efficiency established by clear and forceful evidence.

¶ 97 In addition, if the Summit site cannot be opened to everyone who wishes to enter it, could a formula be designed which would allow only some people to enter without using a quota system which is necessarily discriminatory? Would we not just create total confusion at control points along the perimeter, increasing the risk of confrontation?

¶ 98 Disregarding these considerations, and thus disassociating himself from the position of the Intervenants, the Applicant insists that, as he was the only person to apply to the courts to obtain access to the site, he should benefit from an injunction applicable to him alone as the balance of convenience, in such an event, clearly weighs in his favour. No serious harm would result for the Respondents or for those who, under them, will have to maintain order during the Quebec City Summit. In the context of an application specifically based on the Canadian Charter of Rights and Freedoms, this reasoning puzzles me, given the fundamental and universal nature of the constitutional provisions in question.

¶ 99 In *Gould v. Canada* [See Note 31 below], a prisoner had instituted an action for a declaratory judgement attacking the constitutional validity of section 14 (4) e) of the Canada Elections Act [See Note 32 below], under which people in his situation were declared ineligible to vote in a federal election. Just before an election, the plaintiff had obtained from the Trial Division an interlocutory injunction authorizing him to vote, which decision was quashed by the Ontario Court of Appeal.

Note 31: [1984] 1 C.F. 1133 (C.F.A.); conf. at [1984] 2 S.C.R. 124.

Note 32: R.S.C. 1970 (1st Supp.), chap. 14.

¶ 100 Writing for the majority, Mahoney J. wrote:

" To treat the action as affecting only the rights of the respondent is to ignore reality. If paragraph 14(4)(e) is found to be invalid in whole or part, it will, to that extent, be invalid as to every incarcerated prisoner in Canada. That is why, with respect, I think the learned Trial Judge erred in dealing with it as though the application before her was a conventional application for an interlocutory injunction to be disposed of taking account of the balance of convenience as between only the respondent and appellants."

¶ 101 Contrary to an application for an injunction in ordinary civil matters, an application based on the Charter requires that the court look behind the individual applicant at all citizens whose fundamental rights may have been infringed by the disputed statute, regulation or activity.

SUMMARY AND CONCLUSIONS

¶ 102 The security measures set up for the third Summit of the Americas, which Quebec City will host beginning on Friday, April 20th, have the effect of limiting to a great extent two of the fundamental freedoms guaranteed by section 2 of the Canadian Charter of Rights and Freedoms, namely freedom of expression and freedom of peaceful assembly. However, due to the security requirements dictated by the nature of the event, its unprecedented size in Canada and the violent incidents which have occurred at similar summits held around the world over the past few years, the Respondents have convinced the Court that the limits in question are reasonable and that they can be justified in a free and democratic society.

¶ 103 Accordingly, the Applicant and the Intervenants were unable to meet their burden of establishing the existence of an apparent right or a material issue to be decided on the merits, an essential condition for the issuance of the requested order for an interlocutory injunction.

¶ 104 WHEREFORE, THE COURT:

DISMISSES the application for an interlocutory injunction of the Applicant
and the Intervenants;
WITH COSTS.

GILLES BLANCHET J.

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