

Citizen Participation and Peaceful Protest: Let's Not Forget APEC

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The fault, dear Brutus, is not in the stars, [b]ut in ourselves...¹

Whether we jealously guard the prescription that our constitutional rights as citizens to participate in our political futures through peaceful protest can only be curbed by such “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”² is ultimately the fundamental issue addressed in this paper. Put simply, can our post-September 11th legislative initiatives and law enforcement responses—put in place in the name of security—be justified as “reasonable limits” on citizens’ rights to protest actively the actions of their governments in a “free and democratic society”; or can they only be justified as reasonable limits in a society that measures these limits by yardsticks characterized by a palpable collective sensibility of fear, insecurity and overwhelming government control?

To address these questions, this paper will be divided into four main sections. After this introductory section, I discuss—in Part II—the RCMP commission that looked into complaints made in connection with the 1997 APEC Summit in Vancouver. This commission—having addressed head-on the tension between citizens’ *Charter* rights to protest against government action on public property and the authority of police to limit such protests—provides a useful tool for evaluating security responses in the context of current peaceful protest. Next, in Part III, I discuss our current collective sensibility of fear that—in my view—acts to collapse the important distinction between protesters and terrorists, by militating against full opportunities for citizen participation and peaceful protest. In Part IV, with this backdrop of fear, I look at the landscape of citizen participation and peaceful protest in the context of post-September 11th

¹ W. Shakespeare, *Julius Caesar*, Act 1, Sc. 2, in W. Harness (ed.), *Shakspeare’s [sic] Dramatic Works*, vol. 7 (London: J.F. Dove, 1830) at 9.

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1 [hereinafter the *Charter*].

anti-globalization protests in Canada. Specifically, I use as an example police responses to the 2002 G8 Summit in Kananaskis, Alberta. In Part V, the paper looks at *Charter* rights to free expression and the obligations that, in my view, we as Canadians have to allow for broader and more meaningful opportunities for expression than those afforded citizens in Kananaskis. Several counter-arguments are also addressed in this part of the paper. Finally, the paper finishes, in Part VI, with some concluding observations.

I. APEC

On July 31, 2001, the Honourable Commissioner Ted Hughes, Q.C. released his interim report³ following the public hearing⁴ into the complaints made in connection with the organization and policing of the 1997 APEC conference in Vancouver, B.C.⁵

A. Background⁶

The practice of APEC has traditionally been to hold its annual meetings in remote, relatively isolated locations to promote the atmosphere of a “retreat”.⁷ In 1997, the annual conference was held at

³ 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 at the UBC and Richmond detachments of the RCMP*, File No. PC 6910-199801 by Ted Hughes (Ottawa: CPC RCMP, July 31, 2001) [hereinafter *APEC Interim Report*].

⁴ The “APEC Inquiry”.

⁵ The November 1997 APEC—Asia Pacific Economic Cooperation—Conference involved delegates from 18 Pacific Rim economies who met in Vancouver to discuss economic issues of mutual interest to the participant countries. See *APEC Interim Report*, *supra* note 3 at 10.

⁶ I have discussed the APEC Inquiry elsewhere. See e.g. T.C.W. Farrow, “Negotiation, Mediation, Globalization Protests and Police: Right Processes; Wrong System, Issues, Parties and Time” (2003) 28 *Queen’s L.J.* 665 at 672-674 [“Negotiation, Mediation, Globalization Protests and Police”]. See also W.W. Pue, “Executive Accountability and the APEC Inquiry: Comment on Ruling on Applications to Call Additional Government Witnesses” (2000) 34 *U.B.C. L. Rev.* 335; W.W. Pue, “The Prime Minister’s Police? Commissioner Hughes’ APEC Report” (2001) 39 *Osgoode Hall L.J.* 165; W.W. Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: UBC Press, 2000).

⁷ *APEC Interim Report*, *supra* note 3 at 57, 75, 77.

several locations in Vancouver, B.C. including the University of British Columbia.⁸ The license agreement between the federal government and UBC—providing for how, where and when the event would take place—contemplated the exercise of “lawful protest and... free speech”.⁹ However, according to Commissioner Ted Hughes, notwithstanding this provision, the result was a location that looked much like a “fortress”.¹⁰

During the days leading up to, and on the final day of the Summit, there were a number of forms of protest on the UBC campus.¹¹ The RCMP, charged with the duty of keeping the entire event secure, responded to these protests with various policing techniques, including the use of force, pepper spray, detention and strip searches.¹² As a result of these actions, 52 formal complaints were made by protesters.¹³ Those complaints resulted in an inquiry being conducted under the *Royal Canadian Mounted Police Act*.¹⁴

B. APEC Inquiry

The Commission approached the entire issue—following the lead of the complainants’ submissions—by looking at whether there was an “unprecedented RCMP crackdown” on protest at the Summit.¹⁵ It found

⁸ *Ibid.* at 10-11.

⁹ Pursuant to s. 6.3 of the agreement, it was provided that “[t]he parties undertake not to impede any lawful protest and the exercise of free speech outside the Properties and other designated areas, as determined by the RCMP in conjunction with UBC.” See *ibid.* at 34.

¹⁰ *Ibid.* at 72.

¹¹ The protests included: (1) a tent city and a small break-away group of tents were set up; (2) the Tibetan flag was raised from the Graduate Student Society building flag pole; (3) a speak-out rally was organized; (4) a protest and symbolic arrest of Indonesia’s President Suharto was arranged; (5) students attended at and pushed over the security fence; and (6) the three access and exit routes to the meetings were blocked. See *ibid.* at 87, 109, 128, 220, 242, 290, 301.

¹² *Ibid.* at 5-9.

¹³ *Ibid.* at 5-9, 148-430, Appendix III.

¹⁴ R.S. 1985, c. R-10, s. 45.29(1) [hereinafter the *RCMP Act*]. See *APEC Interim Report*, *supra* note 3 at 2. The terms of reference of the APEC Inquiry were essentially three-fold. Specifically, they were to look into and report on: (1) the events at the APEC Summit between 23-27 November 1997; (2) whether the conduct of the RCMP was appropriate, as defined under the RCMP Code of Conduct, found in s. 37 of the *RCMP Act*; and (3) whether the conduct of the RCMP was consistent with s. 2 of the *Charter*. See *APEC Interim Report*, *supra* note 3 at 3, 38-45.

¹⁵ *APEC Interim Report*, *ibid.* at 46.

that there was a crackdown, in that some instances of RCMP conduct were not appropriate, and further, some instances were not consistent with section 2 of the *Charter*.¹⁶

The Commission then formulated its analysis by looking at the two most likely explanations for the crackdown, as suggested by the complainants' counsel: (1) below standard policing; and/or (2) improper federal government pressure to curtail demonstration, primarily to facilitate the attendance of Indonesia's President Suharto.¹⁷ The exercise of looking into these explanations—involving 153 witnesses, 710 exhibits and 40,000 pages of transcript over 170 days,¹⁸ a process that “cost the taxpayers nearly \$10 million”¹⁹—primarily focused on the second of these possible explanations. The balance focused on the first.²⁰

The Commission, in its final analysis, found substandard policing to be the explanation for the RCMP's crackdown,²¹ not improper government pressure.²² Based on this analysis, the Commission concluded with a number of recommendations for future protest events.²³ On September 7,

¹⁶ *Ibid.* The APEC Inquiry largely focused on protest rights—to free expression—found in s. 2(b) of the *Charter*.

¹⁷ *Ibid.* at 47.

¹⁸ *Ibid.* at 3.

¹⁹ *House of Commons Debates* No. 109 (November 5, 2001) (P. Venne), online: http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/109_2001-11-05/han109_1105-E.htm.

²⁰ *APEC Interim Report*, *supra* note 3 at 47. To analyze the RCMP's conduct, the Commission essentially formulated its analysis by: (1) grouping the 52 complaints into 17 complaint categories (see *ibid.* at 148-430); (2) looking at the events underlying those complaints and the RCMP's response; (3) consistent with its terms of reference (see *supra* note 14), evaluating the response as to its reasonableness; and (4) evaluating the response in terms of its consistency or inconsistency with s. 2 of the *Charter*.

²¹ *Ibid.* at 82-445. Not surprisingly, Commissioner Hughes concluded by finding that some of the RCMP's conduct was appropriate and some of it was not. Further, he made similar findings with respect to *Charter* violations. See *ibid.* at 431-440.

²² *Ibid.* at 102. There are in my view, however, several Commission determinations that only questionably support this conclusion. See my discussion on this point in “Negotiation, Mediation, Globalization Protests and Police”, *supra* note 6 at 673, no. 19.

²³ First, the Commissioner emphasized the importance of making room for peaceful protest, and for promoting the practice of the RCMP working cooperatively with protesters and protest organizers. See *APEC Interim Report*, *supra* note 3 at 446-448. Second, notwithstanding his rejection of the improper government intervention explanation for the “crackdown”, Commissioner Hughes did make some

2001, RCMP Commissioner Giuliano Zaccardelli responded to the *APEC Interim Report*.²⁴ The final report of the APEC Inquiry was released on 25 March 2002.²⁵

C. Making Room for Protest

In the APEC Interim Report, Commissioner Hughes acknowledged that the Canadian government and the RCMP may be justified in using public protest restrictions, in a “narrow sense”, for the protection of visiting heads of state in the context of international meetings, including, for example, avoiding “violent physical assault or a more symbolic act, such as a flying pie”.²⁶ Other restrictions were also acknowledged by Commissioner Hughes to prevent visiting leaders from being “grossly humiliated” by “illegal acts”.²⁷ However, other than these limited circumstances, according to Commissioner Hughes:

“[N]either the federal government nor the RCMP may curtail political criticism by protesters. The right to express political views lies at the very core of the freedom of expression provided for in the Charter. The fact that a visiting leader may be merely upset or angered by the expression of contrary political views and criticism by Canadians does not justify the suppression of such expression.”²⁸

recommendations as to police independence that go to the issue of proper government influence: *ibid.* at 451-452. Third, he focused on a need for police to get adequate legal advice on issues that might invoke the *Charter* and other rights of citizens: *ibid.* at 448. Finally, he also made a number of recommendations for future policing operations: see *e.g. infra* notes 26-30 and surrounding text.

²⁴ G. Zaccardelli, *RCMP Commissioner’s Response to the Interim APEC Report* (Ottawa: September 7, 2001), online: RCMP homepage http://www.rcmp-grc.gc.ca/news/apec_comm_e.htm.

²⁵ Commission for Public Complaints Against the RCMP, *RCMP Act—Part VII, subsection 45.46(3), Chair’s Final Report Following a Public Hearing into the complaints relating to RCMP conduct at events that took place at the UBC campus and the Richmond Detachment during the Asia Pacific Economic Cooperation Conference in Vancouver, B.C., in November 1997*, File No. PC 6910-199801 (Ottawa: CPC RCMP, March 25, 2002) (Chair: Shirley Heafey) [hereinafter *APEC Final Report*, and, together with the *APEC Interim Report*, the *APEC Report*].

²⁶ *APEC Interim Report*, *supra* note 3 at 54.

²⁷ *Ibid.*

²⁸ *Ibid.* See also generally *ibid.* at 38-45.

As a result, in his recommendations regarding “policing public order events”, Commissioner Hughes advocated for an express “opportunity for protest”:²⁹

When the RCMP is called upon in the future to police public order events, the leadership of the Force should ensure that:

- generous opportunity will be afforded for peaceful protesters to see and be seen in their protest activities by guests to the event; and
- no attempt will be made to use a university campus as the venue for an event where delegates are to be sequestered and protected from visible and audible signs of dissent.³⁰

Similar conclusions were reached by the New Zealand Justice and Electoral Committee that was set up to look into police treatment at and around the 1999 APEC Summit in New Zealand of demonstrators protesting the visit of Jiang Zemin, President of the People’s Republic of China, and that country’s involvement in Tibet. In its December 2000 report,³¹ the committee recognized that “freedom of expression and freedom of peaceful assembly are the starting point for the Police in making operational decisions about policing protests.”³² This New Zealand APEC Report was favourably referred to by Commissioner Hughes in the *APEC Interim Report*.³³

²⁹ *Ibid.* at 446.

³⁰ *Ibid.*

³¹ *Inquiry into matters relating to the visit of the President of China to New Zealand in 1999* (December 2000), accessible online: <http://216.239.57.104/search?q=cache:5vPmAsJz1W4J:www.gp.co.nz/wooc/i-papers/i7a-china.html+Tim+Barnett+and+%22Justice+and+Electoral%22+and+APEC&hl=en&ie=UTF8> [hereinafter *New Zealand APEC Report*]. The specific terms of reference of the *New Zealand APEC Report* were:

“To examine the handling of demonstrations held during the visit of the President of China to New Zealand in 1999, and the impact of those events on the civil liberties and fundamental rights of New Zealanders. In particular... assessing whether there are enough protections for peaceful and lawful protest; and... assessing whether the powers of government pertaining to the maintenance of public order are appropriate; and... assessing the procedures for the exercise of those powers.” *Ibid.* at 7.

³² *Ibid.* at 5-6.

³³ *APEC Interim Report*, *supra* note 3 at 54.

So what happened between the issuing of the *APEC Interim Report*, which recommended a narrow scope for limiting future peaceful expression, and the virtual elimination of meaningful protest that occurred at the 2002 Alberta G8 Summit? It is to that question to which I will now turn.

II. COLLECTIVE SENSIBILITY OF FEAR

A. Responses to September 11th

Less than two months after the *APEC Interim Report* was released, the September 11th terrorist attacks in the United States occurred. Almost immediately, the massive legislative, law enforcement and military powers of the United States,³⁴ Canada,³⁵ numerous other nations³⁶ and the United

³⁴ In the United States, for example, on September 18, 2001, Congress authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks...” *Authorization for Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001). Shortly thereafter, Congress passed significant and far-reaching anti-terror legislation. See e.g. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter *USA Patriot Act*]. For general commentary, see e.g. Norman Abrams, *Anti-Terrorism and Criminal Enforcement* (St. Paul, MN: West Group, 2003) [hereinafter *Anti-Terrorism and Criminal Enforcement*]; D.J. Musch, *Balancing Civil Rights and Security: American Judicial Responses Since 9/11* (Dobbs Ferry, NY: Oceana Publications, Inc., 2003) [hereinafter *Balancing Civil Rights and Security*].

³⁵ See e.g. *Anti-terrorism Act*, S.C. 2001, c. 41; *Criminal Code*, R.S.C. 1985, c. C-46, s. 2, 83.01-83.33. In addition to these legislative initiatives, as the Canadian government has outlined, “Following September 11th, the Government moved quickly to implement a range of national security initiatives in both legislative and operational areas. In December 2001, the Federal Budget allocated \$7.7 billion over the next five years to keep Canada safe, terrorists out and the border open.” Government of Canada, “Safety and Security for Canadians”, Government of Canada homepage, online: http://canada.gc.ca/wire/2001/09/110901-US_e.html. For further summary information on Canada’s security budget, see Department of Finance Canada, “Budget 2003 Supports Social and Economic Agenda While Maintaining Balanced Budgets”, online: <http://www.fin.gc.ca/news03/03-010e.html#Highlights>.

³⁶ In the U.K., for example, see *Anti-terrorism, Crime and Security Act 2001* (U.K.), 2001, c. 24. For general commentary, see e.g. Y. Alexander & E.H. Brenner, eds., *The United Kingdom’s Legal Responses to Terrorism* (London: Cavendish Publishing Limited, 2003) [hereinafter *The United Kingdom’s Legal Responses to Terrorism*]. For a useful collection of Canadian and international anti-terror initiatives, see Jurist, “World Anti-Terrorism Laws”, online: <http://jurist.law.pitt.edu/terrorism/terrorism3a.htm>.

Nations³⁷—the “full resources of our intelligence and law enforcement communities”³⁸—were unleashed in the name of security and anti-terror.³⁹

B. “Everything Changed”

From that day forward, there has been precious little mention of the APEC Inquiry or the resulting findings.⁴⁰ In my view, the *APEC Report* has largely been swept off the radar screen by the irresistible wave of anti-terror initiatives and fear that have rolled over our collective political communities and consciousness. Put simply: the *APEC Report* was then; this is now. The reason: people generally believe that the world has changed since September 11th.

Political statements from high-level political figures constantly reinforce this sentiment. For example, according to press materials from President George W. Bush, “The attacks of September 11th changed America”.⁴¹ Similarly, according to recent statements from former British

³⁷ See e.g. SC Res. 1373, UN SCOR (September 28, 2001).

³⁸ US President George W. Bush, “Statement by the President and His Address to the Nation” (September 11, 2001), online: <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>.

³⁹ This paper does not purport to address in a comprehensive manner our post-September 11th legislative, law enforcement and judicial responses. I have looked briefly at these responses elsewhere. See e.g. T.C.W. Farrow, “Law & Politics After September 11th: Civil Rights & The Rule of Law” (2003) 35 *Hosei Riron J. of L. and Pol.* 163 at 165-167 [hereinafter “Law & Politics After September 11th”]. For other, more fulsome examinations of these post-September 11th responses, see e.g. R. Chesney, “Civil Liberties and the Terrorism Paradigm: The Guilt by Association Critique” (2003) 101 *Mich. L. Rev.* [forthcoming], “Responding to Terrorism: Crime, Punishment, and War” (2002) 115 *Harv. L. Rev.* 1217. For a more general discussion on the aftermath of September 11th, see e.g. R. Jervis, “An Interim Assessment of September 11: What Has Changed and What Has Not” (2002) 117 *Pol. Sci. Q.* 37. See also D. Daubney et al., eds., *Terrorism, Law & Democracy: How is Canada Changing Following September 11?* (Montréal: Éditions Thémis, for the Canadian Institute for the Administration of Justice, 2002); R.J. Daniels, P. Macklem & K. Roach, *The Security of Freedom: Essays on Canada’s Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001) [hereinafter *The Security of Freedom*] *The United Kingdom’s Legal Responses to Terrorism*, *supra* note 36; *Anti-Terrorism and Criminal Enforcement*, *supra* note 34; *Balancing Civil Rights and Security*, *supra* note 34.

⁴⁰ The *APEC Final Report*—setting out the findings and recommendations as the Chair “sees fit” from the *APEC Interim Report*—was released on March 25, 2002. See *APEC Final Report*, *supra* note 25 at 1.

⁴¹ The White House, “President’s Biography”, online: <http://www.whitehouse.gov/president/gwbbio.html>.

Prime Minister Margaret Thatcher, as a result of the “horror of Sept. 11”, the United States “will never be the same again.”⁴²

Similar arguments are made from a legal perspective. For example, during an October 2001 interview, Anne McLellan—then Canada’s Minister of Justice—stated that the notion of “reasonable limit” in section 1 of the *Charter* has shifted since September 11th.⁴³ Similarly, in the context of discussing national security and arrest powers, John Manley—then Canada’s Minister of Foreign Affairs and chair of an ad hoc Cabinet committee on security and anti-terrorism—was similarly reported as stating that “Either nothing changed on Sept. 11 or everything changed.”⁴⁴

Many people agree with and have applauded these political and legal responses. As one Canadian report indicated, “two out of every three... [Canadians] believed fighting terrorism outweighed the need to protect individual rights and the due process of law.”⁴⁵ In the US, prior to the recent events in Iraq, a September 2002 CNN-Gallop poll gave President Bush a 66 percent approval rating, with “most Americans saying he has achieved just the right balance between protecting their treasured civil liberties and fighting terrorism.”⁴⁶ Others, rejecting the notion that

⁴² M. Thatcher, “Advice to a Superpower” *The New York Times* (February 11, 2002), online: <http://www.nytimes.com/2002/02/11/opinion/11THAT.html?>

⁴³ S. McCarthy, “The War on Terror: Anne McLellan’s New Ideals” *The Globe and Mail* (October 22, 2001) A7.

⁴⁴ L. Chwialkowska, “Police Get Vast Power of Arrest: ‘Deter, Disable, Dismantle’” *National Post* (October 16, 2001) A1, online: <http://groups.yahoo.com/group/tt-watch/message/6777?source=1>. See also I. Cotler, “Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy” in *The Security of Freedom*, *supra* note 39 at 111. Even the title of the CIAJ Conference at which this paper was presented—see *supra* note *—contemplates the possibility of a changed legal society through a “New Rule of Law”.

⁴⁵ D. Small, “Backlash, Terrorism & Civil Liberties” (2001) 10 *National* 15 at 18.

⁴⁶ R. MacGregor, “Jefferson’s Words Treasured by Patriots, Twisted by Terrorists” *The Globe and Mail* (September 7, 2002) A11. For a discussion of opinion polls on September 11th and their aftermath, see *e.g.* L. Huddy, N. Khatib & T. Capelos, “Reactions to the Terrorist Attacks of September 11, 2001” (2002) 66 *Pub. Op. Q.* 418. See also generally R.P. Hart, S.E. Jervis & E.T. Lim, “The American People in Crisis: A Content Analysis” (2002) 23 *Pol. Psych.* 417; A.F. Healy et al., “Terrorists and Democrats: Individual Reactions to International Attacks”, *ibid.* at 439; V.A. Chanley, “Trust in Government in the Aftermath of 9/11: Determinants and Consequences”, *ibid.* at 469; L. Huddy et al., “The Consequences of Terrorism: Disentangling the Effects of Personal and National Threat”, *ibid.* at 485; D.J. Schildkraut, “The More Things Change... American Identity and Mass and Elite Responses to 9/11”, *ibid.* at 511.

everything has changed,⁴⁷ have criticized our collective response as a “deeply disturbing” move unlawfully to infringe upon long-standing and fundamental rights and liberties.⁴⁸

Regardless with which side of the debate one agrees, it is certainly clear, in my mind, that our response—reminiscent of the Kennedy administration’s nuclear fallout shelter program during the 1961 Berlin crisis—is largely the result of a widespread collective sense of insecurity and fear.⁴⁹ People are scared. And it is with this mindset that we are responding to current world events.⁵⁰ This sense of collective fear was recently commented on by Margaret Atwood when discussing post-September 11th America:

“You’re gutting the Constitution. Already your home can be entered without your knowledge or permission, you can be snatched away and incarcerated without cause, your mail can be spied on, your private records searched... I know you’ve been told all this is for your own safety and protection, but think about it for a minute. Anyway, when did you get so scared? You didn’t used to be easily frightened.”⁵¹

Unfortunately, I think Atwood is right. But regardless of whether we are, in the end, motivated by fear or not, it is also clear that our responses to the tragic events of September 11th have resulted in significant restrictions on freedom of movement, speech and assembly. Further, the

⁴⁷ Kent Roach, for example, has recently argued that “the idea that September 11 changed everything must be rejected”. K. Roach, “Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism” (2002) 47 McGill L.J. 893 at para. 82. See also K. Roach, “The Dangers of a Charter-Proof and Crime-Based Response to Terrorism” in *The Security of Freedom*, *supra* note 39 at 131.

⁴⁸ American Civil Liberties Association (“ACLU”), “Keep America Safe and Free”, online: ACLU homepage <http://www.aclu.org/SafeandFree/SafeandFreeMain.cfm>. See also ACLU, “Freedom Under Fire: Dissent in Post-9/11 America”, online: ACLU homepage <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12666&c=206>.

⁴⁹ President Kennedy reportedly believed, in retrospect, that his 1961 call for a national fallout shelter program had overexcited people. See A.M. Schlesinger, Jr., *A Thousand Days: John F. Kennedy in the White House* (Boston: Houghton Mifflin Company, 1965) at 723, 748.

⁵⁰ I am grateful to Patricia Hughes, Dean, Faculty of Law, University of Calgary, for comments on this aspect of my argument.

⁵¹ M. Atwood, “A Letter to America” *The Globe and Mail* (March 28, 2003) A17 [hereinafter “A Letter to America”].

argument that the world is a “changed” place after September 11th has acted to cloud the more basic question of how properly to balance liberty and security—in the context of citizens actively, yet peacefully, participating in their political futures—in a free and democratic society. As such, we have—through our fear—largely collapsed the difference between activists and terrorists. It is to this issue, discussed through the lens of recent anti-globalization protests, to which I will now turn.

III. CITIZEN PARTICIPATION AND PEACEFUL PROTEST

A. Anti-Globalization Protests

For the past 10 or 15 years, and now most famously since the Seattle anti-WTO protests in 1999, there has been a growing movement of criticism against current globalization trends. This movement, made up of a vast array of individual and group interests, has been loosely characterized as the “anti-globalization movement”.⁵² In 1999, prior to Seattle, it was estimated that the International Civil Society included approximately 800 organizations from more than 75 countries.⁵³ That number has since increased.⁵⁴

Following Seattle, significant protests in connection with world trade and other international meetings have been organized in a number of different cities across the globe, including Davos, Washington, Ottawa, Milan, Québec,⁵⁵ New York, Tokyo, and elsewhere. These protests,

⁵² For recent discussions of current anti-globalization protests, see *e.g.* T.C.W. Farrow, “Reviewing Globalization: Three Competing Stories, Two Emerging Themes, and How Law Schools Can and Must Participate” (2003) 13 *Meikei L. Rev.* 176, trans. into Japanese by M. Kuwahara, (2003) 44 *Aichigakuin L. Rev.* 29 [hereinafter “Reviewing Globalization”]; “Negotiation Mediation, Globalization Protests and Police”, *supra* note 6 at 670-672. See also M. Barlow & T. Clark, *Global Showdown: How the New Activists Are Fighting Global Corporate Rule* (Toronto: Stoddart Publishing Co. Limited, 2002).

⁵³ Members of the International Civil Society, “Statement from Members of International Civil Society Opposing a Millennium Round or a New Round of Comprehensive Trade Negotiations”, online: <http://www.twinside.org.sg/title/wtomr-cn.htm>.

⁵⁴ See *e.g.* “The Growth in the Number of NGOs in Consultative Status with the Economic and Social Council of the United Nations”, online: City University London homepage <http://www.staff.city.ac.uk/p.willetts/NGOS/NGO-GRPH.HTM#data>.

⁵⁵ For a judicial discussion of security measures at the 2001 Québec Summit, see *Tremblay v. Québec (Procureur Général)*, [2001] J.Q. No. 1504 (C.A.), online: QL (JQ), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 231, online: QL (SCCA).

loosely speaking, primarily involve objections to current and dominant neo-liberal trends of free trade, international capital flow and strong corporate influence. A primary theme of the protest movement is that the current balance of political power and world economic arrangements leads to a wide disparity of wealth and lack of equality across world populations. The approach of these protests has largely involved direct and active street demonstrations and the widespread use of the Internet. For purposes of this paper, it is important to recognize that, while there has been some violence, the vast majority of protests have been peaceful. These protests have also become popular media targets.⁵⁶

B. 2002 G8 Summit in Kananaskis

In the context of public anti-globalization demonstrations in Canada following the events of September 11th, national security and the threat of terrorism have been used as justifications for deploying significant police and military units around these meetings of world leaders. For the purposes of this paper, I will look specifically at the June 2002 G8 Summit.

At that Summit—in Kananaskis, Alberta—there was a region-wide security perimeter set up making it essentially impossible for protesters to get anywhere near the international leaders and trade delegates. Even in Calgary, more than 100 kilometers away, protest zones and access to public areas were severely restricted. The cost of these heavy police and military security precautions in place surrounding the entire 2002 G8 Summit was estimated at between \$300 and \$500 million.⁵⁷ The reason for

⁵⁶ For further discussions of post-September 11th Canadian anti-globalization protests, including the November 2001 G20 Summit in Ottawa and the June 2002 G8 Summit in Alberta, see “Negotiation, Mediation, Globalization Protests and Police”, *supra* note 6 at 674-688; “Reviewing Globalization”, *supra* note 52 at 192-204; “Law & Politics After September 11th”, *supra* note 39 at 176-178.

⁵⁷ T. Maloney, “Deputy Chief Defends \$34.3M Tab” *Calgary Herald* (June 26, 2002) A6; T. Maloney, “Federal Ministers Showered With Catcalls” *Calgary Herald* (June 26, 2002) A7. For a summary of the 2002 Alberta G8 security initiatives, see e.g. RCMP, “G8 Summit Security”, online: <http://www.g8summitsecurity.ca/g8/news/nr-02-02.htm#newsrelease>; Government of Alberta, “Security”, online: <http://www.gov.ab.ca/home/g8/Display.cfm?id=4>. See also M. Reid, “Police Steps Up Security Measures: Extra Fencing, Water Cannons in Place” *Calgary Herald* (June 22, 2002) A1.

As it turned out, the protests in Calgary and the neighboring areas surrounding the G8 Summit in Kananaskis were peaceful and were carried off without major incident. As one report indicated, “Protesters preferred to party rather than fight... The protesters

these precautions: security, primarily including security against terrorist attacks.⁵⁸ The result of these precautions: a virtual shut-down of any meaningful debate or protest in the vicinity of the leaders and other powerful decision-makers.⁵⁹

This lack of opportunity for meaningful dissent and protest was troubling in itself.⁶⁰ In my view, the police lock-down of the Kananaskis region was a clear violation of the rights to free speech and expression that are enshrined in section 2 of the *Charter*.⁶¹ There is no way in my mind, on any reading of section 1 of the *Charter*, that a 100 km region-wide security perimeter could be a justified restriction on peaceful dissent and protest.

danced and pounded drums, but were otherwise peaceful.” S. Crowson, “Party Breaks Out at ‘Showdown’” *Calgary Herald* (June 26, 2002) A1. See also J. Mahoney, “Calgary Protests Get Off to Peaceful Start” *The Globe and Mail* (June 24, 2002) A8; D. Walton & L. Nguyen, “So Long, Seattle: Protests Turn Polite” *The Globe and Mail* (June 27, 2002) A1; E. Poole et al., “Polite Protesters Give Peace a Chance in Downtown Streets” *Calgary Herald* (June 27, 2002) A7.

⁵⁸ The reason for extensive security was also, at least arguably in part, to protect the environmentally sensitive area—Kananaskis Country—in which the Federal Government decided to host the Summit. While, in my view, the Government purposely chose and used the nature of the area as a strategic tool to bolster its argument that a shut down of the region was warranted, there is no doubt that the Kananaskis/Canmore/Banff regions are certainly environmentally sensitive areas. For example, even as I delivered this paper at the Participatory Justice Conference—see *supra* note *—deer were walking and grazing just feet away outside the conference room window. I am grateful to Constance D. Hunt, Justice, Alberta Court of Appeal, for comments on the issue of the environmental sensitivity of the Kananaskis region and the fact that the decision to hold the Summit in that region was ultimately made by the Federal Government, not the RCMP.

⁵⁹ As one report leading up to the 2002 G8 Summit indicated, “... officials tasked with managing the nuisance of protesters have all but ensured that their part in this grandiose theatre does not happen at all... The police have done a splendid job of marginalizing the protesters.” B. Cooper & D. Bercuson, “Protest Fest? Not at Kananaskis” *National Post* (May 23, 2002), online: <http://www.nationalpost.com/scripts/print.asp?f=stories/20020523/312656.html>.

⁶⁰ I attended the protest sites in Calgary during the 2002 G8 Summit and observed, first hand, many of the security initiatives that were in place.

⁶¹ It also signaled a clear change from previous G8 meetings in Canada. As Prime Minister Chrétien reportedly indicated at the June 2003 Evian G8 meeting, commenting fondly on the 1995 G8 meeting in Halifax, there the leaders were able to walk “into the crowds and shake hands with people... The people were fabulous” and “we’ve not been able to repeat it” because of security concerns. Canadian Press, “Chrétien Marks 10th and Last G-8 Summit as PM”, online: http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/105465547437_68.

However, perhaps more troubling still is the chilling effect that the post-September 11th approach to demonstration zones has on any kind of meaningful public debate, dissent and protest. Increased police powers, through anti-terrorism initiatives and other law enforcement tools, now provide governments with wide powers to shut out protest and to investigate potential “terrorists”.⁶² As Bill Blaikie, New Democratic Party member of Parliament from Winnipeg-Transcona questioned prior to the 2002 G8 Summit with respect to military action and the resulting suppression of political protests: “I want to ask this government, what is it they’ve got against legitimate protesters who may not share their world view from time to time[?]”⁶³ Ultimately, these government powers and police actions—exemplified in the June 2002 shut-down of the Kananaskis area—have in my view largely silenced meaningful peaceful public protest.

C. Lessons From APEC

Returning now to the findings of the APEC Inquiry, Commissioner Hughes stated, in the recommendation section of the *APEC Interim Report*,⁶⁴ that:

“The Vancouver APEC conference was an extraordinary event in Canadian policing but the evidence is clear that police in Canada and around the world will face increasing challenges as they are called upon to police international gatherings that attract growing dissent. Their role is to protect government leaders and officials and also to safeguard citizens’ rights to lawful protest. As I have quoted Mr. Justice Doherty saying, in the Brown case: ‘We want to be safe, but we need to be free.’”⁶⁵

I think Commissioner Hughes was right: challenges raised by the number and diversity of voices that attend anti-globalization and other public protest events combined with the background of terrorism that has been foregrounded by the events of September 11th do create “increasing

⁶² *Supra* notes 34-39.

⁶³ CBC News Staff, “Don’t Use Anti-terror Bill to Block G-8 Protests: Critics” *CBC News* (November 30, 2001), online: http://cbc.ca/stories/2001/11/30/blaikie_security011130.

⁶⁴ *APEC Interim Report*, *supra* note 3 at 446-453.

⁶⁵ *Ibid.* at 446, citing *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223 at 251 (C.A.).

challenges” for government officials and police officers. There is no doubt that modern policing is a challenging business.⁶⁶

Unfortunately, however, rather than following the recommendations of the APEC Commission, what we have done in Canada since September 11th in terms of policing public events—as exemplified by the June 2002 G8 Summit in Alberta—is largely, in my view, the opposite of what Commissioner Hughes recommended. Opportunity for active participation and protest—allowing protesters “to see and be seen” and avoiding locations that allow government officials to be “sequestered and protected from visible and audible signs of dissent”⁶⁷—has not occurred. As the security arrangements for the 2002 G8 Summit in Kananaskis demonstrate, what has instead occurred has been a complete shut-down of meaningful public dissent in the name of securing public leaders from terrorist threats.

IV. OPENING UP DEBATE

A. Wide Latitude for Expression

It is an understatement to say that the Court has traditionally recognized the importance of free expression, and in particular, free political expression. As McLachlin C.J. and LeBel J. stated in *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*⁶⁸

“The Court, moreover, has repeatedly reaffirmed the importance of freedom of expression. It is the foundation of a democratic society... The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one’s circumstances and conditions. It allows a person to speak not only for the sake of expression itself, but also to advocate change,

⁶⁶ For a useful look at policing in the context of protests in Canada, see J. Esmonde, “The Policing of Dissent: The Use of Breach of the Peace Arrests at Political Demonstrations” (2002) 1 J. of L. & Equality 247.

⁶⁷ *APEC Interim Report*, *supra* note 3 at 54, 446. See further *supra* notes 29-30 and surrounding text.

⁶⁸ [2002] 1 S.C.R. 156.

attempting to persuade others in hope of improving one's life and perhaps the wider social, political, and economic environment."⁶⁹

Similarly, in the context of complaints made about police treatment of demonstrators at President George W. Bush's January 2001 inauguration, Kessler J. of the United States District Court for the District of Columbia stated, when considering the kind of speech at issue in the dispute:

"we are considering the essence of First Amendment freedoms—the freedom to protest policies and programs to which one is opposed, and the freedom to organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest.⁷⁰ This wide freedom to exchange ideas also includes—in the context of the anti-globalization movement—the freedom actively to criticize dominant world views and trends such as 'global capitalism' and 'corporate interests'".⁷¹

These rights to free expression are, in my view, of increased importance in an era when world leaders are debating not only trade restrictions and agreements, but more fundamentally, the future of nations, leaders and political regimes. Now, more than ever, we need the opportunity to debate and take seriously both according and dissenting opinions.⁷²

⁶⁹ *Ibid.* at 172-173. See further *Reference re: Secession of Québec* (1998), 161 D.L.R. (4th) 385 at 417 (S.C.C.), *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 at 970. See also generally P.W. Hogg, *Constitutional Law of Canada*, looseleaf, vol. 2 (Scarborough, Ont.: Carswell, 1997) at 40-1-40-51.

⁷⁰ *International Action Center v. United States of America*, [2002] Civil Action No. 01-72 (D.C. Cir.) at 5, online: <http://www.dcd.uscourts.gov/district-court-2002.html>.

⁷¹ *Lee v. City of Seattle*, [2001] Civil Action No. C01-1928P (W.D.W.) 1 at 3 [hereinafter *Lee*].

⁷² Justice Gonthier recently stated that: "The new era of democratic rights and responsibilities into which the *Charter* has propelled us demands considerable effort on the part of every player in the Canadian democracy... we must make real and significant the enlightened participation of the public in fundamental debates that guide society... It is here that the roles of courts, Parliament and the media unite: in serving the public, as well as in creating public space where ideas can propagate and evolve." The Honourable Charles D. Gonthier (Main Address, The Honourable Charles D. Gonthier Benefit Dinner, CIAJ, Montréal, April 29, 2003) *CIAJ Newsletter XIII*: 2 (Summer 2003) 6 at 7.

Protecting our populations from the threat of terrorism is clearly important. However, peaceful protesters are not terrorists. They should not be treated as such.⁷³ Further, it is important to remember—when labeling “terrorists”—that, as the Supreme Court in *Suresh v. Canada (Minister of Citizenship and Immigration)* acknowledged, “Nelson Mandela’s African National Congress was, during the apartheid era, routinely labeled a terrorist organization, not only by the South African government but by much of the international community.”⁷⁴

Without leaving room for dissent and debate, we impoverish any chance for a fulsome consideration of all views at a time when political stakes are exceptionally high. Protest, debate and demonstration need not be feared; rather, they should be celebrated and encouraged by the majority, and at least vigorously protected by our courts.

B. Anti-Globalization and Beyond

There are several places—flashpoints—where these freedoms will likely clash “on the ground” with state interests of security in the context of anti-globalization and other public protests. These flashpoints potentially include: (1) injunctive relief challenging time, manner and place protest permit restrictions and denials;⁷⁵ (2) similar injunctive relief

⁷³ For useful discussions on the treatment of dissent and protest in the post-September 11th era, see A.-G. Gagnon, “A Dangerously Shrinking Public Sphere” (September 2002) 23 *Policy Options* 18; L. Panitch, “Violence as a Tool of Order and Change: The War on Terrorism and the Anti-Globalization Movement”, *ibid.* at 40; R. Morden, “Finding the Right Balance”, *ibid.* at 45; A. Borovoy, “Protest Movements and Democracy”, *ibid.* at 54.

⁷⁴ [2002] S.C.J. No. 3, online: QL (SCJ) at para. 95.

⁷⁵ In Canada, in June 2002, the Alberta Federation of Labour (“AFL”) and the Canadian Civil Liberties Association challenged a Calgary City by-law invoked to prohibit an anti-globalization protest in a Calgary park during the 2002 G8 Summit. While the by-law was not enacted to protect against terrorism, it was used in the name of security primarily against terrorism. The challenge was settled following the permission by the City to use the park for peaceful demonstrations. See AFL, “AFL and Civil Liberties Association Launch Court Challenge to Defend Freedom of Assembly in Calgary City Parks” (News Release, June 24, 2002), online: <http://www.telusplanet.net/public/afl/newsreleases/june2402.html>. See also R. Rowland, “Security at G8; Watching on Three Fronts” *CBC News*, online: <http://cbc.ca/news/features/g8/security.html>.

In the US, see *e.g.* the November 2001 injunction granted by Pechman J., United States District Court, Western District of Washington at Seattle, ordering the City of Seattle to permit a WTO anniversary protest in Seattle’s Westlake Park. *Lee, supra* note 71. For a report of the decision, see Z.D. Lyons, “N30 Lawsuit Against City

challenging the constitutionality of specific crowd control measures;⁷⁶ (3) surveillance tactics of police and investigative agencies;⁷⁷ (4) efforts by protesters to resist arrest;⁷⁸ (5) after-the-fact general challenges of police crowd control techniques;⁷⁹ and (6) complaints about illegal detentions of protesters.⁸⁰

Further, the importance of this discussion is not limited to the anti-globalization movement. As the critics of recent anti-terror initiatives have made clear,⁸¹ the protection of nations against the threat of terrorism has resulted in massive government restrictions on basic human rights and liberties. For example, after pointing to the prisoners being held by the US in Guantánamo Bay, Cuba, Russia's military involvement in Chechnya, and China's restrictions on Muslims—all largely in place in the name of terrorism—Mary Robinson “blasted governments for using terrorism [the ‘T-word’] as an excuse to trample human rights... under the pretext of

Continues in Federal Court” *The Seattle Press* (January 3, 2002), online: www.seattlepress.com/print-9411.html.

⁷⁶ *Tremblay v. Québec (Procureur Général)*, *supra* note 55.

⁷⁷ Prior to complaints made by the ACLU, the New York City police reportedly attempted to collect information from arrested anti-war protesters on prior political activity. See *e.g.* W.K. Rashbaum, “Police Stop Collecting Data on Protesters’ Politics” *The New York Times* (April 10, 2003), online: <http://www.nytimes.com/2003/04/10/nyregion/10NYPD.html>.

⁷⁸ *Smith c. R.*, [2003] Q.J. No. 6525, online: QL (QJ) (Sup. Ct.), in which the appellant, a protester at the April 2001 Québec Summit of the Americas, was arrested—after refusing to remove a scarf—for resisting arrest.

⁷⁹ In Canada, see *e.g.* the APEC Inquiry, above, Part II. In New Zealand, see *e.g.* the *New Zealand APEC Report*, *supra* notes 31-32. In the United States, several class actions have been launched in connection with police treatment of protesters at large anti-globalization and other anti-government rallies. For example, in connection with the April 2000 IMF-World Bank protests in Washington, D.C., see *Alliance for Global Justice v. District of Columbia* (US District Court for the District of Columbia, 01-CV-811) (amended complaint), online: <http://www.justiceonline.org/a16/a16/complaint.html>. In connection with demonstrations at President George W. Bush’s January 2001 inauguration, see *International Action Center v. United States* (US District Court for the District of Columbia, 01-CV-72). For a discussion of the case, in the context of an interlocutory discovery motion, see *International Action Center v. United States of America*, [2002] Civil Action No. 01-72 (D.C. Cir.), online: <http://www.dcd.uscourts.gov/district-court-2002.html>.

⁸⁰ See *e.g.* *APEC Interim Report*, *supra* note 3 at 9.

⁸¹ See *e.g.* *supra* notes 47-48 and accompanying text.

fighting international terrorist groups.”⁸² Clearly these issues are of critical importance to all citizens, not simply to members of the anti-globalization movement or to members of traditional minority groups.

More specifically, other individuals and contexts that are potentially directly affected by this discussion—perhaps with modification⁸³—include: (1) anti-poverty protests;⁸⁴ (2) abortion clinic protests;⁸⁵ (3) environmental protests;⁸⁶ (4) access to government officials;⁸⁷ (5) university students protesting higher tuition fees;⁸⁸ and (6) potentially many others.⁸⁹

⁸² CBC News Staff, “Outgoing UN Rights Chief Lashes US, Russia, China” *CBC News* (September 9, 2002), online: http://cbc.ca/cgi-bin/templates/print.cgi?2002/09/08/robinson_rights020908.

⁸³ What counts as “reasonable limits” may (and should) change depending on the type and context of expression involved. See, for example, the treatment of expression at abortion clinic protests in B.C.: *R. v. Lewis*, [1997] 1 W.W.R. 496 (B.C.S.C.).

⁸⁴ See e.g. the October 2001 anti-poverty protest organized by the Ontario Common Front, a coalition that includes the Ontario Coalition Against Poverty. For reports of the protest, see e.g. J. Rusk, “Activists Hope to Snarl Traffic” *The Globe and Mail* (October 16, 2001) A23, G. Smith & J. Rusk, “Protesters Snarl Downtown Traffic” *The Globe and Mail* (October 17, 2001) A18. For a discussion of the protest in the context of anti-terror legislation, see A. Dostal, “Casting the Net Too Broadly: The Definition of ‘Terrorist Activity’ in Bill C-36” (2002) 60 U.T. Fac. L. Rev. 69 at para. 3.

⁸⁵ See e.g. *R. v. Lewis*, *supra* note 83. See also *R. v. Demers* (2003), 177 B.C.A.C. 16, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 103, online: QL (SCCA).

⁸⁶ In Canada, see e.g. the Supreme Court’s approach in *MacMillan Bloedel v. Simpson*, [1996] 2 S.C.R. 1048. For a comment on that case, see Amir Attaran, “Mandamus in the Environment of the Criminal Law: Ending the Anti-Protest Injunction Habit—Issues Arising from *MacMillan Bloedel v. Simpson*” (1999) 33 U.B.C. L. Rev. 181. More recently, see e.g. *Hamilton (City) v. Loucks*, [2003] O.J. No. 3669, online: QL (OJ) (Sup. Ct.) (involving the construction of an expressway through an environmentally sensitive area of Ontario). In the United States, see e.g. *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125 (9th Cir. 2002), *cert. denied*, 537 U.S. 1000 (2002) (involving the use of pepper spray against peaceful anti-logging protesters). In Europe, see e.g. *Steel and Others v. United Kingdom* (1998), 28 E.H.R.R. 603 (E.C.H.R.) (involving arrests of hunting protesters).

⁸⁷ See e.g. *R. v. Behrens*, [2001] O.J. No. 245 (Prov. Off. Ct.).

⁸⁸ See e.g. Canadian Federation of Students, “Students Declare February 6 Day of Action” *Canadian Federation of Students Newswire* (February 4, 2002), online: http://action.web.ca/home/cfso/alerts.shtml?srcl=1&scr_scr_Go=7&AA_EX_Session=1db855ffac51c07dca231c950c5ed818.

⁸⁹ For example, consideration should also be given to the impact of these issues on the use of the Internet and other forms of electronic communication for the purposes of citizen participation and peaceful protest.

C. Potential Counter-Arguments

I anticipate several challenges to the underlying premises of this paper. First, what about the argument that—in light of the tragedies of September 11th—governments need wide latitude to legislate against terror and to have its law enforcement officials vigilantly protect its citizens? Certainly there is merit in this argument. And I do not, as a general matter, disagree. What I do take issue with is the underlying sensibility of fear that drives this argument. What we do by resigning ourselves uncritically to this argument is normalize the fear by which this argument is driven. I do not believe that we can, in a sophisticated modern society ruled by law, reject the notions of freedom and democracy that these governmental initiatives are themselves purportedly designed to protect. It quite frankly makes no sense. As Nordheimer J. recently stated in *France v. Ouzchar*:

“While I appreciate that recent world events have brought the existence of terrorism to the forefront of most people’s thoughts, I would hope that the vast majority of reasonably informed, right-thinking members of our community would agree that, notwithstanding those events, every citizen of this country is still entitled to their basic constitutional rights and freedoms...”⁹⁰

This point was further driven home recently by Chief Justice McLachlin who stated, in an interview with *The Lawyers Weekly*, that:

“Without wanting to trivialize in any way... September 11th—which stands in a class, obviously, of its own—what I am saying is it’s the same intellectual effort [in *Charter* review] that the struggle... and the task of the law is to find ways to maintain our freedoms and our democracy and the rule of law while maintaining security... I think the court is vigilant to maintain liberties. We are very cognizant of the difficulties of police work, of course, and the difficulties that face law enforcement officers in the modern age... but we are also very conscious of the need to maintain liberty, and to ensure that Canada remains a democratic and liberal and free country where freedoms are impinged as little as possible.”⁹¹

⁹⁰ [2001] O.J. No. 5713 at para. 26 (Sup. Ct.).

⁹¹ C. Schmitz, “Chief Justice McLachlin Discusses Terrorism, Liberty, Live Webcasting of Appeals” *The Lawyers Weekly* 21:33 (January 11, 2002) 1 at 19.

Second, even if one agrees that total deference to government and law enforcement action is not warranted, surely a wide latitude in the form of time, manner and place restrictions⁹² is permissible and appropriate at this time. Again, as a general matter, I do not necessarily disagree with this argument. However, what I do take issue with is the fact that these restrictions—post-September 11th—seem to have been used, in effect, to shut expression down completely. As argued above,⁹³ I do not see how a 100 km buffer zone between protesters and government officials at the 2002 G8 Summit in Kananaskis can be seen as a reasonable time, manner and place restriction. In my view, it was a prohibition on meaningful expression.

It is not enough to say that the protesters still were able to demonstrate in Calgary. First, there were restrictions imposed even there.⁹⁴ But in any event, there was no meaningful access to the desired target of the protests. While reasonable people could disagree on the exact distance that protesters should be kept away from political leaders, the right to free expression must include the right to expression within some kind of proximity to the target audience.

As Cronin J. indicated in the lower court judgment in *R. v. Lewis*, “It is not an answer to the violation of the Section 2 rights of the protesters to say that they are free to protest elsewhere”.⁹⁵ Similarly, the Georgia ACLU legal director, Gerry Weber, recently indicated that the “right to free speech doesn’t mean much if you can’t communicate with the folks you are trying to communicate with”.⁹⁶ Again, as Commissioner Hughes commented in the *APEC Interim Report*, police officials should ensure

⁹² For a general review of time, manner and place restrictions in Canada, see Hogg, *supra* note 69 at 40-18–40-20.

⁹³ Above, Part IV(ii).

⁹⁴ See *e.g. supra* note 75.

⁹⁵ *R. v. Lewis*, [1996] 4 W.W.R. 27 (B.C. Prov. Ct. (Crim. Div.)), *rev’d*, *R. v. Lewis*, *supra* note 83 (C.A.). For a useful discussion of the case, see B. Daisley, “Legislation Banning Protests Outside Abortion Clinics Constitutional: B.C.S.C.” *The Lawyers Weekly* 16:24 (November 1st, 1996). The United States Supreme Court has recognized the importance of adequate alternative opportunities for expression in the context of time, place and manner restrictions. See *e.g. Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 at 94 (1977), *City of Ladue v. Gilleo*, 512 U.S. 43 at 54 (1994).

⁹⁶ “Burk Appeals Protest Ruling” *The New York Times* (April 9, 2003), online: <http://www.nytimes.com/2003/04/09/sports/golf/y09burk.html>.

that a “generous opportunity will be afforded for peaceful protesters to see and be seen in their protest activities by guests to the event”.⁹⁷

Third, as a related matter, critics make the argument that the anti-globalization movement has made diligent use of the media to disseminate its messages. As such, regardless of where it is allowed to protest, the movement’s message will get out. It is true that the movement has made good use of modern media. Not only has the movement itself made strong use of the Internet and other mass media vehicles, but it has also become the subject of both popularization and vilification in the press.⁹⁸

However, in addition to the constitutional rights not only to expression but expression that is conducted within a reasonably desirable proximity to the intended target audience,⁹⁹ chosen forms of expression that are inexpensive or are otherwise accessible must be available.¹⁰⁰ Notwithstanding media coverage and the ability of some non-governmental organizations and other protest groups to afford and access mainstream media channels, many participants in the anti-globalization movement rely on historically protected and typically inexpensive modes of expression such as placards, leaflets, megaphones, marching, peaceful sit-ins, dancing, music, and the like. It is not an answer to these people to say that they should go and put their message on television or in newspaper advertisements. Those modes of expression, while potentially effective, may be prohibitively expensive.

Finally, critics will likely raise the argument that if we do not leave security decisions to our elected representatives, then it will be either police officers on the street or unelected judges who will be deciding what is reasonable or not in any given circumstance. As to the first concern, I agree that we need clear guidelines—for the benefit of both police officers and the public—as to what is appropriate expression or not.¹⁰¹ However, there is inherently a measure of discretion in the role of policing. If police

⁹⁷ *APEC Interim Report*, *supra* note 3 at 446 [emphasis added].

⁹⁸ See *supra* note 56 and surrounding text.

⁹⁹ See *supra* notes 95-97 and surrounding text.

¹⁰⁰ In Canada, see *e.g. Libman v. Québec (Attorney General)*, [1997] 3 S.C.R. 569 at 617; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 at 1101-1103; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at 198, 251. In the US, see *e.g. City of Ladue v. Gilleo*, *supra* note 95 at 57.

¹⁰¹ See *APEC Interim Report*, *supra* note 3 at 446-453. See also *supra* note 23 and surrounding discussion.

officers are guided by clear and appropriate guidelines, abuse of their discretion will hopefully be minimized.

Further, and in any event, to the extent that we are called on to review the actions of governments or security officials, it is ultimately the job of the courts—and not the government—to decide what is in line with our constitutional norms and traditions.¹⁰² As the Honourable Rosalie Abella, Justice, Court of Appeal for Ontario, recently stated:

“Judges will be required, as they inevitably are in unsettled times of crisis, to monitor and determine even more scrupulously than usual the permissibility of any limits imposed by the state when it purports in good faith to calibrate the tension between the public’s insecurities and its need for security. What, for example, will constitute reasonable limits in a free and democratic society confronting terrorism? What evidentiary basis will assist us in deciding whether, how high, and for how long to raise the justificatory threshold for government intrusion?”

President Bush changed the name of the campaign against terrorism from Operation Infinite Justice to Operation Enduring Freedom. Either way, the adjective connotes a long-term undertaking for his allies. That means that the public is likely to be apprehensive and raw for a long time. And that, in turn, means that as judges we will have to be vigilant for a long time: vigilant that we are neither over nor underreacting; vigilant that we are paying closer attention to the law and evidence before us than to our own fears or misconceptions; vigilant in remembering that compliance

¹⁰² For a useful discussion of the court’s judicial review function in the context of post-September 11th Canada, see L.E. Weinrib, “Terrorism’s Challenge to the Constitutional Order” in *Security of Freedom*, *supra* note 39 at 93; L.E. Weinrib, “Canada’s *Charter of Rights*: Paradigm Lost?” (2002) 6 *Rev. of Const. Stud.* 119. See further the recent remarks of the Honourable Mr. Justice A.H.J. Wachowich, Chief Justice of the Alberta Court of Queen’s Bench, indicating that:

“In a democracy, one of the roles of the Court is to ensure that neither the legislative nor the executive level of government oversteps their respective boundaries. That is a mandate conferred on the courts by the Constitution and the Rule of Law. It is important [to]...understand that this is a mandate specifically conferred by Parliament through the Canadian Charter of Rights and Freedoms—it is not a mandate that the courts took on themselves, as some seem to think.”

A.H.J. Wachowich, “Opening of the Court of Queen’s Bench of Alberta, 2002-2003 Session” (Edmonton, September 3, 2002), online: Alberta Courts homepage <http://www.albertacourts.ab.ca/qb/notices/opening02-03speech.pdf>.

with public opinion may jeopardize compliance with the public interest; and vigilant that our independence and impartiality are not cauterized by controversy. Vigilant, in short, that we do our best to keep doing our jobs properly.”¹⁰³

There are, I am sure, other potential challenges to this discussion.¹⁰⁴ However, in my view—at least in the context of those set out above—none of them challenge the more fundamental principle that free expression, in the context of citizen participation and peaceful protest,

¹⁰³ R.S. Abella, “Judging in the 21st Century” (2002) 25 *Advocates’ Q.* 131, 138-139. Madame Justice Abella has further argued that:

“democracy is enhanced, not cauterized, by a judiciary effectively fulfilling its Charter mandate, and... democratic values are strengthened not only by a strong legislature, but also by a strong judiciary... democracy is not—and never was—just about the wishes of the majority. What pumps oxygen no less forcefully through vibrant democratic veins is the protection of rights, through courts, notwithstanding the wishes of the majority. It is this second, crucial aspect of democratic values which has been submerged by the swirling discourse... When legislatures elected by majorities enact laws like the Charter, the majority is presumed to agree with that legislature’s decision to entrench rights and extend a constitutionally guaranteed invitation to the courts to intervene when legislative conduct is not demonstrably justified in a democratic society. In enforcing the Charter, therefore, the courts are not trespassing on legislative authority, they are fulfilling their assigned democratic duty to prevent legislative trespass on constitutional rights.”

R.S. Abella, “The Judicial Role in a Democratic State” (Keynote Address, 1999 Constitutional Cases Conference, Osgoode Hall Law School, York University, April 7, 2000), online: http://www.ontariocourts.on.ca/court_of_appeal/speeches/judicialrole.htm. See also R.S. Abella, “The Future After Twenty Years Under the Charter” (Closing Session, Canadian Rights and Freedoms, 20 Years Under the Charter, The Association for Canadian Studies, Ottawa, April 20, 2002), online: http://www.ontariocourts.on.ca/court_of_appeal/speeches/future.htm.

Further, and in any event, even if a court charged with the duty of reviewing government action gets the balance wrong, s. 33 of the *Charter*—the “notwithstanding clause”—provides some comfort to those who are skeptical of an all-powerful judiciary. While a comprehensive discussion of s. 33 of the *Charter* is beyond the scope of this paper, for a general discussion, see Hogg, *supra* note 69 at 36-1–36-11. I am grateful to Barbara Billingsley for raising this issue.

¹⁰⁴ For example, others might argue that the amount of damage that has been caused, and that is potentially caused, by anti-globalization protesters warrants significant security restrictions. The result of this approach, however, is that the vast majority of protesters—participating in a peaceful manner—are treated in a similar fashion as a totally different group—a minority—of violent protesters. Again, while I acknowledge that police may put into place appropriate time, manner and place measures that help to curb violence, property damage and injury, labeling all protesters as violent—or worse still, as terrorists—fails to tailor narrowly restrictions on *Charter* freedoms.

must be jealously guarded by a society characterized by freedom and democracy, not by fear and authority.

CONCLUSION

At the outset of this paper, I queried whether our post-September 11th legislative initiatives and law enforcement responses—for example, as discussed in this paper, the police responses around the 2002 G8 Summit in Alberta—can be justified as “reasonable limits” on citizens’ rights to protest actively; or whether they instead can only be justified as reasonable limits in a society characterized by fear, insecurity and government control?

If we accept as “reasonable” those limits on expression that we saw in Kananaskis, then what we have done, in my view, is to normalize a sensibility of fear by which to judge those limits. As with the discussion between Cassius and Brutus in Shakespeare’s *Julius Caesar* set out at the beginning of this paper,¹⁰⁵ whether we follow this trajectory of fear is, in the end, up to us. This paper urges a step away from our current path. Rather, I argue for a path that puts the “reasonable” back into “reasonable limits” of section 1 of the *Charter*. If we do not take this step, then through our far-reaching anti-terrorism initiatives we will have started to silence not only those who want to tear down buildings, but also those who peacefully want to question what those buildings stood for, not in the name of terror, but rather in the name of institutional tinkering and future reform. By giving our police and governments unbridled power, we will be ignoring the very democratic principles for which our governments are currently fighting.

This point was made recently (and more artfully) by Margaret Atwood who, again when commenting on the state of post-September 11th America, cautioned that:

“If you proceed much further down the slippery slope, people around the world will stop admiring the good things about you. They’ll decide that your city upon the hill is a slum and your democracy is a sham, and therefore you have no business trying to impose your sullied vision on them. They’ll think you’ve

¹⁰⁵ *Supra* note 1.

abandoned the rule of law. They'll think you've fouled your own nest.

The British used to have a myth about King Arthur. He wasn't dead, but sleeping in a cave, it was said; in the country's hour of greatest peril, he would return. You, too, have great spirits of the past you may call upon: men and women of courage, of conscience, of prescience. Summon them now, to stand with you, to inspire you, to defend the best in you. You need them."¹⁰⁶

Similarly, we as Canadians need to be strong and resist the fear that embraces us. This is what a commitment to free expression demands. The analysis provided by Commissioner Hughes through the APEC Inquiry provides us with a good starting point.

Shirley Tilghman, President of Princeton University, commented shortly after the events of September 11th that: "Defending... freedom of speech is not particularly difficult in times of peace and prosperity. It is in times of national crisis that our true commitment to freedom of speech and thought is tested."¹⁰⁷ It is time for us to demonstrate that "true commitment".

¹⁰⁶ "A Letter to America", *supra* note 51.

¹⁰⁷ S.M. Tilghman, "Discovery and Discourse, Leadership and Service: The Role of the Academy in Times of Crisis" (Presidential Installation Address, Princeton University, September 28, 2001), online: <http://www.princeton.edu/pr/news/01/q3/0928-SMT.htm>.