PROTESTERS' GUIDE TO THE LAW OF CIVIL DISOBEDIENCE IN BRITISH COLUMBIA

November 20, 2009

Olympic Edition

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INTRODUCTION

> **Historians offer evidence that some extra-legal activity always has had to be, and always will have to be, accepted by the legal system. Philosophers provide us with a rather uncomfortable insight that many brands of intentionally disobedient conduct may be justifiable and there is no bright line to help lawyers and Courts, who … actually have to make decisions.**
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> —Judy Fudge and Harry Glasbeek, "Civil Disobedience, Civil Liberties and Civil Resistance: Law's Role and Limits," (2003) 41 Osgoode Hall Law Journal 165 at 172.

I have written this paper to inform you of your rights when dealing with the police at public demonstrations. It is designed to help you exercise your right to engage in non-violent civil disobedience, and avoid committing any criminal offence. It is also designed to assist you in the event you are arrested.

The original *Protesters' Guide* was written in 1968–70, to assist those demonstrating in opposition to the Vietnam War, and then revised in 1973 to address protest against U.S. involvement in the Chilean military coup. It has gone through many revisions over the intervening years. This current update is intended to assist those who oppose the loss of many of our basic freedoms during the upcoming Olympics and who wish to express that opposition in the form of non-violent civil disobedience.

Issues around civil disobedience have become even more important in recent months, as the message has been delivered again, both here and in the U.S., that political strikes are illegal. In the U.S. the message took the form of a directive from the general counsel for the National Labor Relations Board (NLRB) that employers are justified in firing workers who walk off the job in support of political issues—in this case, in response to a complaint with respect to the May Day 2006 work stoppage of hundreds of thousands of immigrant workers.

Here, the Supreme Court of Canada refused leave to appeal to the British Columbia Teachers' Federation and the Hospital Employees' Union in a case over their right to engage in political strikes, on the basis the prohibition violated their Charter rights (*British Columbia Teachers' Federation and British Columbia Public Sector Employers' Association; Hospital Employees' Union, and Health Employers' Association of British Columbia* [2009], B.C.J. No. 155; leave to appeal refused [2009] S.C.C.A. No. 160).

Everyone must make his or her own individual choice about whether or not to engage in civil disobedience. It is our responsibility to become fully informed about the consequences that may follow from engaging in any form of protest.

The information that follows is of a general nature. It will not answer every question you have and may not apply in every case. I have written about the law as it applies in Canada and specifically in British Columbia as of November 20, 2009.

It is also important to note that the information in this paper should not be relied upon in any legal proceeding, as it is not a replacement for proper legal advice.

When exercised as collective action, civil disobedience can be particularly effective in motivating social and political change. The long history of civil disobedience, as practised by different peoples around the world, is mirrored here in British Columbia.

Aboriginal peoples in British Columbia have engaged in various forms of creative civil disobedience since their lands were first colonized under British and then Canadian law. The Gitxsan and Wet'suwet'en nations of northern BC successfully combined blockading and court actions, which led to the Supreme Court of Canada's unanimous *Delgamuukw* decision of 1997 recognizing aboriginal title. Members of the Neskonlith First Nation occupied the Sun Peaks Resort development site near Kamloops in assertion of their territorial claims.

Our province also has an extensive and remarkably consistent record of conflict between lawmakers, employers and working people. In July 1918, United Mine Workers organizer and pacifist Albert "Ginger" Goodwin was shot by a private policeman outside Cumberland. His murder sparked Canada's first general strike as BC workers walked off the job in protest.

The Doukhobors, a Christian group of Russian origin who settled in the Kootenays, have used a variety of civil disobedience techniques to defend their pacifist and religious beliefs over the past century.

In the late 1980s, gay and lesbian activists adopted ACT UP tactics to bring awareness to the need for anti-discriminatory employment and spousal rights' laws.

In 1983, in Operation Solidarity, a coalition of unions, community and church groups opposed government legislative attacks on human and labour rights. The resistance led to some of the largest demonstrations and marches in the history of the country, including one in Vancouver numbering forty thousand people.

Since 1984, the Nanoose Conversion Campaign has included a series of civil disobedience actions by protesters opposed to American underwater nuclear weapons testing in the Georgia Strait.

The "Clayquot Summer" of 1993 was a non-violent environmental protest that led to the arrests of more than 850 people. It was one of the largest acts of civil disobedience in Canadian history, and resulted in reforms to BC's forest practice laws.

In 1998, irate BC fishers blockaded American boats and a ferry to protest rapidly diminishing wild salmon runs amid the collapse of international salmon treaty talks.

Over the past several years, a wide range of BC citizens have joined in anti-corporate globalization actions, from the Asian-Pacific Economic Forum meetings at the University of

British Columbia to and the World Trade Organization in Seattle, and to the FTAA Free Trade Area of the Americas events in Quebec City.

One of the new models of civil disobedience is the monthly Critical Mass Bike Ride protesting a range of issues from inadequate facilities for bicycles to our society's reliance on motor vehicles. During the summer months the ride can involve as many as several thousand cyclists travelling slowly through some of Vancouver's main streets.

The protests are peaceful and respectful of others—but do slow or impede vehicles in heavily travelled parts of the city. The riders also tend to ignore stop signs and red lights at intersections. They are often dressed in humorous costumes and at times include entire families, from ages five to seventy-five. The rides, which originated in San Francisco almost twenty years ago, have grown to regular events in many cities worldwide.

Allow me to describe one last but striking example of civil disobedience—by a group of average Canadians reacting to a government program that has been described as outsourcing torture.

Abousfian Abdelrazik is a Canadian citizen originally from the Sudan. On a trip to the Sudan he was jailed on the recommendation of the Canadian Security Intelligence Service ("CSIS"). Although he was never charged, the evidence indicates that he was beaten, threatened and tortured during two periods of detention. During this time he was interrogated by CSIS, Sudanese and French intelligence agents, as well as by agents of the FBI.

He was eventually released and cleared of all suspicion by Sudanese officials, CSIS and even the RCMP. In late 2007, however, his efforts to return home to Montreal were repeatedly frustrated. He was under a complete asset freeze and travel ban. In December 2008, almost a year ago, Canadian officials advised him that he must present a fully paid-for airplane ticket before Passport Canada would issue an emergency passport. The government was aware that he was destitute. The government then took the position that anyone who paid for his ticket would be charged under section 3 of the United Nations' Al Qaida and Taliban Regulation.

The civil disobedience began. Well over a hundred people—for the large part, average Canadian citizens—joined together to buy Abdelrazik a plane ticket home. People from all reaches of the country continue to contribute and their number has now reached approximately two hundred and fifty. That has not stopped the federal government's efforts to prevent Abdelrazik from returning to the country of his citizenship. It took a further court decision to enable him to return to his home in Montreal on June 27, 2009.

He has now filed a civil suit for violation of his section 6 Charter rights (see The People's Commission Network website: www.peoplescommission.org/en/abdelrazik).

The law recognizes the important role civil disobedience has played in the preservation of our democratic rights. It also recognizes your right to engage in civil disobedience. Justice Stuart stated it this way (in *R.* v. *Mayer* [1994] Y.J. No. 142 at paras. 7-9):

> A healthy democracy demands an active, informed citizenry willing, nay, eager, to engage in constructive public debate. Our laws must sustain and promote free public discussion. To interfere unduly with this freedom threatens the survival of our democratic existence. Any laws limiting freedom of speech must be designed to protect other fundamental freedoms and be enforced with utmost sensitivity to avoid unnecessarily daunting the desire of any citizen to engage in public debate. Our laws, institutions and society as a whole must develop and abide by a healthy tolerance for the commitment some exercise in pursuing their beliefs.
>
> In the diversity of views and values within our society and in the freedom enshrined to express our differences, we, as a democracy, find the source of our enduring ability to survive. Through constructive resolution of our differences and conflicts, through an open invitation for all to participate in our processes of decision making, our society finds the creativity and energy to develop innovations that overcome the challenges threatening our survival as a democratic society. In this spirit of democracy and in keeping with the fundamental importance of free public discussion, the laws applicable to the actions of the accused must be interpreted and applied.
>
> The accused, with pride, acknowledge that in passionately embracing their beliefs they will be civilly disobedient when necessary to promote the changes they pursue. Civil disobedience lies at the heart of many democratic changes. If acts of civil disobedience do not endanger anyone, or damage property, or significantly restrict essential services and processes within society, and interfere in a minor fashion with the rights of others, the State response must be clear but need not be harsh.

Even the policy of the Vancouver Police Department (VPD) on crowd control now begins with an acknowledgement of the police responsibility "to provide an environment for lawful democratic protests" (BC Civil Liberties Association website, www.bccla.org/police issue/police issue.htm).

This guide takes into account the post–9/11 legislation which impacts the civil liberties of Canadians. Much of the post–9/11 legislation is aimed at terrorists and organized crime, but some of its provisions can be used against protesters.

The Criminal Code referred to in this guide, as well as some of the post–9/11 legislation, are accessible through the Department of Justice website, at laws.justice.gc.ca.

I owe a particular debt to a friend and colleague, Mike Dumler, for his encouragement in writing this guide, and for the time we spent discussing the theories and practices of activists like Saul Alinsky and other Canadian and American civil libertarians.

With respect to some of the earlier versions of this work, I would like to thank the Collective Opposed to Police Brutality (Quebec) for their booklet *Guess What! We've Got Rights?!* (Montreal, March 1999). The work of the Law Union of Ontario, in its manual *Offence/Defence: Law for Activists* (1996 edition), has also been of invaluable assistance.

I have also received a great deal of valuable assistance, particularly from Sam Black, at the time a lawyer with our firm, and two other lawyers with our firm, Michael Prokosh and Maria Koroneos.

If you are interested in reading more about the history and practice of non-violent civil disobedience, I recommend the following:

Saul Alinsky, *Rules for Radicals* (Random House, Toronto, 1971).

Gene Sharp, *The Politics of Non-Violent Action,* Volumes 1, 2 and 3 (Porter Sergeant, Boston, Massachusetts, 1973).

Judy Fudge & Harry Glasbeek, "Civil Disobedience, Civil Liberties and Civil Resistance: Law's Role and Limits" (2003) 41 Osgoode Hall Law Journal, No. 2 and 3 at 165–173. A source of thought-provoking material on civil disobedience, with authors from a range of academic disciplines and occupations, including historians, philosophers, activists, political scientists, social scientists, lawyers and judges.

Finally, we welcome your questions, comments and criticisms. The e-mail address is lmcgrady@mcgradylaw.ca.

DEMONSTRATIONS

Protecting your identity

You can choose to wear a mask or other headgear to protect your identity. However, there are some drawbacks to this. First, it is a crime to be masked or disguised with the intention of committing a crime. This may give police an excuse to target you even though you are not intending to commit a crime. Second, wearing a mask may frighten other demonstrators.

Undercover police officers also often mingle with demonstrating crowds, and often go unnoticed. Their main objective is to identify demonstrators, activists, organizers and speakers. On occasion, they also may be masked, and may even seem to be the most aggressive of the demonstrators.

One of the most dramatic illustrations of this occurred in August 2007, during a demonstration which included many trade unionists protesting at a Security and Prosperity Partnership of North America conference in Montebello, Quebec.

Three masked demonstrators, later exposed to be members of Quebec's Provincial Police Force, were caught on video doing what they could to incite violence. The video, later posted on YouTube, showed three men with bandanas across their faces and large rocks in their hands taunting union members, attempting to provoke violence within the demonstrating group.

One union leader, Dave Coles from the Communications, Energy and Paperworkers Union of Canada, emerged from the group of demonstrators and urged the three to calm down and leave the area, after first putting their rocks down. The men refused and began to swear at him and shoved him. A few moments later Cole realized they were police *agents provocateurs* and began to alert the demonstrators to their presence. The fact that the men were police officers was subsequently acknowledged. They have been summoned to appear before Quebec's Independent Police Ethics Committee.

The footage is available on YouTube and remains a model of how to react when you believe you are dealing with police *agents provocateurs*. It can be accessed by searching for "stop spp protests".

Agents provocateurs may be either police officers in disguise or paid agents hired to infiltrate legitimate peaceful demonstrations. They attempt to provoke violence in order to justify arrests and discredit the protest. The British Columbia Civil Liberties Association (BCCLA) is seeking assurances that they will not be used during the Olympics, but have received no response thus far.

In any event, the choice to protect your identity is yours to make.

What to bring

Items that are always useful to bring to a demonstration include:

Pen and paper: These are handy for taking detailed notes of any incident that might occur during the demonstration. For example, if there are arrests, it is worth recording the names of people arrested, their telephone numbers, contacts, details of the arrest, and so on.

Photographic cameras and video cameras: Police do not like being watched, or worse, being caught committing an illegal act. Photo and video documentation may keep the police in line, or prove useful evidence in cases where the police step out of line.

Tape recorders: A tape recording of remarks by police is a valuable form of documentation.

Clothing: Ask yourself whether the shoes you are wearing are comfortable for running, and whether the clothes you are wearing will attract too much attention. Also, keep in mind that you do not want to be easily grabbed by your clothes or hair by someone attempting to restrain you.

Water bottles: Use for bathing your eyes in the event the police use tear gas. You may consider wearing glasses rather than contact lenses.

Prescription drugs: Have these in their original packaging, in case you are detained.

Identification: You may wish to carry photo identification such as a driver's license, to ensure that you are released from jail within a reasonable time if you are arrested. Write the phone number of your support person or lawyer on your arm, so you can call if you are arrested.

What to leave at home

Do not bring your address book or any other document containing sensitive information.

Do not bring any illegal drugs.

Do not bring anything that might be considered a weapon.

Bring one piece of photo identification and leave the rest at home. If you are arrested, the police may demand photo identification before they will release you.

Watch what you say

Remember, undercover police may be mingling with the crowd. Be careful about what you say. Do not try to expose an undercover police officer yourself by shouting and pointing at him or her; you may be charged with obstruction. Instead, find discreet ways to inform the people around you of potential undercover police presence.

If you are using cellphones at the demonstration, bear in mind that cellphone conversations are easily intercepted, whether it is legal to do so or not.

Voluntary dispersal

Always leave in groups following an event. This is the most vulnerable time for arrest. People are most often improperly targeted for arrests at the end of the demonstration. Consider leaving before the event ends.

Involuntary dispersal by riot police

If the police try to disperse the crowd, remember to leave in groups of about ten to fifteen, so that you have some witnesses and support.

The police may use a number of potentially harmful tactics to disperse the crowd. Efforts have been made to have the substances that police plan to use disclosed to the public in the case of any Olympic demonstrations, but so far unsuccessfully. The following have been used in previous demonstrations:

Pepper spray: If you are pepper-sprayed, do not rub your eyes. Thoroughly rinse the affected areas with water. Do not panic; the burning sensation will pass in time. One of the unspoken features of pepper spray is that it blurs your vision, to the extent that you are not able to witness any police misconduct that may follow.

Tear gas: Comes in a variety of forms:

> **HC** – this is crowd-dispersing smoke. It is white smoke that is harmless and non-toxic. It is used for the psychological effect.
>
> **CN** – this is standard tear gas. It smells like apples. It causes a burning sensation in the eyes and skin and may irritate mucous membranes.
>
> **CS** – this is much stronger than CN, but has the same effects. It has a strong pepper-like smell and causes nausea and vomiting.

If you are sprayed with tear gas, try to do the following:

1. Do not panic. The effects will wear off in about ten to fifteen minutes. Panicking will only make it worse.
2. Go to a well-ventilated area, facing the wind with your eyes open. Do not rub your eyes.
3. Rinse your face and any exposed parts of your body with water. Adding baking soda to the water will improve its effectiveness as a liquid solution.

Stun guns: Also referred to by the brand name Taser. Police use stun guns that deliver a 50,000-volt shock that overwhelms the central nervous system. There have been at least eighteen deaths in Taser-related incidents across Canada in the past six years. This includes the tragic death of Robert Dziekanski at the hands of the RCMP at Vancouver Airport on October 14, 2007.

Sonic guns: The technical name for the sonic gun is "Long Range Acoustic Device" (LRAD). Much like the police press releases surrounding Tasers, we hear regular assurances that LRADs are really very simple devices used to communicate with large crowds in emergencies.

The parallel with Tasers is quite remarkable in other respects. Police reassurances that they did not provide special training for the use of Tasers because these are very simple piece of equipment are echoed in the current assurances that no special training is required for LRADs because all is the operator needs to do is plug in a microphone and push a button.

A more accurate assessment of the LRAD's capabilities is that it could be used to disperse protesters with "intense beams of irritating—and possibly ear-damaging—sound" (Mark Hume, "Vancouver Police criticized over 'sonic gun'", *Globe & Mail*, November 11, 2009, page S2; see also Kim Pemberton, "New hailer is a loudspeaker, not a crowd-control device, police say," *Vancouver Sun*, November 11, 2009, page A5).

It is rather ironic that the use of the LRAD during the September 24 and 25, 2009 G20 demonstrations in Pittsburg is cited as an illustration of the weapon's success. Material posted on the website of the American Civil Liberty Union ("ACLU") referring to it as a "noise cannon" suggests the contrary (www.aclu.org/blog/free-speech/fighting-free-speech-g20-pittsburgh).

On November 18, 2009, the VPD announced they would disable the "tone" capability of the device for the time being, until they develop an appropriate policy for its use and their officers are trained in its proper use. They will also seek the approval of the Police Board before reversing that decision.

BCCLA legal observers

The British Columbia Civil Liberties Association (BCCLA) has developed an excellent program for legal observers to act on its behalf during the Olympics. These are volunteers who will focus on police, military and private security conduct to ensure accountability. They will observe major protests and report their observations back to the BCCLA's team of volunteer lawyers. In some cases, these lawyers may be able to go to court to protect people's rights where complaints cannot be resolved informally.

The legal observer program is similar to the very successful Gandhi-inspired "protective accompaniment" practice used in Mexico and Latin America by Peace Brigades International for almost thirty years now. It uses non-violent methods to help deter politically motivated violence and assert human rights in high conflict-areas (see www.pbicanada.org).

The ACLU has also made effective use of the legal observer program in a wide range of free speech campaigns, including the September 24 and 25, 2009 G20 protests in Pittsburgh.

The National Lawyers Guild has prepared a very detailed and helpful Legal Observer Manual (nlg.org/resources/publications_handbooks.php). You may want to review it before a demonstration.

Are the police bothering you?

Prior contact with the police

It is generally worthwhile to make contact with the police and establish a relationship before you decide to engage in protest activity. But before you share information with them, decide exactly *how much* information you are prepared to share. Telling them the approximate number of demonstrators you are expecting and the location and/or route of a demonstration makes some sense. Organizations like the BCCLA also recommend appointing a group spokesperson for an event; this person can then be given a cell phone to encourage communication with the police.

A number of individuals otherwise inclined to make contact with the police prior to demonstrating have been discouraged from doing so by a recent presentation by the Assistant Commissioner of the RCMP, Bud Mercer. In an appearance in July 2009 before Vancouver City Council, Mercer appeared to characterize all demonstrators as engaging in "criminal protests" around the Olympics. He argued that characterisation justified what have been described as "secret police" tactics—police visiting active opponents of the Olympics at their homes or workplaces, as well as accosting people on the street, to question them about their plans for the Olympics.

Identifying yourself

At common law, a citizen has no legal duty to identify him- or herself to the police. This right is waived if the police see a person committing an offence.

When the police stop a citizen who they have not seen committing an offence, but merely because they are suspicious of that person, the courts have upheld the citizen's right to refuse to identify him- or herself. Such a refusal, where the citizen has a lawful excuse not to respond to the authority's demand to identity him- or herself, is not considered to be obstruction.

The law obliges you to identify yourself to police in the following situations:

1. Absent some statutory provision to the contrary, a person must identify him- or herself to a police officer only if that police officer is in a position to arrest that person or to issue some form of summons.

2. You should identify yourself if you have been lawfully arrested. A refusal to identify yourself once you have been lawfully arrested can result in a conviction for obstructing a police officer.

3. If you are driving a motor vehicle, you must show your driver's licence. If you do not have your licence and the officer asks for your name and date of birth, you should provide it.

4. The Trespass Act, R.S.B.C. 1996, c. 462, requires you to provide your correct name and address if you are on "enclosed land" and there are reasonable grounds for the occupier or a person authorized by the occupier to believe you have contravened the provisions of the act.

5. If you are found in a bar or movie theatre, you are obliged to prove that you are of legal age.

6. According to some municipal bylaws, if you are found at night in a public place (e.g. a park), you are obliged to identify yourself or you may be charged with vagrancy.

Other than these exceptions, you are never obliged to identify yourself or speak to the police. Page three of the Collective Opposed to Police Brutality's booklet *Guess What! We've Got Rights?!*, is informative:

> If police ask you to identify yourself or to come with them, ask them: **"Am I under arrest?"** If you're not, you may tell them, calmly and firmly, that you don't have to either identify yourself or follow them.

It is extremely important to stay calm when you are asking the police if you are under arrest. If you yell, or draw attention to yourself to the extent that you cause a disturbance, the police will be able to arrest you for breach of the peace.

The Vancouver-based Pivot Legal Society produces a Rights Card that summarizes your rights and suggests a way of addressing a police officer in a manner designed to secure those rights. A copy can be downloaded from their website, www.pivotlegal.org, or obtained as a folding card from Pivot.

You should also bear in mind that you are probably being videotaped on a fairly constant basis during any demonstration. You may also want to assume that your cellphone is being wire-tapped and recorded at all times. Until a recent ruling that section 184.4 of the Criminal Code violated the section 8 search-and-seizure provisions of the Charter, police

had the power to intercept private communications without court authorization. That power applied in circumstances in which immediate action was called for to prevent serious harm (*R.* v. *Sipes,* 2009 BCSC 285).

If you are demonstrating at some special event such as the Olympics, expect to encounter an extraordinary number of police, armed forces and private security, as well as all forms of electronic surveillance. The chief of Olympic security has planned for at least 900 perimeter cameras, 7,000 police and 5,000 private security officers and 4,500 members of the armed forces.

Do the police have to identify themselves?

In BC, according to the Police (Uniforms) Regulations of the Police Act (B.C. Regulation 564/76, section 8), all uniformed officers have to wear a "badge, metal, plastic or cloth, bearing an identification number or name" above the right breast pocket of their uniform. Only executive and senior officers are not required to wear such identification.

Undercover police, of course, are also excluded from this regulation.

If their identification is not clear, you should ask the officer to identify him- or herself.

It may be worth writing down a description of any officer acting illegally or improperly. Try to remember or note obvious characteristics such as height, weight, hair colour and any distinguishing features, such as eyeglasses, scars, etc.

You should bear in mind that in addition to the thousands of police on duty for the Olympics, there will also be several thousand private security and military personnel.

Racial profiling: the offence of *demonstrating while Muslim*

Professor Patricia Williams of Columbia University has described the psychological harm caused by racial profiling as the equivalent of "spirit murder," because that expression captures the psychological and emotional suffering not adequately addressed by the law (cited by R. Bahdi, "No Exit: Racial Profiling and Canada's War Against Terrorism," in "Civil Disobedience, Civil Liberties and Civil Resistance: Law's Rule and Limits" (2003) 41 Osgoode Hall L.J. 293 at 311).

For its First Nations, Chinese, Japanese, Punjabi, South Asian, Black and Muslim residents, racial profiling has existed in Vancouver throughout the city's history. Much the same, of course, can be said of other cities in Canada. This remains true despite the recent and groundbreaking official recognition of racial profiling in our police and judicial system by both the courts and political figures. During and after your

demonstration, you may well be confronted with official statements denying the existence of racial profiling.

The leading case in Canada on the issue is *R.* v. *Brown* (2003) 64 O.R. (3d) 161, available on the Ontario Courts' website (www.ontariocourts.on.ca). The definition of racial profiling adopted by the Ontario Court of Appeal was advanced by one of the intervenors—the African Canadian Legal Clinic:

> Racial profiling is criminal profiling based on race. Racial or colour profiling refer to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group (paragraph 7).

The court emphasized that the attitude underlying racial profiling may be consciously or unconsciously held. The police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping (paragraph 8). The court also set out the kinds of proof, primarily direct evidence, by which racial profiling can be proved (paragraphs 42 to 49).

The court noted that the typical assumption that racial profiling is more likely to occur in an area where the population includes a large proportion of the targeted racial group was simply not accurate. Studies demonstrated that profiling was more likely to take place in areas where the victims looked out of place (paragraph 87).

The court adopted this passage, parts of which had also been quoted with approval by L'Hereux-Dube J. and McLachlin J. in the Supreme Court of Canada at paragraph 46 of *R.* v. *S. (R.D)* [1997] 3 S.C.R. 484:

> Racism, and in particular anti-black racism, is a part of our community psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes (paragraph 94).

One of the other misconceptions about racial stereotyping is that when you complain about it, you must establish that the decision or conduct was based on race. In fact, this is not the case. You need only establish that race was a factor in the decision or conduct, which can be established by indirect or circumstantial evidence (*Troy* v. *Kemmir Enterprises,* 2003 BCSC 1947).

Hijacking your protest

Virtually every peaceful non-violent civil disobedience event attracts other protesters who engage in violent activity directed towards the police or towards property. Oftentimes these

protesters are masked; on occasion they are agent provocateurs or police officers themselves, as we saw in the Montebello illustration above. Often they mingle with peaceful protesters, in the hope that these peaceful protesters will inadvertently act as their cover or to make it seem as if their numbers are greater than they truly are.

It goes without saying that the activities of these individuals frustrate and discredit the conduct of the peaceful non-violent protesters. The media often seizes upon the conduct of the violent few to characterize and discredit the entire protest movement.

There are a few basic steps that may minimize these results and protect you against this type of conduct.

The first and most obvious one is to physically move away from these individuals when they attempt to join your group of protesters.

It is also helpful to state clearly in a very loud voice that you disprove of the violence and are not part of it in any way.

We also strongly recommend the use of marshals around all four perimeters of your group of protesters. The function of the marshals is to ensure that other violent individuals cannot mingle with your particular group. They also perform a valuable function in keeping your group physically together.

Detention

Canadians expect to be able to walk freely without being arbitrarily detained. These expectations are confirmed through section 9 of the Canadian Charter of Rights and Freedoms, which sets out that "Everyone has the right not to be arbitrarily detained or imprisoned." If you are detained by police for investigative purposes, the police must advise you, in clear and simple language, of the reasons for the detention.

The power to detain cannot be exercised on the basis of a hunch or intuition gained by experience, nor can it become a de facto arrest. Police officers do not have carte blanche to detain.

As a result of recent rulings by the Supreme Court of Canada, police officers may briefly detain an individual for investigative purposes. They may do so only if there are reasonable grounds to suspect, in all the circumstances, that the individual is connected to a particular crime and that such detention is necessary. At a minimum, they must advise you clearly and simply of the reason for your arrest (*R.* v. *Mann*, 2004 SCC 52).

The detention must be conducted in a reasonable manner. Investigative detention should be brief. There is no obligation on the detained person to answer questions.

Arrest

Individuals who engage in acts of civil disobedience should be prepared for arrest and expect to be arrested.

Arrest with a warrant

A warrant for arrest is a piece of paper signed by a judge with your name and the alleged offence you have committed written on it. You may ask the police officer to show it to you—if you do, the police officer is required to show you the warrant.

Arrest without a warrant

The Criminal Code (section 495) states that you can only be arrested without a warrant if:

1. a police officer believes on reasonable grounds that you have committed or are about to commit an indictable offence;

2. a police officer sees you committing a criminal offence; or

3. a police officer has reasonable grounds to believe that there is an outstanding warrant for your arrest (e.g. for unpaid tickets).

An arrest without a warrant is only lawful if the type of information which would have been contained in the warrant is conveyed to you orally. The alleged offence should be conveyed before the officer questions and obtains a response from the person under arrest or detention. These basic and important values are included in section 10(a) of the Charter of Rights and Freedom, which states that "Everyone has the right on arrest or detention to be informed promptly of the reasons therefore…". The purpose of communicating this information is to enable the person under arrest or detention to immediately undertake his or her defence, including a decision as to what response, if any, to make to the accusation.

You may not wish to speak to anyone regarding your arrest

Many demonstrators have a rule that they do not say anything to the police. However, once arrested you are required to provide police with your first and last names, complete address, and your date of birth.

You have a right to remain silent. Immediately ask to speak to a lawyer. If you cannot afford one, get legal aid or speak to the appointed Duty Counsel whose job it is to advise you of your rights. Under no circumstances should you give up your right to speak to a

lawyer. There is no such thing as "only one phone call." You have a right to take appropriate steps to contact legal counsel.

You may not wish to speak to anyone, other than a lawyer, regarding the circumstances of your arrest. The police may try to engage you in conversation by being friendly and concerned, or may try to use the "good cop/bad cop" routine. They may make promises that are not binding. They may tell you lies to intimidate you. Do not discuss your arrest with a person in your cell; that person could be an undercover police officer.

Just stay calm. Continue to request to speak to a lawyer. The police can only hold you for 24 hours before taking you in front of a judge.

Arrested for what?!

If you are arrested, the police must tell you what they are charging you with. The right to be promptly advised of the reason for one's detention is embodied in section 10(a) of the Charter of Rights and Freedoms. The right to be informed of the true grounds for the arrest or detention is also firmly rooted in the common law, which requires that the detainee be informed in sufficient detail so that he or she "knows in substance the reason why it is claimed that this restraint should be imposed." The right is founded on the notion that a person is not obliged to submit to an arrest if they do not know the reasons for it.

Ask the police if you are under arrest and if so, what the charge is

Crown Counsel's policy on civil disobedience is referenced in *Slocan Forest Products Ltd.* v. *John Doe* [2000] BCJ No. 1592 at para 24:

> On occasion those involved in public demonstrations come into conflict with the law and obstruct or interfere with the rights of others. The use of criminal sanctions in these situations is generally not appropriate. Charges may be considered where the circumstances described in #7 below exist.
>
> When Crown Counsel are consulted, they should encourage the police to exercise discretion in selecting an appropriate response for each factual situation while ensuring that the general public is not unduly inconvenienced.
>
> The following guidelines apply to civil disobedience situations:
>
> > Where the civil disobedience affects only a selected group of individuals, those individuals should generally be encouraged to apply for a civil injunction to stop the disobedience;
> >
> > In the event the civil disobedience continues after an injunction is granted the party obtaining the injunction should be encouraged to

proceed with civil contempt proceedings in the court in which the injunction was obtained.

The Attorney General may intervene in the contempt proceedings where the contempt becomes criminal in nature. This usually will occur only where the conduct of disobeying the court order tends to bring the administration of justice into public ridicule or scorn or the disobedience otherwise interferes with the proper administration of justice.

In appropriate cases, where a large sector of the public is affected by the demonstrators, and the demonstration affects public property such as highways or waterways, the Attorney General, acting for the Ministry affected, may bring an application for an injunction to cease the disobedience. Any subsequent contempt proceedings would be pursued by the Attorney General.

Civil contempt proceedings are more expedient and more effective than lengthy criminal proceedings under section 127 of the Criminal Code. As a result prosecutions under section 127 for the disobeying of an injunction are discouraged.

In cases where there are reasonable grounds to believe that the injunctive relief would either not be granted or that it would be ineffective, consideration should be given to charges under provincial or federal statutes rather than the Criminal Code. Where a provincial or federal statute or regulation applies to the facts of the case, it is preferred that action be taken under such legislation or regulation (e.g., section 6 and 14 of the Highways Act).

Charges under the Criminal Code against demonstrators may be appropriate in the following situations:

conduct involving violence resulting in physical harm, which is not insignificant, or consisting of assaults with a reasonable apprehension of violence or physical injury.

conduct causing property damage, which is not insignificant, or where there is property damage and there is a reasonable apprehension of further serious property damage.

conduct involving an assault on a peace officer, which is not insignificant.

conduct where the public interest clearly requires a prosecution.

When the conduct described in (a), (b), (c) or (d) exists and criminal charges result, other Criminal Code charges such as mischief (s. 430(1)(c) or (d)) or obstruction of a highway (s. 432(1)(g) may also be appropriate.

Crown Counsel should be aware that police have the power of arrest under

> provincial statutes to prevent the continuation of an offence (*Moore* v. *The Queen* (1978) 43 CCC (2d) 83). There also exists under the Criminal Code and under the common law the power to arrest for breach of the peace without the necessity of criminal charges as a consequence.
>
> All proposed prosecutions in this category, or civil injunctions that come to the attention of Crown Counsel who, in turn, will consult with the Director of Legal Services . . . about the appropriate action to be taken pursuant to these guidelines.

In *Slocan Forest Products Ltd., supra*, the B.C. Supreme Court, although disapproving of "police neutrality in the instance of genuine civil disobedience", made the following comment with respect to labour disputes:

> ¶ 46 In the context of an ordinary civil dispute police restraint and the maintenance of police neutrality may be very important. The police should not generally be seen to take sides in anything that is essentially a civil dispute.

See *Canada Post Corp.* v. *Canadian Union of Postal Workers* (1991), 61 B.C.L.R. (2d) 120, for a helpful discussion of such considerations.

The Criminal Justice Branch, Ministry of Attorney General, Crown Counsel Policy Manual on Civil Disobedience, updated October 2, 2009 is available at www.ag.gov.bc.ca /prosecution-service/policy-man/pdf/civi-CivilDisobedience.

The most common charges

Mischief

This offence is extremely broad in its scope and includes destroying, damaging or rendering inoperative property, or preventing or interfering with its lawful use.

The key is not to destroy, damage or render inoperative property, or prevent or interfere with its lawful use.

In *R.* v. *Mayer* [1994] Y.J. No. 142, three individuals sat silently chained together to a railing in the legislature in the Yukon. The court stated that their actions did not constitute mischief. Actions constituting slight inconvenience that do not interfere or interrupt the lawful use or enjoyment of property do not amount to criminal mischief.

In *R.* v. *McBain* [1992] A.J. No. 515 (Prov. Ct.), the mere presence of protesters sitting in the public waiting room of a minister's office during regular business hours was not

considered to be mischief. However, it became mischief when the protestors refused to leave when the office was closing for the evening.

Creating a human barricade so that no person can pass is mischief.

Protesters chaining themselves to the anchor chain of a U.S. aircraft carrier were found to be interfering with the potential use of the ship's anchor and were convicted of mischief.

Electronic civil disobedience and mischief

Electronic civil disobedience often constitutes the offence of mischief. Some protesters view electronic media as a new space within society that can be used in much the same fashion as you would a city council, chamber, legislative grounds or city street.

One of the most popular such acts of civil disobedience in recent years involved the use of a software referred to as "FloodNet" which invited mass participation in what came to be described as virtual sit-ins against the Mexican government during the Chiapas uprising in southern Mexico in 1994.

Another group called X-Ploit hacked the website of Mexico's finance ministry and replaced it with the face of the Mexican revolutionary hero Emiliano Zapata, in sympathy with the Zapatista rebellion in Chiapas.

Other protesters staged an electronic blockade of Mexican embassies and consulates in the United States and Canada, in solidarity with the teachers and protesters of the state of Oaxaca.

Electronic civil disobedience is often used in combination with street demonstrations, as it was during the World Trade Organization demonstrations in Seattle. The disadvantage of electronic civil disobedience, of course, is its lack of visibility. This is perhaps more than compensated for by its reach in terms of numbers and geography.

In addition to the offence of mischief, this type of civil disobedience can also involve violation of copyright and trademark laws, with civil rather than criminal consequences.

The City of Vancouver noise bylaw

According to the City of Vancouver Noise Control Bylaw No. 6555, Section 3:

> No person shall make or cause, or permit to be made or caused, any noise or sound in a street, park or similar public place which disturbs or tends to disturb unreasonably the quiet, peace, rest, enjoyment, comfort or convenience of persons in the neighbourhood or vicinity.

The levels of noise permitted vary in different zones in the city (Sections 5, 6, 6A, 7 of Bylaw No. 6555), but in all zones, levels of permissible noise are higher in the daytime hours, from, 7 a.m. to 10 p.m.

For the Olympic period, these provisions have become redundant for most of downtown Vancouver and the likely sites of most civil disobedience during the games.

City of Vancouver Bylaw No. 9908: the "Winter Games Bylaw"

On June 18, 2003, the City of Vancouver and the Canadian Olympic Committee signed a contract with the International Olympic Committee (IOC) with respect to the games (see olympichostcity.vancouver.ca /pdfHost%20City%20Agreement.pdf).

It is a lengthy document but bears reading, most particularly section 4. It is a morality tale about the degree to which our elected governments will compromise our Charter rights without public debate or even notice.

In clause 47 of that contract the City undertook to ensure that the basic terms of Rule 51 of the Olympic Charter would be strictly observed. It undertook to ensure that there would be no "propaganda" inside or outside Olympic venues or in City airspace that could be seen by spectators or viewed by television cameras.

Rule 51 of the IOC's Olympic Charter prohibits any "demonstration, or political, religious or racial propaganda …. in any Olympic sites, venues or other areas."

There is a real question as to whether or not the City had the capacity to enter such a contract. First of all, it appears to violate the Canadian Charter of Rights and Freedoms—perhaps several key rights. Secondly, it is very likely contrary to public policy (Angela Swan, *Canadian Contract Law*, 2nd edition, paragraph 10.2).

It was pursuant to that contract that the City passed its now notorious Bylaw No. 9908, "the Winter Games Bylaw." If you have time, I recommend that you review this bylaw. It is available at vancouver.ca/blStorage/9908.pdf.

The bylaw covers some forty square blocks of downtown Vancouver as set out in Schedules A to C—the city's commercial and residential core, and a prime focus for civil disobedience during the Olympics. According to section 15.2 of the bylaw, it came into force on the day of its enactment—July 23, 2009.

The most extraordinary feature of the bylaw is found in section 4. It provides that during the Winter Games, a person must not bring on city land any stick or glass or metal bottle usable as a weapon; any large object including any bag or luggage that exceeds roughly 2' x 3' x 4'; any voice amplification system including a megaphone; anything that makes

noise that interferes with the enjoyment of entertainment; and must not cause any disturbance or distribute any advertising material or install any signs unless licensed to do so.

Section 7.1 gives the mayor power to restrict the use of voice application systems—staples for any good protest—from 8:00 a.m. to midnight each day at venues in the city.

The City's sign bylaw is the subject of section 8, which essentially allows for the relaxation of this bylaw when it comes to celebratory signs. Special status is given to "celebratory signs"—ones that celebrates the Winter Games and create or enhance a festive environment or atmosphere for the 2010 Games.

When these various provisions are combined, they constitute a very powerful ban on all traditional protest activities in these key areas of the city: signs, congregating, leafleting, chanting, using megaphones or otherwise making loud noises.

The Province has also passed the Miscellaneous Statutes Amendment Act (Bill 13), giving the cities of Richmond and Vancouver and the Resort Municipality of Whistler the power to enter private property and remove, cover or alter a sign in contravention of the municipality's bylaws (section 32). Similar authority is granted with respect to graffiti (section 33). Fines of up to $10,000 can be imposed for violation of the bylaws. The act received third reading on October 22, 2009.

The City has been promising amendments to the bylaw to address some of the concerns for some time, but nothing has been changed to date (www.bccla.org/pressreleases/09city_bylaw.pdf).

The latest announcement of pending amendments was made on November 18, 2009. The City has promised to "tweak" the bylaw to make it clear our rights will be respected. Many of us remain skeptical.

In the meantime, our Charter rights have been suspended for what is essentially a sporting event.

Assault

An assault consists of any use of force against another person directly (e.g. with your fists) or indirectly (e.g. throwing a pie at the prime minister). Assault includes an attempt or threat to use force against another person if that person has reason to believe that the attempt or threat could be carried out. The force or attempted force must be applied in an intentional manner. An assault can consist of a very minor force. However, where the force applied is as a result of carelessness or reflex action, no assault is committed (see *R.* v. *Drury* [2004] B.C.J. No. 1317 (S.C.), where several protesters were charged and

convicted of assaulting police officers during a demonstration against the Campbell government's educational policies).

Assault during an attempt to resist arrest is more serious. It includes assaulting any public officer or peace officer engaged in the execution of his or her duty, or of assaulting a person with intent to resist or prevent the lawful arrest or detention of anyone, including yourself. The BC Crown Counsel Policy Manual suggests this type of conduct will invariably result in charges being laid.

It is not an offence to resist an unlawful arrest. However, the right to resist an unlawful arrest belongs solely to the person arrested; it does not extend to a friend of the person arrested.

Obstructing a police officer

Anyone who resists or willfully obstructs a police officer in the execution of his or her duty or any person lawfully acting in aid of such an officer may be guilty of an offence.

The elements of the offence of obstruction which must be proven are as follows:

- that there was an obstruction of a police officer;
- that the obstruction affected the police officer in the execution of a duty that the police officer was then executing; and
- that the person obstructing did so willfully.

The law recognizes a distinction between a peace officer being "engaged in the execution of his duty" and simply being on duty, in the sense that he or she is "at work". Where the activities of a police officer are unlawful, even though undertaken with the specific intent of discharging one or more of the general duties of a police officer, they will not amount to a "duty". What amounts to a "duty" will depend, in each case, on the nature of the police officer's activities at the time of the obstruction.

To trigger a charge of obstructing a police officer in the execution of his or her duty requires some knowledge on the part of the person to be charged that a threshold has been crossed and the police officer is now in a position to arrest or issue a summons or appearance notice.

A person asking why his friend is being arrested is not obstructing a police officer. If the actions of police may be considered to be grossly excessive under the circumstances, verbal protestations by an arrested person or by someone acting on their behalf may be considered fully justified, and thus not obstruction.

It is also not an obstruction for a citizen to ask in a persistent manner the reason for an arrest. The exercise of this right cannot be converted into obstruction unless it is intemperate, unduly persistent and irrelevant, or made in an unreasonable manner.

However, if a person physically grabs hold of a police officer while the officer is arresting his or her friend, this may lead to a conviction for obstruction.

The BC Crown Counsel Policy Manual suggests this type of conduct will also invariably result in charges being laid.

Causing a disturbance

Although everyone has the right of freedom to express themselves under section 2(b) of the Charter of Rights and Freedoms, there is also a collective interest in peace and tranquility in a public place. The rights of the individual must be balanced against those of the public. The issue is where to draw the line. Some disruption of the peace and tranquility of a public place must be tolerated.

The offence of causing a disturbance can be committed in a variety of ways. The most common are by fighting, screaming, shouting, swearing, singing or using insulting or obscene language, impeding or molesting another person, or loitering in a public place and in any way obstructing persons there.

The disturbance is of the public's use of a public place and not the disturbance of an individual's mind. The intensity of the activity and its effect on the degree and nature of the peace that is expected to prevail at the particular time must be considered. For a conviction to take place, the court must find that there is an externally manifested disturbance of the public peace which interferes with the ordinary and customary use of a public place.

Using obscene language toward police officers or your neighbour where there is no evidence that anyone else heard the obscene language will not constitute a disturbance.

Speaking normally through an electronic megaphone can constitute causing a disturbance.

Union members carrying placards and shouting insulting language outside the cottage of the company president were not found to be causing a disturbance.

A person singing "Na na na na, na na na na, Hey Hey Hey Goodbye" in the public gallery of the legislative assembly was found not guilty of causing disturbance because the legislative assembly was in a state of disarray at that moment. However, if the accused had done his singing during a quiet moment of voting or almost any other "normal"

period of activity on the floor, or even in an empty assembly, his conduct would very likely have been considered a disturbance.

In *R.* v. *Clarke* [2002] N.J. No. 293 (Prov. Ct.), a group of protesters were found guilty of causing a disturbance for chanting directly outside the doors of the council chamber in city hall during a council meeting. Members of the city council were distracted and the meeting was temporarily adjourned. The protesters did not have their section 2(b) Charter rights violated because their right of free expression in public buildings can be limited by the legitimate purpose of the building.

In *R.* v. *Drury* [2004] B.C.J. No. 1317 (Prov. Ct.), protesters were demonstrating against the education policies of the Campbell government. The court held that the shouting, swearing or use of obscene language by the defendants was incidental to a disturbance that had other causes and in which other events were much more prominent. Only if the activities of the defendants materially contributed to the disturbance, lent impetus to it or gave it momentum, would they have been found guilty of causing disturbance.

Unlawful assembly

Freedom of assembly is a fundamental freedom, a value whose constitutional protection is not lost just because those taking part in an assembly have become loud and angry.

An offence of unlawful assembly requires that three or more persons be involved and that they assemble in a way, or behave in a way, that causes others in the neighbourhood to be afraid that the assembly will either disturb the peace tumultuously or provoke others to do so. Tumultuous means chaotic, disorderly, clamorous or uproarious. It means more than boisterous, noisy or disorderly conduct. Tumultuous must have an air or atmosphere of force or violence, either actual or constructive.

The fears of others must be based on reasonable grounds. An assembly can start out lawful, but later become unlawful.

A riot is an unlawful assembly. To prove a riot, it is essential that there be actual or threatened force and violence, in addition to public disorder, confusion and uproar. The accused must be shown to have intended to be a participant and to have taken part in the disturbance (intention can be inferred through being reckless).

What differentiates a riot from an unlawful assembly is that a riot entails an actual, tumultuous disturbance of the peace, whereas an unlawful assembly requires only the reasonable fear that such a disturbance will erupt.

In *R.* v. *Drury* [2004] B.C.J. No. 1317 (Prov. Ct.), persons who had come to peacefully protest government policies were upstaged by supervening events. While it might be suspected that the presence of onlookers and peaceful protesters was encouraging to other

people with objectives other than a peaceful protest, this does not constitute an unlawful assembly. To be an unlawful assembly, persons must not only have a common purpose, but must also conduct themselves in a prohibited way with the intent to carry out the common purpose.

Searches

There is an overall need to balance the competing interests of an individual's reasonable expectation of privacy with the interests of public safety. With this in mind, there are two main police powers of search: search incidental to an investigative detention and search incidental to arrest.

Search incidental to an investigative detention

Police officers may detain an individual for investigative purposes if they have reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such detention is necessary.

Where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search. The officer's decision to search must be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition. The search must be grounded in objectively discernible facts to prevent "fishing expeditions" on the basis of irrelevant or discriminatory factors.

Both the detention and the pat-down search must be conducted in a reasonable manner, be brief and impose no obligation on the detained person to answer questions.

The "reasonable grounds" concept is vague and open to interpretation, but it is a lower threshold than "reasonable and probable grounds".

If you feel that the police are abusing their power, let them know that you do not agree with them searching you. Again, try to remember every detail you can, such as the name or badge number of the officer conducting the search and of any other officers present. This will make it easier to file a complaint or commence legal proceedings against the police if you later choose to do so.

Search incidental to arrest

In the context of arrest without a warrant, police officers are empowered to search for weapons and to preserve evidence.

If you are arrested, the police can search you, but they cannot arrest you just for the purpose of searching you. Police will most often search you after arrest to make sure that you do not pose a danger to them or yourself. They will also search you to find evidence that can be used against you.

Types of searches

There are three types of searches:

1. summary search, a general "pat down" or "frisking" over clothing and sometimes inside pockets;

2. strip search, which generally involves the removal of all clothing to permit a visual inspection of a person's private areas; and

3. a body cavity search involving a physical inspection of the genital and/or anal regions.

Generally, you can only be searched by an officer of the same sex; however, there are a few exceptions. It is more likely that a female officer will be allowed to search a male prisoner than that a male officer will be allowed to search a female prisoner.

In *R.* v. *Golden* [2001] 3 S.C.R. 679, the Supreme Court of Canada issued tough new rules limiting a police officer's ability to conduct a strip search. Such searches can no longer be carried out as a matter of routine policy, but only where there are reasonable and probable grounds for them.

For example, if the officer in charge at the Vancouver jail has not yet decided if an arrested protester will or will not be removed to the general population, the protester should not be strip-searched; if he was, it would be an unreasonable search in violation of section 8 of the Charter.

It is unreasonable to strip-search a person being detained for a short period of time pursuant to an arrest for breach of the peace.

For more information on your rights regarding arrest, read the "Arrest Handbook" and the "Arrest Pocketbook," available from the BCCLA's website, www.bccla.org/arrest/BCCLA%20pocketbook%20web.pdf.

OTHER ISSUES

Consequences of having a criminal record

There is a difference between a finding of guilt and a conviction. If a person pleads guilty or is found guilty of a criminal offence, the court determines whether or not to enter a conviction. Instead of entering a conviction, the court can grant an absolute or conditional discharge.

If a person has been granted an absolute or conditional discharge, they have not been "convicted" of a criminal offence. If you have been granted an absolute or conditional discharge, you should ask the local police and the RCMP to have your records destroyed.

There are numerous social and economic consequences of having a criminal record. These include possible limitations on job prospects, potential deportation from Canada if you are a visitor or even a landed immigrant, difficulty entering foreign countries, and the social stigma of having a record. For example, the U.S. Immigration and Nationality Act makes it illegal to enter the United States if you have a criminal record unless you have an entry waiver. Such a waiver takes months to process and, if you enlist the assistance of an agency to help with the process, can cost close to $1,000 (CND). Entry waivers are only valid for one year.

Complaints against the police

If you have a complaint concerning a municipal police detachment in British Columbia, you can file a complaint with the Office of the Police Complaint Commissioner, British Columbia. You can access the complaint form and information at www.opcc.bc.ca.

The Office of the Police Complaint Commissioner, British Columbia will assist you in filling out the complaint form. The complaint will be investigated and you will be kept informed throughout the process.

If your complaint is against the RCMP, the complaint must be made through the Commission for Public Complaints Against the RCMP, at www.cpc-cpp.gc.ca.

False imprisonment / false arrest

A civil action for false imprisonment, sometimes called false arrest, can be filed when a person is improperly detained or arrested. It is possible to file such a claim without the assistance of a lawyer in Small Claims Court. Pivot Legal will provide advice on how to sue the police for misconduct in Small Claims Court—contact lawyer@pivotlegal.com or 604-255-9700, ext. 132.

In *Sandison* v. *Rybiak et al.* (1974), 1 O.R. (2d) 74 (H.C.J.), police officers were found liable for illegally arresting a plaintiff for obstruction when all the plaintiff had done was ask the officers why they were arresting a third person.

Malicious prosecution

If a person believes that he or she has been wrongly prosecuted by someone else, the tort of malicious prosecution can be used. In *Miazga* v. *Kvello Estate* [2009] SCC 51 at para 3, the Supreme Court of Canada set out the following four elements which the plaintiff has to prove in order to succeed in an action for malicious prosecution:

a) the proceedings must have been initiated by the defendant;

b) the proceedings must have terminated in favour of the plaintiff;

c) the proceedings must have been undertaken without reasonable and probable cause; and

d) the proceedings must have been motivated by malice, or a primary purpose other than that of carrying the law into effect.

Police officers have a duty to engage in a thorough investigation and satisfy themselves that they had reasonable and probable cause to continue a prosecution. Failure of a police officer to conduct an adequate investigation can constitute malice and lead to a finding of malicious prosecution.

Injunctions

An injunction is a legal remedy granted by a court to prevent interference with the legal rights of a person, a company or the government.

Injunctions are a powerful tool used by people engaged in civil disobedience, but also by companies or governments to stop protests.

The fundamental question the court asks when it responds to a request for an injunction is whether the injunction is just and equitable in all the circumstances of the case.

The Supreme Court of Canada, in *RJR-MacDonald Inc.* v. *Canada (Attorney General)* [1994] 1 S.C.R. 311, sets out what the applicant must prove in order to be granted an 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. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

In *British Columbia (Attorney General)* v. *Sager* [2004] B.C.J. No. 1114 (S.C.), the court held that 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 is thus not to be used as a first-choice remedy except in extraordinary circumstances. The government was denied an injunction against some local citizens who were opposed to the construction of a parking lot next to Cathedral Grove Park on Vancouver Island.

Contempt of court

Contempt of court is conduct that is in deliberate or willful disobedience of a court order and thus offends the court. In recent years, the government and private companies have frequently been granted injunctions against potential demonstrators. Because an injunction is an order of the court, any person who violates an injunction can be charged with contempt.

There is a difference between civil and criminal contempt. In *Canada Post Corp.* v. *Canadian Union of Postal Workers* [1991] B.C.J. No. 3444 (B.C.S.C.), the court stated the difference, at page 6:

> The Court must consider whether the conduct in question was so defiant of the rule of law and so designed to interfere with the proper administration of justice that it would tend to bring the administration of justice into scorn. If there is a reasonable doubt on that issue, the conduct should be characterized as civil contempt.

In *MacMillan Bloedel Ltd.* v. *Simpson* [1994] B.C.J. No. 1913 (B.C.S.C.), the court wrote:

> In order to establish a person is in criminal contempt of court, Crown counsel must prove beyond a reasonable doubt four elements….
>
> 1. Did the Court issue an injunction [Order] prohibiting certain acts?
>
> 2. Did the particular accused know about the terms of the injunction [Order]? Knowledge includes willful ignorance. Personal service of the copy of order is not required. It is sufficient if the evidence shows the respondent had knowledge of it.

3. Did the accused do one or more acts amounting to disobedience of one or more of the terms of the injunction? Disobedience must be proved to be "deliberate" or "willful".

4. Did the conduct of the accused amount to a public defiance or violation of the order so as to make the contempt criminal as opposed to civil?

For civil contempt, the first three elements above need to be proved; for criminal contempt, the fourth element has to be proved as well.

The punishment is generally the same regardless if a person is convicted of civil or criminal contempt. Fines can run from several hundred to a few thousand dollars, or a term of imprisonment may be imposed.

In *Hayes Forest Services Ltd.* v. *Forest Action Network* [2003] B.C.J. No. 2184 (S.C.), aff'd [2006] B.C.J. No. 672 (C.A.), leave to appeal to the Supreme Court of Canada refused [2006] S.C.C.A. No. 227, a protester disobeyed an injunction not to interfere with the logging rights of the company. The court ruled that the protester's disobedience of the court order was open, public, continuous and flagrant. She was found in criminal contempt of court and sentenced to six months' imprisonment.

Interference with contractual relations

Protests often disrupt the lives of working people. Protesters sometimes unwittingly interfere with the employment contracts of others.

The decision in the case of *Potter* v. *Rowe* [1990] B.C.J. No. 2912 (S.C.) sets out five general requirements for a successful claim of interference with contractual relations:

1. the existence of a valid and enforceable contract;

2. awareness by the defendants of the existence of a contract;

3. breach of the contract procured by the defendants;

4. wrongful interference; and

5. damage suffered by the plaintiff.

In *Verchere* v. *Greenpeace* [2003] B.C.J. No. 988 (S.C.); aff'd [2004] B.C.J. No. 864 (C.A.), members of Greenpeace chained themselves to logging equipment to protest logging on Roderick Island in British Columbia. As a result of the protest, the loggers could not do any work and were not paid. The loggers sued Greenpeace for interference with contractual relations and claimed recovery from Greenpeace for their lost wages.

Greenpeace was found liable and had to pay the loggers several thousand dollars in lost wages.

It should be noted here that such a case may be less likely to reach the courts today. There have been a number of recent cases in which environmental activists such as the Western Canada Wilderness Committee have picketed alongside trade unionists over job security issues.

Persons, corporations, and governments are increasingly turning to lawsuits as a way of recovering extraordinary expenditures and economic loss generally, and deterring future acts of civil disobedience. The Municipality of Langford, outside of Victoria, recently announced plans to sue a group of environmental protesters to recover the costs of their interference in the construction of a new Trans-Canada Highway interchange designed to provide secondary access to the Bear Mountain Resort Development. The protesters' actions prompted a huge RCMP operation involving fifty to sixty officers. The protesters had climbed trees and remained there, interfering with equipment use and resulting in employees being sent home and a halt in construction work. One protester, Zoe Blunt, responded humorously by noting that unlike the Mayor of Langford's billionaire friends, the only asset she had was her five-year old computer. She continued:

> We would like to see all the evidence of all the money that was spent and all the plans that were made and everything that had to do with the transfer of land; and all of their own assets and all of the interests they have in Bear Mountain and other resorts and other land and properties. We would like to get that all on the table (*Vancouver Sun,* February 26, 2008, page 3).

Often the threat of a McLibel-type trial is enough to deter lawsuits against protesters. As many of you may recall, the so-called McLibel trial was the infamous court case in London, England, between the McDonald's fast food company and two unemployed individual protesters who represented themselves. The two-and-a-half year case established a British record for the longest trial, despite the defendants being denied legal aid and the right to a jury.

The U.K. court's decision was devastating for McDonald's. It found that the company had exploited children with their advertising, produced misleading advertising, was culpably responsible for cruelty to animals, was antipathetic to unionization and paid its workers low wages. Even though the two defendants were required pay £60,000 in damages, which they could not afford and, in any event, refused to pay, the Court of Appeal made additional findings that it was fair comment to say that the McDonald's employees worldwide do badly in terms of paying conditions and that, "if one eats enough McDonald's food, one's diet may well become high in fat with a very real risk of heart disease."

The two individual defendants appealed the case to the European Court of Human Rights and succeeded in obtaining a ruling that expanded the public's right to criticize multi-

nationals and stated that British libel laws were oppressive and unfair; that the defendants were denied a fair trial; and that the case had breached the right to freedom of expression, as well as a fair trial (see www.mcspotlight.org).

Picketing and leafleting

As a result of a Supreme Court of Canada decision in *Pepsi-Cola Canada Beverages* [2002] 1 S.C.R. 156, peaceful protesting and picketing is now permitted as part of our Charter rights of freedom of expression. As stated by the court:

> The core values which free expression promotes include self-fulfillment, 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 condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.

However, picketing which breaches the criminal law or which involves civil torts such as trespass, nuisance, intimidation, interference with contractual relations or defamation is impermissible regardless of where it occurs.

In *Compass Group Canada (Heath Services) Ltd.* v. *Hospital Employees' Union* [2004] B.C.J. No. 57 (S.C.), union members protesting the Campbell government's health care policies picketed a hotel where a "contracting out" job fair was being held. In setting aside an *ex parte* injunction to restrain the picketing, the court stated that there was not a strong *prima facie* case that the business of the hotel was being unreasonably interfered with. The pickets were not impeding access to the hotel, and the picketers were not threatening hotel patrons or acting in an unruly or coercive manner. Picketing in and of itself is not wrongful.

Similarly, leafleting with accurate, non-defamatory information is an exercise of our freedom of expression rights. In a government building, an individual is free to communicate in such a place if the form of expression used is compatible with the principal function or intended purpose of the place and does not deprive citizens as a whole of the effective operation of government services and undertakings. For example, distributing pamphlets and talking to members of the public in an airport is in no way incompatible with the primary function of the airport, which is to accommodate the needs of the travelling public.

Trespass

The Land Act, R.S.B.C. 1996, c. 245, sets out in sections 59–68 the general offences regarding the unlawful occupation or possession of crown land. If you are trespassing on crown land, you may receive a notice of trespass and be required to leave. Failure to comply may lead to a conviction and liability for a fine of not more than $20,000, or imprisonment for not longer than 60 days.

The Trespass Act, R.S.B.C. 1996, c. 462, prohibits trespassing on "enclosed land". Enclosed land is defined as land:

> (a) surrounded by a lawful fence defined by or under this Act,
>
> (b) surrounded by a lawful fence and a natural boundary or by a natural boundary alone, or
>
> (c) posted with signs prohibiting trespass in accordance with s. 5(1).

If you are trespassing on enclosed land, section 8 of the Trespass Act requires you to provide your correct name and address if there are reasonable grounds for the occupier or a person authorized by the occupier to believe you have contravened the provisions in section 4 of the act. Like all other British Columbia legislation, the Trespass Act and the Trespass Regulation can be found at www.bclaws.ca.

As a general rule, there is no provincial offence of trespassing in British Columbia, other than on enclosed land. However, the Campbell government introduced Bill M 203-2004, Trespass To Property Act. This bill received second reading on May 10, 2004, but has since been withdrawn. It would have allowed the occupier, or a person authorized by the occupier, to arrest without warrant any person he or she believes on reasonable and probable grounds to be on the premises without permission. The occupier, or a person authorized by the occupier, would be able to use reasonable force to affect the arrest.

The power of arrest in the hands of landowners and occupiers is a dangerous thing. Over the past twenty years in Ontario, a province with a Trespass To Property Act similar to Bill M 203-2004, one of the province's largest security firms estimate its security guards have arrested over thirty thousand people.

Trespassing in a private building or on private property, or in a public building or property to which access is restricted, remains a civil wrong, or a tort. If requested to leave, you must comply or risk the consequences. If you refuse to leave, the owner or agent may use reasonable force to evict you. Even the most minimal physical resistance on your part may constitute the offence of a "deemed assault" under the Criminal Code. But merely passively resisting, for example by going limp, is not a deemed assault.

On March 12, 2004, five women representatives from the British Columbia Coalition of Women's Centres were arrested because they refused to leave the legislative building. The five women were protesting the Campbell government's cuts to the province's women's centres. They were charged by police with "assault by trespass" under section 41(2) of the Criminal Code. The Crown Attorney refused to proceed with the charge. This is not surprising given the protesters went limp and did not physically resist being removed.

Trademark / freedom of expression issues during the Olympics

The Host City Contract for the Olympic Games was signed by the International Olympic Committee ("IOC"), the City of Vancouver and the Canadian Olympic Committee ("COC") on June 18, 2003. Section 42 of that agreement required the City to ensure that all graphic, visual, artistic and intellectual works developed by any of the three parties or on their behalf is owned by the IOC. The list is extensive and includes the logo, emblems, posters, music, multimedia works etc.

In the wake of that agreement, the federal government passed the Olympic and Paralympic Marks Act, S.C. 2007, c. 25, effective December 17, 2007. **Section 3(1)** of this act contains a standard test which prohibits the use of any mark in connection with a business "that so clearly resembles an Olympic or Paralympic mark as to be likely to be mistaken for it."

An Olympic mark is defined in **section 2** as one of the 58 words or graphics set out in **Schedules 1 or 2**. The list is extraordinary. In addition to predictable words like *Olympic, Paralympic* and *Olympian,* it includes *Faster Higher Stronger*, *Spirit in Motion, Games City, Sea to Sky Games, Vancouver 2010, VANOC* and *Whistler Games.*

The use of a trademark, if registered and used prior to March 2, 2007, is excluded.

Section 3(5) provides that the use of Olympic or Paralympic marks for the purposes of criticism or parody is not covered. This appears to be a departure from the traditional law on parody and trademark, *Perrier* v. *Fira-Less Marketing* [1983] 2 F.C. 18 at 23.

Artistic work may contain Olympic and Paralympic marks as long as the work is not "reproduced on a commercial scale". Thus the large mural on the outer wall of the Wildfire Bakery, a family-owned bakery at 1517 Quadra Street in Victoria, was apparently not in violation. It showed people handcuffed by the Olympic rings, with Uncle Sam and several animals wearing police hats in the background (*Vancouver Sun,* November 11, 2009).

Section 4(1) prohibits persons from using a mark to promote their goods or services in a manner likely to mislead the public into believing they are endorsed by the COC or an organizing committee, or that a business association exists between them.

Section 4(2) provides that the court can take into account in considering whether there has been a violation of the Act, whether the defendant has used any combination of 10 words set out in Part 1 of **Schedule 3,** or any one in Part 1 with an expression in Part 2. Part 1 includes the words *Games, 2010, 21st, tenth,* and *medals*. Part 2 includes *winter, gold, silver, bronze, sponsor, Vancouver* and *Whistler.*

Extraordinary remedies are available under the Act for any violation of its strictures, including an injunction, the recovery of damages or profits, punitive damages, an order compelling the publication of corrective advertising and the destruction of any offending wares (**section 5(1)**). If an interim or interlocutory injunction is required, the plaintiff is relieved of their traditional obligation to prove irreparable harm (**section 6**).

Professor Michael Geist, the leading privacy and intellectual property academic in the country, has described the remedial provisions of the legislation as creating "enormous power to police the use of anything approaching association with the Olympics."

One contributor to Professor Geist's blog suggested that the words *corruption*, *under the table*, *cost overrun* and *kickback* should also be listed and prohibited in association with some of the previous (not the current) Olympics, because we have all come to associate those words with the Olympics (www.michaelgeist.ca).

VANOC has even gone so far as to publish what some have described as an "infringement calculator". It scores the mark according to a series of factors, then calculates the total: 8 or less is unlikely to infringe; between 9 and 13 is a potential infringement; and 14 or higher is a likely infringement.

You may wish to have a look at the PETA website. It features a page that labels the Olympic mascots, Miga, Quatchi and Sumi, as "bloodthirsty seal killers" (see www.olympicshame2010.com/Interactive.aspx). To date, VANOC has not taken any action against the group. In a previous confrontation over *Vancouver 2010* and the use of the Olympic rings, VANOC and COC took the position that they had no jurisdiction as PETA was based in the U.S.; when the U.S. Olympic Committee complained, they took the position that it was fair use under the U.S. Trademarks legislation. One can only assume that VANOC and COC are not taking action because this is obviously meant to be a criticism or parody.

The Canadian Olympic Association (COA) has in the past taken some pretty extraordinary steps. In October 1999, for example, it litigated against Olymel, a large Quebec-based meat processor, for infringing one of the protected marks owned by the Canadian Olympic Association through the use of its name. "Olymel" was created in 1991 as a merger of several pork-producing companies, notably Olympia Meats and Termel Meats. The resulting company combined the "Oly" in Olympia and the "Mel" in Termel to form "Olymel".

The test was whether a person who, on first impression, knowing one mark only and having an imperfect recollection of it, would likely be deceived or confused (*Canadian Olympic Association* v. *Olymel* [2000] F.C.J. No. 842 at paras 24 to 26). The COA's application was dismissed.

The COC, which owns the phrase *Road to Vancouver*, is currently suing the CBC for using the expression "*Road to the Games"*.

POST–9/11 LEGISLATION

After the September 11, 2001 terrorist attacks on the United States, Canada passed legislation which increased the power of police, intelligence agencies and customs officials to encroach upon civil liberties and privacy rights. The Supreme Court of Canada, in Application under s.83.28 of the Criminal Code [2004] S.C.J. No. 40, has expressed how liberties must not be trammelled when dealing with the challenges of terrorism:

> Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of the law…the challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy.

The following is a selection of Canadian legislation passed post–9/11 which is relevant in the context of civil disobedience.

Despite the above ruling by the Supreme Court of Canada, there is no question that engaging in acts of civil disobedience, particularly in the context of high-profile events like the Olympics, is substantially riskier then it was pre-9/11. Indeed, a recent report by the prestigious International Commission of Jurists (ICJ) concludes after a four-year study that what it calls a "war mentality" has seriously eroded human rights.

The ICJ is an NGO devoted to promoting observance of the rule of law and the legal protection of human rights worldwide. Its report is described as one of the most comprehensive surveys on the effects of counter-terrorism on human rights. One of its authors was Justice Ian Binnie of the Supreme Court of Canada.

With respect to Canada, the report refers to the Maher Arar case as a "model of how transnational intelligence should not be happening." The ICJ also had the benefit of

testimony from Adil Charkaoui, a Moroccan Montrealer who was jailed and, until recently, was still being monitored under a "security certificate" (ejp.icj.org).

For the third and latest Charkaoui decision in his epic six-year battle for his Charter rights in the context of security certificates, see *Re Charkoui* (2009), CF 1030.

The Anti-Terrorism Act, formerly Bill C-36

The Anti-Terrorism Act (ATA) received royal assent on December 18, 2001. It amends ten different statutes, including the Criminal Code, which it amends by adding section 83.01. The overall purpose of the act is the prosecution and prevention of terrorism offences. The provisions in it deal with judicial investigative hearings, recognizance, detention, seizures and arrests and provide a new and very broad definition of terrorism. This definition of terrorism is very complex. For our purposes, the relevant sections can be summarized as follows:

> It is a terrorist activity, **for a person with a political, religious, or ideological purpose**, to do anything
>
> > with the intention of compelling a person or government to do something,
> >
> > and which intentionally causes a serious risk to the health or safety of the public,
> >
> > or which intentionally causes serious interference with a public or private essential service or facility.

The section includes even attempting, threatening or counseling such conduct, or assisting someone after they have committed such an act.

The most objectionable portion of the offence appears in bold above. The language was universally criticized as unnecessary and contrary to the Charter, and was ruled unconstitutional in *R.* v. *Khawaja* [2006] O.J. No. 4245; leave to appeal dismissed by the Supreme Court of Canada on April 5, 2007.

Section 83.28 compels an individual to testify at a judicial investigative hearing. So far, this is the only part of the act the Supreme Court of Canada has had the opportunity to review. Section 83.28 of the Criminal Code has met the requirements of section 7 of the Charter and is constitutional.

The ATA amendments to the Criminal Code require the Attorney General of Canada and all provincial attorneys general to publish an annual report on the operation of sections 83.28 (investigative hearing), 83.29 (preventive arrest) and 83.3 (recognizance with condition) of the Criminal Code.

The amendments that the ATA made to the Criminal Code contain a "sunset" clause whereby the extended powers will cease to apply as of the end of the fifteenth sitting day of Parliament after December 31, 2006, unless extended pursuant to procedures set out in section 83.32(2)-(5). The sections ceased to have effect on March 1, 2007. The motion to extend was defeated on February 27, 2007.

It was re-introduced as Bill C-10, An Act to Amend the Criminal Code (investigative hearing and recognizance with conditions). It was debated at second reading on June 8 and 9, 2009: Status of House Business as of November 6, 2009.

Bill C-7: The Public Safety Act, 2002

Bill C-7, the Public Safety Act, 2002, received royal assent on May 6, 2004. The Public Safety Act, 2002 ("PSA") amends several other acts. The major concern for people practising civil disobedience had been the amendments to the National Defence Act. Earlier versions of the PSA had granted the Minister of National Defence the power to designate "Controlled Access Military Zones" from which anyone could be forcibly removed. The PSA has now removed the provisions concerning the establishment of such zones.

However, the federal government, through an order-in-council—in other words, at their pleasure—can establish what are now called "Controlled Access Zones". It has already designated zones in Halifax, Esquimalt, and Nanoose Bay harbours (*Canada Gazette* Vol. 137, No. 2 (January 1, 2003)), and there is nothing to prevent it from declaring other zones where there is a potential for demonstration and protest. If this is done, it will be extremely difficult to obtain a successful judicial review of the order-in-council.

Controlled Access Zones will have been put in place between mid-January and the end of March 2010 for the Olympics in four areas—Coal Harbour, False Creek, The Fraser River, and the Sea-to-Sky corridor. Access will be restricted except with authorization by the Vancouver 2010 Integrated Security Unit. There is also an "Exclusion Zone" to which all access is prohibited; see www.portmetrovancouver.com /2010/Access.

The PSA also makes it an offence for anyone to commit an act that is likely to cause a reasonable apprehension that a terrorist activity is occurring or will occur. That is now set out in section 82.231 of the Criminal Code.

The RCMP has announced the creation of "Free Speech Areas" near Olympic venues for those wanting to express their opposition to the games. It has added that protesters will not be required to use them, and it is unlikely that many will. Dr. Chris Shaw, a prominent Olympic critic, responded to that announcement last summer by saying that in his view, and the view of most Canadians, the entire country is a free speech area.

There are also what are euphemistically termed Safe Assembly Zones, which the City plans set aside near Olympic venues for the use of protesters. The City claims they are there for the protesters' safety and convenience.

VANOC officials have said that slogans on T-shirts inside Olympic venues or sites are unlikely to be a problem. They indicated that they are more likely to respond if large groups of individuals are creating distractions or noise or obstructing the views of athletes or members of the audience.

Bill C-24: An Act to amend the Criminal Code

On December 18, 2001, An Act to amend the Criminal Code (organized crime and protection of justice system participants) received royal assent. The provisions relating to sections 25.1-25.4 of the Criminal Code were proclaimed in force on February 1, 2002. This bill is intended to, and probably does, aid in the fight against organized crime. However, it includes is an important feature that you should keep in mind; in certain circumstances it authorizes the police to violate the law.

A competent authority may designate police officers to violate the law, and become immune from criminal liability. There are some pre-conditions: the officer must believe that his/her illegal conduct is reasonable as well as proportional to the offence being investigated; there must be no serious loss or damage to property; and there must be no intentional bodily harm.

The act defines a "competent authority" as the solicitor general of Canada in the case of the RCMP; the provincial minister responsible for policing in the province in the case of a member of a police service; or, in the case of any other peace officer, the minister responsible for the particular legislation that the officer has the power to enforce.

The act contains no provision limiting the use of this new power to organized crime contexts. It can be used in the context of demonstrations (section 25.1, Criminal Code). A parliamentary review of sections 25.1 to 25.4 of the Criminal Code was required to be undertaken by January 6, 2005. The House of Commons Standing Committee on Justice and Human Rights was given an order of reference from the House on April 25, 2006 to study sections 25.1 to 25.4 and has issued an interim report which did not make any recommendations on whether or not these sections of the Criminal Code should be amended. The interim report can be found at the following web address:

> cmte.parl.gc.ca/Content/HOC/committee/391/just/reports/rp2315361/JUSTRpt01-e.html

Section 25.3(1) of the Criminal Code requires the competent authority to publish an annual report on the number of designations and authorizations made. In addition, the annual report must, among other things, publish the number of times police officers have committed violations of the law and the nature of these violations. The annual report

must not disclose any information which would compromise an investigation or legal proceeding, endanger the life or safety of any person or otherwise be contrary to the public interest.

Bill C-35: An Act to amend the Foreign Missions and International Organizations Act

Bill C-35, An Act to amend the Foreign Missions and International Organizations Act, S.C. 1991, c.41, received royal assent on April 30, 2002. It provides that the RCMP has the primary responsibility to ensure security at intergovernmental conferences. The RCMP can also be assisted by provincial and municipal police forces.

This legislation gives extraordinary new powers to the police, including broad new statutory powers "to ensure the security for the proper functioning of any inter-governmental conference." The act allows for police to take "appropriate measures, including controlling, limiting or prohibiting access to any area to the extent and in a manner that is reasonable in the circumstance" (section 10.1(2)).

The limits of the ability of the police to take "appropriate measures" under this bill have not yet been subject to scrutiny. However, the public outcry over the RCMP's treatment of peaceful protesters during the APEC summit and the subsequent recommendations from the APEC Inquiry should assist the police in determining what the "appropriate measures" are, and how to conduct themselves in a "reasonable manner."

Bill C-45: An Act to amend the Criminal Code (Criminal Liability of Organizations)

Bill C-45: An Act to amend the Criminal Code (Criminal Liability of Organizations) received royal assent on November 7, 2003. It is designed to attribute criminal liability to organizations for acts of their representatives or senior officers, depending on the offence.

This act could be used against organizations whose members are engaged in civil disobedience. Its provisions are now incorporated into sections 22.1 and 22.2 of the Criminal Code. The provisions are analyzed and criticized in Manning et al, *Criminal Law*, 4th edition 2009, pages 238 to 244.

DEMONSTRATING IN THE UNITED STATES

There are a number of considerations Canadians should be aware of if they plan to participate in a demonstration in the United States.

First, racial profiling: You should be aware that in August 2006, then Homeland Security Chairman Peter King endorsed ethnic profiling, stating that he considered it reasonable that people of "Middle-Eastern and South Asian descent" undergo additional security checks due to their ethnicity and race.

The U.S. and Canada have a Smart Border Plan to facilitate information sharing and the secure flow of people and goods across the border. Canadians now need a passport to enter the United States. A birth certificate and photo identification will no longer suffice.

A U.S. immigration officer will ask you questions about the purpose of your trip. Do not lie. Lying can lead to serious sanctions. Generally, you are allowed to visit the U.S. for recreational or tourist pursuits, visits with friends, and other social activities. If you are vague about the purpose and duration of your journey, you may be turned away. You will also be turned away if you have a criminal record and do not have an entry waiver.

The USA Patriot Act, passed on October 24, 2001 in the wake of the 9/11 terrorist attacks, has particular consequences for non-U.S. citizens who engage in demonstrations.

The Patriot Act has amended the Immigration and Nationality Act (INA) and allows the secretary of state to designate certain groups as foreign terrorist organizations. The amendments also allow the secretary of state to designate a political, social or similar group whose public endorsement of acts of terrorist activity he or she has determined undermines the United States' efforts to reduce or eliminate terrorist activities. This captures what can be termed "domestic terrorist organizations".

"Terrorist activity" is defined by section 212(a)(3)(B) of the INA as any activity which is unlawful under the laws of the place where it is committed and which involves among other things the use of any weapon or dangerous device to cause either endangerment to persons or substantial damage to property.

Consequently, foreign or domestic groups that have ever engaged in violent activity to persons or property can be considered "terrorist organizations." While the U.S. State Department keeps a list of designated foreign terrorist organizations, no U.S. department keeps a list of designated domestic terrorist organizations. "Domestic terrorism" is defined in section 802 of the Patriot Act. According to the testimony of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, FBI, before Congress on the "Threat of Eco-Terrorism," domestic terrorism is:

> "…the unlawful use, or threatened use, of violence by a group or individual based and operating entirely within the United States (or its territories) without foreign direction, committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."

Non-citizens suspected of being members of a foreign or domestic terrorist organization are subject to mandatory detention during immigration or criminal proceedings. Any non-citizen who has engaged in, is engaged in or at any time after admission to the United States engages in any terrorist activity, can be deported.

As a result of the Patriot Act, Canadian demonstrators could find themselves subject to mandatory detention and subsequent deportation.

Although he did not enter the U.S. to participate in a demonstration, the experience of Canadian citizen Maher Arar is an example of how the provisions of the Patriot Act can be implemented. In 2002 Mr. Arar, who is of Syrian origin, was returning from vacation in Tunisia and had a scheduled flight stopover in New York. He was detained by U.S. border officials and, instead of being deported to Canada, was deported to a Syrian jail where he was tortured. Mr. Arar's ordeal was the subject of a Canadian public inquiry which cleared him of all terrorism allegations. The Canadian government eventually settled a lawsuit brought by Mr. Arar by paying him $11.5 million in compensation. Despite the outcome of the public inquiry and political attempts to allow Mr. Arar to freely enter the United States, the U.S. government has refused to take him off its watch list.

More information on the Arar story can be found at www.maherarar.ca. I urge you to access it and read the contents.

There is a long history both in the labour movement and in the broader Canadian and American communities of engaging in civil disobedience in support of common causes in each other's countries. However, Canadians need to be aware that there are significant new risks associated with demonstrating in the U.S. since the passage of the Patriot Act. The following are valuable resources which review the law of arrest in the U.S. and offer advice to people engaging in non-violent civil disobedience post 9/11:

ACT UP Civil Disobedience Manual, www.actupny.org/documents/CD. U.S. activists generally consider this manual to be the best.

Another valuable U.S. manual is *Africa Action: Non-Violent Civil Disobedience Guide:* www.africaaction.org/campaign_new.

The American Civil Liberties Union Handbook *Know Your Rights* is also excellent: www.aclu.org/files/kyr.

The National Lawyers Guild and the ACLU of Northern California have jointly published a manual which many of us have used: nlg.org/resources/kyr.

Another valuable source on civil disobedience is: resurgence.opendemocracy.net/index.php/Civil_Disobedience.

If any of these websites do not work, you may wish to try locating the material by googling the organisation and using it's internal search engine.

You may also wish to check YouTube for videos of various civil disobedience events. One of the best is Howard Zinn, a prominent U.S. historian and activist from Boston University, speaking on civil disobedience.

CONCLUSION

The prelude to these Olympic Games bears some of the chilling qualities of the period leading up to the APEC Economic Leaders Conference in Vancouver on November 24 and 25, 1997, and the "no signs and no people" culture that was being pressed on critics of the conference by the federal government and the RCMP.

Perhaps the best way to conclude the Olympic version of this manual is to quote a remarkable passage from a remarkable book on that APEC conference, *Pepper in our Eyes: The APEC Affair*, edited by Wesley Pue (Vancouver, UBC Press, 2000).

In the essay "Policing, the Rule of Law and Accountability in Canada: Lessons from the APEC Summit," Pue writes:

> Ultimately, however, institutional structures alone cannot resist power's corrosive effects. Our main protection lies in our own vigilance. No single institution, person, association, or idea can long defend any democracy, however stable it seems, from power's corrupting effects. A watchful citizenry, well informed about the basic principles of democratic government, is indispensable to liberal democracy. The hallmarks of freedom and constitutional liberty need to be understood, absorbed, internalized and discussed by all of us (page 3).