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ROYAL CANADIAN MOUNTED POLICE
PUBLIC COMPLAINTS COMMISSION

RELATING TO events that occurred in British Columbia on November 23rd to November 27th, 1997 on or near the University of British Columbia ("UBC") campus and subsequently at the UBC and Richmond Detachments of the RCMP.

Final Argument of the B.C Civil Liberties Association

B.C. PUBLIC INTEREST ADVOCACY CENTRE
815 - 815 West Hastings Street
Vancouver, B.C. V6C 1B4
Tel: (604) 687-3034

Attention: Michael P. Doherty

Counsel for B.C. Civil Liberties Association

RCMP PUBLIC COMPLAINTS COMMISSION
2600 - 595 Burrard Street
Vancouver, B.C. V7X 1L3
(604) 666-7570

Attention: Barbara L. Fisher

Counsel for R.C.M.P. Public Complaints Commission

DEPARTMENT OF JUSTICE
Room 2341, East Memorial Building
284 Wellington Street
Ottawa, Ontario K1A 0H8
(613) 957-8401

Counsel for Royal Can and Government of Canada

Attention: I.G. Whitehall, Q.C.

A. CAMERON WARD & COMPANY The Dominion Building #1205 - 207 West Hastings Street Vancouver, BC V6B 1H7 (604) 688-6881	Counsel for Jamie Doucette and 26 others

Attention: A. Cameron Ward

FARRIS, VAUGHAN, WILLS & MURPHY
Barristers & Solicitors
PO Box 10026 Pacific Centre South
26th Floor, 700 West Georgia Street
Vancouver, BC V7Y 1B3
(604) 661-9332

Counsel for W. Dingwall and others

Attention: George K. Macintosh, Q.C.

SMART & WILLIAMS
Robson Court, PO Box 10
#1190 - 840 Howe Street
Vancouver, BC V6Z 2L2
(604) 687-6278

Counsel for H. Stewart

Attention: James W. Williams

ARVAY, FINLAY
#400 - 888 Fort Street
Victoria, BC V8W 1H8
(250) 388-6868

Counsel for Craig Jones

Attention: Joseph J.M. Arvay, Q.C.

HEENAN BLAIKIE
2200 – 1055 West Hastings Street
Vancouver, BC V6E 2E9
(604) 669-0011

Counsel for Isabela Varela

Attention: Robert W. Grant

TAYLOR JORDAN CHAFETZ
#1010 - 777 Hornby Street
Vancouver, BC V6Z 1S4
(604) 683-2223

Counsel for the University of British Columbia

Attention: James P. Taylor, Q.C.

ERIC WYNESS
2 – 5730 Carnarvon Street
Vancouver, BC V6N 4E7

I. INTRODUCTION

1. In November 1997, the leaders of the eighteen Asia-Pacific Economic Cooperation (“APEC”) economies met in Vancouver. On November 25, 1997, those individuals convened on the campus of the University of British Columbia (“UBC”). Security for their meeting was provided, in part, by the Royal Canadian Mounted Police (“RCMP”). In addition to the legitimate performance of their security function,

some members of the RCMP engaged in actions that were not legitimate and in some cases not lawful. Those actions included assaults, threats of assault, arrests without warrant or *Criminal Code* authority, arrests for improper purposes, unlawful confiscation of property, unjustified surveillance, unlawful confinement, confinement without adequate food or warmth, verbal abuse, defamation, and deceit. Those actions deprived members of the public of rights guaranteed to them under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), including their right to freedom of expression pursuant to s. 2(b), their right to liberty under s. 7, and their right to freedom of peaceful assembly under s. 2(c). Those *Charter* violations were, in part, attributable to the intervention by central agencies of the Government of Canada - particularly the Prime Minister's Office ("PMO") – in the planning and operations of the RCMP.

2. These unlawful activities by the RCMP prompted two letters of complaint to the RCMP Public Complaints Commission from the BC Civil Liberties Association ("BCCLA") in December 1997. The first of these, dated December 8, 1997, appears at Exhibit 1, Tab 28. In it, the BCCLA requests a hearing into the activities of the RCMP at the University of British Columbia during APEC. The actions into which the BCCLA asked the Commission to inquire were "those which prevented students and others on the UBC campus from carrying out peaceful protests, where the individuals were not inside, or threatening the integrity of, security fences around official APEC sites and motorcade routes on the campus." Specific examples cited included, but were not limited to:

(a) arrests and threats of arrest for refusing to take down signs of protest;
(b) removal of protest signs;
(c) unacceptable conditions for release from custody;
(d) broad security zones around APEC sites and motorcade routes to prevent signs and sounds from being visible and audible to APEC delegates;
(e) unacceptably small official protest sites.

In addition, the BCCLA specifically asked the Commission to inquire into whether the RCMP had been acting pursuant to directions from other branches of the Government of Canada, including the Prime Minister's Office. When addressing this issue in her letter of reply dated 20 January 1998, PCC Chair Shirley Heafey gave assurances to the BCCLA that any "policies or directives under which the RCMP was operating" as well as "the source of these directives or policies" would be fully investigated and reported upon.

3. In accordance with the mandate of the BCCLA, these submissions will focus on those issues that are most directly relevant to the RCMP's violation of protesters' civil rights. It will not touch on all matters that were the subject of argument in this hearing process, despite the importance of some of those matters. These submissions will also focus on unlawful acts by the RCMP, including violations of the *Charter*. Note, however, that the acts complained of were in many cases also violations of policy, of code and of socially acceptable standards of behaviour, and that those violations are also of significance. Note also that although we make reference in this Argument to facts set out in the Final Submission of Commission Counsel, our reply to the legal arguments of Commission Counsel, as well as to the arguments of other parties, will be set out in our Reply.

4. The BCCLA has participated in the entirety of the resulting hearing process from the outset, including the initial hearing chaired by Gerald Morin, Q.C., the current hearing chaired by Ted Hughes, Q.C., and the associated Federal Court hearings. This participation has been at enormous cost, given that the BCCLA – unlike other participants – did not receive government funding to cover its legal costs. Despite that, the BCCLA was compelled to participate by the enormous importance of the issues underlying this hearing.

II. THE IMPORTANCE OF THIS MATTER

5. It would be easy to assume that the importance of this hearing is exclusively based upon the degree of force that police used on protesters at UBC. This would be incorrect. Although the use of force in some instances was quite shocking, that alone would not merit the expenditure of time and resources that have gone into this hearing.

6. Two immediate concerns prompted the complaint of the BCCLA. First, there were indications that the RCMP was motivated in its conduct not by legitimate concerns about the security of Internationally Protected Persons ("IPPs") or by its duty to enforce the law, but by the influence of the executive branch of government. Whether because of direct orders from political actors or because the RCMP, either correctly or incorrectly, believed that those political actors desired a particular result, it appeared that the RCMP had accepted political direction to prevent embarrassment to visiting IPPs. Second, it appeared that the always difficult position of police in a modern democracy had been compromised. That is, although police themselves are part of the government, they are expected to remain sufficiently independent of the representatives of the governing political party that they never become simply the "palace guard", exercising the coercive power of the state for political goals. There were indications that this independence had not been maintained at APEC.

7. These two concerns are both subsumed within one principle, the apparent violation of which necessitated this hearing: the Rule of Law. Without an understanding of the Rule of Law, it would be impossible to understand why the actions of the RCMP and the Prime Minister's Office around the APEC conference were so objectionable. In particular, the Rule of Law underlies objections to the RCMP functioning as an enforcement branch of the Government of Canada rather than as an enforcer of the law.

8. Since so many of the actions of the RCMP also violated the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and particularly s. 2(b) of the *Charter* – the right to freedom of expression – it will be convenient to consider the relevance of s. 2(b) in this section, prior to examining the APEC events.

A: The Rule of Law – Historical Sources

9. The Rule of Law is often referred to as the foundation upon which the common law is built. As with most elements of the common law, the rule of law was imported into Canada. While the concept was present during the Colonial period, the *Constitution Act, 1867* confirmed its importance by giving Canada a "Constitution similar in Principle to that of the United Kingdom". The Supreme Court of Canada has recognized that this phrase is evidence that the Rule of Law has been incorporated into Canadian law.

> *Roncarelli* v. *Duplessis,* [1959] S.C.R. 121

10. The *Constitution Act, 1982* went even further, stating in the preamble that the Rule of Law and the supremacy of God are the principles upon which Canada is founded.

11. No exact definition of the Rule of Law has been stated by the courts. Judicial treatment is typified in *Reference re Questions Concerning Amendment of the Constitution of Canada*, in which the court found the Rule of Law to be "…a highly textured expression, importing many things…but conveying, for example, a sense of orderliness, or subjection to known legal rules and of executive accountability to legal authority."

Reference re Questions Concerning Amendment of the Constitution of Canada as set out in O.C. 1020/80, (1981), 125 D.L.R.(3rd)1 S.C.C. at 46.

12. In the absence of a strict legal definition, those seeking to define the Rule of Law usually turn to three prominent thinkers: Aristotle; John Locke; and A.V. Dicey.

13. Aristotle's starting point in the *Politics* was his concept of natural law. This might be summarized by stating that law exists naturally and that because law is part of nature and therefore comes from God rather than man, then the law must apply equally to all people. This leads to his oft-quoted conclusion: "Hence the rule of law is preferable to that of a single citizen, by this same argument, and if it is better that some rule, these are appointed as guardians of the law or servants of the laws."

14. John Locke in The Second Treatise of Government pursued an argument very similar to Aristotle's with regard to the legitimacy of law and government in general. He defined the rule of law in terms of freedom:

> Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; liberty to follow my own will in all things, where that rule prescribes it not; and not to be subject to the inconstant, uncertain, arbitrary will of another man.

15. For Locke's goal to be accomplished, it is important that "whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws promulgated and known to the people, and not by extemporary decrees."

16. A.V. Dicey's formulation of the Rule of Law has "constituted the roots of most of the modern or contemporary conceptions" and is therefore central to any consideration of this topic.

17. For Dicey, the Rule of Law had "three meanings, or may be regarded from three different points of view." The first of these is the supremacy of "regular law" as opposed to arbitrary power. Arbitrariness is in opposition to the Rule of Law and must be excluded from government. People can be punished for the breach of a law, but cannot be punished for anything else.

18. The second of Dicey's principles is that the Rule of Law means equality before the law. There can be no exemptions from the law for anyone, so that the highest government official must receive the same treatment as the average citizen.

19. The third of Dicey's principles is that the expression "the Rule of Law" summarizes the principle that constitutional laws are not the source but are the consequence of the rights individuals already possess. In this, Dicey follows a similar line of reasoning to Aristotle and Locke.

20. In its contemporary context the rule of law is thus widely taken to require:

> (i) that all legitimate laws must arise and find their ground in the rights of the individual citizens governed by the law (*i.e.* that all laws must ultimately be justified through democratic processes),

A.V. Dicey, *supra*

Margot E. Young, "Relax a Bit In the Nation: Constitutional Law 101 and the APEC Affair", in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), p. 49

(ii) that the law must be the sole source of state power (i.e., all state and police power arises through, and may be exercised only in accordance with, the law)

A.V. Dicey, *supra*

W. Wesley Pue, "Policing, The Rule of Law, and Accountability in Canada", in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), p. 17

Donald J. Sorochan, "The APEC Protest, The Rule of Law, and Civilian Oversight of Canada's National Police Force in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), p. 59

Margot E. Young, "Relax a Bit In the Nation: Constitutional Law 101 and the APEC Affair", in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), pp. 47-48

Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721

(iii) that all persons must be subject to and equal before the law (*i.e.*, no one, including members of government and the police, are above the law)

A.V. Dicey, above

W. Wesley Pue, "Policing, The Rule of Law, and Accountability in Canada", in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), pp. 17, 26

Margot E. Young, "Relax a Bit In the Nation: Constitutional Law 101 and the APEC Affair", in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), pp. 47-48

Donald J. Sorochan, "The APEC Protest, The Rule of Law, and Civilian Oversight of Canada's National Police Force", in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), pp. 58-59,

Entick v *Carrington* (1765), 19 St. Tr. 1030; 95 E.R. 807 (K.B.)
Roncarelli v. *Duplessis*, *supra*
Re Manitoba Language Rights, *supra*
Re Secession of Quebec (1998), 161 D.L.R. (4th) 385 (S.C.C.)

(iv) that the law must be enforceable (*i.e.*, there must exist mechanisms for all citizens to obtain redress for breaches of the law)

Donald J. Sorochan, "The APEC Protest, The Rule of Law, and Civilian Oversight of Canada's National Police Force", in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), pp. 59-62

(v) that there must exist clear separation of powers (*i.e.*, public accountability--for example of the courts or of the police--is not the same as political control).

Andrew D. Irvine, "Free Speech, Democracy and the Question of Political Influence", in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), pp. 31,34

W. Wesley Pue, "Policing, The Rule of Law, and Accountability in Canada", in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), 17

Margot E. Young, "Relax a Bit In the Nation: Constitutional Law 101 and the APEC Affair", in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), pp. 47-48

21. Specifically, points (ii) through (v) are relevant to the argument that follows.

B. The Rule of Law – Judicial Interpretation

22. As mentioned above, the courts have not provided an authoritative definition of the Rule of Law. This does not mean, however, that the courts – including the Supreme Court of Canada - have not frequently considered the concept. In Roncarelli v. Duplessis, for example, the attempt by the Premier of Quebec to use the liquor licensing process for his own political purposes was found to be unlawful. The Court ruled that the Premier should be forced to follow the process of law, since if the court were to do nothing, it would signal the "disintegration of the rule of law."

Roncarelli v. *Duplessis*, *supra* at 137

23. In *Re Manitoba Language Rights*, the Court found that the publication of the laws of Manitoba in English only was contrary to the Province's constitution. The consequences of that finding were dependent upon the Rule of Law. The Court held that the Rule of Law means "at least two things", the first being that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power." This principle led the court to hold that all English only laws were unconstitutional, although the second of the two stated meanings of the Rule of Law – the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order – led it to presume validity for a limited period while the statutes were brought into line with constitutional requirements.

Re Manitoba Language Rights, [1985] 1 S.C.R. 721

24. One of the best known applications of the Rule of Law by the United States Supreme Court was in *U.S.* v. *Nixon*, following an attempt by the Special Prosecutor to subpoena the production of tapes and documents that contained conversations between President Nixon and others. The President, claiming executive privilege, filed a motion to quash the subpoena. Speaking for the Court, Chief Justice Burger upheld the subpoena. He did not deny the existence of presidential privilege, but stated "this presumptive privilege must be considered in light of our historic commitment to the rule of law."

U.S. v. *Nixon* 418 U.S. 683 (1974), at 707

25. How do the principles underlying the Rule of Law apply to the events that gave rise to this hearing? As will be shown below, they apply in at least two ways. First, the actions taken by police against protesters in some instances - most notably the arrest of Craig Jones, the removal of protest signs at Green College, the removal of the flag at the Graduate Students' Society building, and the clearance of Gate 6 – were not undertaken to enforce any law, but were instead intended to achieve non-legal objectives. Second, the treatment accorded by the police to the Prime Minister and other VIPs both in the security planning for APEC and particularly in the clearance of Gate 6 was entirely inconsistent with the principle of equality before the law.

C. Alternative to the Rule of Law

26. The Rule of Law is so fundamental to the Canadian legal system and to the Canadian way of life that it would be easy to forget that there could be any alternative to it. Examples of the alternative can, unfortunately, be easily found. While it might be excessive to draw comparisons either to contemporary police states in the third world or to the historical examples of western liberal democracies that have become police states, it would be wrong for Canadians to believe that we are somehow immune to the threats that those examples illustrate. Indeed, if former Commissioner of the RCMP R.H. Simmonds was correct to define a police state as emerging when a Government uses its police agencies as instruments of repression against the citizens of the state, then the incidents that gave rise to this inquiry arguably fall within the ambit of that definition.

> Philip C. Stenning, "Someone to Watch over Me: Government Supervision of the RCMP", in W. Wesley Pue, ed., *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), p. 106
>
> See also W. Wesley Pue, "Policing, the Rule of Law, and Accountability in Canada: Lessons From the APEC Summit", in Pue, *ibid*.

27. It would be preferable, however, to avoid digressing into a debate about whether or not the conduct of police at APEC is consistent with what would be expected in a police state. The more salient point is that vigilance is required to ensure that police in Canada behave in a manner consistent with the values of a liberal democratic state and in accordance with the Rule of Law. The inquiry by this Commission is the principle means by which this vigilance is to be exercised. The Commission therefore carries the burden of ensuring that the Rule of Law is upheld and that any inconsistency between RCMP conduct and the Rule of Law is censured.

D. Section 2(b) of the Charter – Freedom of Expression

28. Section 2(b) of the *Charter of Rights and Freedoms* guarantees that:

> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

29. The Supreme Court of Canada has consistently and frequently held that freedom of expression is of crucial importance in a democratic society.

> *Irwin Toy* v. *Quebec* (1989), 58 D.L.R. (4th) 577 (S.C.C.) at 606
>
> *R.* v. *Keegstra* (1991), 2 W.W.R. 1 (S.C.C.)
>
> *R.* v. *Zundel* (1992), 95 D.L.R. (4th) 202 (S.C.C.) at 260-261
>
> *Libman* v. *Quebec (Attorney General)* (1997), 151 D.L.R. (4th) 385 (S.C.C.)

30. In the first attempt by the Supreme Court of Canada to interpret s. 2(b), McIntyre J. in *Dolphin Delivery* underlined that freedom of expression is not a creature of the *Charter*. It is one of the fundamental concepts that have formed the basis for the historical development of the political, social and educational institutions of Western society. The Court in *R.* v. *Keegstra* elaborated on this concept, commenting that the connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and that the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

> *Retail, Wholesale and Department Store Union, Local 580 et al.* v. *Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174 at 183 (Commission Counsel's Book of Authorities, Tab 59)

R. v. *Keegstra* (1991), 2 W.W.R. 1 (S.C.C.) at 55, adopted in *Libman* v. *Quebec (Attorney General)* (1997), 151 D.L.R. (4th) 385 (S.C.C.) at para. 29

31. Dickson C.J.C. in *Irwin Toy* referred to Rand J.'s comment in *Switzman* v. *Elbling* that freedom of expression is "little less vital to man's mind and spirit than breathing is to his physical existence."

Irwin Toy v. *Quebec* (1989), 58 D.L.R. (4th) 577 (S.C.C.) at 606

Switzman v. *Elbling* (1957), 7 D.L.R. (2d) 337 (S.C.C.) at 358

32. In *Irwin Toy* v. *Quebec*, Dickson C.J. discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours, summarizing them as follows:

(1) Seeking and attaining the truth is an inherently good activity;

(2) Participation in social and political decision-making is to be fostered and encouraged; and

(3) The diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

Acceptance of all three reasons as the basis for the right to freedom of expression entails a very broad definition of that right.

Irwin Toy v. *Quebec* (1989), 58 D.L.R. (4th) 577 (S.C.C.) at 612

33. *Irwin Toy* articulated the test for determining whether there has been an infringement of freedom of expression. First, is the form of expression at issue protected by s. 2(b)? Second, does either the purpose or effect of the impugned legislation restrict that form of expression?

34. According to the Supreme Court of Canada in *Irwin Toy*, "activity is expressive if it attempts to convey meaning." Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. This broad definition has been supported by a willing acceptance of the broadest rationale for the protection of expression – a realization of individual self-fulfillment – as well as the Court's view that the *Charter* should be given a generous interpretation. Most activities constitute expression under the Court's definition, as "most human activity combines expressive and physical elements". What is excluded is that which is "purely physical and does not convey or attempt to convey meaning."

Irwin Toy v. *Quebec* (1989), 58 D.L.R. (4th) 577 (S.C.C.) at 607

Peter Hogg, *Constitutional Law in Canada* (loose-leaf edition, Volume 2, Carswell), at 40.5(a)

35. The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts. Indeed, freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure.

Irwin Toy v. *Quebec* (1989), 58 D.L.R. (4th) 577 (S.C.C.) at 607

36. The guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be. Adapted to this context, it serves to preclude the majority's perception of "truth" or "public interest" from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. In *R.* v. *Zundel* it was determined that even deliberate lies and falsehoods are protected by s. 2(b) of the *Charter.* In *R.* v. *Keegstra* the Court unanimously held that even the promotion of hatred against the Jews or another racial group, which is a

Criminal Code offence, is protected by s. 2(b). Further, *R.* v. *Lucas*, confirmed that even deliberate falsehoods (defamatory libels) were protected by s. 2(b).

R. v. *Zundel* (1992), 95 D.L.R. (4th) 202 (S.C.C.) at 260-261

R. v. *Keegstra* (1991), 2 W.W.R. 1 (S.C.C.)

R. v. *Lucas* (1998), 157 D.L.R. (4th) 423 (S.C.C.)

37. Picketing – an activity very similar to demonstrating - can fall within the protection afforded by s. 2(b) because there is always some element of expression in picketing. In *Dolphin Delivery*, for example, the picketing that was sought to be restrained would have involved the exercise of the right of freedom of expression. The union was making a statement to the general public that it was involved in the dispute, that it was seeking to impose its will on the object of picketing, and that it solicited the assistance of the public in honouring the picket line. All picketing is designed to bring economic pressure on the person picketed and to cause economic loss for so long as the object of the picketing remains unfulfilled.

Retail, Wholesale and Department Store Union, Local 580 et al. v. *Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174 at 183 (Commission Counsel's Book of Authorities, Tab 59)

38. Courts have noted that the legal protection of freedom of expression is not solely dependent upon the *Charter*. The Supreme Court of Canada in *U.F.C.W., Local 1518* v. *KMart Canada Ltd.* and *Allsco Building Products Ltd.* v. *U.F.C.W.*, *Local 1288P*, considered whether it was a justifiable infringement of s. 2(b) for a statutory labour relations regime to prohibit the peaceful distribution of leaflets by unions and union members, where those leaflets accurately set out the position of the employees involved in a labour dispute with their employer, and were distributed in a manner that was not intimidating or such as to cause undue influence. Leafleting was unanimously held to be a protected activity under s. 2(b). In coming to this conclusion, the court noted that free expression on matters of public interest and the right to publicly disseminate news and information and to express opinions on matters of public interest were considered to be fundamental rights long before the enactment of the *Charter*. The distribution of leaflets and posters is typically less expensive and more readily available than other forms of expression. As a result, they are particularly important means of providing information and seeking support by the vulnerable and less powerful members of society. This reasoning was adopted in *Allsco Building Products Ltd.*

U.F.C.W., Local 1518 v. *KMart Canada Ltd.* (1999), 176 D.L.R. (4th) 607 (S.C.C.)

Allsco Building Products Ltd. v. *U.F.C.W.*, *Local 1288P* (1999), 176 D.L.R. (4th) 647 (S.C.C.) at 656-660

39. The Supreme Court of Canada has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by s. 2(b), unless the physical form by which the communication is made (for example, by a violent act) excludes protection.

Irwin Toy v. *Quebec* (1989), 58 D.L.R. (4th) 577 (S.C.C.) at 607

R. v. *Keegstra* (1991), 2 W.W.R. 1 (S.C.C.)

R. v. *Zundel* (1992), 95 D.L.R. (4th) 202 (S.C.C.) at 261

40. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, the purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes does the mischief consist in the meaning of the activity or the purported influence that meaning

has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiffs can still claim that the effect of the government's action was to restrict their expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

> *Irwin Toy* v. *Quebec* (1989), 58 D.L.R. (4th) 577 (S.C.C.) at 614

41. The broad and liberal approach to s. 2(b) developed in *Irwin Toy* was recently reaffirmed in *Libman* v. *Quebec; R. v. Lucas;* and *U.F.C.W., Local 1518* v. *KMart Canada Ltd.*:

> Unless the expression is communicated in a manner that excludes the protection, such as violence, the court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b) of the *Canadian Charter*.
>
> > *Libman* v. *Quebec (Attorney General)* (1997), 151 D.L.R. (4th) 385 at para. 31 and adopted in *R.* v. *Lucas* (1998), 157 D.L.R. (4th) 423 (S.C.C.)at para. 27
> >
> > *U.F.C.W., Local 1518* v. *KMart Canada Ltd.* (1999), 176 D.L.R. (4th) 607 (S.C.C.)

42. Going beyond judicial statements of the justification for the protection of freedom of expression, the BCCLA urges the protection of free expression based on what it calls the "democratic commitment". The democratic commitment justification for the Charter protection of expression is based not simply on free expression's value for accountability of elected politicians in a representative democracy. Rather, the importance of free expression is a fundamental right because it is critical to our society's vision of a democracy in which the citizens are themselves, collectively, self-governing, sovereign rulers. On this basis, citizens cannot tolerate censorship without compromising a right which is constitutive of their ruling function. Because citizens must govern, their minds and expressions must be protected by our laws and institutions of government rather than limited by them.

III. THE INCIDENTS AND PROBLEMS

43. Any discussion of the conduct of the RCMP at APEC is complicated by the number, complexity and inter-relatedness of the events at which objectionable incidents took place. In this Argument, an attempt will be made to discuss these incidents separately and to present them in a roughly chronological order. This will be followed by a discussion of the role of the Prime Minister, a list of substantive recommendations, and a list of recommendations concerning RCMP Public Complaints Commission procedures.

A. Removal of the Protest Camp at the Museum of Anthropology

(i) Facts

44. We adopt the facts as set out at pages 216 through 218 of the Final Submission, subject to the following additions and clarifications.

45. On Thursday, November 20th, a group of protesters marched to the Museum of Anthropology ("MOA") and set up their tents on a knoll about thirty meters away from the MOA (Jones, May 26, 1999, p. 197, lines 16-19).

46. At that time, the secure zone at UBC – which included the MOA – was not due to be established until 6:00 p.m., Monday, November 24th . That was the time agreed upon in the contract between UBC and the Government of Canada and was the time which had been provided to students (*e.g.* Exhibit 119, second page, second paragraph).

47. The approach of the campus security guards, the RCMP and the Vancouver Police Department ("VPD") bicycle police at the UBC site over the ensuing days was to keep an eye on the protesters, establish a dialogue with them and ensure that there was no property damage (Jones, May 26, 1999, p. 198, lines 1-4, p. 199, lines 7-12, p. 200, lines 9-18).

48. In fact, there was no damage. A couple of protesters wrote slogans on the glass windows of the MOA, but they were written in what has been referred to as "glass chalk" so that they could be removed without any damage (Jones, May 26, 1999, p. 198, lines 5-20). A fire was lit on a cold night, but it was in an empty drum rather than on the ground (Jones, May 26, 1999, p. 199, lines 14-17).

49. During the succeeding days, however, the RCMP, UBC, the federal government and the Government of British Columbia negotiated an early transfer of the MOA from UBC to the federal government. On or about November 20, 1997, Robert Vanderloo approached UBC requesting that the date for the government takeover of the MOA be advanced from what had been originally agreed upon (Brown, July 29, 1999, p. 123). At midday on Friday November 21, 1997, Robert Vanderloo, Executive Director of the APEC '97 Canadian Coordination Office, telephoned Martha Piper to ask that the University hand over control of the MOA to the Government on that day or early the next day. Dr. Piper agreed to take the request under advisement. Unsatisfied, the Government sought the cooperation of the Provincial Government to put pressure on the University, and also threatened to unilaterally take over jurisdiction of the MOA area. Later that day, the compromise was reached and confirmed in a telephone conversation between Robert Vanderloo and Christopher Brown by which control would be transferred at 6:00 p.m. Saturday, November 22, 1997. The written agreement between the Government and UBC was amended and initialled by both sides on the evening of Saturday, November 22, 1997.

Exhibits 170, 171

50. On the strength of that transfer, one group of protesters was arrested on Saturday, November 22nd (Jones, May 26, 1999, p. 201, lines 8-20). The fact of the early transfer had not become public knowledge at that time (Jones, May 26, 1999, p. 212, lines 5-9). Two more protesters were arrested on Sunday, November 23rd when two dozen protesters marched to the MOA, and those two refused to leave when told to do so by the police (Jones, May 26, 1999, p. 212, lines 1-4, 12-19, p. 213, line 9 to p. 219, line 210). At that protest on Sunday November 23rd, the police divulged the early transfer of the MOA from UBC to the Government of Canada (Jones, May 26, 1999, p. 215, line 18 to p. 216, line 4).

51. Despite the supposed basis for the early transfer being to facilitate security, members of the public were able to wander unimpeded onto the MOA grounds as late as the evening of November 24th (Jones, May 26, 1999, p. 221, lines 4-9).

(ii) Argument

52. Although counsel for the individual RCMP officers repeatedly argued that the Commission should not consider evidence of the removal of the protest camp, there are obvious reasons why this incident must be carefully scrutinized. First, it must be noted that this event is relevant to the complaint of the BCCLA that the Commission inquire into actions “which prevented students and others on the UBC campus from carrying out peaceful protests, where the individuals were not inside, or threatening the integrity of, security fences around official APEC sites and motorcade routes on the campus.” Although the protesters in this case were, in fact, inside the secure zone, that is only because that site was made part of the secure zone at that particular time for the specific purpose of removing the protesters. That is, the protesters were carrying out peaceful protest at a venue at which it had been predetermined that security measures would not require establishing a secure zone until much later. The removal of the protest camp was therefore a clear interference with “peaceful protests” and falls squarely within the complaint of the BCCLA.

53. A second reason for careful scrutiny of the removal of the protest camp is that this incident – together with the location of the law school fence – is one of the clearest examples of direct interference for purely political reasons with decisions that should have been made solely on security grounds.

54. As discussed above, the evidence clearly establishes that the RCMP had concluded that for security purposes, the secure zone – including that around the Museum of Anthropology - did not have to be established until 6:00 p.m., Monday, November 24th. Based upon that conclusion, the RCMP behaved in one respect exactly as they should have at UBC. When initially pressured to remove the protesters who were camped at the Museum of Anthropology, the RCMP demurred. The RCMP recognized that there were no legal grounds for the removal of the protesters and refused to remove them without legal authority. Despite the fact that nothing less should be expected, in light of the pressure the RCMP were under, this was commendable.

55. What happened next, however, was far from commendable. A plan was devised by which the date for the Government of Canada taking over control of certain sites at UBC pursuant to its agreement with UBC would be moved up. The property interest which the Government of Canada would then have in the property would allow it to enforce its property rights and have the protesters evicted from its property, despite there being no security reason for doing so. On the face of it, this must have seemed a clever trick. By relying on its status as leaseholder rather than as conference organizer, the Government of Canada could call upon the services of the RCMP as would any other property holder confronted by trespassers. What was ignored, however, is the fact that the Government of Canada is not like other property holders, and that its relationship with the RCMP is not like that of normal members of the public.

56. Unlike private property holders, the Government of Canada is bound by the provisions of the *Charter*. These provisions include s. 2(b):

> Everyone has the following fundamental freedoms:
> …(b) freedom of thought, belief, opinion <u>and expression</u>, including freedom of the press and other media of communication;…[underlining added]

57. The Supreme Court of Canada has held that governments have a duty to accommodate expression, such as by allowing the distribution of pamphlets in airports. Given that the tenters were engaged in expressive activity, that they posed no security threat, and that there was no security reason or other legitimate reason to remove them any earlier than the date originally intended by the RCMP, it is clear that their premature removal constituted a violation of their *Charter* rights.

Committee for the Commonwealth of Canada v. *Canada* (1991), 77 D.L.R. (4th) 385 (S.C.C.) (Commission Counsel's Book of Authorities, Tab 5)

58. Ironically, while the Museum of Anthropology was still under control of UBC, the *Charter* protection of the protesters might not have been so clear. Unfortunately for the RCMP and the Government of Canada, however, as long as UBC was in control, it was concerned to ensure that the right to peaceful protest was respected.

Harrison v. *University of British Columbia*, [1990] 3 S.C.R. 451

59. Not only is the Government of Canada not like other property owners in terms of its duty to accommodate free expression, it is also not like other property owners in terms of its relationship with the RCMP. When the RCMP is called by any other property owner, it is to be hoped that the RCMP will consider the situation in a completely detached manner, and be concerned only with enforcement of the law. When its services are requested by the Government of Canada, however, that detachment cannot be guaranteed since the RCMP is itself part of the Government of Canada. The essential unity of these entities was, of course, demonstrated even by the fact that the same counsel represented both the Government and the RCMP in these proceedings.

60. Given that essential tie between the RCMP and the Government of Canada, any claim that the Government of Canada was just another property owner seeking to remove trespassers from its property can be seen to be completely facile. While it will be argued below that steps should be taken to ensure that the RCMP maintain at least an arm's length relationship from other government agencies, the relationship between the RCMP and the central agencies in this case was much closer than arm's length, sufficiently so that any claim that the RCMP was merely assisting a property owner in the removal of trespassers must be seen as completely illegitimate. Not only were the ongoing institutional ties between the RCMP and the central agencies of government present (*e.g.* reporting, budgetary, promotion at senior levels), but the RCMP was privy to the expressions of political will for the protesters' removal and to the discussions about how to remove the protesters in the absence of any immediately apparent lawful authority. In that situation, the RCMP should have been more careful to ensure the propriety and legality of the proposed removal of the protesters before it agreed to facilitate that removal.

61. In summary, the removal of the protest camp was unlawful, violated the protesters' *Charter* rights, probably constituted both assault and battery at civil law and assault under the Criminal Code, and was an example of the RCMP allowing itself to be improperly influenced by the central agencies of the Government of Canada.

B. Establishment of Protest Zones

62. The visit of the APEC leaders occasioned protest about globalization, about the Chinese occupation of Tibet, and about the Indonesian occupation of East Timor. Those who protest seek to communicate their message of protest and in this case the intended recipients of that communication included the APEC leaders themselves. UBC anticipated that this would be the case and sought to ensure that protesters would be able to be seen by the APEC leaders by providing that there would at least be a protest area in front of the Law School that had a line of sight to the motorcade route. The boundaries of this area were contentious, however, and the willingness of the RCMP to enforce a reduction of these boundaries at the instigation of central agencies of the Government of Canada is objectionable. In addition, there was some attempt by the RCMP to claim that the area in front of the Law School was the only area where protest would be allowed, somehow supplanting the right to engage in protests in other public, non-secured areas. Further, the RCMP was also apparently willing to enforce a "noise free" zone, despite the complete absence of any legal authority for doing so and the obvious infringement of the rights of protesters that would result.

(i) Facts

63. UBC made some attempts to ensure that those who wished to demonstrate their opposition to APEC, to the trade system it promotes, or to the policies of its member economies, would have the opportunity to effectively do so. Although there is some question about the adequacy of those arrangements that were originally made, it is at least clear that an attempt was made to ensure that the RCMP would not prevent protesters from effectively exercising their right to freedom of expression. The RCMP, however, violated the agreement it reached with the University. It unilaterally moved barricades back to restrict protesters to "designated protest areas" that were so far back from the routes of the APEC delegates that meaningful communication between them would be impossible.

64. UBC's commitment to ensuring that there were meaningful opportunities for protest is evident in a number of the documents filed as exhibits in this hearing. As noted in Chris Brown's August 8, 1997 memo to Martha Piper, for example, "Clearly we want to let any demonstrations or protests against APEC or related issues proceed in an open an unhindered fashion" (Exhibit 158). Page 00399 of Exhibit 159 states that, "Set against [security concerns] is an absolute requirement on the part of UBC to allow and even encourage the active and vigorous expression of views on AELM and the substantive issues of concern on the APEC agenda." The October 17, 1997 letter from Eilis Courtney to Trevor Thompsett (Exhibit 164, p. 2) states that "it is unacceptable to the university to have no area of protest within sight of the leaders."

65. This commitment on the part of UBC was incorporated in s. 6.3 of the contract between UBC and the Government of Canada:

> The parties undertake not to impede any lawful protest and the exercise of free speech outside the Properties and other designated areas as determined by the RCMP in conjunction with UBC.
>
> Exhibit 172, p. 000007

66. As of October 17, 1997, UBC was still expressing concern about the failure to establish a designated area for protesters to gather (Exhibit 164, 2nd page). On November 10th, Trevor Thompsett and Dennis Pavlich met and discussed the placement of the fencing in front of the Law School. On November 11th, the RCMP advised UBC that the proposed line for the placement of the fence in front of the Law School that had been worked out in the previous day's meeting was agreeable to the RCMP (Brown, July 29, 1999, p. 130).

67. On November 13th, 1997, however, the site visit by the delegation from the Government of Canada occurred. Jean Carle, from the Prime Minister's Office, demanded two changes to the protest zones. These were that the line agreed upon between UBC and the RCMP in front of the Law School be moved back, and that a "noise-free" zone be established on the West Mall of the UBC campus. There was disagreement on the former of these two demands, although apparently not on the latter (Brown, July 29, 1999, pp. 130-135).

68. Through the intercession of Eddie Goldenberg and Jean Pelletier, agreement was reached on a fence line in front of the Law School that was acceptable to UBC (Brown, July 29, 1999, pp. 140-141). Eventually, in fact, the actual line of the fence was concluded when Chris Brown of UBC told the contractors erecting the fence where to put it (Brown, July 29, 1999, p. 142).

69. The noise-free zone was created in response to Jean Carle's concern about the sound of protesters disturbing the IPPs. He believed that the APEC leaders should not be disturbed or distracted (Carle, August 23, 1999, p. 205). He believed that APEC leaders were entitled to be treated differently from other citizens in terms of being insulated from noise and distractions (Carle, August 23, 1999, pp. 207-208).

70. Mary McNeil, the Deputy Executive Director for APEC '97, also wanted to make sure that the leaders would not hear any noise that was disruptive to the meeting, including demonstrators.

McNeil, October 5, 1999, p. 147

71.   Richard Anderson understood that Jean Carle's concern was not even about protesters being heard inside the MOA, but was that IPPs might hear them at the drop off point during the small amount of time as they were getting out of their limousines and entering the MOA.

Anderson, November 23, 1999, p. 61

72. When Jean Carle raised his noise concerns on August 27th, he was not told by members of the RCMP that the RCMP would not be interfering with lawful protest.

Dingwall, September 10, 1999, pp. 75-76

73. On November 13th, Bill Dingwall told Jean Carle that the RCMP could check for megaphones in the Gate 4 area. His intention was that the RCMP would stop people with megaphones from entering the area. Bill Dingwall was not aware of any noise control bylaws at UBC that would justify this, but would apparently have been prepared to base enforcement of the noise free zone on Criminal Code provisions such as breach of the peace. He also believed that s. 6.3 of the Memorandum of Understanding between UBC and the Government of Canada would allow the RCMP to take measures inside the specified properties which would impede lawful protests and the exercise of free speech.

Dingwall, September 10, 1999, p. 76-78, 82-86

74. Despite the lack of any connection between sound levels and security requirements, the RCMP conducted a test by which a police cruiser used its siren to determine whether loud noises such as megaphones could be heard inside the MOA.

May, August 17, 1999, pp. 91-92

75. It is not clear to what extent the "noise free" zone was actually enforced.

(ii) Argument

76. It would be understandable if an independent observer were puzzled by the amount of attention that was given to the location of the fence line in front of the law school, both in the days before the APEC retreat and at this hearing.   After all, none of the people that might have been expected to protest at the APEC conference had ever expressed any desire to protest in that particular location, and in fact, the most important protests took place at other locations. In addition, despite all of the debate about which of several possible fence lines a few scant meters apart from each other would be used, it is obviously not the case that there was some "right" line that had to be identified; instead, the different parties to the discussion each lobbied for locations that reflected their separate interests, with the end result that the fence ended up being at the originally agreed upon location. What, then, are the pertinent issues concerning the establishment of protest zones, and why are they important?

77. First, if the placement of a fence in front of the law school was intended to provide security for the APEC delegates, and if the Prime Minister's Office attempted to move that fence further away from the delegates' route than the RCMP had deemed necessary, then that was political interference with the RCMP's security function, and it would be wrong of the RCMP to acquiesce. Second, if the location of the fence was to be determined pursuant to a term of the contract between UBC and the Government of Canada and the Government was attempting to violate the terms of the contract, it would be wrong of the RCMP to assist them in that attempt. Third, if the RCMP attempted to limit protests to only what it considered to be a "designated demonstration area", it would be wrongfully interfering with expression rights under the *Charter*. Fourth, if the establishment of protest zones included the establishment of "quiet zones" in which amplified sound would not be permitted, that would be an action for which the RCMP had no legal authority and would also be a violation of *Charter* expression rights.

78. It is clearly established by the evidence that the RCMP and UBC agreed upon a boundary for the fence in front of the law school, that Jean Carle insisted that that fence be moved further away from the motorcade route and that the RCMP demonstrated its willingness to enforce that enlarged boundary, thereby moving protesters further away from the APEC delegates. In considering the significance of this, it must first be noted that Jean Carle's purported justification for moving the fence - namely that protesters were in danger from the fence toppling over in the original location – is completely nonsensical. The site visit on April 13, 2000 revealed that the line that Jean Carle wanted the fence moved from was not visibly steeper than the line he wanted it moved to, and may even have been less steep. Combined with Mr. Carle's lack of any qualifications in a field such as engineering, this strongly suggests that his purported concern was not a *bona fide* one. An explanation far more likely to be true is one consistent with his responsibilities as a political aide to the Prime Minister: namely, that he was prepared to do whatever he believed would please the Prime Minister. What he believed would please the Prime Minister in this case was to minimize the chance that the visiting APEC delegates – particularly Indonesian President Suharto – would see or hear any protests.

79. The conduct of Jean Carle is certainly reprehensible in a number of ways, and will be discussed in a separate section below. More important for the purposes of this hearing, however, is how the RCMP responded to Jean Carle's insistence that the fence be moved, as compared to how the RCMP should have responded.

80. The RCMP should have asked the question, "What gives us the legal right to erect a fence in front of the Law School". The answer, given that that area is private property, would have been the consent of the titleholder to the property. Who held the title to that particular property? Obviously, UBC was the titleholder unless that area was one ceded to the Government of Canada as part of the September 29, 1997 Memorandum of Agreement or the November 22, 1997 Letter of Understanding.

81. Was the area in front of the Law School that Jean Carle wanted to have included in the secured zone one of the ceded properties? It would appear not. It was clearly not one of the "properties" pursuant to s. 4.0 of the Memorandum of Agreement and does not even appear on the map that is Schedule "A" to that document. The revised Schedule "A" that is attached to the Letter of Understanding does include part of the lawn in front of the Law School, but it appears to be only a small portion of the lawn, leaving most of the lawn outside of the secure zone. A comparison with Exhibit 467 shows that the line to which Jean Carle demanded that the fence be moved is outside the area ceded to the Government of Canada pursuant to the Letter of Understanding.

82. Despite the apparent lack of any contractual basis for Jean Carle's demands that the fence be moved close to the Law School, and despite the fact that it was beyond what Trevor Thompsett and the RCMP had deemed acceptable for security purposes, the RCMP was apparently willing to enforce Jean Carle's edict. In an after the fact articulation of the RCMP's position, Wayne May put forward the notion of two separate perimeters: a "security perimeter", determined by the RCMP; and an "event perimeter" determined by the Government of Canada. According to Wayne May, the RCMP would have been willing to secure an event perimeter that was larger than the RCMP needed for security purposes, and the only reason it did not do so was that the event perimeter and the security perimeter turned out to be exactly the same.

May, August 17, 1999, pp. 38-40

83. Wayne May's testimony on this point establishes that the RCMP was prepared to enforce the whims of federal government functionaries, rather than just enforcing the law or meeting legitimate security needs. Further, although he qualified his remarks by saying that if the government wanted to move the perimeter back half a mile "and they had the authority to do it" the RCMP would enforce that boundary, there is no evidence that the RCMP ever took any steps to satisfy itself as to whether the federal government had the authority to establish any given boundaries at UBC. Instead, it was prepared to turn its officers into security guards for the APEC event without satisfying itself that there was legal authority for its actions or that it was impairing the liberties of Canadian citizens as minimally as possible. In the event, the exact extent of the impairment that did occur through the RCMP's collusion in Jean Carle's moving of the fence is uncertain. It deserves to be condemned, however, for its willingness to further Jean Carle's personal agenda at the expense of the law.

84. The issue of the "noise free" zone is, if anything, even more disturbing than the restriction of the space allocated to protesters. At least the establishment of boundaries for protest areas is connected to legitimate security goals and the RCMP could – by staying within the terms of the Memorandum of Understanding – have founded its actions in the contractual rights of the Government of Canada. The creation of the noise free zone, on the other hand, had no basis in security goals and no legal basis whatsoever. It was a completely unlawful decision to infringe the rights of protesters and to once again cast the RCMP as enforcers of government whims rather than enforcers of the law.

85. Since UBC has no anti-noise regulations and since the City of Vancouver's noise control bylaws do not apply at UBC, the use of megaphones by protesters was completely lawful. The decision to prevent protesters from using megaphones was therefore completely unlawful. Had the RCMP and the Government of Canada been concerned with behaving lawfully, a civil action in nuisance might have been commenced and a *quia timit* injunction sought to enjoin amplified sound. It is, admittedly, doubtful whether an injunction could have been obtained, given that it would be for the trivial purpose of preventing the IPPs from hearing the protesters in the brief interlude between getting out of their limousines and entering the Museum of Anthropology. As with other instances at the APEC retreat, however, no attempt to comply with legal procedures was made. Instead, law was sacrificed to expediency and to the hubris of those who failed to recognize that legitimate authority must be based in law rather than in armed force and political power.

C. Undertakings

(i) Facts

86. We adopt the facts as set out at pages 217 through 221 of the Final Submission of Commission Counsel.

(ii) Argument

87. Given that the RCMP has acknowledged the inappropriateness of the undertaking that it required protesters to sign, there is no need to argue that it was, in fact, inappropriate. The flaws in its blanket prohibition of political protest are too glaringly obvious either to be defended or to require further elaboration. Instead, in order to try to ensure that

similar errors are not made in the future, it will be sufficient to attempt to point out the errors that led to the flawed undertaking being used.

88. As a preliminary point, having recourse to legal counsel when drafting documents of this sort would seem to be a sensible precaution.

89. Even without legal counsel, the RCMP could have asked itself the following questions concerning the undertaking, any one of which might have been sufficient to alert it to the problems inherent in the undertaking:

- will anyone signing this protest still be able to engage in meaningful protest or will the undertaking preclude that?
- does the undertaking impair the rights of persons signing it to the minimum degree possible, or does it go further than that?
- are we doing our utmost to ensure that we comply with the relevant *Charter* provisions and jurisprudence?

90. Unfortunately, the RCMP did not ask itself these questions, or at least did not ask in time to prevent the infringement of protesters' rights. Even when problems with the undertaking were drawn to the attention of the RCMP, as when Craig Jones pointed them out to Trevor Thompsett, those problems were ignored. This is characteristic of the disregard for the legal rights of protesters shown by the RCMP throughout APEC.

91. In essence, the RCMP forgot that for it to act legitimately, it must function within the constraints of the law. Regrettably, this was true of many of its actions at APEC.

D. Confiscation of Dennis Porter's Media Pass

(i) Facts

92. We adopt the facts as set out in Final Submission of Commission Counsel at pp. 226-229, subject to the following additions and clarifications.

93. Although as noted at p. 226, paragraph 84 of the Final Submission of Commission Counsel, Mr. Porter agreed with the proposition put to him on cross-examination that the press pass gave him certain "privileges", that should not be taken as in any way conceding that what was accorded to him were merely privileges that might be taken away arbitrarily, rather than rights or legitimate expectations.

94. It should be noted that the confiscation of Mr. Porter's media pass was presaged by harassment that other members of the press pool did not suffer (Porter, May 31, 1999, pp. 171-173).

95. The explanation for the confiscation of his media pass that was given by the RCMP to Mr. Porter that was captured in Exhibit 92, the audiotape, is at odds with the explanation subsequently given by John Buis.

96. The TAG Daily Bulletin for 1997-11-24, which is contained in Exhibit 536, states that Dennis Porter's media pass was confiscated because he was noted to be overly sympathetic to the APEC Alert protestors:

> Two members of the media attending UBC last night as invited observers were noted to be overly sympathetic to the APEC Alert protestors. Both subjects have had their accreditation seized.
>
> The first subject is Dr. Joan RUSSOW federal leader of the Green Party. Second subject Dennis PORTER's accreditation states he is a journalist employed by Working TV. It should be noted that PORTER's hair as of Nov. 22 was bright orange.

97. Hugh Stewart threatened to arrest Dennis Porter if he continued to interrupt his attempts to question his assistant about her media pass, despite the fact that the area they were in was not one where a pass was required.

> Stewart, October 28, 1999, pp. 130-135

(ii) Argument

98. Two interpretations can be put upon the discriminatory behaviour of the RCMP toward Dennis Porter. The first is that which Mr. Porter himself ascribes to the RCMP actions: that RCMP officers were prejudiced against him because of the orange dye in his hair. If this is correct, it is most regrettable. Many young people currently dye their hair. Others have body piercings or tattoos, and some wear unusual clothing. By adopting fashions that distance themselves from older generations, they are doing nothing different from what those older generations did in their turn. If police discriminate against young people because they look different, then not only will it exacerbate social problems by alienating those young people from the social mainstream and causing them to distrust the police and other representatives of the state, it will also deny those young

people the rights and benefits to which they have a legitimate expectation in common with all other Canadians.

99. The second interpretation that can be ascribed to the discriminatory actions of the RCMP officers toward Dennis Porter as compared to their treatment of other media representatives is even more disturbing. This is that the RCMP sought to achieve homogeneity not in the physical appearance of the reporters, but in their thinking and reporting. That is, Mr. Porter's appearance was merely one factor that signalled to the RCMP that his reporting was likely to be sympathetic to the protesters in any coverage of conflict between protesters and the RCMP. This, regrettably, is the more likely of the two interpretations.

100. The RCMP could have easily recognized Mr. Porter's sympathy toward the protesters. In addition to his youth and appearance, he worked for a company that was associated with trade unions and focused on social justice issues (Porter, May 31, 1999, p. 78), he covered the activities of APEC Alert (*ibid*. p. 82), he stayed in the tent city while filming it (*ibid*.), he covered the People's Summit (*ibid*. p. 85), and he was even interviewed himself by another reporter (Porter, June 1, 1999, p. 106-107). Questions he asked RCMP officers on November 25th suggest an actual antipathy toward the police, although given that his pass had already been confiscated by that time, his attitude could have been a product of his earlier mistreatment.

101. The attitude of the RCMP toward Mr. Porter seems to have been characterized by hostility from the outset; see, for example, his account of his harassment in the media centre, harassment which there is no evidence of any other reporters having to endure (Porter, May 31, 1999, pp. 171-173). The RCMP's approach appears, in fact, to have gone beyond hostility and into the absurd, as evinced continued threats to take away Mr. Porter's media pass even after being told that the media pass had already been removed (*ibid*. p. 99).

102. The attempts at justification for the confiscation of Dennis Porter's media pass are curiously insubstantial. There was Sergeant Buis' view that Dennis Porter did not behave like a professional reporter, since Sergeant Buis held the opinion that professional reporters do not become part of the story and that they act in a predictable manner. Sergeant Buis admits to never having checked to see whether his opinion on that point was in accordance with normal journalistic paradigms (Buis, February 2, 2000, p. 48). Another supposed justifications for the cancellation – that Dennis Porter was running and laughing – might justify a reprimand in a kindergarten, but not in a media centre, and was hardly any of John Buis' business. The allegation of having crossed a barrier to do an interview was unsubstantiated and was apparently tolerated in other reporters. Finally, the objection to Dennis Porter having been in the secured zone at the MOA on the evening of November 22nd, 1997 might be more meritorious if the fact of the early transfer of jurisdiction over the MOA had been made public at the time of the alleged infraction, which it had not (Jones, May 26, 1999, p. 212, lines 5-9).

103. The most convincing explanation by the RCMP for its confiscation of Dennis Porter's media pass is that which it gave contemporaneously in the APEC Tag Daily Bulletin: namely, that Dennis Porter was observed to be "overly sympathetic to the APEC Alert protestors."

Exhibit 536

104. When the RCMP moved from mere hostility toward Dennis Porter to confiscating his media accreditation, what errors or wrongdoing were committed? First, it is clear that the RCMP's treatment of Dennis Porter was not consistent with standards of natural justice and procedural fairness. Sergeant Buis admits to having only advised Mr. Porter of the intention to remove his accreditation after having physically taken possession of the accreditation, and to not having advised Mr. Porter of his concerns and affording him the opportunity to address those concerns before making his decision (Buis, February 2, 2000, pp. 44-45). The completely arbitrary nature of the decision to confiscate his pass and the lack of any

opportunity for him to challenge the confiscation were completely at odds with the standards that have been established by Canadian courts. Those decisions were, on the other hand, consistent with Sergeant Buis' view that he was not bound by any rules in making his decision to revoke Dennis Porter's media accreditation.

Buis, February 2, 2000, p. 44

105. Second, the inability to point to any valid and plausible reason for the confiscation of the media accreditation suggests that the confiscation was for an invalid reason. Whether it was that the RCMP did not approve of the journalistic model in which the reporter is involved in the story being covered, or whether it was that the RCMP did not approve of his orange hair, or whether it was that the RCMP did not approve of his sympathy for the protesters, it was wrong of the RCMP to remove his accreditation. There are certainly countries in the world where the police control what gets reported on or in what way it gets reported, but Canada is not supposed to be one of those countries.

106. In a democracy, it is essential that the news media be free to report stories without fear of reprisal from government. This principle is so important that freedom of the press is explicitly included in s. 2(b) of the *Charter*. If government entities, particularly the police, should be allowed to arbitrarily prevent reporters that incurred their displeasure from functioning as reporters, then there would soon be no meaningful reporting on government. Without meaningful reporting, there would be no informed electorate, and democracy would wither and die.

E. Flagpole Protest (Arrest of David Malmo-Levine)

(i) Facts

107. We adopt the facts as set out at pages 241 to 248 of the Final Submission of Commission Counsel, subject to the following additions and clarifications.

108. The police officers that were involved in this event gave various justifications for the decision to intervene. Hugh Stewart was concerned that it might be difficult to remove James Pond from the flagpole if he was allowed to climb the flagpole and refused to come down. Ian Ferguson wanted to ascertain whether there might be something objectionable in the climbing, such as if James Pond was carrying a weapon or if he posed a danger to himself or others (Ferguson, January 21st, 2000, p. 39). He also claimed to have various concerns about whether the flagpole was structurally sound to support James Pond's weight, whether he had ingested alcohol or chemicals (although he admitted to having no reason for that concern), or whether James Pond might paint the flagpole (although he admitted to not having found any paint) (*ibid*. pp. 39-43).

109. Although some of the police officers claimed to have been motivated by concerns about the safety of James Pond, none of the police officers – unlike James Pond - had any expertise in technical climbing.

Ferguson January 21, 2000, p. 43, Killaly, December 7, 1999, p. 136

110. Videotape evidence shows that James Pond was using a climbing harness that appears to have been very secure and to have dictated a slow, methodical climb.

111. Hugh Stewart knew at the time of this incident that the area around the flagpole was not a secure area (Stewart, October 28, 1999, p. 84, lines 6-10). He did not believe that James Pond was doing something unlawful by climbing the flagpole (*ibid*., pp. 83-84). Ian Ferguson also recognized that clearly James Pond had a right to be there (Ferguson, January 21st, 2000, p. 39).

112. Larry Killaly realized at the time of the incident that James Pond might be attempting to express himself in protest by climbing the flagpole, but decided that his expression right was outweighed by safety considerations. He believed that he had the legal authority to do this.

Killaly, December 7, 1999, pp. 129-132

113. When Ian Ferguson contacted James Pond's foot, it was not merely by touching it and releasing it, as might be the case if he merely wished to attract his attention. Instead, he left his hand on James Pond's foot (*ibid*., p. 45), which would be consistent with wishing to restrain him from climbing the flagpole. Larry Killaly also grabbed James Pond's leg rather than merely touching it (Killaly, December 7, 1999, p. 131).

114. Hugh Stewart threatened to cut James Pond's climbing harness if he did not come down. This was apparently a ruse, and Hugh Stewart was not being truthful when he made the threat (Stewart, October 28, 1999, p. 90).

115. Hugh Stewart sprayed individuals that were behind him without attempting to ensure that he was only spraying those individuals who were touching him. He acknowledges that there may have been some "over spray" but that that was not his concern. He was only concerned about his own safety.

Stewart, October 28, 1999, pp. 87-89

(ii) Argument

116. The first question to be asked with regard to the events surrounding the arrest of David Malmo-Levine is whether the precipitating event - the attempt by James Pond to climb the flagpole - was unlawful or otherwise justified police intervention. The answer is that the climbing of the flagpole was completely lawful, as was acknowledged by Hugh Stewart and Ian Ferguson.

117. Some of the justifications given by police officers in testimony for their intervention in this incident should be given little credence. None of them in any way justified the intervention of the police. It follows that the subsequent events cannot be excused by an argument that the police were engaged in the lawful execution of their duties.

118. The physical restraint of James Pond by Larry Killaly and Ian Ferguson was not justifiable in law. It therefore constituted a criminal assault. It was at least as serious as the touching of Hugh Stewart by the man in the leather jacket, and that touching prompted Hugh Stewart's pepper spraying of the crowd. Following the line of reasoning in Sergeant Ryan's expert testimony (Ryan, March 15, 2000, p. 53, line 10 to p. 55, line 5), the touching of James Pond could have justified a response by Mr. Pond in which he struck the offending police officer with his hands or a weapon. Fortunately, Mr. Pond exercised a degree of restraint that was not shown by Staff Sergeant Stewart.

119. The deception of Mr. Pond to which Staff Sergeant Stewart testified was certainly wrong. That it was wrong for a uniformed police officer to prevent a citizen from engaging in a lawful act by making a threat of physical harm is patently obvious. A less obvious point may, however, be raised by asking the question: if police officers were to be allowed to deceive members of the public, then how could members of the public ever know when they should take the directions of police seriously and when they should not? If, for example, the protesters at Gate 6 had known that Staff Sergeant Stewart considered it acceptable to lie to people engaged in lawful activities in order to achieve his ends, then might they not reasonably have concluded both that their protest was lawful and that Staff Sergeant Stewart did not really intend to use pepper spray to remove them from the road? Might not anyone knowing of that incident conclude that distrust and disobedience would be the correct response to directions from RCMP officers?

120. Not only was it wrong of Hugh Stewart to threaten to cut James Pond's climbing harness, it was also unlawful. It probably violated both s. 264.1 and s. 423(1)(b) of the *Criminal Code*.

121. The lack of justification for the initial decision to enter the crowd and prevent Mr. Pond from climbing the flagpole colours all of the subsequent events at the flagpole. If the police were not initially in lawful execution of their duty, then few of their subsequent actions can be justified, given that they all flow from that initial decision.

122. In effecting an arrest, police will often have to exercise some force. It should go without saying that the degree of force should be the minimum necessary to achieve their purpose. The arrest of David Malmo-Levine does not appear to have been effected using the minimum degree of force necessary. Recognizing that the police were in a stressful situation, there are still three aspects of the

arrest that were not justifiable. The first of these was the hitting of his head against the flagpole. The greatest care should be taken to avoid cranial collisions with hard objects such as, in this case, the flagpole. Such impacts frequently cause concussions, and may cause traumatic brain injuries resulting in brain damage or death.

123. The second clearly objectionable aspect of the arrest was the use of pepper spray against David Malmo-Levine. There is no doubt that David Malmo-Levine was not being violent and that the pepper spray was not used against him in self-defence. It must certainly be conceded that he was extremely uncooperative, but not to the point of posing a threat. At best, then, the pepper spray was used in an attempt to make it easier to subdue him and place him under arrest. Alternatively, the pepper spray may have been used against Mr. Malmo-Levine in anger, simply in order to hurt him. Either way, the use of pepper spray against Mr. Malmo-Levine was unwarranted and inconsistent with RCMP guidelines and the use of force models.

124. The third clearly objectionable aspect of the arrest was the use of a front chokehold. It was clearly established that David Malmo-Levine was grabbed by the throat rather than the back or the side of the neck. Whether or not there was an intention to use a chokehold, a grab to the front of the neck must be interpreted as such. The use of chokeholds that constrict the throat has been widely condemned because of the serious danger of resulting death and has accordingly been generally abandoned by police forces. The use of a chokehold to the throat in this instance should be condemned.

125. Two aspects of the arrest that engendered some comment but to which we specifically do not object were the use of a "come along" wrist lock, on the one hand, and the combined effort of numerous police officers to hold Mr. Malmo-Levine down. Both of these aspects of the arrest were, in our submission, calculated to minimize the amount of force necessary to effect the arrest and to therefore reduce the likelihood of harm that might otherwise have occurred. In particular, we heard no evidence that would indicate any fault on the part of those four officers that were involved in removing Mr. Malmo-Levine from the flagpole site and putting him into custody.

126. A further objectionable aspect of the incident is that pepper spray was not used solely against Mr. Malmo-Levine. It was used indiscriminately against protesters and nearby spectators who had been watching the demonstration at the flagpole. The decision to pepper spray the crowd was wrong in several respects.

127. First, it should go without saying that if one enters a crowd, one should expect it to be crowded. In a crowd, one might expect to have some physical contact with other people. Given that, the famous dictum of Holt C.J. seems apt, that "if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery."

> *Cole* v. *Turner* (1705), 6 Mod. 149, 87 E.R. 907

128. Staff Sergeant Stewart's pepper spraying of the crowd has been justified, however, on the basis that he was surrounded by the crowd and that the man in the black leather jacket touched his shoulder. Given that

he had chosen to be surrounded by the crowd when he entered into it to speak to James Pond and that the touch appears to have been very gentle and made merely to get his attention rather than in anger, something more should have been required to justify pepper spraying.

129. Furthermore, Staff Sergeant Stewart did not even see the people that were behind him against whom he directed his pepper spray. It is irresponsible to discharge a weapon without knowing against whom it is targeted.

130. In fact, with the exception of the man in the black leather jacket, there is no evidence that any of the people in the crowd could reasonably have been perceived by Staff Sergeant Stewart as posing a threat of any sort whatsoever. Those people were engaged in an entirely lawful protest and there is no justification for their being pepper sprayed. Sergeant Stewart's pepper spraying of those people constituted an assault.

F. Surveillance and Arrest of Jaggi Singh

131. Among the many disturbing incidents that occurred at APEC, the arrest of Jaggi Singh stands out. The image of a Canadian citizen on a university campus being accosted by unknown men in plain clothes and thrown onto the floor of an unmarked car that speeds him away to an unknowable destination is so antithetical to Canadian values as to be deeply shocking and offensive. That arrest, however, was merely the culminating incident in a series of highly questionable incidents relating to Jaggi Singh.

132. We will deal with the surveillance of Jaggi Singh separately from his arrest.

Surveillance of Jaggi Singh

(i) Facts

133. We adopt the facts as set out at pages 210-211 of the Final Submission of Commission Counsel, subject to the following additions and clarifications.

134. The extensive surveillance of Jaggi Singh was done despite the Threat Assessment Group ("TAG") advising operational branches of the RCMP that there was no real or perceived threat to the IPPs (*e.g.* Boutilier, November 19th, 1999, p. 57).

135. The extensive surveillance of Jaggi Singh was done despite recognition that the RCMP is supposed to be limited to conducting undercover operations in which there has been a criminal offence or there is reliable information that one is likely to be committed.

Chrustie, November 16, 1999, pp. 241-242

(ii) Argument

136. The surveillance of Jaggi Singh would not be so disturbing if there were any evidence that the RCMP ever seriously considered him to pose any threat to the IPPs. It is clear, however, that the RCMP had identified no real or perceived threats to the IPPs – including Jaggi Singh – and that what was of interest to the RCMP was Jaggi Singh's activism. Donna Smith wrote that "surveillance should begin on known activists" (Exhibit 528) and Joanne Boyle wrote "Singh is of particular interest to the TAG for his anti-APEC activism" (Exhibit 588).

137. For Canadian citizens to be subject to police surveillance just because they are active participants in the political process is deeply disturbing and more suggestive of Iron Curtain totalitarianism than it is of western democracy.

138. This failure of the RCMP to recognize the distinction between political activism and criminal activity brings to mind the activities that led to the instigation of the McDonald Commission of Inquiry a quarter century ago. Those activities have recently been summarized as follows:

> [The Commission] found that the RCMP had infiltrated many non-violent pubic interest organizations, including political parties. It also found that the RCMP had compiled dossiers on tens of thousands of Canadian citizens, and that it had engaged in "dirty tricks" to discredit various political groups. As a result of its investigations, the commission concluded that it was necessary to remove responsibility for national security intelligence gathering from the RCMP.
>
> This decision was based on evidence found by the commission that police officers lacked the training and judgment necessary for doing the delicate job of security intelligence gathering in a way that properly respected the basic democratic rights of Canadian citizens. For this reason the Canadian Security Intelligence Service (CSIS) was created in the early 1980s, with a mandate that explicitly excluded the covert surveillance of groups involved in "lawful advocacy, protest or dissent" unless it could be proved on independent grounds that they posed a significant security threat.

Andrew D. Irvine, "Free Speech, Democracy, and the Question of Political Influence", W. Wesley Pue, ed., *Pepper In Our Eyes: The APEC Affair*, (Vancouver: UBC Press, 2000), pp. 35-36

139. The surveillance of Jaggi Singh indicates that problems uncovered by the McDonald Commission still persist in the RCMP twenty years later. Unjustified citizen surveillance and a failure to distinguish between political activism and criminal activity must be condemned as clearly by this Commission as by that one.

Arrest of Jaggi Singh

(i) Facts

140. We adopt the facts as set out at pages 231 through 287 of the Final Submission of Commission Counsel, subject to the following additions and clarifications.

141. The police that arrested Jaggi Singh were not merely in plain clothes, such as jackets and ties, they were in casual clothes that would allow them to blend in on the campus and make them less identifiable as police officers (Rasche, January 13, 2000, pp. 198, 214).

142. The car into which Mr. Singh was thrown was not identifiable as a police car to observers. It was unmarked, had two doors rather than four, and neither flashing lights nor a siren were used.

143. Although we submit, *inter alia*, that this incident was deeply shocking, the officers involved in the incident found nothing shocking or even unusual about it and felt no need to reassure bystanders as to what had occurred, despite being sure that some people that saw the incident were unsure of what was going on..

Rasche, January 13, 2000, pp. 206, 208

Howell, January 14, 2000, pp. 53-54

Tuckee, January 18, 2000, pp. 87-88

144. When John Tuckee put his hand over Jaggi Singh's mouth to stop him from shouting or screaming, he did not have any legal authority in mind that would allow him to do so.

Tuckee, January 18, 2000, pp. 86-87

(ii) Argument

145. The comparison drawn by Bob Everton between the arrest of Jaggi Singh and an abduction by a Latin American death squad is undeniably apt. Those death squads, however, have operated in what are recognized as "police states", where police have dispensed their own brands of justice without regard to any constraints imposed by law. Canada is not supposed to be such a state.

146. The arrest of Jaggi Singh was wrongful on a number of grounds. The first of these is that it occurred at all. The notion that someone could commit assault by speaking through a megaphone at a rally is so absolutely ridiculous that no one with any legal training could take it seriously. The related idea that Jaggi Singh's smile constituted evidence of the requisite *mens rea* to found an assault charge is equally absurd. Even Ju-Hwam Lee, the investigating officer, admitted that it would have been odd for Jaggi Singh to remain impassive when everyone else present was laughing (Lee, January 13, 2000, p. 62). The most generous interpretation that could be accorded to the decision to initiate the assault charge is that it was extremely poor judgment occasioned by a combination of Lloyd Plante's wishful thinking and Dave Goodrich's annoyance. Equally plausible, however, is that it was a calculated and deliberate misuse of the legal process to remove Jaggi Singh from the UBC environment during APEC.

147. A second objectionable aspect of Jaggi Singh's arrest is its timing. The most plausible interpretation for the delay in effecting the arrest is that it was timed to remove Jaggi Singh from UBC during APEC. The fact that it did not occur even closer to the scheduled events of November 25th, 1997 may reflect a calculation by the RCMP of the competing risk of his being released from custody early enough to allow

him to return to UBC on the 25th versus the possibility that delaying the arrest might cause the RCMP to lose track of his whereabouts or to have to arrest him in the presence of more people.

148. A third objectionable aspect of Jaggi Singh's arrest is the value the RCMP placed on efficiency at the expense of Jaggi Singh's safety, dignity and rights. If speed were the only criterion by which it were to be judged, then the RCMP would be right to be pleased with the conduct of the arrest. In fact, however, aspects of the arrest that demand a harsher judgment include:

- the non-violent and physically slight Jaggi Singh being taken to the ground with at least one RCMP officer on top of him;
- reports by an eyewitness of an RCMP foot in Jaggi Singh's back and of his head being pulled back by the hair;
- the dubious claim that the reason for Jaggi Singh being taken to the ground was that by the act of turning away, it could be judged that he intended to run, despite not having actually done so (January 18, 2000, p. 82-83).
- the dubious claim that Jaggi Singh pulled one way, an RCMP officer pulled the other way, with the result being that they ended up in the middle with the RCMP officer on top (January 28, 2000, pp. 85-86);
- the fact that Jaggi Singh's mouth was deliberately covered to prevent him from communicating with no thought of any legal authority that would justify that act (January 28, 2000, pp. 86-87);
- serious doubt about whether the police properly identified themselves as police officers to Mr. Singh at the time of the arrest (*e.g*. January 28, 2000, p. 82);
- serious doubt about whether the police advised Jaggi Singh of his *Charter* rights at the time of the arrest and of whether, if that advice was given, it was given in a manner that Mr. Singh could have understood while being violently manhandled by several RCMP officers;
- use of a degree of physical force, even to the point of throwing Jaggi Singh onto the floor of the car, that was not required, that could easily have resulted in injury, and that contributed to the shock and confusion that left Jaggi Singh weeping;
- a predisposition by at least one arresting officer against Jaggi Singh as a potential troublemaker and potential agitator, someone who likes to see problems occur because it attracts more media attention, someone who goes to protest after protest after protest (January 18, 2000, pp. 78-81).

149. A fourth objectionable aspect of Jaggi Singh's arrest is the disregard shown for witnesses to the arrest. Despite knowing that bystanders would have been unsure of what was going on, there was almost no attempt to assure those witnesses that what was transpiring was a legitimate arrest rather than a criminal

assault and kidnapping. The violent and dramatic nature of the arrest could have been guaranteed to be shocking to anyone witnessing it.

G. Green College

150. The actions of the RCMP at Green College constitute some of the clearest examples of the violation of the s. 2(b) *Charter* right to freedom of expression. It is clear that these violations were not incidental to a *bona fide* attempt to maintain security, but were deliberately intended to prevent protesters from effectively communicating their messages to the APEC delegates in the passing motorcade. In addition, there were violations of the right of the residents of Green College to the quiet enjoyment of their home.

(i) Facts

151. We adopt the facts as set out at pages 255 to 276 of the Final Submission of Commission Counsel, subject to the following additions and clarifications.

152. The first adverse impact of the APEC Conference on many of the residents of Green College would have been when they were asked to sign waivers for the release of their names to the RCMP. If they did not sign those waivers, they would not be allowed to enter and exit their home during the APEC Conference. Even for those who did sign the waivers, there were two two-hour periods scheduled during which the Green College residents were told that they would not be allowed to enter or leave their home.

Jones, May 27,1999, p. 15-16; Exhibit 119

153. The next relevant incident at Green College was the threat of arrest made against Karen Pearlston on Friday, November 21st. On that morning, Ms. Pearlston made several signs on 8½" X 11" pieces of paper. These signs had wording such as "APEC off campus", "Green College is for ideas and friendship NOT APEC" and "secret police off campus". When she began taping these signs on the fence in front of Green College, police officers threatened her with arrest if she did not stop, told her that they would "make something up" to charge her with, and told her that the Prime Minister's Office had ordered that there be no signs and no people at that spot.

Exhibit 120

154. Ms. Pearlston's testimony that her conversation was with police officers is supported by Jody Morris' testimony that he saw a police car pull up and police begin speaking to her.

Morris, May 31, 1999, p. 9-10

155. On the evening of Sunday, November 23rd, Craig Jones made three signs on 8½" by 11" pieces of paper that he inserted into clear plastic sleeves. One of these signs said "free speech", one said "democracy" and one said "human rights" (Jones, May 27, 1999, p. 7-8). He made these because of his concern generated by Karen Pearlston's experience and by the wording of the undertaking that the RCMP were targeting anti-APEC protest (Jones, May 27, 1999, p. 11, lines 12-17). He then hung the "democracy" sign on the fence outside Green College (Jones, May 27, 1999, p.12, lines 1-6). The next morning, Monday, November 24th, he also hung the other two signs on the fence. At some point during that day, a fourth sign was added by an unknown person, saying "police state" (Jones, May 27, 1999, p. 27, lines 20-24).

156. On the evening of Sunday, November 23rd, Craig Jones was told by police officers that they had orders to remove his signs from the fence (Jones, May 27, 1999, p. 29, lines 21-24).

157. Craig Jones then had a telephone conversation with Trevor Thompsett in which Mr. Thompsett said that Mr. Jones could not hang his signs on Mr. Thompsett's property – the fence – and should instead hang

them on his own property (Jones, May 27, 1999, p. 32, lines 11-16). Accordingly, when the police officers removed the signs from the fence and returned them to Mr. Jones, he hung the "democracy" and "free speech" signs on Green College property: namely, two coat racks. This was done at the suggestion of Arnab Guha, an APEC delegate and fellow Green College resident (Jones, May 27, 1999, p. 36). Because Mr. Jones only had two coat racks, he placed the "human rights" sign directly on the sidewalk (Jones, May 27, 1999, pp. 38-39).

158. Trevor Thompsett testified that he told Craig Jones: "…you can put your signs anywhere you like there. There's lots of room and they can be anywhere you like, but, they are not going to be on that fence, on our secure fence and - - security fence." Trevor Thompsett agreed that it would have been perfectly reasonable for Craig Jones to conclude from that that it was fine for him to stand behind the fence with his sign.

Thompsett, October 21, 1999, pp. 58-59

159. On the morning of Tuesday, November 25th, 1997, Mr. Jones wheeled the two coat racks containing the "democracy" and "free speech" signs onto the sidewalk in front of Green College so that they could be viewed by the passing motorcade. By his estimate, there were three or four other people with signs present at that time, and a similar number who were there just to watch the motorcades (Jones, May 27, 1999, p. 50).

160. Mr. Jones was promptly approached by a police officer, Bill Dingwall, who told him to move his signs because they were blocking pedestrian traffic on the sidewalk. Inspector Dingwall realized that it was not, in fact, true that pedestrian traffic was being impeded, but this deception was a device he used to get the protesters to move.

Dingwall, September 10, 1999, pp. 22-24

161. Craig Jones immediately complied with the order, moving his signs onto the lawn of Green College. The others who were present also moved off the sidewalk. This was despite the fact that there was no pedestrian traffic, since the fencing erected for APEC precluded the possibility of actually going anywhere on that sidewalk.

162. The area in front of the Law School that Inspector Dingwall referred to as the "designated demonstration area" and to which he attempted to get the protesters to move was not a site at which he had ever been told that any protester intended to demonstrate.

Dingwall, September 10, 1999, pp. 44

163. Inspector Dingwall's removal of protest signs from the protesters when they had done nothing unlawful was based upon his belief that in the protection of IPPs, the police have powers over and above those that they have in their normal policing functions.

Dingwall, September 10, 1999, pp. 46

164. Inspector Dingwall admits that there was nothing to indicate that the protesters had any actual intent to use the signs as projectiles.

Dingwall, September 10, 1999, p. 59

165.Everett McLachlan, one of the RCMP officers at Green College, testified that among the options that Bill Dingwall offered to the protesters was to lay their signs flat on the ground. It did not strike him as odd that the protesters would be allowed to keep their signs as long as they laid them flat on the ground, despite the supposed concern that the signs might be used as projectiles.

McLachlan, January 31, 2000, pp. 59-60

166. Richard Anderson testified that he considered in advance the possibility of a demonstration at Green College, but because of the nature of the students that lived there, the RCMP believed that they had a "vested interest in behaving themselves, and…we felt that they were not of the type to…have a violent demonstration in that area." He acknowledged that Green College was outside the secured area and that given that it is lawful for people to demonstrate in Canada, it was the nature of the residents of Green College that led him to conclude that they would not have a demonstration.

November 23, 1999, pp. 58-60

167. Although there were references in testimony to a sign on Green College saying "F*CK APEC" being allowed to remain up, Ken Doern of the VPD testified that during a pre-event security walkabout that he did with the RCMP, there was a discussion that the sign would have to go.

Doern, January 12, 2000, p. 9

(ii) Argument

168. Although the decision by the RCMP to restrict movement by the residents of Green College in and out of their home was no doubt legally objectionable, amounting at least to false imprisonment and probably to a violation of s. 7 of the *Charter*, there is no complaint before the Commission concerning those restrictions. It is therefore not necessary that they be given any further consideration or that they be the subject of any ruling.

169. The confiscation of protest signs and the arrest of Craig Jones for refusing to surrender his sign constitute the most extraordinary violation of the right to freedom of expression. Even by the most generous interpretation, the actions of the RCMP restricted the rights of protesters to a degree not justifiable on security grounds. The exact culpability of the RCMP, however, must be weighed on the basis of the following determinations:

- Was Inspector Dingwall motivated by security concerns in his decision to confiscate the protest signs?

- Did the RCMP exceed its legal authority in the confiscation of the protest signs and the arrest of Craig Jones?

170. We submit that Inspector Dingwall was not motivated by security concerns in his decision to confiscate the protest signs. We submit that as a planning officer, he was well aware of pressure from the Government of Canada, particularly the Prime Minister's Office, to avoid embarrassment to visiting IPPs and ensure a quiet, retreat-like atmosphere for the APEC delegates. We submit that he had succumbed to this pressure. We submit that his motivation in removing the protest signs was to prevent those riding in the limousines in the arriving motorcade from seeing them.

171. The factors that lead to these conclusions are numerous. They include the following.

172. Bill Dingwall should not even have been involved in RCMP operations on November 25th. His responsibilities had been confined to planning. for APEC. Working closely with Wayne May, he would have been fully aware of pressure from the PMO to ensure a quiet, retreat-like atmosphere, and of the general perception that Wayne May was being "beaten up" by the PMO. That experience would have created the perspective with which he viewed the protest signs at Green College, and would have been responsible for his decision to circumvent the established chain of authority and personally ensure that the protest signs were taken away.

173. Bill Dingwall had already demonstrated his willingness to restrict protest signs to appease the Prime Minister's Office in an earlier exchange of correspondence with Trevor Thompsett about the Graduate Students' Society Building. Trevor Thompsett had written: "Common sense tells us we do not want banners nor would the PMO's office. Having said that, banners are not a security issue. They are a political issue." Bill Dingwall's reply in no way questioned the propriety of restricting banners when it was acknowledged that they posed a political rather than a security issue. Instead, he inventively sought to think up ways of removing the banners or preventing them from being seen.

174. Bill Dingwall had already demonstrated his lack of honesty when he told protesters to move off the sidewalk because they were impeding pedestrian traffic when he knew that that was not, in fact, true. This must be borne in mind when assessing his claim to have told the protesters that his concern was with regard to the possibility of their signs being used as projectiles, a claim the protesters deny.

175. Bill Dingwall's claim that he was concerned about the use of signs as projectiles is not credible in light of his having had <u>all</u> signs removed, even those that were just on small pieces of paper with no handles.

176.Bill Dingwall's claim that he was concerned about the use of signs as projectiles is not credible in light of his complete lack of concern about a myriad of objects that would have made much better projectiles than the protest signs, or could even have held explosives. These included items brought by the protesters such as a motorcycle helmet, knapsack and coffee mugs, as well as those items that were already present at the site.

177.Bill Dingwall's claim that he was concerned about the use of signs as projectiles is not credible in light of the number of police officers present in comparison to the relatively small number of protesters. These officers would have been sufficient to successfully intervene and prevent any attempts by protesters to throw signs or engage in any unlawful behaviour.

178.Bill Dingwall's claim that he was concerned about the use of signs as projectiles is not credible in light of the fact that along the motorcade route to UBC, the opportunities for throwing projectiles would have been much greater than at Green College, and there was no attempt to take away potential projectiles along the route. Unlike at Green College, the rest of the route was not lined with tall security fences, offered a plethora of potential projectiles, and was occupied by large numbers of people about whom the RCMP knew nothing. Although the slow speed of the motorcade at Green College might have increased the vulnerability of the limousines to being hit by projectiles, it would have decreased the vulnerability of the motorcycles, which would have had a better chance of avoiding any obstacles on the roadway. Also, the motorcade would have had to travel slowly elsewhere on the route, such as when negotiating 90 degree turns.

179.Bill Dingwall's claim that he was concerned about the use of signs as projectiles is not credible in light of the fact that as a graduate college, Green College housed a population that was particularly unlikely to engage in acts of violence.

180.Bill Dingwall's claim that he was concerned about the use of signs as projectiles is not credible in light of Everett McLachlan's testimony that he offered the protesters the option of keeping their signs with them as long as they laid them flat on the ground, something which would have prevented them from being seen by those in the motorcade.

181.In summary, we submit that Bill Dingwall's claim that he was concerned about the use of signs as projectiles is an after the fact rationalization which is not supportable on the facts. We submit that he was not motivated by security concerns in his decision to confiscate the protest signs.

182.The answer to the second of the two questions posed above, whether the RCMP exceeded its lawful authority in confiscating the protest signs and arresting Craig Jones, is that the RCMP did exceed its lawful authority. We submit that the RCMP was clearly in breach of civil, criminal and constitutional law.

183.It became obvious in the course of the evidence of RCMP witnesses that many of them believed that the RCMP's responsibility for protecting IPPs gave it some special powers in the discharge of that responsibility that it does not have in the discharge of its other responsibilities. Despite having asked a number of these witnesses in cross-examination what the source of those special powers might be, we remain absolutely unable to find any statute conveying such powers. Subject to having some such statutory authority pointed out by other counsel in argument, we must conclude that it does not exist. That is, in exercising its function of protecting IPPs, the RCMP has only those powers that it has in the exercise of its other duties.

184.If this is correct, then it may be stated with confidence that the RCMP does not have the authority to prevent Canadian citizens from engaging in an entirely lawful activity, confiscate property which those citizens lawfully possess, and arrest them when they refuse to comply with the RCMP's own unlawful demands. In particular, the RCMP cannot claim as the basis for its actions that it was acting to prevent those citizens from committing a crime when there is not the slightest evidence of either the *actus reus* or the *mens rea* necessary to commit any crime. Any claim that the RCMP might have such powers would be particularly offensive where the activity with which it interfered was not merely lawful in the sense of not

being prohibited by law, but was specifically protected under Canada's supreme law, the *Charter*.

185. The RCMP must, of course, purport to have such authority, since this is precisely what it did at Green College. If it were to pursue the exercise of any of its other responsibilities in the same way, it might readily be seen how fatuous any attempted justification would be. The suggestion that the RCMP could confiscate all automobiles parked near banks lest they be used as getaway cars, or confiscate all shovels lest they be used to tunnel into bank vaults would immediately be perceived as absurd, but the RCMP apparently believes that it can confiscate all protest signs displayed near IPPs. This, of course, begs the question of when protest signs could ever be used, since they could never be displayed to the Prime Minister or other IPPs if the RCMP's conception of the law were actually valid.

186. In addition to questioning what powers the RCMP generally purported to be exercising at Green College, it is also necessary to question its authority for what it would apparently have done if it had occurred to those exercising its planning functions that there might be protests at Green College. That is, when RCMP officers indicated in their testimony that if it had only occurred to them that there might be protests at Green College, then they would have pushed the fence back from the road right to the edge of the buildings in order to prevent those protests, what authority might the RCMP have had to do so? In our submission, there was no such authority.

187. In order to consider this point, it must first be realized that UBC is private property. The Government of Canada obtained the property interest in certain parts of UBC through the Memorandum of Agreement it signed with UBC and the Letter of Understanding modifying that agreement. Under the original Memorandum of Agreement, Green College does not appear in Schedule B, those buildings for which full control was being ceded to the Government; instead, it appears in Schedule C, the list of buildings to which only "partial access" by the Government was authorized. Furthermore, the Revised Schedule A to the Letter of Understanding which was in effect on November 25th clearly shows an area of lawn in the southeast corner of Green College as being outside of the area ceded as part of the "Museum of Anthropology and Grounds". This lawn is exactly the area that the RCMP would have occupied if the officers had only thought of it, despite the fact that this would have constituted an obviously unlawful intrusion on private property. This would, of course, have flown in the face of s. 6.3 of the Memorandum of Agreement:

> 6.3 The parties undertake not to impede any lawful protest and the exercise of free speech outside the Properties and other designated areas, as determined by the RCMP in conjunction with UBC

188. It is clear, then, that the RCMP saw itself as being no more constrained by the lack of any contractual authority than it was by the lack of any statutory authority. When this is taken together with its disregard for the *Charter*, the RCMP can be seen to have been as completely unfettered by limits to its power as any government body since the decline of the absolute monarchy and the Star Chamber.

189. Two final factors must be mentioned which made the actions of the RCMP at Green College particularly inexcusable. First, those actions were taken despite the persistent efforts that Craig Jones, Mike Thoms, Karen Pearlston and others made to remind the RCMP of the existence of the *Charter* and of its relevance to their situation. Second, the chronology of Craig Jones' interactions with the RCMP demonstrate his step by step compliance with the restrictions imposed upon him by the RCMP, however unreasonable, until his eventual refusal to comply with a demand that would have effectively prevented him from engaging in meaningful protest.

H. Tibetan Flag

(i) Facts

190. We adopt the facts as set out at pages 280 to 289, subject to the following additions and clarifications.

191. When asked how a banner could possibly become a security risk, Trevor Thompsett testified that this could occur if it were covering a bomb. He acknowledged, however, that many other things that were present at the site that day, such as trees and shrubs had the same potential for obscuring a bomb. Richard Anderson, on the other hand, thought that someone might hide behind a banner.

Thompsett, October 21, 1999, p. 68; Anderson, November 23, 1999, p 55

(ii) Argument

192. If the actual reason for the RCMP's removal of the Tibetan flag were the same as its claimed justification for doing so - *i.e.* as a response to threats by Chinese students to violently protest and remove the Tibetan flag themselves - then it would represent the most perverse approach to policing imaginable. That is, faced with the threat of a violent and unlawful act, the RCMP supposedly decided neither to restrain those who had made the threats nor to arrest them when they attempted to commit the threatened offence, but to instead take action against those law-abiding citizens who were the object of the threats.

193. Imagine if the same approach were used in providing security for banks. Faced with the certainty that attempts will be made by criminals to violently rob banks, the response of police would be to remove all of the money from banks without the banks' consent. As absurd as this scenario is, it is directly analogous to what the RCMP claim to have done at APEC in removing the Tibetan flag. Unfortunately, the reality is less absurd, but more reprehensible.

194. The Tibetan flag was removed from the roof of the Graduate Students Society building in order to prevent it from being visible to the APEC delegates. Evidence of this includes the following:

- Superintendent Thompsett told Kevin Dwyer that the flag was not a security threat, and that if it were removed it would only be for political reasons, not for security reasons. This suggests that the removal of the flag was, as Superintendent Thompsett had predicted, for political reasons.

- The banners on the GSS building, which were not visible from the APEC delegates' route, were not removed. The Tibetan flag, however, which would have been visible from the route, was removed. This suggests that the removal of the Tibetan flag was to prevent it from being seen from the route.

- Kevin Dwyer was told by RCMP officers that the Site Commander - Superintendent Thompsett - had taken down the flag because he had been told to do so in telephone calls he received on the morning of November 25, 1997. This suggests that the calls Superintendent Thompsett received were made by a superior RCMP officer or representative of the Government of Canada, since such an individual - one with the ability to give orders to an RCMP officer of Superintendent Thompsett's rank - would be more concerned with political considerations than operational decisions. In addition, the

fact that the communication was made by telephone rather than in person, would indicate that the caller was not on-site; unless the caller were on-site, it is unlikely that he or she would be second-guessing the Site Commander with regard to operational decisions.

- As discussed in the previous section, Trevor Thompsett had already exchanged correspondence with Bill Dingwall which contemplated the taking down of banners from the GSS building for what were acknowledged to be political rather than security reasons.

195. It would be difficult to determine whether the taking down of the Tibetan flag was more or less reprehensible than the confiscation of protest signs at Green College. On the one hand, the taking down of the Tibetan flag did not involve the manhandling and arrest of a Canadian citizen engaged in the defence of his fundamental liberties under the *Charter*. On the other hand, it did involve the callous violation of an agreement that the GSS had entered into with obvious reservations after receiving explicit guarantees from the RCMP. In any event, it deserves to be strongly condemned.

I. Arrest of Protest Leaders

(i) Facts

196. We adopt the facts as set out at pages 291 through 302 of the Final Submission of Commission Counsel subject to the following clarifications and additions.

197. The observation of Jamie Doucette upon which his arrest was based was apparently not such as to even allow certainty that it was a radio that he was speaking on.

Stewart, October 28, 1999, pp. 120-121

(ii) Argument

198. The arrests of Annette Muttray and Jamie Doucette are objectionable for several reasons. The least contentious of these is that good police procedure would require that police encourage protest organizers to carry communications devices such as radios, cell phones and megaphones and to use those devices to control crowd movements. In the City of Vancouver, the FEST process requires that event organizers do this. The expert witnesses from England also testified that this would be the norm in that jurisdiction.

199. More serious objections arise from the reasons for the arrest. Police observed Annette Muttray and Jamie Doucette using communication devices. Despite not knowing what they were saying on those communication devices and having no evidence that their communications were in any way unlawful and not even being certain of what kind of communication devices they were, the police decided that they were organizing the movements of the protesters. While not, apparently, deciding that the movements of the protesters were themselves unlawful – since they did not arrest the protesters – the police claim to have decided that by organizing the movements of the protesters, Annette Muttray and Jamie Doucette were committing the offence of obstruction of a police officer.

200. The thought process that RCMP officers claim to have followed in arriving at the decision to arrest Jamie Doucette and Annette Muttray is far too fantastic a string of conjecture to have ever stood up to

scrutiny in a court of law. Of course, those officers must have felt some confidence that that would never happen, since after being arrested and imprisoned, Jamie Doucette and Annette Muttray would be released with no charges. This Commission, however, should conclude that there was no lawful basis for the arrests.

201. In addition, the Commission must consider whether the RCMP ever believed that it had any basis in law for the arrests. It would be reasonable to conclude that there was never any such genuine belief. Instead, it may be concluded that the arrest of Annette Muttray and Jamie Doucette was prompted by the perception that they were leaders of the protest, a protest which despite being legal and protected by the *Charter* guarantees of freedom of association and freedom of expression was becoming increasingly irritating to the RCMP. Illogically concluding that a disorganized protest would be preferable to an organized one, RCMP members decided to remove the protest leaders.

202. This interpretation of events is consistent with the more questionable aspects of the arrest of Jonathan Oppenheim. There are, admittedly, two competing versions of events to choose from with regard to the question of whether Jonathan Oppenheim tore down a section of fence. Looking at the videotape of the arrest, however, and at the inability of the RCMP officers to provide an answer to the persistent question of the reason for the arrest, and the change to what was supposed to be the basis for the arrest , it is difficult not to conclude that he was arrested first and that the official reason for the arrest was decided upon later. If so, then it seems likely that the real reason for the arrest was that Jonathan Oppenheim, like Annette Muttray and Jamie Doucette, was perceived to be a leader of a protest that the RCMP wanted stopped, and that the RCMP believed that arresting the protest leaders might put an end to the protest. If anything, however, these arrests may have led to greater disorder and confusion and helped precipitate the confrontations at the fence and Gate 6.

203. A further objectionable aspect of the arrests of the protest leaders is the disregard that the RCMP showed for the security of their possessions. This disregard is inconsistent with RCMP policy and should be criticized.

204. Finally, it must be noted that when the RCMP officers chose to listen in on the radio that they had seized from Jamie Doucette, they would appear to have violated s. 184(1) of the Criminal Code, which provides that "Every one who, by means of any electro-magnetic, acoustic, mechanical or other device wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years." Given that police regularly have to intercept communications, it might be expected that they would realize the seriousness of doing so without having first obtained judicial authorization.

J. Protests at the Fence and Gate 6

(i) Introduction

205. In order to consider fully the events at the fence and at Gate 6, it will be necessary to give some consideration to the topic of civil disobedience, given that that is the act in which a number of the protesters have testified that they considered themselves to be engaged. Without first considering what should be the appropriate response to civil disobedience of the state generally and of law enforcement officials specifically, it would be impossible to evaluate how closely the behaviour of the RCMP and its officers came to meeting the ideal in this instance.

206. The term "civil disobedience" is generally considered to originate with Henry David Thoreau, whose 1848 lecture "On the Relation of the Individual to the State" was republished posthumously under the title "Civil Disobedience". In the essay, Thoreau - who did not use the term "civil disobedience" in any of his writings - was justifying his refusal to pay taxes because of his opposition to government policies that supported slavery in the southern states and an expansionist war against Mexico. That refusal had culminated in his arrest and brief confinement in Concord jail in 1846.

207.Thoreau's work directly influenced the two most prominent subsequent exponents of civil disobedience. Gandhi said of civil disobedience "The expression was, so far as I am aware, coined by Thoreau..." Mohandas K. Gandhi, *Non-Violent Resistance* (New York, 1961), p. 3). Martin Luther King, Jr. wrote:

> During my student days at Morehouse, I read Thoreau's Essay on Civil Disobedience for the first time. Fascinated by the idea of refusing to cooperate with an evil system, I was so deeply moved that I reread the work several times. This was my first intellectual contact with the theory of nonviolent resistance.

Martin Luther King, Jr., *Stride Toward Freedom* (New York: Harper, 1958) at 72

208. As King noted in his "Letter From Birmingham Jail", however, the practice of civil disobedience pre-dates Thoreau by thousands of years. King cites the refusal of Shadrach, Meshach and Abednego to obey the laws of Nebuchadnezzar, as well as the familiar example of Socrates, who refused to obey the law abridging his freedom of speech, but also refused to evade the law that required him to drink the hemlock.

Martin Luther King, Jr. "Letter From Birmingham City Jail", Hugo Adam Bedau, ed., *Civil Disobedience: Theory and Practice* (Indianapolis: Pegasus, 1969), p. 79

209. Classical examples are compelling, as are the more recent examples of Gandhi, King and others who used civil disobedience in the struggles for colonial independence, racial equality, voting rights for women and labour rights. The most persuasive argument for civil disobedience in the modern world, however, is based upon the experience of the Holocaust under Nazi Germany. As King noted, "We can never forget that everything Hitler did in Germany was 'legal' and everything the Hungarian freedom fighters did in Hungary was 'illegal'."

King, *ibid*., p. 79

210.Simply put, the judgments at Nuremberg and the Eichmann trial in Jerusalem make it clear that individual citizens have a moral obligation to question the law and, in some cases, to disobey it. As one reviewer wrote, "Each time we obey an order from higher up without evaluating and judging it in moral terms, there is the Eichmann within ourselves bending his neck."

Jens Bjorneboie, "Eichmann I vaare hjerter", Orientering. Oslo, December 18, 1965, quoted in Christian Bay and Charles C. Walker*, Civil Disobedience: Theory and Practice* (Black Rose Books, Montreal, 1975), p. 30.

211. If there may be an obligation on citizens to disobey the law in some cases, does this mean that the police should treat those committing civil disobedience differently from ordinary lawbreakers? In our submission, it does. Support for this can be found in the nature of "civil" disobedience as opposed to less well-intentioned disobedience of the law. The Commission heard a number of witnesses attempt to explain their conceptions of civil disobedience; while these may not all have been eloquent, eloquence should not be required before individuals can act in accordance with the dictates of conscience.

212. Although different academics and practitioners might vary in their definitions of civil disobedience, a useful summary might be that given by the influential law professor Harris Wofford Jr. in his description of Reverend King's version of Gandhi's non-violent civil disobedience:

> We accept personal responsibility for injustice. We will take direct action against injustice without waiting for the government to act or a majority to agree with us or a court to rule in our favor. We will not obey unjust laws or submit to unjust practices. We will do this peacefully, openly, cheerfully, because our aim is to persuade. We adopt the means of non-violence because our end is a community at peace with itself. We will try to persuade with our words, but if our words fail we will try to persuade with our acts. We will always be ready to talk and to seek fair compromise, but we are also ready to suffer when necessary, to go to jail or risk our lives, to become witnesses to the truth as we see it.
>
> Harris L. Wofford, Jr., "Non-Violence and the Law: The Law Needs Help", Bedau, *Civil Disobedience*, supra, pp. 64-65

213. If this is an accurate summary of the aims and methods of non-violent civil disobedience, then it is clear that it does not pose the same threat to social order as disobedience of the law by those who seek to further their own selfish aims by illegal ends. Further, it also does not pose the threat of violence to those charged with upholding the law that they face from other lawbreakers. For these reasons, police officers in a liberal-democratic state such as Canada have no reason to treat those engaged in non-violent civil disobedience with the same degree of harshness and inflexible resolve as is appropriate for dealing with those engaged in acts of criminality, let alone for treating them more harshly than ordinary criminals. Instead, there should at least be a recognition that civil disobedients may ultimately be proved to be serving the best interests of the public and the state, and the need to maintain order should be combined with a good faith attempt to accommodate the legitimate goals of those engaged in civil disobedience.

214. This tolerance of civil disobedience would be in accordance with the views expressed in the leading British contemporary text on constitutional and administrative law. Wade and Bradley assert that the Rule of Law must go beyond the principal of legality. Unwilling to accept that the Rule of Law requires complete obedience to the law from all citizens all of the time, Wade and Bradley argue that the Rule of Law has to allow for certain low levels of civil disobedience. Some forms of limited disobedience, it is argued, "do not run counter to democratic reasons for obedience, particularly those which are designed to improve the working of democratic procedures for political decisions."

> Wade and Bradley, *Constitutional and Administrative Law* (10th ed.), (1985), pp. 100-103

(a) The Fence

(i) Facts

215. We adopt the facts as set out in the Final Submission of Commission Counsel at pages 224 to 226 and 306 to 330, subject to the following additions and clarifications.

216.Ken Doern of the VPD testified that there was a period of between thirty to forty-five minutes on November 25th between when the fence fasteners started to break down and the RCMP did some initial repairs to when the fence completely collapsed and the RCMP reacted in a significant fashion.

> Doern, January 12, 2000, pp. 66-67

(ii) Argument

217. The errors made by the RCMP with regard to the "fence down" incident were largely made by those

responsible for planning and deployment, not by the individual RCMP officers who used pepper spray. With few exceptions, we suggest that those RCMP officers who used pepper spray when the fence came down did nothing wrong.

218. The decision to use the Indy style fencing is one for which no satisfactory explanation was ever given. There was no explanation of the process by which the Indy fencing was selected, and no identification of any other fencing that might have been considered.

219. The only two factors we are aware of that would explain the selection of the Indy fencing were that it was conveniently available and that it was free of charge. Wayne May testified that a quarter of a million dollars was initially budgeted for all of the fencing and barricades, but that the Indy fencing was obtained for free (May, August 17, 1999, p. 24**).** He was unable, however, to recall who on his staff researched the fencing alternatives, what alternatives were considered or who proposed using the Indy fencing (May, August 17, 1999, p. 24-25).

220. Convenience and economy should not have been the deciding factors in the choice of fencing. By choosing fencing that was unsuited to its intended purpose, the RCMP established the necessary precondition for the collapse of the fence and the resulting pepper spraying. That choice alone is sufficient to establish the RCMP's culpability for the pepper spraying.

221. That the fencing was unsuitable for the purpose to which it was put was discovered in advance of its collapse. That discovery, however, did not prompt the RCMP to make a determined effort to prevent the collapse of the fence. One way that the collapse might have been prevented would have been to reinforce the fence, such as by replacing the plastic attachments with the type of metal fasteners that are normally found on chain link fencing. This was not done. Instead, only one officer took any initiative to reinforce the fence, running a length of wire through the fence near its base. Although this officer should be commended for having taken even this minimal step, it was not sufficient, and his superiors and the RCMP as a whole should have taken more decisive action to strengthen the fence. Their failure to do so contributes to their culpability for the collapse of the fence and the resulting pepper spraying.

222. Having failed to either select an appropriate fence or adequately reinforce the Indy fencing, the RCMP could still have saved the situation by not allowing the crowd to get close enough to the fence to touch it. This was not done. Based on dubious "intelligence", the RCMP allowed the crowd to approach right up to a fence in which RCMP officers had already identified weaknesses, and despite having supposedly received other intelligence which supposedly indicated that students were planning to breach the fence, and despite knowing in fact that students had expressed their desire to engage in a symbolic arrest of President Suharto, one of the IPPs who was on the other side of the fence. Given those factors, it is a mystery how the RCMP could have failed to foresee that protesters would climb onto the fence and that the fence would collapse.

223. When the fence collapsed, the failure of those responsible for the RCMP's planning to take the one additional step that could have prevented the pepper spraying even once the fence came down then came into play. That was the failure to adequately train the RCMP personnel at the fence so that they could utilize such crowd control techniques as a single belt cordon or a double belt cordon. Had the RCMP trained its members in those manoeuvres, the police could have formed an effective barricade even in the absence of a functional fence. Unfortunately, the recruitment and training of RCMP officers for those duties was a case of too little too late, and the RCMP officers deployed at the fence were not capable of such a disciplined response.

224. It was not the fault of the RCMP personnel who were deployed at the fence that did not have recourse to options that better training might have made available. Faced with a crowd which greatly outnumbered them, with no barrier but their own bodies between the crowd and the Museum of Anthropology, the police at the fence had to react very quickly and under extremely stressful conditions. We would not criticize their initial use of pepper spray under those circumstances.

225. In particular, the use of pepper spray is greatly preferable to the force option that would probably have been used prior to pepper spray becoming available to the RCMP, namely batons. The use of batons in a crowd situation is likely to lead to serious injuries, including traumatic brain injuries.

226. We do, however, object to the continuing use of pepper spray against demonstrators who were coming forward to present themselves for arrest. That usage was inconsistent with use of force models and RCMP policy, was punitive and was ineffective. It reflects poor training, poor judgment and an attitude unsuitable for members of a police force. If people break the law, they should be arrested, not assaulted.

227. To the extent that the failure of the RCMP to non-violently take into custody those that presented themselves for arrest was due to their lack of resources, including sufficient resources for the arrest, supervision, transportation and detention of prisoners, those responsible for planning must be faulted.

228. The excuse given by some RCMP officers that the decision to cease arresting those protesters who presented themselves peacefully for arrest was because they had not actually committed an offence is highly questionable. Given that – as argued elsewhere in these submissions – protesters were arrested at Gate 6 and at Green College who were doing nothing unlawful whatsoever, an inability on the part of the RCMP to think of a charge for protesters who were pressing up against the police line with the stated purpose of entering into the secured zone where the IPPs were located would be most surprising. Given the purported reliance on breach of the peace in other incidents, it might have been expected that the police would consider an arrest pursuant to s. 31 of the *Criminal Code* in this instance.

229. We also object to the other acts of violence to which witnesses testified, such as empty-handed strikes and the dragging of protesters across the bicycle line.

(b) Gate 6

(i) Facts

230. We adopt the facts as set out at pages 358 to 383 of the Final Submission of Commission Counsel, subject to the following additions and clarifications.

231. There is a reference at paragraph 516 of the Final Submission of Commission Counsel to “the fact” that protesters had been asked to let two buses through but had refused . It is our understanding of the evidence that this was not established as a fact and that the only reference to it was by Hugh Stewart, who was unable to provide any basis for his belief that this had occurred.

232. The protesters were never told to get off the road prior to Hugh Stewart’s arrival.

Stewart, October 28, 1999, p. 94

233. Robert Moulton acknowledged that: not all demonstrators in a crowd will wish to be arrested; only a minority could reasonably be expected to commit civil disobedience; the same group of officers can arrest protesters, take them to a staging area and return to arrest more officers; and that RCMP officers have physically removed protesters who were protesting on roads throughout any number of locations in British Columbia.

Moulton, November 16, 1999, pp. 17-19

234. During the discussions that led to the decision to remove the protesters from the roadway at Gate 6, the

possibility that the protesters might not be doing anything unlawful was never discussed.

Moulton, November 16, 1999, pp. 24-25

235. During the discussions that led to the decision to remove the protesters from the roadway at Gate 6, there was no reference to the recognition by the Supreme Court of Canada of roads as a traditional venue for demonstrations.

Moulton, November 16, 1999, p. 25

236. During the discussions that led to the decision to remove the protesters from the roadway at Gate 6, there was no discussion of the possibility that even if the protesters were acting unlawfully, that while that might permit the RCMP to move them along or arrest them, it might not permit the RCMP to pepper spray them.

Moulton, November 16, 1999, pp. 25-27

237. Despite their apparent agreement that the protesters at Gate 6 must have been doing something unlawful, RCMP officers were curiously disparate in their opinions as to what that might have been:

- Bill Dingwall believed that what the protesters were doing unlawfully that would justify their removal was obstructing police officers in the performance of their duties (Dingwall, September 10, 1999, p. 67).

- Trevor Thompsett believed that what the protesters were doing unlawfully that would justify their removal was obstructing a highway contrary to the *Motor Vehicle Act* (Thompsett, October 21, 1999, p. 62).

- Hugh Stewart believed that what the protesters were doing unlawfully that would justify their removal was committing mischief **(**Stewart, October 28, 1999, p. 113),

- Gerald Green believed that what the protesters were doing unlawfully that would justify their removal was breaching the peace (Green, November 23, 1999, p. 232)

- Robert Moulton believed that what the protesters were doing unlawfully that would justify their removal was committing obstruction and mischief (Moulton, November 16, 1999, pp. 11-12).

- Larry Killaly did not turn his mind to the question of whether the protesters were doing anything unlawful (Killaly, December 7, 1999, p. 142-143).

238. Larry Killaly acknowledged that if someone on November 25th had been in a position to say with regard to Gate 6, “Look, we can’t achieve this objective without using pepper spray and the use of pepper spray would be inappropriate in this circumstance”, he would have been that person.

Killaly, December 7, 1999, p. 150

(ii) Argument

239. It is important to realize that the protesters at Gate 6 were not doing anything unlawful. On the contrary, they were using a public road for a purpose that has been recognized as appropriate, important and constitutionally protected by the Supreme Court of Canada. Had the police believed that the protesters were behaving unlawfully, however, then they could have used remedies provided by law to seek to make them desist. The police did not use these lawful remedies. Instead, they unlawfully assaulted the protesters. This assault, in addition to whatever criminal and civil liabilities it might found, deserves the

censure of this Commission.

240. The appropriateness of using roads as fora for expression on matters of public policy has been recognized in both pre-*Charter* and post-*Charter* cases. In the pre-*Charter* case of *R.* v. *Saumur*, for example, the Court considered a municipal by-law which forbade use of city streets for distribution of pamphlets without the permission of the chief of police. Rand J. stated at p. 332:

> That public ways, in some circumstances the only practical means available for any appeal to the community generally, have from the most ancient times been the avenues for such communications, is demonstrated by the Bible itself: in the 6th verse of Chapter XI of Jeremiah these words appear: "Proclaim all these words in the cities of Judah, and in the streets of Jerusalem"; and a more objectionable interference, short of complete suppression, with that dissemination which is the "breath of life" of the political institutions of this country than that made possible by the by-laws can scarcely be imagined.
>
> *R.* v. *Saumur*, [1953] 2 S.C.R. 299

241. The importance of roads as fora for expression was recognized in a *Charter* context in *Committee for the Commonwealth of Canada* v. *Canada*. In arriving at the conclusion that the respondents had a right to freedom of expression in an airport, the Court cited numerous authorities that acknowledged the indisputable status of roads (as well as parks) as venues which the public has the right to use for the dissemination of their views on public matters:

> The first, traditional public forum, comprises streets and parks. Restrictions on access to these properties comes under strict judicial scrutiny. If the restrictions are not narrowly tailored to serve a compelling state interest, they are unconstitutional.
>
> P. Jakab, "Public Forum Analysis after *Perry Education Association* v. *Perry Local Educators' Association* - A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property" (1986), 54 *Fordham L. Rev*. 545 at p. 547, cited by Lamer C.J.C. in *Committee for the Commonwealth of Canada* v. *Canada* (1991), 77 D.L.R. (4th) 385 (S.C.C.) (Commission Counsel's Book of Authorities, Tab 5) at pp. 390-391
>
> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.
>
> *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939) at 515-6, cited by Lamer C.J.C. at p. and by L'Heureux-Dubé J. at p. 427
>
> ...in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.

> Harry Kalven, Jr., "The Concept of the Public Forum: *Cox* v. *Louisiana*", [1965] *Sup. Ct. Rev.* 1 at pp. 11-12, cited by L'Heureux-Dubé J. at p. 427

242. Both McLachlin J. and La Forest J. did themselves explicitly recognize the status of roads as constitutionally-protected fora for public expression:

> I agree with the Chief Justice and McLachlin J. that that freedom [expression] does not encompass the right to use any and all government property for purposes of disseminating one's views on public matters, but I have no doubt that it does include the right to use for that purpose streets and parks which are dedicated to the use of the public, subject no doubt to reasonable regulation to ensure their continued use for the purposes to which they are dedicated.
>
> La Forest J. at p. 402
>
> I consider first the Crown's argument that the government qua proprietor has the absolute right to prohibit and regulated expression on all property which it owns. This contention is belied by a venerable tradition which supports the view that some types of state-owned property are proper forums for public expression. The right of free speech has traditionally been associated with streets and by-ways and parks - all government property.
>
> McLachlin at p. 449

243. As the above cases indicate, the actions of the protesters in using a public road as the venue for their protest were not merely legal in the sense of not being forbidden by law; they were more than this, in that they were the exact form of a *Charter* right that been recognized by the Supreme Court of Canada.

244. Given that what the protesters were doing was *prima facie* lawful, then the actions of the police in pepper spraying them were *prima facie* unlawful. Given the seriousness of this determination, fairness demands that any possible legal ground by which the protesters' conduct could be construed as unlawful should be considered. This includes not only those grounds that police officers testified that they believed they were relying upon, but also others that they did not think of when the question of their legal authority was put to them.

245. The first possible basis for an allegation of illegality is one raised by Officers French and Caldwell during their testimony on March 20, 2000 (188:8; 261:7), namely an explicit statutory offence of obstructing a highway. In England, the jurisdiction in which those officers work, s. 137 of the *Highways Act*, 1980 provides for just such an offence:

> 137(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding [level 3 on the standard scale].

246. British Columbia's own *Highway Act*, RSBC 1996, chap. 188, contains no provision equivalent to s. 137(1). Like the English *Highways Act*, it does contain offence provisions that aim at preventing the specific types of nuisances that sometimes result in obstruction of a highway, but examination of these reveals no general offence of obstructing a highway:

> 14 It is an offence, on a highway in a rural area or on an arterial highway within the meaning of section 27 in a municipality, to do any of the following:
> (a) camp, unless where impracticable to do otherwise, so that any part of

the camp is within 6 m of the centre of a highway;
(b) make a fire within 6 m of the centre of a highway, or make a fire at a place so as to endanger a bridge or cribbing, or leave unextinguished a fire on a highway;
(c) leave a dead animal within 60 m of the centre of a highway;
(d) leave a portion of the chains, yokes or other harness or of the cargo or apparatus of any team or train within 1.8 m of the centre of a highway;
(e) wilfully or without lawful authority place, maintain or leave material or an obstruction on part of a highway;
(f) change the level of a highway in any way;
(g) stop the natural flow of water through a drain or culvert on or under a highway;
(h) construct or maintain a ditch the water from which causes damage to a highway;
(i) drag logs or timber over or along a public highway, except as authorized by permit from the minister;
(j) dig up, break up or remove part of a highway, or cut down or remove trees or timber grown on a highway, or excavate in or under a highway without first having obtained a permit from the minister;
(k) place or maintain skids, rails or other mechanical devices on, along or across a highway without first having obtained a permit from the minister;
(l) place or maintain a loading platform, mail box or other structure on a highway without first having obtained a permit from the minister;
(m) throw or deposit or cause to flow on a highway noxious, offensive or filthy water or substance, or empty bottles, glass containers or other articles, whether broken or intact.

247. The intention of the Legislative Assembly of British Columbia appears to have been to make only certain types of highway obstruction unlawful. This is in contrast to the decision by the British Parliament to make wilful obstruction of a highway an offence. Unlike in the United Kingdom, therefore, wilful obstruction a highway is not an offence and the protesters at Gate 6 were not in violation of any statute. Note also that even in the United Kingdom, a public meeting held on a highway is not ipso facto unlawful.

> *Burden* v. *Rigler*, [1911] 1 K.B. 337; 89 L.J.K.B. 100

248. Given the absence of any statutory provision forbidding obstruction of highways, other sources must be considered that could potentially make the protesters conduct unlawful. The first of these is the common law concerning obstruction of highways.

249. At common law, it was recognized that obstruction of a highway was lawful but could, at some point, become a nuisance, due to the competing needs of other members of the public.

> The fact is of course that many obstructions of a highway are lawful and give no right of complaint either to the Attorney-General on behalf of the public or to an individual who may thereby suffer damage. No member of the public has an exclusive right to use the highway. He has merely a right to use it subject to the reasonable user of others, and if that reasonable user causes him to be obstructed, he has no legal cause of complaint....The law relating to the user of highways is in truth the law of give and take.
>
> *Harper* v. *Haden*, [1933] 1 Ch. D. 298 per Romer L.J. at 316-317, 320

1. A temporary obstruction to the use of the highway or to the enjoyment of adjoining

premises does not give rise to a legal remedy where such obstruction is reasonable in quantum and in duration.

2. If either of those limitations is exceeded so that a nuisance to the public is created the obstruction is wrongful, and an indictment to abate it will lie.

Harper v. *Haden*, *ibid.* per Lord Hanworth M.R. at p. 304.

250. Was the protesters' obstruction of the road "reasonable in quantum and in duration"? We submit that it was, particularly given that at the time that the protest was taking place, the police blockade of the road meant that no traffic was actually using the road. In the one instance in which a vehicle - an ambulance - wished to drive along the road, the protesters got out of the way and allowed it to pass. Furthermore, the total duration of the protest up to the point that the protesters were pepper-sprayed by the police, was relatively short. In summary, therefore, the protesters had done nothing that would constitute an unlawful obstruction of the highway pursuant to common law.

251. Since the protesters were not violating either any specific statutory provisions or the common law concerning road obstruction, the next source of any possible wrongdoing that must be considered is the more general offences set out in the Criminal Code. Three Criminal Code offences that were cited by police officers in their testimony were s. 129(a), wilfully obstructing a peace officer in the execution of his duty, s. 430(1), mischief [presumably s. 430(1)(c) or (d), obstructing, interrupting or interfering in the lawful use, enjoyment or operation of property], and s. 31(1), breach of the peace.

252. Two preconditions to the finding of an offence under s. 129(a) are that the alleged obstruction of an officer must be wilful and that the officer was engaged in the execution of his duties. It is unlikely that either of these preconditions is met in this case.

253. For conduct to be "wilful", there must be both the intention to bring about a proscribed consequence and no lawful excuse for the conduct in question. It seems certain that the consequence intended by the protesters was not to obstruct the police, but rather to protest and – in a handful of cases – perhaps to obstruct the APEC leaders. And far from having no lawful excuse, the protesters were – as discussed above – exercising their right to protest as guaranteed under the *Charter*.

R. v. *Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.)
Rice v. *Connolly*, [1966] 2 Q.B. 414 (C.A.)

254.It is also pertinent to recall what the protesters were physically doing: nothing. It is clear that a person is not guilty of obstructing a peace officer merely by doing nothing, unless there is a legal duty to act arising at common law or by statute. Just as the refusal of a motorist to hand over a radar detecting device in *Lavin* did not constitute obstruction, so the refusal of protesters to leave the road – if they had, in fact, been given the opportunity to leave and had refused – would not have constituted obstruction. Wilful obstruction of a peace officer requires either some positive act, such as concealment of evidence, or an omission to do something that one is legally obliged to do.

R. v. *Lavin* (1992), 76 C.C.C. (3d) 279; 16 C.R. (4th) 112 (C.A.)

255. It is also unlikely that the police officers who cleared the protesters at Gate 6 could be said to have been in the execution of their duty. For a police officer to be "in the execution of his duty", something more is required than merely being "on duty": the officer's duties must be those described by statute or common law.

R. v. *Noel* (1996), 101 C.C.C. (3d) 183 (B.C.C.A.) (Commission Counsel's Book of Authorities, Tab 44)

256. As noted above, we are unable to identify any statute or common law that the protesters were violating, and therefore cannot see how the police could have been in the execution of their duty in

suppressing that protest. If the claim is that the duty the police were executing was purely the enforcement of s. 129, then this would be a tautology. That is, the duty the police would be purporting to act upon as a prerequisite to enforcing s. 129 would be s. 129 itself. As ridiculous as this seems, it may be what officers who claimed to be enforcing s. 129 are asserting.

257. When police officers asserted that the protesters might have been engaged in mischief, the only section that they could have been referring to is s. 430(c) and (d). If it were possible for a public road to constitute "property" for the purpose of s. 430, however, then any use of a road would constitute mischief, in that it obstructs, interrupts or interferes with the lawful use, enjoyment and operation of the road by other members of the public. Obviously, this would be an absurdity. More credible, perhaps, might be a claim that by obstructing the road, the protesters were obstructing, interrupting or interfering with the property at the UBC campus which the federal government had leased for the APEC retreat. Courts, however, have held that employees may lawfully bring pressure on an employer by picketing the employer's place of business and that s. 430(1)(c) should not be interpreted so as to make that lawful activity an offence. Some physical act that has the effect of causing some sort of obstruction, interruption or interference with the use of property that goes beyond the mere communication of information through picketing is required before the picketing will constitute mischief. The same interpretation should be applied in the case of public protest, and protest of the government's chosen meeting place should not be turned into a criminal offence simply because of the inconvenience and pressure which the protest puts upon the government when it attempts to enjoy its property.

R. v. *Dooling* (1994), 94 C.C.C. (3d) 525; 124 Nfld. & P.E.I.R. 149 (Nfld. S.C.)

258. In order to allow a *Charter* analysis, however, suppose that the pepper spraying had been lawful. Would that lawful restriction on the protesters' *Charter*-protected right or freedom - in this case, freedom of expression under s. 2(b) - have been "reasonable" and "demonstrably justified in a free and democratic society", pursuant to s. 1 of the *Charter*? As will be demonstrated below, the answer to this question is "no".

259. The test for a s. 1 justification of an infringement of *Charter* rights was set out in *R*. v. *Oakes*. It was held that two conditions must be met if a limit on a right is to be justified. First, the objective which the limit is designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right. Second, if such an objective is established, the party invoking s. 1 must show that the means chosen to attain the objective are reasonably and demonstrably justified. It was suggested in *Oakes* that the second condition is met if the court is satisfied that: (1) the limit is rationally connected to the objective; (2) that the means impairs the right or freedom in question as little as possible; and (3) that the effect of the limit is proportionate to the legislative objective.

R. v. *Oakes*,[1986] 1 S.C.R. 103

260. Applying the *Oakes* test to the events at Gate 6, it would appear that the RCMP's objective in pepper spraying the protesters was to make it possible for the APEC delegates to leave without the delay that might have ensued if they had used lawful measures to clear the road. This objective - preventing a minor inconvenience to a handful of individuals - is not of sufficient importance to warrant overriding the constitutionally protected rights of a large group of people.

261. Even if the objective did meet the first part of the test, it would fail the second part of the test because the means - assaulting the protesters with pepper spray - did not impair the protesters right of free expression as little as possible and because the effect of the limit was not proportionate to the objective. On the former point, it is clear that giving those protesters willing to leave the road an opportunity to do so and arresting those unwilling to do so, would have impaired the protesters' rights much less than not giving them adequate time to leave and then

assaulting them all with pepper spray. On the latter point, it is equally clear that the unlawful pepper spraying of dozens of people was not proportionate to the objective of avoiding inconvenience to a handful of APEC delegates.

262. A final point which must be addressed in regard to the pepper spraying at Gate 6 is the spraying of CBC camera operator Rob Douglas. Hugh Stewart has testified that he never saw Rob Douglas and never made eye contact with him (October 27, 1999, pp. 205-207. The videotape evidence, however, shows that he walked directly towards Rob Douglas, who was dressed in a red jacket and red hat with a large television camera and boom microphone overhead, and was right beside Rob Douglas when he addressed the protesters. When he began spraying moments later, he turned, looked at Rob Douglas directly and sprayed him in the face from point blank range. The testimony that Hugh Stewart did not see Rob Douglas is simply impossible to accept in the face of the videotape evidence.

263. In summary, the pepper spraying of the protesters did not result from any unlawful act by the protesters, under the *Criminal Code*, statute or common law. It violated the protesters' *Charter* rights and is not saved by s. 1 of the *Charter*. What further findings would this support? First, that the pepper spraying constituted an assault by the RCMP, by Hugh Stewart and by Gary Mercer. Although this assault may have violated a number of provisions of the *Criminal Code*, such as s. 266 (assault), s. 267 (assault with a weapon and assault causing bodily harm), s. 269 (unlawfully causing bodily harm), and possibly even s. 269.1 (torture), it is our submission that it is unnecessary for this Commission to make a finding that any particular Criminal Code offence had taken place. It would, however, be appropriate to find that what took place – namely the use of force without legal authority - was generically an assault.

> *Canada (Attorney General)* v. *Canada (Commissioner of Inquiry on the Blood System)* (1997), 48 Admin L.R. (2d) 1 (S.C.C.) at 23 (Commission Counsel's Book of Authorities, Tab 2)

K. Treatment of Prisoners in Transit and at Richmond Cells

264. On November 25, 1997, protesters were not only subjected to assault at the hands of the RCMP on the front lines, those who were arrested were treated badly – or neglected. Neither the neglect nor the bad treatment was in accordance with the rule of law, accepted standards of conduct in a free and democratic society or the professional duty of members of the RCMP. Many prisoners were not decontaminated or were not adequately decontaminated after having been pepper sprayed; they were packed into vans like chattel, not human beings; in one case, 3 individuals who had been badly pepper sprayed were abandoned, handcuffed, in the back of a van; women prisoners were strip searched whereas male prisoners were not; prisoners were denied adequate food and warmth; the prisoners' rights to counsel were flaunted; and they were released from custody after an inordinately long detention and under conditions that can only be characterized as retributive.

265. As a preliminary point, it should be noted that unlike that of the United States, Canada's constitution provides for the rights of prisoners not only with regard to punishment, but with regard to their "treatment". Whereas the Eighth Amendment to the Constitution of the United States proscribes only cruel and unusual punishment, the Canadian *Charter* and a number of international instruments to which Canada is a signatory, proscribe cruel and unusual treatment and punishment. It is submitted that many of the prisoners who were held and transported in RCMP vehicles and who were held at Richmond Cells, were subjected to treatment that, if it is not indeed cruel and unusual treatment, can usefully be analysed within that legal framework.

266. The treatment of the prisoners in transit and their subsequent treatment at the Richmond Cells were, admittedly, quite separate events, but because in each case the conduct objected to amounts to "treatment", and is therefore subject to the same legal analysis, their respective facts and arguments will be delineated under this common rubric.

267.Note that although much of the following argument focuses on the extent to which the prisoner treatment violated the *Charter*, the treatment complained of would be unjustifiable even if it did not violate the *Charter*.

(i) Facts

268.We adopt the facts as set out in the Final Submissions of Commission Counsel at pp. 390-414, subject to the following additions and clarifications.

(a) Decontamination

269.With regard to decontamination in general, protestors such as Elise Thorburn, David Malmo-Levine and Mark Brooks who were sprayed with OC spray were, in many cases, heavily sprayed at close range. Not only were they sprayed in the face, in some cases their clothing was soaked through with the spray. Arresting officers were not equipped to treat those they sprayed, nor were those who took over control of the prisoners in vehicles and at staging sites. Not surprisingly, with one exception, the prisoners did not receive any decontamination prior to transport. A few protestors who had been heavily sprayed were permitted to shower and provided with paper suits to replace their sodden clothes. But others, such as David Wolinetz, were required to endure the effects of the spray for hours before being provided with the means to effectively decontaminate.

270.It is important to note the *degree* of discomfort suffered by the prisoners who were not treated. Describing the effects of having been sprayed in the face, Mark Brooks stated, "It was intensely painful, excruciating - I felt like my face was on fire…". He was even more emphatic when he described the situation of David Wolinetz, with whom he was held in the back of a police van for at least an hour: "I was met with screams of agony as the door [to the back of the van] was opened and I was shoved in… David [Wolinetz] had clearly been doused with pepper spray. He was soaked, absolutely soaked in it. And in excruciating pain… He was writhing in agony. I mean, he was screaming for some relief. It was burning his skin, he couldn't see, he had it in his eyes." And later in cross examination he stated, "It was quite horrific…It was quite difficult to breathe…the air was thick with pepper spray and I was coughing continually."

> Brooks, June 21, 1999, p. 133, lns. 22-24; p. 134, lns. 6-7, lns. 21-24; p. 135, lns. 4-6; p. 175, lns. 1-7

271.Although it was stated at p. 391, para. 637 of the Final Submission of Commission Counsel that the prisoners were held in the back of Allan Homeniuk's van anywhere from 10 to 40 minutes, it is clear that the prisoners were held in excess of an hour, and probable that the detention endured as long as an hour and a half, as claimed by the complainants Mark Brooks and David Wolinetz. Their claim is completely compatible with Allan Homeniuk's testimony. To wit, he stated that he loaded 4 prisoners as they were brought to the van, that the prisoners had been held for some 15 minutes when the ambulance arrived, and that he subsequently moved ahead and maintained his position for about an hour

> Wolinetz, June 22, 1999, p. 120, lns. 14-21
>
> Homeniuk, Feb. 22, 2000, p.190-194; p. 196, lns. 6-8; p. 205, lns. 1-6

272.The "conditions" under which the prisoners were held in the back of Allan Homeniuk's van were held were not disputed. Throughout the entire period of their lengthy confinement in the back of the van, the prisoners were handcuffed, making it impossible for them to help themselves or each other to get some relief from the effects of the spray. Moreover, apart from the few minutes required to have their eyes cursorily rinsed, they were held in that small enclosed space. Little or no fresh air circulated where they

were being held because there were no windows in the back of the van and the window on the passenger side at the front was closed.

273. Allan Homeniuk admitted that the prisoners had complained that their eyes were sore, but in spite of the latter's continued cries for assistance, it took twenty to thirty minutes before Allan Homeniuk sought "permission" to have someone attend to their burning eyes. When the prisoners continued to complain about their eyes after they had been rinsed out, Allan Homeniuk told them that if they wanted to dance, they would have to pay the band, although he admitted he had no idea what the prisoners had done to result in their being pepper-sprayed. After he had the prisoners' eyes rinsed out by the ambulance attendants, he did not call for further assistance and though he was parked at the side of the road, he neither opened the back of the van to allow fresh air to circulate nor allowed the prisoners to be outside in the fresh air.

Homeniuk, Feb. 22, 2000, p. 203. lns. 5-6; p. 222, lns. 22-25

274. With regard to the facts surrounding the prisoners' detention at Richmond Cells. All the prisoners who were transported to the Richmond Detachment, including those who had not received any assistance with decontamination, were held in the bay area of the facility. During this time some prisoners complained that they were suffering from the effects of OC spray. RCMP witnesses claimed that the bucket and hose arrangement in the bay area was for decontamination purposes, but neither Karina Watson nor Michel Liu, both of whom spent some time in that area processing prisoners, directed the latter to use this decontamination equipment. Nor were the prisoners in the second group allowed to go to the bathroom to decontaminate themselves until all the prisoners being held in the bay agreed to waive or put off what the officer termed their right to a phone call.

Watson, Feb. 21, 2000, p. 203, ln. 22 – p. 204, ln. 1

Liu, Feb. 23, 2000, p. 7, lns. 15-20

Westergard-Thorpe, June 3, 1999, p. 87, lns. 10-17

(b) Overcrowding in Transport

275. The facts that the vehicles used to transport the arrested students from UBC Detachment to Richmond Detachment were overcrowded and uncomfortable is uncontested. Christina McCarthy stated that six women were placed in one of the small compartments of a transport vehicle, the compartments that Cst. Frank Sheddon described as seating from 1-3 persons. Christina McCarthy stated that it was very cramped and that because there was neither adequate seating nor anything to hold on to, and because the vehicle was bouncing and jolting, she and the other women were falling into each other. She described the trip from UBC to Richmond Cells as "an interminable ride." Elise Thorburn stated that she had to stand with her neck crooked because there was no room to sit on the bench in the tiny compartment in which she travelled to Richmond.

McCarthy, Mar. 24, 1999, p. 17, lns. 9-15

Thorburn, June 2, 1999, p. 37, lns. 9-12

276. Frank Sheddon, the constable who drove the arrested students from UBC Detachment to Richmond Detachment, confirmed that some of the cubicles in the transport van he drove were crowded and that it would have been difficult to stand in one of the cells.

Sheddon, Feb. 21, 2000, p. 41, lns. 17-22

(c) Overcrowding of Cells

277. We adopt the fact set out in the Final Submission of Commission Counsel at p. 408, para. 713-714, with the following addition. The cells, into which as many as 13 prisoners were crowded, were meant to accommodate *two* prisoners, thus many were forced to sit on the floor.

(d) Rudeness and Neglect of Duty by Guards

278.Ronald Docherty told prisoners the longer they kept singing the longer they would be kept in cells, even though he knew that the responsibility for decisions with regard to release lay with the constables. With regard to the alleged complaints about noise from a justice, it is clear that Ronald Docherty's comments were made sometime after he came on shift at 19:00, which was two or three hours after the courts closed late that afternoon.

Docherty, Feb 23, 2000 p. 72, lns. 17-24; p. 73, lns. 10-19

279.Pursuant to Richmond Cells policy, students were required to remove all but one layer of clothing and to remove their shoes. Some of the students who had been heavily doused with OC spray were still damp and one prisoner wore a paper suit. As stated in Final Submissions of Commission Counsel at para. 713, p. 408, as many as 13 people were crowded into a single cell. In addition, it should be noted that those cells were meant to accommodate *two* prisoners, thus many were forced to sit on the floor. In spite of these unusual circumstances, the prisoners were never offered blankets. A number of the prisoners requested blankets because they were cold. Ronald Docherty stated in his testimony that he gave blankets to anyone who asked, and remembered giving blankets to prisoners in cell 7, but was not sure about prisoners in other cells.

Docherty, Feb. 23, 2000, p. 73, lns. 14-18; p. 80, lns. 23-25

280.While it is agreed that both Pearl Fraser and Lori Rice-Wells denied that they were ever asked for blankets, it should be noted that when Pearl Fraser was asked whether she was "aware of the prisoners requesting blankets", she answered, "Not really". Elise Thorburn asked one of the female guards for a blanket, because she was cold and only dressed in a paper suit that was ripped, but the guard brushed off her request, and when she and another prisoner asked to share a blanket the guard left without responding. Frank Tester had a similar experience. He testified that in the early evening the cells were cold and he requested a blanket. He was told there were not enough blankets to go around.

Fraser, Feb. 23, 2000, p. 198, lns 6-10 (Commission Counsel)

Thorburn, June 2, 1999, p. 48, lns. 21-25; p. 87 18-20

Tester, June 14, 1999, p. 67, lns. 1-5

281.When the prisoners were asked whether they wanted dinner, they were told that dinner would consist of beans with pork. At that time, many of the prisoners stated that they were vegetarian and therefore could not eat beans with pork. No alternatives were offered and when dinner was served, the vegetarian prisoners were given coffee and bread. Although Pearl Fraser stated that she was unaware of any occasion on which staff had ordered take-out food for prisoners, Allan Speevak agreed that if it were necessary, it would be possible to order out for food. He stated that normally if a guard had any problems providing for the prisoners, they would address themselves to the Watch Commander. Pearl Fraser did not contact the Watch Commander when it became apparent that she and Lori Rice Wells could not provide adequate meals to the vegetarians.

Fraser, Feb. 23, 2000, p. 204, lns. 1-4

Speevak, March 2, 2000, p. 311, lns. 2-13; p. 313, lns 12-15

282.The toilets in the individual cells were visible from the hall. This was particularly a concern for women prisoners, some of whom complained that male guards or officers appeared while they were using the toilet. No announcement was made that male guards were checking the female cell area or conversely that female guards were entering the male cell area. Moreover, Elisa Westergard-Thorp stated that the door from the cell area directly opposite to the door to the guard room was left open so that she and the other women who were held in Cell 6, which is directly opposite the doorway in question, were visible by

anyone who passed that doorway, and not simply by those who actually entered the cell area.

Docherty, Feb. 23, 2000, p. 78, lns. 1-4; p. 93, lns. 4-5

Westergard-Thorpe, June 3, 1999, p. 103, lns. 14-18

Exhibit 99b, Diagram of Richmond Cells

283. A prisoner, who was housed in the drunk tank with Jamie Doucette when they first arrived at Richmond Cells, asked to use the toilet. A male guard or an officer agreed and began to escort the man out of the drunk tank, but when it became clear that the prisoner only had to urinate, he told the prisoner to "piss in the floor" and said other "nasty" things.

Doucette, June 14, 1999, p. 20, lns. 1-8.

284. Frank Tester, who like others understood that a lawyer would be attending Richmond Cells on the prisoners' behalf, did not make a phone call to a lawyer. However, he told "one of the officers" that he had a teen-aged daughter at home who didn't know where he was. He requested that he be allowed to make a phone call and he stated that the officer replied, "Well, we'll see about that." However, the officer didn't get back to him and he never made the phone call. He was released at 23:05 that evening.

(e) Notice of and Conditions upon Release

285. Prisoners, largely youth in their late teens and early twenties, who had been detained as early as 8:30 were released in Richmond as late as 23:30 that same day. Many of the protestors were unfamiliar with Richmond and the bus system. Kari Warton testified that when she was released – still dressed in her paper suit because her clothes were still saturated with pepper spray – she stated that she was from Victoria and didn't know the area, and asked to be directed to the bus stop. In response, the person responsible for her release told her he didn't know or care where the bus stop was and that she ought to get off the property or she would be arrested again. Jamie Doucette also testified that when he and others were released, the were told to get off the property quickly and not to make any fuss or else they would be arrested again.

Warton, June 17, 1999, p. 168, lns. 1-22

Doucette, June 14, 1999, p. 26, lns. 19-22

(ii) Argument

286. The facts, as stated above and in the Final Submission of Commission Counsel indicate clearly that the students who were detained and transported in vans and detained at Richmond Cells were treated badly. The question that remains is, how badly? This question will be analysed from the perspective of the prisoners' *Charter* rights to not be subjected to cruel and unusual treatment and from the perspective of RCMP policy. In the former case, the purpose is twofold: it is submitted that the treatment to which the prisoners' were subjected was, in many cases, cruel and unusual treatment. In the instances where the treatment was not cruel and unusual but was simply wrong, the *Charter* analysis will provide the Commission with a framework in which to analyse that treatment.

287. It will be argued that the following actions – or inactions as the case may be - constitute a failure on the part of the RCMP to act in accordance with sub-sections 37(a) & (g) of the *RCMP Act* and that that conduct ought to be scrutinized in light of the prisoners' rights under section 12 of the *Charter* and under two international human rights instruments to which Canada is a signatory:

- failure on the part of Allan Homeniuk to ensure that the prisoners under his care received adequate decontamination and medical attention and were not subjected to undue distress or verbal harassment,

- failure on the part of Frank Shedden to ensure that the prisoners in his care were given passage in safe and humane conditions,
- failure on the part of the constables responsible for booking the prisoners into cells to ensure that the cells were not overcrowded, that prisoners had timely access to adequate decontamination facilities, to toilets and to the phone, and to ensure that prisoners were released under conditions appropriate to all the circumstances of the situation, and
- failure on the part of the guards to refrain from verbally harassing the prisoners, to provide them with the means to stay warm and to provide adequate nourishment for vegetarian prisoners.

(a) Cruel and Unusual Treatment

288. Section 12 of the *Charter* provides as follows:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

289. With regard to the prisoners' *Charter* rights, the issues that must be decided are whether the activities complained of can be characterized as "treatment" and if so whether they can be characterized as "cruel and unusual" treatment.

290. In *R.* v. *M. (T.),* a leading case on what constitutes "treatment"*,* several youths, who had not yet been charged, were being held in detention and were habitually escorted to and from court in handcuffs and otherwise humiliated. The youths alleged breach of their rights under s. 12 of the *Charter*. In that case, King J. of the Ontario Court (Provincial Division) held that while many cases concerned with s. 12 of the *Charter* deal with sentencing parameters or prison conditions, the ambit of the word "treatment" is wider. She cited *R.* v. *Hudye* (1983), 7 C.R.R. 363 (Sask. Prov. Ct.) in which treatment was found to include behaviour of which a pre-trial detainee complains. By extension, she concluded, "it would also include complaints by accused about the conditions and treatment surrounding holding cells." Thus the treatment of the prisoners held in detention at Richmond Cells is treatment with regard to which s. 12 of the *Charter* applies.

> *R.* v. *M. (T.)*. (1991), 7 C.R. (4th) 55 (Ont. Prov. Ct.) at 69

291. In the analysis of the prisoners' treatment under s. 12 of the *Charter*, the next step is to consider whether the treatment objected to was "cruel and unusual". The test to establish whether "punishment" is cruel and unusual, as it applied to s. 2(b) of the *Canadian Bill of Rights,* was originally established by Laskin C.J.C. in *Miller and Cockriell* v. *The Queen*. In *R.* v. *Smith*, the Supreme Court confirmed that

> [t]he criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is, to use the words of Laskin, C.J. in Miller and Cockriell, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be *grossly disproportionate* to what would have been appropriate. [Citations omitted; emphasis added]

> *Miller and Cockriell* v. *The Queen* (1975), 63 D.L.R. (3d) 193, as cited in *R.* v. *Smith*, (1987), 40 D.L.R. (4th) 435, at 476-477 (per Lamer J.)

292. In *R.* v. *M. (T.)*, King J. held that the following principles can be considered to determine whether treatment is in violation of s. 12 of the *Charter*:

1. The treatment prescribed must not be so excessive as to outrage standards of decency.
2. One of the factors in assessing no. 1 is whether the treatment is unduly degrading or

humiliating.

3. Treatment must not be grossly disproportionate to what is required in the circumstances. This principle may help in determining whether the treatment is unduly degrading or humiliating and so excessive as to outrage standards of decency.
4. One of the factors in assessing disproportionality is whether other alternatives could be made available to meet the same end…

R. v. *M.(T.)*., *supra* at 74 (note that King J.'s fifth criterion was not included as it deals specifically with youth)

293. In addition to a contextual analysis of the impugned treatment, consideration may be given to other sources of the right to be free from cruel and unusual treatment. Article 7 of the *International Covenant on Civil and Political Rights*, (the "Covenant") to which Canada is a signatory, states:

> No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

International Covenant on Civil and Political Rights, G.A. Res. 220 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966)

294. And Article 10 of the *Covenant* states:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> …
>
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

295. Article 3 of the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, states:

> …
>
> 3. No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment.

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment G.A. Res. 3452 (XXX), December 9, 1975 (Treaty 859)

296. We turn now to the application of the above principles to the treatment to which the prisoners were subjected in transport and at Richmond Cells:

297. On the one hand, Frank Sheddon is to be commended for ensuring that prisoners who were visibly suffering from the effects of OC spray were given the opportunity to decontaminate themselves in the showers at UBC detachment and that the van doors were kept open while the prisoners awaited transport to Richmond. On the other hand, taking into account the criteria outlined in *R.* v. *M.(T.)*., it is submitted that to pack the arrested protesters into a van in which they were neither safely installed nor reasonably comfortably accommodated violated standards of safety and humane treatment. Not only was this treatment degrading and humiliating to the protestors, it was unnecessary and was not done in accordance with any known standards. Proper planning would have ensured that adequate personnel and vehicles were available to provide safe and dignified passage of the prisoners. Moreover, prisoner vans ought to be fitted with seatbelts.

298.That prisoners who visibly and audibly suffered from the effects of OC spray were held for an hour in the back of the van driven by Allan Homeniuk was cruel and inhuman and is, on its face, so excessive as to outrage standards of human compassion, decency and professionalism. Certainly Allan Homeniuk must be held accountable for his own disregard for human suffering, and his lack of initiative and imagination, however, the situation once again points to a failure to engage in adequate planning with regard to prisoner handling and to establish and communicate adequate standards or practices.

299.Although the conduct described in paragraphs 257-263, above, under the rubric "Rudeness and Neglect of Duty" might not, in each individual case, comprise cruel and unusual treatment, it is submitted that taken together they amount to conduct that fails to live up to standards of decency. The rudeness and neglect of duty on the part of the guards was unacceptable treatment. This and their failure to provide blankets and adequate meals was disproportionate to what was required in the circumstances, as were the conditions under which the prisoners were released. In all cases, there were alternatives available to those responsible for the objectionable conduct and in no case was there a rational basis, in accordance with ascertained or ascertainable standards, for such conduct. On the contrary, in several cases the objectionable conduct breached national and Detachment policy (see below).

300.In *R.* v. *M. (T.),* King J. noted that in assessing punishment or treatment, courts have made a distinction between remand centres and custodial reformatories or prisons. In support of this proposition she cited *Maltby* v. *Saskatchewan (Attorney General*), in which Sirois J. stated:

> …the sentenced inmates are in a "settled" situation –they know where they are at– whereas the remanded inmates are going through a period of great agitation and uncertainty and require more supervision than the former. The status of each is vastly different and hence different conditions apply.
>
> *Maltby* v. *Saskatchewan (Attorney General*) (1982), 2 C.C.C. (3d) 153, at 159, as cited in *R.* v. *M. (T.)*., *supra* at 73

301.As in the present case, the case before King J. was one in which those arrested were in a holding cell and "[had] not even had a bail hearing to determine their pre-trial status."

> *R.* v. *M. (T.)*, *supra* at 73

302.This is relevant to the conditions under which the prisoners were held at Richmond Cells. The prisoners were in a state of great uncertainty. Many of them had been told early in the day that they would be released once they had been booked into a detachment. Then throughout the day, many different people gave misleading or wrong information about when they would be released. In fact, even when the officers at Richmond actually began to release prisoners, the prisoners were not informed that that was what was taking place. When prisoners were suddenly taken from their cells with no explanation and did not return, prisoners who remained in their cells were concerned. In the case of Kari Warton, she saw Elise Thorburn taken away just after she and the others in her cell had been reprimanded and told they would be held all night.

> Tester, June 14, 1999, p. 67, lns. 11-15
>
> Warton, June 17, 1999, p. 166, ln. 22 – p. 167, ln. 17

303.Finally, many prisoners were released under conditions that were degrading, potentially dangerous and utterly unnecessary under the circumstances. At the end of such an inordinately long detention for breach, arrangements should have been made to ensure that the prisoners were returned safely to downtown Vancouver or UBC, where they were at least familiar with the transportation system.

(b) Breach of RCMP Policy

304. As indicated in the Final Submission of Commission Counsel at p. 5, para. 12, the *RCMP Act*, Part IV, establishes standards of conduct for members of the RCMP. Relevant subsections of section 37 are reproduced here for convenience:

> s. 37 It is incumbent on every member
>
> (a) to respect the rights of all persons
>
> …
>
> (g) to act at all times in a courteous, respectful and hororuable manner

305. We accept the policy overview with regard to decontamination as set out in Commission Counsel's Final Submission at pp. 203-204, subject to the following additions.

306. In the case of demonstrations, where tactical operations are deployed, additional personnel, in the form of a prisoner processing team, are to undertake prisoner handling upon arrest. The duties of that team include the application of necessary first aid, which includes decontamination, among other things. RCMP decontamination policy, as it pertains to an arrested person who has been sprayed, is reproduced here for convenience:

> 1.2.c. A person who has been sprayed should be encouraged to relax and breathe normally. The affected area should be exposed to fresh air, and if possible flushed with cold water. If symptoms persist or if it is believed that the person is asthmatic or in distress, medical attention should be sought.
>
> Exhibit 658, RCMP Tactical Operations Manual, Ch. 2, s. L.4.d
>
> Exhibit 647, RCMP Operations Manual, Arrest, p. 007

307. In addition, as Commission Counsel has noted at p. 203 of the Final Submission, a July Bulletin to the RCMP Operations Manual stated that "persons who have been exposed to OC should not be left unattended." Ideally, according to Insp. Keith Clark, persons should be monitored subsequent to being sprayed with OC.

> Exhibit 503A, Bulletin to RCMP Operations Manual, p. 006
>
> Clark, Mar. 2, 2000, p. 66, lns. 1-14

308. While Cpl. James Harrison admitted that everything up to the time the prisoners were received at a facility was his responsibility, he declined to take responsibility for prisoner handling with regard to decontamination stating that there was nothing pertinent in the APEC Operations Manual and therefore he assumed that the RCMP's "prevailing policy" would apply. The chapter cited in the preceding paragraph *is* the prevailing policy, and although James Harrison mentions that decontamination was provided by members of the QRT at the staging sites, this decontamination was manifestly inadequate. Moreover, given the fact that the plan to transport the prisoners involved large transport vans, it was foreseeable that many prisoners would be held in this enclosed space for some time as the vans were filled up and the actual transport took place.

> Harrison, Jan. 17, 2000, p. 123, lns. 14-20; p.124, lns. 3-15

309. The failure to provide adequate decontamination facilities at the staging areas was a huge oversight

given the time, energy and public expense the RCMP invested in the investigation of protesters and tactical operations. The use of pepper spray was not unforeseen. On the contrary, the RCMP had anticipated having to resort to pepper spray, and yet no checks and balances were instituted to ensure that someone take responsibility for tactical operations as they relate to decontamination, and more particularly transport and decontamination. By way of example – and contrast – the Final Submission of Commission Counsel makes note of the preparedness of other jurisdictions on p. 204, the most notable of which is the TPS's occasional provision of water to a crowd *prior* to the event.

310. With the exception of Frank Shedden's common sense approach, whereby he allowed prisoners who were obviously suffering from the effects of OC spray to take showers at UBC detachment, and allowed others who were awaiting transport from UBC to Richmond, to circulate freely, on November 25, 1997 decontamination was largely unavailable and when it was made available, it was inadequate. Moreover, the failure to decontaminate initially resulted in the prisoners re-contaminating each other when they were held in enclosed spaces such as the vans, paddy wagons and cells. Finally, even if the bucket and hose arrangement in the bay area of Richmond Detachment did, as RCMP witnesses claimed, technically serve as a decontamination area, this purpose is belied by the fact that the prisoners, who asked to be allowed to go to the toilet in order to wash off, were not made aware of its existence.

311. With regard to the availability of blankets, Richmond Detachment policy states that prisoners are not to be denied blankets, but each circumstance must be considered on its own. It is submitted that in spite of guards' and members' testimony to the contrary, the prisoners were denied blankets and/or their requests for blankets were ignored. Lori Rice Wells and Pearl Fraser claimed that even if they had been asked for blankets, there was a policy against handing them out during the day. While this may be the general practice, it is known from both detachment policy and the testimony of Allan Speevak that it is not policy. Her testimony was inconsistent. Pearl Fraser stated initially that there were 30 or more blankets available and then in cross-examination that there were only 15 blankets available. For his part, Ronald Docherty testified that there were at least 3 dozen blankets available. She also stated that had she would not have given out blankets because there were not enough to go around, that "the minute you bring out one (1), it creates a chain reaction. They all want them." Her testimony bespoke the reasoning of someone who had in fact been asked and who had either explicitly or tacitly denied prisoners. Furthermore, her testimony belied a hostility towards the prisoners as individuals and an indifference towards them as prisoners under her care.

Speevak, Mar. 2, 2000, p. 310, lns. 4-5

Fraser, Feb. 23, 2000, p. 199, lns. 1-2

312. Finally, it is submitted that guards Fraser and Rice Wells had a duty to provide adequate meals to those individuals who, by reason of their vegetarianism, could not eat beans with pork. Admittedly, it was an extremely busy afternoon, and in fairness to the guards, they could not reasonably have anticipated that the prisoners would be held into the evening. However, had the guards been at all concerned for the welfare of the prisoners, it is reasonable to assume they would have called for reinforcements or at least explored the possible alternatives with the Watch Commander.

313. Under the circumstances that prevailed at Richmond Cells on November 25, 1997, failure on the part of guards to provide blankets and adequate meals to vegetarians was, in addition to being a breach of Detachment policy, patently unreasonable and reflected an unprofessional attitude. Guard Fraser was defensive and volatile during her testimony, demonstrating, it is submitted, her discomfort with the role she played in the objectionable conduct.

Fraser, Feb. 23, 2000, p. 247-251

L. Searches

314. The facts as they relate to members, guards and the sheriff, John Kendall, and to the prisoners have

been reviewed in detail in the Final Submission of Commission Counsel at pp. 396-405. It is not disputed that all the prisoners were searched and that all the females, with the exception of the juvenile, Sheri Crist, were strip searched. While there is a great deal of inconsistency in the evidence as to the degree to which the women's privacy was invaded, we submit that irrespective of the inconsistencies, the female prisoners were clearly not given sufficient privacy in breach of their s. 8 *Charter* rights and in breach of national RCMP policy.

(i) Facts

315. We adopt the facts as set out in the Final Submission of Commission Counsel on pp. 396-405, and pp. 417-420, subject to the following additions and clarifications.

316. In the pages mentioned in the previous paragraph, Commission Counsel sets out the facts as they relate to "Searches of Females". We would add that all the male prisoners were also searched and the lawfulness of those searches will be a matter for argument in the following section.

317. With regard to Karina Watson's strip search practices, she stated that generally after clearing the guard room, she placed herself between the prisoner on whom she was conducting a strip search and the door leading from the booking room into the guard room, as indicated in the Final Submissions of Commission Counsel at p. 402, para. 688. It should be noted, however, that Karina Watson also testified that she could, in these circumstances, have her back to the doorway in question, that is the doorway leading from the booking room into the guardroom.

> Watson, Feb. 21, 2000, p. 219, lns. 13-15

318. With regard to the factual matter of whether or not the females were strip searched in pairs, Commission Counsel's final submissions, at para. 767 review the conflicting testimony of the women themselves and that of Karina Watson and Pearl Fraser. It should be added that the evidence is reasonably clear on the fact that the prisoners were processed in groups of two or more, albeit, according to the members and the guards, with an individual officer taking responsibility for an individual prisoner. In addition, the log book clearly indicates groupings of two or three prisoners in both the morning and the afternoon: theses groupings indicate that prisoners who were booked, searched, and had their effects taken, labelled, and stored, and then transferred into a cell were booked in 1-3 minute intervals.

> Exhibit 642, Richmond Cells Booking Sheets (see, for example, p. 002, Risbey and Shellborn, booked in at 12:25 and 12:26 respectively and p. 003, Worton and Thorburn, booked in at 15:23 and 15:26 respectively).

319. Women who were searched were not allowed to put their bras back on after they were strip searched. Rather, the women's bras were placed with their other effects. All the witnesses for the government testified that it was and is general practice to have women remove their bras and pantyhose before entering the cell area, and this is the case whether or not the woman is strip searched.

(ii) Argument

320. We adopt the analysis of Canadian law with regard to the conduct of strip searches as set out in the Final Submission of Commission Counsel, at pp. 21-29. As indicated above, however, we will set out the law as it applies to searches incident to lawful arrest and argue that the searches of the male prisoners were illegal inasmuch as any given individual's arrest was illegal or it is found that the

search was not otherwise conducted incident to lawful arrest. It will be argued that in addition to being illegal, the strip searches that were conducted on the women prisoners who were detained at Richmond Detachment infringed those prisoners' privacy rights, and were conducted in a discriminatory manner.

321. As was done by Commission Counsel in Final Submission, the lawfulness of the searches conducted at Richmond Cells will be analysed according to the test set out in *R.* v. *Stillman*. The three conditions that must be satisfied in order for a search to be valid under the common law power of search incident to arrest are reproduced here for convenience and then each one will be treated in turn:

(a) the arrest must be lawful;
(b) the search must be conducted incident to the lawful arrest; and
(c) the manner in which the search is carried out must be reasonable.

(a) The Arrest must be Lawful

322. Police may only exercise their powers in accordance with the law. A search of the person of an individual, to be lawful, must be authorized by the law. Not only must the authority conducting the search be able to point to a common law rule or statutory provision that authorizes the search, the search must be carried out in accordance with the procedural and substantive requirements the law provides. While the authorities under investigation in this proceeding may be able to point to the common law rule that permits a search to be conducted incident to lawful arrest, it has been argued, above, that in a number of cases, the arrests themselves were not lawful.

323. In *R.* v. *Januska*, as in the case at hand, a strip search was conducted on a person who had been arrested for breach of the peace. Fleury J., on reviewing the case law found that the accused had not been arrested legally under s. 31(1) of the *Criminal Code*, that the officers in question "were not aware of what a breach of the peace really is and that they overstepped their jurisdiction". Fleury J. concluded that because the accused was not properly under arrest, the search was unlawful. Similarly, in the case at hand, in those cases where it is found that a protester was unlawfully arrested for breach, the search of that person, whatever its nature, was itself unlawful.

> *R.* v. *Januska* (1996), 106 C.C.C. (3d) 183 (Ont. Gen. Div.) at 189 (Commission Counsel's Book of Authorities, Tab 37)

324. As stated in the Final Submission of Commission Counsel at p. 22, it was found in *R.* v. *Stillman* that no search, no matter how reasonable, is lawful if it is not conducted incident to a lawful arrest. It is the essence of the power to search incident to lawful arrest that where the arrest is unlawful, the search is unlawful. Thus the searches that were conducted on individuals who were arrested unlawfully were themselves unlawful.

(b) The Search Must Be Conducted Incident to the Lawful Arrest

325. There is no federal or provincial statute that gives police general authority to conduct searches of the person. However, in *Cloutier* v. *Langlois*, the Supreme Court of Canada acknowledged that "the power to search a lawfully arrested person has its roots deep in the common law." What had remained uncertain until *Cloutier* was decided, was the scope of that power, that is how it was to be reconciled with individuals' privacy and freedom. L'Heureux-Dubé J., writing for the Court in *Cloutier*, found that while a "frisk" search incidental to lawful arrest "reconciles the public's interest in the effective and safe enforcement of the law on the one hand, and on the other its interest in ensuring the freedom and dignity of individuals", the existence of the power to conduct such a search is not unlimited. She concluded that a search will only be lawfully incident to arrest if the following criteria are met:

1. The power does not impose a duty. The police have some discretion in conducting the search. Where they are satisfied that the law can be effectively and safely applied without a

search, the police may see fit not to conduct a search.

2. The search must be for a valid objective in pursuit of the ends of the criminal justice system such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused. The objective must not be unrelated to the objectives of the proper administration of justice.
3. The search must not be conducted in an abusive fashion.

A search that does not meet these objectives could be characterized as unreasonable and unjustified at common law.

Cloutier v. *Langlois,* [1990] 3 C.C.C. (3d) 257 at pp. 275 and 278 (Commission Counsel's Book of Authorities, Tab 4)

326. As Lamer C.J.C. stated in *R.* v. *Caslake,*

> The *Charter* requires that agents of the state act in accordance with the rule of law. This means that they must not only objectively search within the permissible scope, but that they must turn their mind to this scope before searching. The subjective part of the test forces the police officer to satisfy him or herself that there is a valid purpose for the search incident to arrest before the search is carried out. This accords with the ultimate purpose of s. 8, which, as Dickson J. stated in *Hunter* […] is to prevent unreasonable searches before they occur."
>
> *R.* v. *Caslake* (1998), 121 C.C.C. (3d) 97 (S.C.C.) at 111 (Commission Counsel's Book of Authorities, Tab 24)

327. Thus to conduct a search that is incidental to arrest, the peace officer "must be attempting to achieve some valid purpose connected to the arrest" at the time the search was carried out, and that purpose must be objectively reasonable. There are both subjective and objective aspects to this test: not only must the individual police officer have had one of the valid purposes in mind in conducting the strip search, the officer's belief that the purpose was valid must also be objectively reasonable in order that there be some reasonable basis for the officer to have conducted the search.

R. v. *Caslake*, *supra* at 110

328. With regard to the subjective reasonableness of a search, there are three valid objectives to which an officer may appeal to conduct a lawful search incident to arrest: guaranteeing the safety of the police and the accused, preventing the prisoner's escape and providing evidence against him. The officer must have had one of these objectives in mind for the search to be justified under this common law power.

Cloutier v. Langlois, *supra* at 274.

329. The power to conduct a search ancillary to arrest does not extend to the power to *routinely* strip search arrested persons. In *R.* v. *Flintoff*, Ferguson, J. considered the reasonableness test of *Collins* and stated in *obiter* that where a strip search is conducted on the basis of a general policy to strip search every person brought into custody, regardless of particular circumstances, the strip search will be found to be unreasonable and thus a violation of s. 8 *Charter* rights.

R. v. *Flintoff* (1997), 29 M.V.R. (3d) 149 (Ont. Gen. Div.) at 158 (Commission Counsel's Book of Authorities, Tab 32); rev'd [on a different point] (1998), 126 C.C.C. (3d) 321 (Ont. C.A.) (Commission Counsel's Book of Authorities, Tab 33)

330. A strip search incident to an arrest is only justified where the police are attempting to achieve some valid purpose connected to that arrest. In the present case, both Pearl Fraser and Karina Watson admitted

that it is the policy of Richmond Detachment to strip search all prisoners, thereby negativing any claim they might have made that the searches were conducted incident to arrest for a valid purpose.

331.Not only must the officer conducting or ordering a search incident to arrest have had at least one of the three valid purposes in mind, that purpose must have been objectively reasonable in the circumstances. While both Karina Watson and Pearl Fraser claimed emphatically that their primary purpose in conducting the searches was to ensure their own safety, the other prisoners and the safety of the prisoner herself, and that that purpose was uppermost in their minds, neither could point to any circumstances that would demonstrate that such a belief was objectively reasonable in the circumstances.

332.It is submitted that given the peaceful nature of the activities related to the prisoners' arrest for breach, strip searches were not objectively reasonable. Indeed, Michel Liu, a reasonably experienced constable did not conduct a single strip search that day. The peaceful nature of the APEC protest would not cause a reasonable person to suspect the sequestering of weapons, evidence related to the reason for arrest, or a means of escape. Neither Cst. Karina Watson nor Guard Pearl Fraser had a reasonably valid objective for conducting strip searches, thus the strip searches they conducted were illegal.

R. v. *Belnavis* (1997), 151 D.L.R. (4th) 443 (S.C.C.)

333.Finally, there is the temporal component of the expression "incident", that is whether, with the passage of time, a search can be said to be incident to an arrest. While delay and distance do not automatically preclude a conclusion that a search is incident to arrest, in the absence of a proper explanation for such delay, they may cause the court to draw a negative inference.

R. v. *Caslake*, *supra* at 109-110

334.The delay between arrest and search diminishes justification for the search. It is submitted that due to the unnecessary and significant delay of anywhere from to 3 to 5 hours between the arrests and searches, the searches were not conducted ancillary to the arrest of those who were arrested without warrant. For instance, Craig Jones, who was arrested between 8:00 and 8:30, was searched and booked into Richmond Cells at 13:21. Moreover, the first load of prisoners had in fact been searched at UBC detachment. No enquiries were made of the driver Frank Shedden as to whether or not the prisoners had been searched, and neither were the documents he transported from UBC detachment reviewed by the officers at Richmond Detachment. None of the searches conducted on the prisoners at Richmond Cells was conducted "incident to arrest" and thus none of the searches was legal.

Watson, Feb. 21, 2000, p. 208, ln. 23 – p.209, ln. 17

(c) The Manner in which the Search is Carried Out must be Reasonable

335.In paragraphs 763-765, at pp. 417-418 of the Final Submission, Commission Counsel has set out the law as it applies to the test of reasonableness and we adopt those paragraphs.

336.Under the reasonableness test, a search conducted pursuant to the common law power of search incident to lawful arrest will be only be valid where the arrest was lawful and where it is conducted for a valid purpose, as discussed in the previous two sections, and finally, where the degree of intrusion is reasonable.

337.Given the time that had elapsed between when the female prisoners were arrested and when they were searched, that Constables Liu and Semeins did not consider that strip searches were warranted in the circumstances and that there was no indication whatsoever that the female prisoners were a danger to themselves or others – even if they had been hiding matches, for instance – it was unreasonable to conduct strip searches on the female prisoners. Moreover, it our submission that the emphatic denials on the part of both Pearl Fraser and Karina Watson that no men were in the vicinity when women were being strip

searched is simply not credible. While they may have earnestly strived to maintain those conditions, the general level of confusion, the lack of preparedness and the sheer numbers of prisoners and staff present undermine their assertions. Finally, even if it were found that John Kendall is the only man who might have inadvertently seen women being strip searched, and that no prisoners were held in the prisoner telephone room at a time when the women could be seen being searched, absent a door on the booking room, strip searches were conducted in an unreasonable manner.

338. In the case of the women who were strip searched, the manner in which the searches were conducted was all the more egregious in that their *Charter* rights were breached.

339. Section 8 of the *Charter* provides:

> Everyone has the right to be secure against unreasonable search or seizure.

340. In *Hunter* v. *Southam*, the Supreme Court of Canada delineated for the first time the purpose underlying s. 8 *Charter* right to be secure against unreasonable searches, *i.e.* the nature of the interest the right is meant to protect. The Court expressed this interest in positive terms as the right to a reasonable expectation of privacy. Accordingly, in any given circumstance an assessment must be made as to whether "the public's interest in being left alone by the government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement." As L'Heureux-Dubé J. stated in *Cloutier*, "[W]hile the common law gives the police the powers necessary for the effective and safe application of the law, it does not allow them to place themselves above the law and use their powers to intimidate citizens. This is where the protection of privacy and of individual freedoms becomes very important."

> *Hunter* v. *Southam* (1984), 14 C.C.C. (3d) 97 (S.C.C.) at 108 (Commission Counsel's Book of Authorities, Tab 15)
>
> *Cloutier v. Langlois*, *supra* at 276.

341. Ordinarily, persons who complain that their *Charter* rights have been infringed have the burden of proving such infringement. However, the Supreme Court held in *Hunter* v. *Southam* that a warrantless search of the person is *prima facie* unreasonable. In the result, the burden of proof shifts and it is the Crown that has the burden of showing, on the balance of probabilities, that the search was reasonable. However, in *R*. v. *Stillman*, the Supreme Court of Canada found that where a search is conducted incidental to a lawful arrest, there is no reversed burden. And this rule stands even where it is a strip search that is conducted incident to lawful arrest.

> *Hunter* v. *Southam* (1984), 14 C.C.C. (3d) 97 (S.C.C.) at p. 109 (Commission Counsel's Book of Authorities, Tab 15)
>
> *R*. v. *Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.) at 337 (Commission Counsel's Book of Authorities, Tab 49)
>
> *R*. v. *Morrison* (1987), 35 C.C.C. (3d) 437 (Ont. C.A.) at 443 (Commission Counsel's Book of Authorities, Tab 43)

342. Under the common law, a search will be reasonable under s. 8 of the *Charter*, where it is authorized by law, the law itself is reasonable, and the search is carried out in a reasonable manner.

> *R*. v. *Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.) at p. 14 (per Lamer J.) (Commission Counsel's Book of Authorities, Tab 26)

343. In the present case, the strip searches were illegal for the reasons given above. And indeed, in *Stillman*, the Supreme Court held that "[n]o search, no matter how reasonable, may be upheld under this common law power [of search incident to arrest] where the arrest which gave rise to it was arbitrary or otherwise unlawful."

> *R*. v. *Stillman*, *supra* at 338 (per Cory J.)

344.With regard to reasonableness, as indicated above, where a strip search is conducted on the basis of a general policy to strip search, it will be found to be unreasonable. In *R.* v. *King*, Ms. King, who was charged with theft over, possession of stolen property and unlawful use of a credit card, was strip searched in a room with a glass door and a video camera that she did not know was not working. MacDougall J. found that the arresting officer had no immediate concerns for his safety, nor any concerns that Ms. King might destroy evidence, and thus found the strip search that was conducted by a female officer pursuant to a detachment policy to strip search was "arbitrary and quite oppressive and patently unreasonable."

R. v. *Flintoff, supra* at 158

R. v. *King*, [1999] O.J. No. 565 (Ont. Gen. Div.) (QL) at para. 46

345.With regard to whether a search was carried out in an oppressive manner, L'Heureux-Dubé J. stated clearly in *Cloutier* that a frisk search is the type of search that best reconciles police powers with individual dignity and liberty. She described a frisk search as "a relatively non-intrusive procedure: outside clothing is patted down to determine whether there is anything on the person of the arrested individual. Pockets may be examined but the clothing is not removed and no physical force is applied."

Cloutier v. *Langlois, supra* at 277

346.In *R.* v. *King*, the Court found that a strip search conducted in a room with a non-operational video camera and a clear window in the door was an unreasonable search and thus a breach of an accused's s. 8 *Charter* rights. In the present case, the fact that the doorway leading into the guard room was devoid of a door means that the women who were subjected to strip searches could be viewed by guards and other members, including those of the opposite sex. Further, in the case where there are prisoners being held in the prisoner telephone room, the women being strip-searched could be seen by other prisoners if she is in the direct line of sight from the prisoner telephone room. Male members can enter inadvertently or indeed, in the case of the sheriff, actually remain in the guardroom while strip searches are being conducted. Even Guard Fraser, who appeared to be the most vigilant in her surveillance of the guard room while females were being strip searched, admitted that when she was seated at her desk, it was possible that a male could walk into the guard room as far as the booking room door, from which point he would be able to see the woman being searched, before she could accost him.

R. v. *King*, *supra* at para. 47

347.There is conflicting evidence as to whether males actually were in a position to see into the booking room, and as stated above, as to whether people were held in the prisoner telephone room and if so whether they could see women being strip searched. With regard to the former, Michel Liu and Mark Semeins deny that they saw women being strip searched. However, the evidence is very clear as to the state of general chaos that reigned. Sheriff John Kendall was more frank in his testimony: not only did he state that it was possible that he stayed at his desk in the Guard Room while a search was being conducted, he also stated that while he couldn't remember entering a room where a woman or women were being strip searched, it was possible that he had and he certainly would have excused himself if such an event occurred. He also stated that although the guards generally kept an eye out and warned others if a strip search was being conducted, if it was busy, it was "terribly" busy it was possible that a guard might not be available to give such a warning.

Kendall, Mar. 28, 2000, p. 74, lns. 11-24; p. 76, lns. 4-23

348.It is submitted that on its face the strip searches of the female prisoners in the Richmond Detachment booking room, as it was then and remains configured, violated the female prisoners' s. 8 *Charter* right to privacy. The booking room doorway lacked a door that could be closed to more effectively ensure privacy. The guard's signal system for keeping others out of the area while a strip search was being conducted was fallible at the best of times in that it relied on a guard being available in the first place to clear the room and on people knowing a search was being conducted prior to entering the room. It would only be the case that officers, guards or sheriffs would know that a search was being conducted if they had been asked to leave

the room or if there were others waiting at the entrance from the hall into the guard room.

349.For example, Mark Semeins testified that had he accompanied a prisoner to cells after that person was booked in, which was the general manner in which the prisoners were booked in, on returning to the booking room he would not necessarily have known that a strip search was being conducted and it is not hard to imagine many other scenario's where Pearl Fraser's signal system could fail. On one of the busiest days ever in Richmond Cells, it stretches credulity to imagine that female prisoners were not observed being strip searched. This is further born out by guard Lori Rice Wells' testimony to the effect that she did not clear the room when a search was being conducted. Finally, the prisoner telephone room, where prisoners were held prior to being booked in, permitted a direct line of view into the booking room whereby a prisoner being strip searched could be viewed by the former if they were not wedged into the corner where strip searches are normally held.

Semeins, Mar. 27, 2000, p. 105, ln. 13 – p. 106, ln. 12

Rice Wells, Mar. 31, 2000, p. 60, lns. 16-18

350.It is submitted that there was nothing in the events that took place at UBC that could underpin a reasonable fear for personnel or prisoner safety. First, the protesters were arrested for breach of the peace while engaged in non-violent protest. Not a single person was charged, let alone charged with an offence of which a component is violence. Secondly, in the case of the first load, the prisoners had all been searched at UBC detachment (booking sheets and prisoner effects were given to the officers at Richmond by Frank Sheddon) and in the case of the second load, Cst. Frank Sheddon, who drove the prisoners from UBC to the Richmond Detachment to UBC, and Cpl. Jim Harrison, who was in charge of prisoner handling, unloaded the prisoners from the small transport vans, cut the handcuffs off the prisoners and loaded them directly into the larger van in which they would be transported to Richmond Detachment. And thirdly, in terms of perceived risk, while the prisoners waited at UBC, the van doors were left open, and in some cases the prisoners were allowed to roam about freely.

351.According to Frank Sheddon, he and Jim Harrison did not feel the prisoners were a danger. On the contrary, there were clear indications that they would <u>not</u> be armed such as the protesters' statement of principles. Through their intelligence, the RCMP were aware that the students would be engaged in passive, non-violent civil disobedience. Communication between those dealing with prisoner handling in the field and those dealing with prisoners being held in detention, to say nothing of having involved Richmond Detachment in pre-conference briefings, would have dispelled any safety concerns. Unfortunately, it is not clear that under those conditions, no strip searches would have occurred since it is clear that policy, be it personal or Detachment prevailed.

Sheddon, Feb. 21, 2000, p. 32, lns. 3-21

352.While there is no evidence to support the contention that it was due to a discriminatory policy *per se* that only women were searched, it is clear that both Karina Watson and Pearl Fraser persist in routinely strip searching the women they are responsible for booking in. Because of that practice, the women who were strip searched at Richmond Cells on Nov. 25, 1997 were subjected to *de facto* discrimination. This practice must be roundly condemned.

353.It is submitted that the general practice of having female prisoners remove their bras and pantyhose is discriminatory and as such is a breach of female prisoners' privacy rights under s. 8 of the *Charter* and their equality rights under s. 15 of the *Charter*. The stated logic underpinning this practice is that women could harm themselves or others with their bras or pantyhose were they allowed to keep them on. According to this logic, jockstraps or similarly elasticized male undergarments should also be cause for concern and yet all those RCMP officers questioned on the subject testified that it is not part of their booking and search procedure to even enquire whether males are wearing such undergarments, let alone have them remove them.

354.This practice is profoundly sexist and subjects all women prisoners at Richmond Cells to an indignity and an invasion of their privacy to which male prisoners are not subjected, especially given that the women

are subjected to the objectionable practice of removing clothing in an essentially public space. This practice amounts to a de-facto strip search. It is submitted that this practice is unreasonable. If there is a valid purpose for strip searching a female, a strip search should be done, but then the woman should be permitted to put her bra back on just as she is permitted to put her underwear back on. If there is no valid purpose for conducting a strip search, women prisoners should not be required to remove their bras. Nor should women be required to go without an item of underwear and to place it among her effects in the absence of a reasonable concern that she might do herself or others harm.

(d) Breach of Duty

355. As the provincial police force, the RCMP are subject to the police officers' Code of Professional Conduct.

> *Police Act*, R.S.B.C. 1996, c. 367, ss. 14(2)(a).
>
> Code of Professional Conduct Regulation, B.C. Reg. 205/98, s. 1.

356. Under subsection 4(2) of that Code, it is a breach of the Code to commit a disciplinary default referred to in subsection (1), which defines a disciplinary default to be, *inter alia*, discreditable conduct. Subsection 5(b) provides that a police officer commits the disciplinary default of discreditable conduct if, while on duty, his or her conduct is oppressive or abusive to any person. Moreover, under subsection 10(a) of the Code, a police officer commits the disciplinary default of abuse of authority if the police officer, without good and sufficient cause, arrests, detains or searches a person. Not only were the women prisoners strip searched without lawful authority, the manner in which they were strip searched was oppressive: they were not warned that they would be strip searched, they were not given appropriate privacy and they were required to remove their bras and enter detention deprived of half of their undergarments.

M. Access to Counsel

(i) Facts

357. We adopt the facts as set out in the Final Submission of Commission Counsel at pp. 394-396 subject to the following additions and clarifications.

358. During the time that Cst. Frank Sheddon detained the prisoners who awaited transport at UBC, he assured them that they would be given the opportunity to contact counsel at Richmond Detachment.

> Sheddon, Feb. 21, 2000, p. 46, lns. 7-12

359. When Karina Watson contacted the lawyer's number that some of students had written on their arms, she did not record the name or the occupation of the person to whom she spoke, nor did she confirm that a lawyer would be notified. Nonetheless, she informed the prisoners that a lawyer was coming to Richmond Cells. About 18:00, a person presented herself at the front desk of the Richmond Detachment saying that she had been called and that she was there to see the prisoners, but when she stated that she was not a lawyer, Karina Watson refused to allow her to attend in Cells. Again, she did not get the name of the person to whom she spoke and, when asked whether she informed the prisoners when she became aware that no

lawyer had been contacted or would be attending in Cells, she replied that she could not recall.

Watson, Feb 21, 2000, p. 120, ln. 25 – p. 121, ln. 22; p. 123, lns. 17-22

360. Christina McCarthy repeatedly asked a female guard, who passed through the cell area often, to be allowed to make a phone call, and when she said something to the effect that she knew she had a right to make a phone call, the guard replied that she "watched too much t.v."

McCarthy, Mar. 24, 1999, p. 31, lns. 4-11.

(ii) Argument

361. Section 10 of the *Charter* provides as follows:

> Everyone has the right on arrest or detention
>
> …
>
> (b) to retain and instruct counsel without delay and to be informed or that right; and
>
> (c) to have the validity of the detention determined by the way of habeas corpus and to be released if the detention is not lawful.

362. In the case of *R.* v. *Baig*, the Supreme Court found that the s. 10(b) duty to warn a detained person of the right to counsel does not include a correlative duty to offer the person the use of a telephone or to offer other help in contacting counsel, until such time as the as the detained person indicates his or her desire to exercise the right to counsel. *R.* v. *Manninen*, the Supreme Court held that if the accused does indicate that he or she wishes to exercise the right to counsel, then he or she must be provided with a "reasonable opportunity to retain and instruct counsel without delay".

R. v. *Baig* (1987), 45 D.L.R. (4th) 106 (S.C.C.) at 108.

R. v. *Manninen* (1987), 41 D.L.R. (4th) 301 (S.C.C.) at 307.

363. While the duty to facilitate contact with counsel has been consistently acknowledged under s.10(b) of the *Charter* by lower courts, that duty is limited by what constitutes a "reasonable opportunity to retain and instruct counsel without delay" under the circumstances of each case. The Supreme Court found in the *Manninen* case there was "no urgency which would justify … the denial of the opportunity to contact his lawyer" (p. 310). Similarly, in *R* v. *Strachan*, the Supreme Court found that once the police officers had contained a potentially volatile situation, that is once they had found two restricted weapons that they knew were on the premises and had seen that two other people in the house had left, "the police were clearly in control and there was no reason why they should not have allowed the appellant to telephone a lawyer."

R v. *Strachan* (1988), 46 C.C.C. (3d) 479 (S.C.C.) at p.494 (Commission Counsel's Book of Authorities, Tab 51)

364. It is submitted that due to a serious lack of organization and planning, the situation at Richmond cells was chaotic. However, it was not a volatile situation, or one that posed any danger. On the contrary, Mark Semeins and John Kendall both testified that during the booking in, there was no difficulty with either the male or female prisoners, that they were cooperative. When the administrative magnitude of the situation became apparent, more staff could have been called out to ensure that prisoners were not forced to wait until all the prisoners had been booked in to exercise their right to contact counsel. In short, there was nothing that could justify delaying the prisoners' opportunity to contact a lawyer.

Semeins, Mar. 27, 2000, p. 47, lns. 8-18

Howard, Mar. 28, 2000, p. 66, lns. 6-19

365.With regard to policy, the National RCMP Operations Manual provides that "[a] person in RCMP custody will be permitted to contact legal counsel and a relative or friend for assistance" and yet a number of prisoners who asked to be allowed to contact family or friends were denied access to the phone. Given the nature of the arrests, the length of time the prisoners were held and the conditions under which they were released, it was inappropriate to deny those who did not exercise their right to contact counsel, the ability to seek assistance from other sources.

366.Finally, in being denied timely and reasonable access to phones to contact their lawyers and in being under the misapprehension that counsel had been contacted on their behalf, the prisoners were effectively denied the possibility of exercising the only recourse available to them - to have the lawfulness of their detention reviewed – in breach of their rights under s. 10(c) of the *Charter*. As stated above, s. 10 of the *Charter* provides that everyone has the right on arrest or detention to have the validity of the detention determined by the way of *habeas corpus* and to be released if the detention is not lawful. Section 482(3)(c) of the *Criminal Code* gives the superior court of criminal jurisdiction authority to make rules governing *habeas corpus*. The BC Supreme court exercises jurisdiction over the issuance of orders regarding *habeas corpus* under Rule 63 of the *Supreme Court Rules*, R.S.B.C. 1996, c. 443

367.In *R.* v. *Reimer*, Hall J.A. found that the accused, for whom no application for detention review was made after the expiration of 90 days from the order to stand trial, was unlawfully detained contrary to s. 9 of the *Charter* and ordered his release under s. 10(c) of the *Charter*. In the present case, the prisoners were denied the opportunity to make a finding as to, in some cases, the lawfulness of their arrest and subsequent detention, and in other cases the lawfulness of their detention after the events with regard to which the prisoners had been arrested, had wound up on the afternoon of Nov. 25, 1997.

R. v. *Reimer* (1987), 30 C.R.R. 184 (Man. C.A.)

N. Detention

(i) Facts

368.We adopt the facts as set out in the Final Submission of Commission Counsel at pp. 410-414, however we place particular emphasis on what follows.

369.Insp. Allan Speevak had doubts about the lawfulness of prisoners' detention**,** absent their being charged. He testified that prisoners booked into Richmond Cells on breach are normally released as soon as they are booked in, but in the case at hand, he gave instructions that they be held for over two and a half hours after the last prisoner had been booked in. Although he took responsibility for his decision to release the prisoners later that day, he had no specific knowledge of the circumstances of the individual prisoners' arrest, nor did he enquire at any time as to the nature of the alleged breaches of the peace.

Speevak, Feb. 25, 2000, p. 288, ln. 18-289 ln. 7

370.Robert Moulton took full responsibility for the decision to release the prisoners after the APEC-related events in downtown Vancouver had wound up on the evening of November 25, 1997. He admitted that at the time he made that decision, the demonstrations taking place downtown were lawful.

Moulton, Nov. 16, 1999, p. 9, ln. 22-p.10, ln. 1; p. 15, lns. 10-16

(ii) Argument

(a) Unlawful Detention

371. With regard to those prisoners who were lawfully detained for breach under s. 31 of the *Criminal Code*, it is asserted that in the absence of charges being laid, failure to release them when there was no longer any possibility that they would continue the breach the peace for which they were arrested, was unlawful.

372. Arrest by a peace officer for breach under subsection 31(1) of the *Criminal Code* is limited to those whom the officer finds committing the breach, or those who, on reasonable grounds the officer believes is about to join in or renew the breach of the peace. In other words, a lawful arrest under this section may only occur where the officer is in the presence of a breach, and not in a case where breach is anticipated. While the B.C. Court of Appeal has found that there is a common law power to arrest for anticipated breach, that power "does not include any and all conduct which right thinking members of the community would regard as offensive, disturbing , or even vaguely threatening. A breach of the peace contemplates an act or actions which result in actual or threatened harm to someone."

> *Hayes* v. *Thompson* (1985), 44 C.R. (3d) 316 (B.C.C.A.) (Commission Counsel's Book of Authorities, Tab 14)
>
> *Brown* v. *Durham (Regional Municipality) Police Force Court* (1998), 167 D.L.R. (4th) 672 (Ont. C.A.) at 697.

373. *Hayes* is not, however, authority for the proposition that prisoners may be further "detained" where it is anticipated that prisoners will breach the peace. Rather ss. 497 and 498 of the *Criminal Code* state the rule: persons arrested without warrant shall be released "as soon as practicable" unless there is reason not to, such as to prevent the "continuation" of the breach. In the case at hand, it could not logically be said that the prisoners would continue the breach for which they had been arrested after events at which the prisoners had been protesting had wound up. It is our submission that the enquiry need go no further. What the students would or would not have done at demonstrations that were taking place down town was irrelevant. The students were arrested for alleged breach during demonstrations that took place at UBC. When those events terminated, any possibility that the prisoners would continue that alleged breach terminated. Moreover, RCMP had a duty to release the prisoners under s. F.5.A.3 of the Operations Manual because the need for detention no longer existed.

> Exhibit 647, p. 004.

374. In the alternative, Inspectors Green, Moulton and Speevak had no reasonable grounds on which to base their apprehension that the individual prisoners detained in Richmond Cells would continue to breach the peace at the events downtown. Absent specific enquiries, each of the prisoners was entitled to be released as soon as practicable. Yet Allan Speevak, whose duty it was to authorize the release of the prisoners, did not make any specific enquiries either about the nature of the breach for which the individuals' were arrested or their intended activities on release. Rather he based his decision to continue to detain them on conjecture on the part of Insp. Moulton and on the demeanour of the prisoners, which he stated indicated that "should they be released they might well resume the breach." In response to Commission Counsel's questions he had state that "there was a fair likelihood they would go downtown and joining [sic] the ongoing demonstration. And that would be a resumption of the breach of the peace, for which I understood they had been arrested." It is clear that Allan Speevak understood, wrongly it is submitted, that simply to demonstrate would constitute a resumption of the breach. Earlier in his testimony he could cite no evidence that would underpin APEC headquarters' apprehension that the prisoners, if released, would continue to demonstrate, let alone engage in actions that would result in actual or threatened harm to someone. In the absence of such evidence, it was not reasonable on the part of Allan Speevak to continue to detain the prisoners.

375. Martin J.A. of the Ontario Court of Appeal has stated that s. 454(1) of the *Criminal Code* (now s. 503 (1)), which provides that an arrested person must be taken before a justice without unreasonable delay or in any event within 24 hours, does not give a police officer "an unqualified right to keep such person in

custody for the purposes of investigation for a period of 24 hours before taking such person before a Justice". Rather, he observed, the section states that the police must take the person before justice *without unreasonable delay* and that the 24 hours is *simply the outer limit* of the time span. Thus in the present case, neither Robert Moulton nor Allan Speevak had legal authority to simply detain the prisoners for up to 24 hours. Under the common law, the RCMP were bound to take the prisoners before a justice to be charged or to be released when there was no chance that they would continue to commit the breach of the peace for which they were arrested.

> *R.* v. *Koszulap* (1974), 20 C.C.C. (2d) 193 (Ont. C.A.) at 200.

376. As a direct result of the RCMP's failure to release the prisoners when they were legally and duty-bound to do so, the prisoners who intended to demonstrate at the APEC events that took place on the evening of Nov. 25, 1997, were effectively prevented from doing so in further breach of their right to freedom of expression as guaranteed by the *Charter*.

(b) Arbitrary Detention

377. Section 9 of the *Charter* provides as follows:

> Everyone has the right not to be arbitrarily detained or imprisoned.

378. To determine whether, in the case at hand, detention of the complainants was arbitrary, one must first consider whether the detention was authorized by law. Although the question of whether an unlawful detention is arbitrary was left open by the Supreme Court in *R.* v. *Latimer*, in *Brown* v. *Durham (Regional Municipality) Police Force Court*, Doherty J.A. held that "the absence of lawful authority for a detention is at least strongly suggestive of arbitrariness and will be crucial if s. 1 of the *Charter* is breached."

> *R.* v. *Latimer* (1997), 142 D.L.R. (4th) 577 (S.C.C.) at 588
>
> *Brown*, *supra* at 682

379. Drawing an analogy between section 8 and section 9 *Charter* analysis, Peter Hogg reasons that any arrest that is not authorized by law is arbitrary: just as the Supreme Court found in *R. v. Kokesch* that lawfulness is an essential ingredient of reasonableness with regard to unreasonable search and seizure under s. 8, "strict compliance with the law is a necessary (although not a sufficient) condition for compliance with s. 9 of the *Charter*." It is submitted that those protesters who were unlawfully arrested were arbitrarily detained.

> Peter Hogg, *Constitutional Law of Canada*, loose-leaf ed., vol. 2 (Toronto: Carswell, 1999) at 46-5;
>
> *R* v. *Kokesch*, [1990] 3 S.C.R. 3 as cited in Hogg, *ibid*. at 45-27

O. Videotape Evidence

(i) Facts

380. No videotape record of the events that occurred at Richmond Detachment was maintained. On Nov. 25, 1997, there were newly installed recording cameras monitoring the booking room and the cell area, although the only monitors that were working were those in the guardroom. However, according to Jim Provost, between October 1, 1997 and February 1, 1998, when a new policy of 30-day tape rotations was instituted, there was no formal policy with regard to the use and reuse of the tapes. A single tape of 4 hour duration was used and it simply rewound itself when it reached the end and taped over the previous 4 hours' recording. On November 25, 1997, at no point was the tape retrieved and as Jim Provost pointed out in his fax to Al Speevak on April 14, 1998, during the period of detention that concerns the

Commission, the tapes would have recycled at least once

Exhibit 696, p. 001.

(ii) Argument

381.The events that occurred at Richmond Detachment on Nov. 25, 1997 were, by all accounts, unusual. The number of prisoners expected at Richmond Detachment, the circumstances of their arrest and the conditions of their release gave Insp. Allan Speevak pause. While he only attended in the cell area on three occasions, he was aware of the general level of both chaos and prisoner dissatisfaction. It is submitted that it ought reasonably to have occurred to Insp. Allan Speevak to preserve the video recording of the events of that day.

382.In *R.* v. *Zdep*, the defendant, who had allegedly kicked an officer while the latter was installing him in his cell, was charged with assault. Fraser J. found that the police had on 4 occasions in the past preserved videos after the usual 30-day holding period (after which they were erased or reused) for disciplinary hearings. The Court held that in this case, though it was by inadvertence that the tapes were not preserved, that the police ought reasonably to have thought of it, that it was the best evidence and that justice would not seem to be done if tapes were preserved in matters where they were of assistance to the police, but destroyed in situations where they were of potential assistance to the accused. In that case it was argued that destruction of the tapes infringed the defendant's right to full answer and defence.

R. v. *Zdep*, [1999] O.J. No. 3196 (Ont. Ct. J.) (Q.L.)

383. In the present case, the plaintiffs have been deprived of the best evidence and thus the ability to more forcefully make their case.

IV. INVOLVEMENT OF THE PRIME MINISTER AND THE PRIME MINISTER'S OFFICE

(i) Facts

384. We adopt the facts as set out at pages 188 to 191 of the Final Submission of Commission Counsel, subject to additions and clarifications set out below.

385. The PMO's interest and involvement in APEC planning became a topic of general conversations.

McGuinness, November 24, 1999, p. 115

386. The information that Wayne May was acting under instructions from the Prime Minister's Office was a topic of general discussion and was available generally to RCMP officers.

Bambury, January 14, 2000, p.135

(ii) Argument

387. There is no direct evidence of the Prime Minister personally giving any direction that would have been the cause of unlawful actions taken by the RCMP. There are references in certain documents to the Prime

Minister which might have indicated his personal involvement, but these seem more likely to be indicative of either the lack of political sophistication of individuals who could not distinguish between the Prime Minister and the Prime Minister's Office, or of Jean Carle's propensity to use his boss' name when he wanted to toss his weight around.

388. The absence of direct evidence of the Prime Minister's personal involvement does not mean that he was not directly involved. If a person with such extraordinary power as the Prime Minister were directly involved, it would not be surprising that subordinates would go to great lengths to protect that person, particularly if they were themselves complicit in any wrongful conduct. The shredding of documents by Jean Carle contributes to the apprehension that this has occurred in the present case. The absence of direct evidence of the Prime Minister's involvement must therefore be viewed as equivocal at most.

389. The most reliable piece of evidence of whether the Prime Minister did, in fact, have any personal involvement would seem to be his statement when he was told that President Suharto of Indonesia might not attend. Reportedly, the Prime Minister said words to the effect that Canada is a democratic country, demonstrations are a fact of life, and if the Indonesian President did not find the conditions to his liking, he could stay home (August 26, 1999, p. 23, line 4; September 15, 1999, p. 32, line 10). This would seem to suggest that the Prime Minister, however much he might have hoped that the Indonesian president would attend and that the APEC conference would go smoothly, personally recognized that there were limits to what could properly be done to appease Indonesian concerns.

390. Although any evidence pointing to the personal involvement of the Prime Minister may be equivocal, the same cannot be said with regard to the involvement of the Prime Minister's Office, particularly that of Jean Carle. The evidence indicates that Jean Carle aggressively intervened in APEC security planning, that there was a general awareness of this intervention among RCMP officers, and that this was interpreted as indicating the personal involvement of the Prime Minister.

391. Despite testimony from RCMP officers that they did not allow the intervention of the Prime Minister's Office to affect their decisions, their actions indicate that they did. It must be concluded that their belief that the Prime Minister wanted to ensure that foreign dignitaries were not subject to protest in Canada was what caused them to engage in the improper and unlawful acts which took place around the APEC retreat.

392. In considering the degree of culpability of the Prime Minister and the Prime Minister's Office, an analogy might be drawn to the death of Thomas Archbishop of Canterbury in 1170. Despite the degree of animosity which had developed between King Henry II and the Archbishop, it appears that the King did not directly order the Archbishop's death. Instead, he made a remark that is reported as either "Will no one rid me of this turbulent priest", or "What miserable drones and traitors have I nourished and promoted in my household, who let their lord be treated with such shameful contempt by a low-born clerk." Coming from the king, such an innocuous remark was sufficient to trigger a secret plot by four knights to murder the Archbishop.

Frank Barlow, *Thomas Beckett* (London: Weidenfeld & Nicolson, 1986), pp. 235-247.

393. Similarly, in the present case, the evidence does not disclose direct orders from the Prime Minister or from officials in the Prime Minister's Office to violently repress protest or to restrict freedom of expression. Instead, there was a degree of interest and intervention which would have given the impression that the Prime Minister wanted to ensure that foreign dignitaries not be exposed to expressions of protest during their visit to Canada. This led inexorably to the events that have given rise to this hearing.

394.In the case of King Henry, of course, the mere fact that he did not directly order the death of Archbishop Thomas did not absolve him from blame or spare him from punishment. In May 1171, he admitted to the papal legates that although he neither ordered nor desired the killing, he was the effective cause of the archbishop's death. Not only did he accept the heavy penalties imposed on him by the church at that time, but three years later he made a pilgrimage on foot to Canterbury Cathedral where he publicly confessed his sins including his being the unwitting cause of the martyrdom, suffered public flagellation, spent a day and night in prayer and fasting, and made substantial offerings of gold, silk and land. To date, neither the Prime Minister nor any of the officials in the Prime Minister's Office have offered any similar atonement for having caused the acts of violence and oppression by the RCMP at the APEC conference.

> *Ibid*., p. 270

395.If, however, this Commission should find that a member of the Prime Minister's Office acted improperly, the conventions of our political system will certainly require that the Prime Minister resign.

> Constitutional convention is clear: any minister who engages in serious misconduct with respect to his office is constitutionally, morally bound to resign. This is the key doctrine of responsible government, and responsible government is the centerpiece of our constitution. This is no ordinary theory, but the core of democracy. It does not matter whether wrongdoing resulted from the personal actions of a minister or from the actions of the minister's senior staff: the minister is equally responsible to Parliament either way. The buck stops on his or her desk.
>
> W. Wesley Pue, "Policing, the Rule of Law, and Accountability in Canada: Lessons from the APEC Summit", W. Wesley Pue, ed. *Pepper In Our Eyes: the APEC Affair* (Vancouver: UBC Press, 2000), p. 25

396.Notably, both Jean Carle and Jean Pelletier acknowledged in their testimony that it is the Prime Minister who is the minister accountable for the actions of members of the Prime Minister's Office.

> August 23, 1999, pp. 198-199, August 26, 1999, p. 70

397.This Commission, however, should have no regard for questions of ministerial responsibility or for the possible consequences of a finding that the Prime Minister's Office wrongfully interfered with the security operations of the RCMP. That is entirely a matter for Parliament to deal with. The Commission's responsibility should go only so far as to make a finding that the actions of Jean Carle wrongfully interfered with the security function of the RCMP and created a belief within the RCMP that the RCMP was accountable to the Prime Minister and the Prime Minister's Office in the discharge of its security function, and a climate in which a misguided wish to placate the Prime Minister's Office led to inappropriate and wrongful decisions being made in the course of the RCMP's discharge of its security function.

V. CONCLUSIONS

398.In assessing the conduct of the RCMP at the APEC meeting, Reverend King's "Letter from Birmingham City Jail" is once again apposite, at the point where he takes issue with some clergymen's praise for the Birmingham police:

> You warmly commended the Birmingham police force for keeping "order" and "preventing violence". I don't believe you would have so warmly commended the police force if you had seen its angry violent dogs literally biting six unarmed, nonviolent Negroes. I don't believe you would so quickly commend the policemen if you would

> observe their ugly and inhuman treatment of Negroes here in the city jail; if you would watch them push and curse old Negro women and young Negro girls; if you would see them slap and kick old Negro men and young boys; if you will observe them, as they did on two occasions, refuse to give us food because we wanted to sing our grace together. I'm sorry that I can't join you in your praise for the police department.
>
> Martin Luther King, Jr. "Letter From Birmingham City Jail", Bedau, *Civil Disobedience*, supra, p. 87

399.The differences between the events described by Dr. King and those at the APEC meeting are only differences of degree. Only one of the "angry violent dogs" actually bit a protester, Jamie Doucette. Any pushing, slapping or kicking by the police is alleged to have taken place before the protesters were sent to jail, rather than in the jail. When the jailed protesters sang, they were told that they would be punished by a lengthier term of imprisonment, rather than by denial of food; of course, given that the protesters had already been denied adequate food, the latter threat would not have been an effective threat.

400.At first, however, a comparison between protesters at the APEC conference and those who took part in the American civil rights movement of the 1960s may seem invidious. After all, the latter sought redress from centuries of terrible injustices, sometimes at the cost of their lives, while the APEC protesters were for the most part members of a privileged middle class, a handful of whom had to suffer a few hours or perhaps days of discomfort. The American civil rights movement was led by the brilliant, charismatic Dr. Martin Luther King Jr., while the leaders of the APEC protest have in the course of this hearing seemed determined to prove themselves sophomoric, self-absorbed, self-righteous and annoying.

401.It must be remembered, however, that this hearing heard testimony from only a handful of the APEC protesters. There were hundreds of others on the UBC campus that day, people who had decided that a few hours of their time was not too much to sacrifice in the hope of ending genocide and totalitarian repression. Surprisingly, they succeeded. Suharto is out of office and the Indonesians are out of East Timor. There might be some who would reckon the APEC protesters' suffering as a small price for that result. That price, however, should not include the erosion of civil liberties here in Canada.

402.Canadian civil liberties and the Rule of Law now rest in the hands of this Commission. We urge it to be resolute in their protection.

VI. RECOMMENDATIONS

403.In this section, we have not provided specific recommendations with regard to the various individual incidents that are the subject of argument above. We leave it to the Commission to arrive at the appropriate recommendations consistent with the findings that we have argued. Instead, Under the "Substantive" heading below, we make recommendations primarily aimed at correcting some of the problems which gave rise to this hearing, while under the "Procedural" heading, we make recommendations with regard to the procedures of the RCMP Public Complaints Commission.

Substantive

404.We submit that the Commission should recommend that individual officers be disciplined for their own individual breaches.

405.We submit that the Commission should recommend that chain of command officers be disciplined for allowing themselves to be influenced by political directives and considerations, rather than simply by security concerns.

406.If members of the Vancouver Police Department acted improperly or unlawfully at UBC, the RCMP should be held responsible for those actions, given that the VPD members were outside of their normal,

geographical jurisdiction and were operating pursuant to the RCMP's responsibility to protect IPPs.

407.In cases of political demonstrations or protests on government property or on property that is under the control of the government, the RCMP should only remove peaceful protesters if the government has obtained judicial authorization in the form of an injunction for their removal. An exception would be if there were real or threatened acts of violence or destruction or immediate risks lives or property. This policy would help to preserve the Rule of Law while respecting citizens' rights to freedom of expression, assembly and association. It would, first, assist the RCMP to retain its independence by relying on the independent judiciary to supervise the use of its coercive power, thereby avoiding any appearance of favouritism to the government. Requiring the government to obtain judicial authorization through an injunction to enforce its rights would, second, provide at least a minimum opportunity for an independent judicial review of the government's justification for abridging the fundamental freedoms of demonstrators under the *Charter*. If this rule had been in place in November 1997, then although the propriety of the decision by the Government of Canada to remove the protesters at the MOA might still have been in question, the legality of their removal by the RCMP would not.

408.Similarly, the RCMP should only remove peaceful protesters from a public highway if it is enforcing an injunction obtained by the Attorney General or, again, if there are immediate risks to lives or property. This would respect the recognition by the Supreme Court of Canada of public highways as traditional venue for public protest, and would be consistent with the practice that the RCMP already follows when removing protesters from roads in logging protests. Given that it can be generally anticipated that protesters will occupy roads, that the RCMP should be able to determine in any particular instance whether this will pose a security threat, and that injunctions can be obtained in advance on a *quia timit* basis, this would hardly be an onerous requirement.

409.Protocols should be established setting out procedures and safeguards for ensuring that the Government of Canada does not improperly interfere with the operations of the RCMP. The first and most important buffer designed to protect police officers from improper political interference with operations must be the police command structure itself. While there may be in some cases a need for communication between political officials and police, such communication should take place only with senior officers. Their duties include protecting ordinary police officers from improper political interference. In a case such as this, where one of the Prime Minister's closest advisors was in direct, at times constant, contact with Inspectors, Staff Sergeants and other lower level members of the RCMP, the police command structure simply cannot serve, as it should, to screen out improper political direction. The main safeguard designed to protect police officers from improper political interference thus becomes irrelevant when this happens. We therefore suggest, first that meetings between representatives of the RCMP and representatives of the Government, particularly at the political level, be avoided except where necessary. Instead, RCMP contact with the Government should generally be limited to its reporting functions through normal channels. Second, where such meetings do take place, detailed and accurate minutes should be kept. This would help to avoid the extremely unsatisfactory situation of RCMP officers and government representatives claiming to have no recollection or records of important meetings and discussions. Third, a liaison position should be established within the Ministry of the Solicitor General with the responsibility of advising the RCMP in its dealings with other government agencies, and members of the RCMP should be encouraged to have recourse to this resource. Fourth, we recommend an information and education program directed at all members of the RCMP to make it absolutely clear that the RCMP is not to take direction in the performance of its day-to-day functions from the political level of the Government of Canada.

Procedural

410.In considering how the Commission's hearing procedures might be improved, the question that must first be asked is what was unsatisfactory about this hearing. We would suggest that the hearing was too long, too expensive, and spent too much time dealing with evidentiary objections and other procedural matters. Document production was unsatisfactory. Evidence was not obtained from all witnesses to the incidents, or was obtained long after the incidents had taken place.

411.Some of these problems are attributable in part to the unusual nature of this hearing. It involved a number of separate incidents, each of which would individually have merited a hearing. A large number of people had been affected by the RCMP's actions, due to the crowds of protesters that they targeted. The shocking nature of the videotaped coverage of the incidents combined with the importance of the APEC conference and the involvement of the Prime Minister's Office made the hearing newsworthy, which may have retarded its progress.

412.Although the hearing was unusual, however, it was not unique. It is therefore important to consider what reforms might avoid future problems.

413.We recommend the adoption of provisions for a modified summary hearing procedure, somewhat similar to Rule 18A of the British Columbia Supreme Court Rules. Even though many of the witnesses in the current hearing gave testimony that was sufficiently contentious that it would have had to have been given *viva voce* in front of the Commissioner in any event, this was not true for all of the witnesses. Time could have been saved by having at least some of the testimony given in affidavit form, thereby both eliminating the time needed for evidence in direct and avoiding some unproductive cross-examination. If it were necessary for witnesses to be examined on their affidavits, this would be done outside of the hearing itself.

414.We recommend that in future complaints to the Commission, Commission investigators obtain evidence in affidavit form in the first instance, and that such evidence be promptly obtained from all available witnesses. In the current hearing, although the Commission received the evidence of many witnesses, there were even more witnesses whose evidence the Commission did not receive. This is particularly unfortunate in the case of matters on which there is directly conflicting testimony, such as whether or not Bill Dingwall ever told the protesters at Green College that his concern about their protest signs was based on their potential use as projectiles.

415.We recommend that provision be made for cost awards to complainants' counsel and that a tariff on which those costs would be based be established. In the current hearing, a great deal of time was taken up in argument on the question of whether or not complainants' would receive counsel fees, with the final result that those complainants that wished to retain counsel – with the exception of the BCCLA – would receive counsel fees. This, in our submission, reflected a recognition of the unfairness of having respondent RCMP officers represented by counsel while complainants were unrepresented. That unfairness would not be specific to this one hearing, and it should not be the case that only complainants in cases that have the high profile in Parliament and the news media of the current case be entitled to fairness. It should also not be necessary for time to be fruitlessly occupied in future debates about costs.

416.We recommend that the role of Commission Counsel be clarified. Without wishing to revisit decisions that were made in the current case or to be seen to be critical of Commission Counsel in the present case, we nevertheless submit that the roles allocated to counsel for the respective parties are unlike those in any other judicial or quasi-judicial process of which we are aware. On the one hand, counsel for the RCMP are properly charged with vigorously defending the interests of their clients, just like counsel to the defendants in civil litigation or a criminal prosecution or counsel to a respondent in an administrative hearing. Unlike in those other types of cases, however, there is no counsel whose client is adverse in interest to the RCMP officers and who also has the ability to determine what evidence will be brought forward. Instead, Commission Counsel calls evidence, but purports to play an impartial role, while counsel to the complainants – if any – is not allowed to call evidence. The adversarial system that underlies our model of justice is therefore not permitted to function normally. Whatever the result in the current case, it is difficult to imagine how a case in which the complainants do not have their own counsel could arrive at just results.

417.We recommend that standardized demands for retention and production of evidence be created and used as soon as a complaint is received by the RCMP Public Complaints Commission. We further recommend that sanctions be established for use where evidence is destroyed or is not promptly produced.

418.We recommend that the role of the Chair of the Commission currently occupied by Shirley Heafey -

be considered, clarified and, if necessary, constrained. It is entirely unacceptable for a Chair of the PCC to attempt to micro-manage panels or to attempt to influence their proceedings or outcomes. This is all the more so in circumstances such as the present hearing where the Prime Minister, to whom the Chair ultimately owes her job, has a direct and personal interest in the outcome of the proceedings. The resignation of Gerald Morin Q.C. as the Chair of the first Inquiry Panel was stated to be because of conflicts with the current Chair of the Commission over the respective roles of the Commission and the Inquiry Panel and what he perceived as her encroachment on the decision-making role of the Inquiry Panel to the point where its independence was compromised. In addition, the current statutory structure fails to ensure that there are clear separations between participants who have different functions. The Commission Chair has the power, either by statute or commission policy, to lay complaints; to choose whether to proceed by investigation, review or hearing; to set the terms of reference for a panel; to appoint a panel; to sit on a panel; and to edit and finalize review reports. This lack of institutional independence of panels from the Chair of the Commission - a political appointee - is so significant as to possibly impede the existence of fair and impartial tribunals. Future inquiries should not be hindered by any confusion about the proper roles of the Chair of the Commission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
this 7th day of June, 2000.

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Michael P. Doherty
Barrister & Solicitor

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