
4-1-2003

Bail, Global Justice, and the Limits of Dissent

Jackie Esmonde

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Citation Information

Esmonde, Jackie. "Bail, Global Justice, and the Limits of Dissent." Osgoode Hall Law Journal 41.2/3 (2003) : 323-361. <http://digitalcommons.osgoode.yorku.ca/ohlj/vol41/iss2/9>

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Abstract

This article examines the ways in which the law of bail has been used to criminalize dissent in Canada. Three case studies are analyzed to demonstrate how the law of bail has been applied to those arrested at global justice demonstrations associated with militant civil disobedience. The first case study examines the bail conditions imposed on protesters arrested at anti-APEC demonstrations in Vancouver 1997. These bail conditions were intentionally designed to prevent those arrested from attending the protests. The second case study focuses on the Ontario Coalition Against Poverty (OCAP), with an analysis of how the bail system has been used to criminalize its activism through a combination of bail conditions prohibiting public protest, pre-trial detention orders of its leaders, and prohibitions on association with OCAP. The final case study turns to arrests at demonstrations against the Summit of the Americas in Quebec City in April 2001, documenting the intentional violation of the statutory right to a bail hearing within 24 hours, and the denial of bail to a perceived leader of the global justice movement. Viewed together, these case studies demonstrate that the law of bail has provided insufficient protections for civil liberties.

Keywords

Bail; Civil disobedience--Law and legislation; Political activists--Legal status, laws, etc.; Civil rights; Canada

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BAIL, GLOBAL JUSTICE, AND THE LIMITS OF DISSENT[©]

BY JACKIE ESMONDE*

This article examines the ways in which the law of bail has been used to criminalize dissent in Canada. Three case studies are analyzed to demonstrate how the law of bail has been applied to those arrested at global justice demonstrations associated with militant civil disobedience. The first case study examines the bail conditions imposed on protesters arrested at anti-APEC demonstrations in Vancouver 1997. These bail conditions were intentionally designed to prevent those arrested from attending the protests. The second case study focuses on the Ontario Coalition Against Poverty (OCAP), with an analysis of how the bail system has been used to criminalize its activism through a combination of bail conditions prohibiting public protest, pre-trial detention orders of its leaders, and prohibitions on association with OCAP. The final case study turns to arrests at demonstrations against the Summit of the Americas in Quebec City in April 2001, documenting the intentional violation of the statutory right to a bail hearing within 24 hours, and the denial of bail to a perceived leader of the global justice movement. Viewed together, these case studies demonstrate that the law of bail has provided insufficient protections for civil liberties.

Cet article examine comment la loi sur le cautionnement a servi à criminaliser la dissidence au Canada. Trois études de cas sont analysées pour démontrer comment la loi sur le cautionnement a été appliquée aux personnes interpellées lors de manifestations altermondistes assimilées à la désobéissance civile militante. La première étude de cas examine les conditions de cautionnement imposées aux manifestants interpellés lors des manifestations contre l'APEC de Vancouver en 1997. Ces conditions de cautionnement étaient sciemment élaborées pour empêcher les personnes interpellées de participer aux manifestations. La deuxième étude de cas s'intéresse à Ontario Coalition Against Poverty (OCAP), avec une analyse de la façon dont le système de cautionnement a été utilisé pour criminaliser son militantisme, à travers un ensemble de conditions de cautionnement qui visent à empêcher les manifestations publiques, des ordonnances de détention avant les procès des chefs militants, et des interdictions d'association avec l'OCAP. La dernière étude de cas vise les arrestations intervenues lors de manifestations contre le Sommet des Amériques à Québec en avril 2001, et documente la violation intentionnelle du droit légal à une enquête de cautionnement sous 24 heures, et le refus de cautionnement opposé à un prétendu chef du mouvement altermondiste. Considérées ensemble, ces études de cas démontrent que la loi sur le cautionnement n'a pas su convenablement protéger les libertés civiles.

I.	INTRODUCTION	324
II.	CONSTRUCTIVE CIVIL DISOBEDIENCE AND THE GLOBAL JUSTICE MOVEMENT	326
	A. <i>Democracy, the Rule of Law, and Civil Disobedience</i>	326
	B. <i>The Movement Against Neo-Liberal Globalization</i>	330
III.	THE LAW OF BAIL IN CANADA	333
	A. <i>The Function and Law of Bail in Canada</i>	333
	B. <i>Limiting Civil Rights: The Law of Bail Applied to Demonstrators</i>	335

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IV.	CRIMINALIZATION OF POLITICAL DISSENT THROUGH THE IMPOSITION OF BAIL CONDITIONS	339
A.	<i>APEC Alert! and the Use of Undertakings</i>	339
1.	Targeting leaders of civil disobedience organizations	340
2.	Prohibiting participation in demonstrations	342
B.	<i>"Breaking the Back" of the Ontario Coalition Against Poverty</i>	344
1.	Conditions that prohibit demonstrations and association	345
2.	Detention and denial of bail of perceived leaders	349
C.	<i>Demonstrations at the Summit of the Americas, Quebec City 2001</i>	353
V.	CONCLUSIONS: THE GLOBAL JUSTICE MOVEMENT AND TERRORISM	358
I.	INTRODUCTION	

Civil disobedience as a strategy of resistance is treated with both respect and revulsion. Images of resistance from the past are often heaped with praise and idealized as important fights for freedom, credited with bringing about progressive social change. The fight to end slavery and the civil rights and anti-war movements of the 1960s all used civil disobedience in order to fight injustice.¹ At the time that these same movements were mobilizing, however, the response of the state was often to jail and, on occasion, to execute dissenters.

The global justice movement of today faces similar contradictions. This movement is made up of a loose grouping of people who oppose neo-liberal forms of globalization. A series of massive demonstrations across the world—in Seattle, Bolivia, Washington, Prague, Quebec City, Genoa, and Argentina—have successfully placed globalization on the political agenda. One segment of the movement has used civil disobedience as a tactic for disrupting the capacity of world leaders to plan the world economy. It has been met with fierce resistance from the state, through extraordinary mobilizations of police forces and mass arrests. It has been denounced as profoundly misguided, criminal, and a threat to democracy.

This article arises out of my own experience in the global justice and anti-poverty movements. I have participated in many of the major Canadian global justice demonstrations of the last several years in a variety of different roles—as a protester, an organizer, and more recently as part of

¹ For an overview of some of the historical movements that have used civil disobedience, see Martin C. Loesch, "Motive Testimony and a Civil Disobedience Justification" (1991) 5 Notre Dame J.L. Ethics & Pub. Pol'y 1069.

a legal support team.² I have found that rather than seriously engaging with the arguments put forth by demonstrators, the response of the state has been to seek protection behind walls of police armed with chemical and other types of weapons. My experiences have allowed me to assess first-hand the increasing criminalization of global justice protest, from security preparations to initial contact with police to the reactions of lawyers and judges. I have been particularly struck by the role that bail has played in the criminalization of political expression and activity.

Part II examines the relationship between democracy, the Rule of Law, and civil disobedience in a liberal capitalist state. I will argue that not only is civil disobedience compatible with democracy and the Rule of Law, but it can actually further these principles and thus make an important contribution to positive social change. Given this contribution, as well as the protected status given to political expression by the Canadian *Charter of Rights and Freedoms*,³ arrests arising from civil disobedience pose challenges for lawmakers.

Part III provides a brief overview of the law of bail in Canada, demonstrating that there is a basic presumption that accused persons will be released before trial, a presumption that can only be overcome where it is necessary to forward one of the goals of the bail system. A key goal of the bail system is the prevention of unlawful activity. I will analyze the protections provided in the *Charter* for those arrested at political demonstrations. I will argue that the jurisprudence does not offer sufficient protection to political and civil rights, and allows for the significant curtailment of individual freedoms.

Part IV contains three case studies designed to demonstrate how the law of bail has been applied to those arrested at global justice demonstrations associated with militant civil disobedience. The first case study examines the bail conditions imposed on protesters arrested at the 1997 anti-Asia-Pacific Economic Cooperation (APEC) demonstrations in Vancouver. I will demonstrate that they were intentionally designed to prevent those arrested from attending the protests. The second case study focuses on the Ontario Coalition Against Poverty (OCAP), with an analysis of how the bail system has been utilized to criminalize its activism. This criminalization has been accomplished through a combination of bail conditions prohibiting public protest, pretrial detention orders of its leaders, and prohibitions on association with OCAP. The final case study

² My organizational affiliations include the Ontario Coalition Against Poverty, Ontario Common Front, New Socialist Group, and the Common Front Legal Collective.

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

turns to arrests at demonstrations against the Summit of the Americas in Québec City in April 2001. It will document the intentional violation of the statutory right to a bail hearing within twenty-four hours and the denial of bail to a perceived leader of the global justice movement.

When viewed together, these examples show a disturbing trend in which arrested activists, not yet proven guilty beyond a reasonable doubt, have had their political activity substantially curtailed. It is not sufficient to say that tactics such as pretrial detention, restrictive conditions, or the denial of bail hearings are necessary in order to prevent unlawful activity at future demonstrations. These tactics limit much more than future civil disobedience. Lawful and constitutionally protected political expression and activity are themselves prohibited or prevented. It is difficult to come to any conclusion other than that the bail system is being used to suppress dissent.

II. CONSTRUCTIVE CIVIL DISOBEDIENCE AND THE GLOBAL JUSTICE MOVEMENT

A. *Democracy, the Rule of Law, and Civil Disobedience*

In the abstract, a democratic government is said to express the interests and will of the people it is elected to represent—the principle of governance for the people by the people.⁴ But in order for a government to speak for its citizens, there must be protections ensuring that those who are governed can participate in political choices by expressing their wishes or dissent. Thus liberal democracies have made a commitment to civil rights such as freedom of speech to guarantee that there are avenues for political participation. Freedom, equality, and individual liberty are seen as core characteristics of democracy and, combined with liberal notions of constitutionality and the Rule of Law, are considered effective protections against tyranny. Given this commitment to political participation, political expression that takes the form of unlawful acts may create a conflict between a state's need to maintain order and its protection of civil liberties. Some argue that civil disobedience poses an insupportable challenge to the Rule of Law and that it undermines the democratic decisions made by representative governments.

However, to ensure that concepts such as the Rule of Law support democratic principles, they must have some content beyond ensuring that the law applies equally to all: "Stability and order are not the only desirable conditions of social life. There is also *justice*, meaning the fair treatment of

⁴ J.S. Mill, *On Liberty with The Subjection of Women and Chapters on Socialism*, ed. by Stefan Collini (Cambridge: Cambridge University Press, 1989).

all human beings, the equal right of all people to freedom and prosperity. Absolute obedience to law may bring order, but it may not bring justice.”⁵

If the judgments at Nuremberg have taught anything, it must be that the fact that a law exists is not in and of itself sufficient cause to follow it.⁶ The content of the law or policy must be critically assessed to determine how it measures up to the fundamental principle of democracy—a commitment to equality in both a formal and substantive sense.

Classic liberal political theorists who staunchly defend the Rule of Law, such as John Locke or John Rawls, have argued that disobedience is justified in a democratic state where the government has failed to fulfill the conditions of the “social contract.”⁷ Through disobedience to unjust laws, the protestor calls attention to this failure and demands that it be addressed. Civil disobedience as understood from this perspective is remedial, as the reform of the unjust law will mean that the state is once again relatively democratic and just.⁸ The social contract will be repaired. This justification underlies the classic definition of civil disobedience: “an illegal, public, non-violent, conscientiously motivated act of protest, done by someone who accepts the legitimacy of the legal and political systems and who submits to arrest and punishment.”⁹

This justification of civil disobedience is applicable only so far as the state is believed to be democratic and just. Where a democracy is constituted by political equals, and where the laws express the desires *and* needs of the people, there is little reason to disobey those laws. However it must not be forgotten that democracy is more than a commitment to individual civil rights. It is also a system by which people are governed: “a democratic government, like any other, exists to uphold and enforce a certain kind of society, a certain set of relations between individuals, a certain set of rights and claims that people have on each other both directly, and indirectly through their rights to property.”¹⁰

⁵ Howard Zinn, “Law, Justice and Disobedience” (1991) 5 Notre Dame J.L. Ethics & Pub. Pol’y 899 at 902.

⁶ Christian Bay, “Civil Disobedience Theory” in Christian Bay and Charles C. Walker, eds. *Civil Disobedience: Theory and Practice* (Montréal: Black Rose Books, 1975) 13 at 30.

⁷ John Locke, *Second Treatise of Government*, ed. by Peter Laslett (Cambridge: Cambridge University Press, 1988); J. Rawls, *Theory of Justice* (Cambridge: The Belknap Press of Harvard University Press, 1971).

⁸ The distinction between remedial and constructive disobedience is drawn from Les Green, “Globalization and Civil Disobedience” (2001) [unpublished].

⁹ Paul Harris, “Introduction: The Nature and Moral Justification of Civil Disobedience” in Paul Harris, ed., *Civil Disobedience* (Lanham, MD: University Press of America, 1990) 1 at 2.

¹⁰ C.B. Macpherson, *The Real World of Democracy* (Concord, Ont.: Auausi Press, 1992) at 4.

In a liberal democracy, which is inextricably tied to capitalism, this means upholding capitalist social, political, and economic relations. In such a context, the possibilities and limits of a liberal democracy must then be assessed from within the possibilities and limits of capitalism itself.

Stripped down to its bare essentials, capitalism requires that the minority own the means of production, while the majority is required to sell its labour power in order to survive. On its surface, capitalism may appear to take the form of a free and equal exchange between property owners. For some of the classic political economists, such as Adam Smith and Jean Jacques Rousseau, the protections afforded to private property that make capitalism possible were closely identified with individual freedom and equality: every property owner was equal to every other, none had exclusive access to property, and all were subject to the same rules.¹¹ However, such equality is undermined where the minority has greater access to private property than the majority. Rather, equality of form masks the fact that capitalism by necessity requires great inequality in the content of social relationships.¹²

When these social relations are supported, produced, and reproduced through a liberal state, unequal distributions of resources, wealth, and access to power are formalized. Thus the possibilities for full democratic participation and freedom are always limited in a liberal democracy because the "narrow horizons of bourgeois right and democracy derive from the material conditions of capitalist production: the exploitation of the majority by the minority is compatible only with limited democracy and limited right."¹³ This inequality in a liberal capitalist state is legitimized by an ideological separation between political and economic spheres:

Liberal democracy leaves untouched the whole new sphere of domination and coercion created by capitalism, its relocation of substantial powers from the state to civil society, to private property and the compulsions of the market. It leaves untouched vast areas of our daily lives—in the workplace, in the distribution of labour and resources—which are not subject to democratic accountability but are governed by the powers of property and the 'laws' of the market, the imperatives of profit maximization.¹⁴

¹¹ B. Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (London: Pluto Press, 1984) at 11.

¹² Macpherson, *supra* note 10 at 7.

¹³ Fine, *supra* note 11 at 131.

¹⁴ E. Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (Cambridge: Cambridge University Press, 1995) at 234.

The key democratic principles of equality and freedom do not extend to the regulation of the economic sphere. However this line between political and economic spheres is subject to historical shifts. For example, the great defenders of liberalism such as Locke or Albert Venn Dicey never envisioned the extension of suffrage beyond the class of white, propertied men. The extension of democratic principles beyond these parameters resulted from the pressure of masses of people demanding that a commitment to democratic government be taken to its logical conclusion. From the abolition of slavery, the dismantling of legislated segregation in the American South, the establishment of social welfare programs, to the creation of protections for trade unions, pressure from below has challenged governments to demonstrate a commitment to substantive equality.¹⁵ Social movements have done this in a variety of ways, combining workplace actions, mass mobilizations of people, and civil disobedience.

Thus a second form of civil disobedience emerges—*constructive* civil disobedience.¹⁶ Constructive civil disobedience acts on the assumption that a full democratic and just order does not yet exist, and employs tactics of resistance that break the law in order to create relations that are democratic and just.¹⁷ Where laws are created by a powerful elite with disproportionate access to state power, and the laws serve to maintain these unequal social relations, disobedience may be the only avenue for those without political power to press for change.

Constructive disobedience thus relies on a different justification for civil disobedience than that advocated by traditional liberal theorists. This justification has consequences for the kinds of civil disobedience that can be justified. For example, under the classic definition, civil disobedience is limited to non-violent acts for which the offender accepts full punishment. Such a requirement makes sense where the state is viewed as essentially legitimate. However these requirements make less sense in the context of constructive disobedience, which begins with a more critical analysis of the state.

Where the state is viewed as unjust, and people believe that they have acted in the interests of justice, there is no compulsion to accept punishment from the same state that is believed to be illegitimate.¹⁸ For the

¹⁵ P. Rosenthal, "The Toronto Nuclear Weapons Trials: A Look Back to the Future" (1990) 10 Windsor Y.B. Access Just. 194 at 220.

¹⁶ Green, *supra* note 8.

¹⁷ In practice, the distinction between remedial and constructive civil disobedience is less apparent. Historically and currently both have occurred, even within the same movement.

¹⁸ Zinn, *supra* note 5 at 915-20.

same reason, pacifism may not always be appropriate. Violence is a strategic and tactical question that must be assessed in each context rather than being dismissed outright: the choice of means should be "rationally calculated to promote the limited ends."¹⁹ Thus where the state engages in violence in order to protect the unequal distribution of power, violence by a civil disobedient as self-defence or in order to defend others may be appropriate. A dogmatic commitment to pacifism can represent acquiescence to continued violence and oppression.²⁰ For these reasons, the definition of civil disobedience that I use is not confined to the strict limits of the traditional definition. Civil disobedience is

any act or process of public defiance of a law or policy enforced by established governmental authorities, insofar as the action is premeditated, understood by the actor(s) to be illegal or of contested legality, carried out and persisted in for limited public ends, and by way of carefully chosen and limited means.²¹

Thus violence is not excluded from the definition of civil disobedience, leaving the question of its justification to be determined in each context.

B. *The Movement Against Neo-Liberal Globalization*

The global justice movement burst into mass consciousness with the "Battle of Seattle" in November 1999. Over a year's worth of grassroots organizing brought together more than sixty thousand people, all gathered to express resistance to the World Trade Organization's (WTO) plans for the global political economy. Most frequently known as the anti-globalization movement, there are, in fact, many different constituencies in this movement with sharp differences of opinion over their analyses of the issues, appropriate tactics, and best solutions.²² Despite these differences, the movement has continued to grow, presenting challenges to world leaders wherever they meet to discuss the implementation of neo-liberal policies.

¹⁹ Bay, *supra* note 6 at 18.

²⁰ *Ibid.* at 28.

²¹ *Ibid.* at 15.

²² A great deal has already been published on the protests against the WTO in Seattle 1999. Interesting articles from the protesters' point of view include: T. Clarke, "Taking on the WTO: Lessons from the Battle of Seattle" (2000) 62 *Studies in Political Economy* 7; B. Epstein, "Anarchism and the Anti-Globalization Movement" (2001) 53 *Monthly Review* 4; David McNally, "The Quebec City Protests" (2001) 31 *New Politics* 76; W. Wesley Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: UBC Press, 2000).

Although there is no unified argument put forth by the global justice movement, the broad outlines of the critique of neo-liberal globalization can be sketched. The argument runs along the following lines: neo-liberalism represents an intensely ideological approach to social and economic policy, which claims that free markets and free trade are a solution to global inequality with the capacity to increase wealth for all.²³ Activists argue that, in reality, during the last two decades of the neo-liberal experiment, poverty and inequality have increased both within and between countries. This is a direct result of massive cuts to social programs, privatization of services and resources, attacks on workers' rights, and other staples of the neo-liberal agenda.²⁴ Through the imposition of aid packages tied to so-called structural adjustment programs, international economic organizations such as the WTO, the IMF, and the World Bank have developed enormous power to influence or control outright the economic and social policies of countries around the world. Free trade agreements between countries have similar results, resulting in global poverty, job insecurity, Third World debt, and imperialism.

Activists disagree over several fundamental questions. Social democratic branches of the movement argue that international trade agreements and institutions undermine the democratic decision-making power and the sovereignty of individual states, giving more power to corporations. Such activists often argue that the addition of social clauses to free trade agreements is an adequate solution. The more radical branches of the movement interpret neo-liberal globalization as representing the current form of global capitalism. They argue that the problem is not that individual countries are losing power to international institutions. Rather, it is that the state has shifted its focus to the world level as decisions at the national level get increasingly tied to the global movement of capital, accelerating processes of exploitation and oppression. Despite these differences, there is agreement that neo-liberalism has increased global inequality on a massive scale, and that the current outlets for democratic participation in decisions about the global economy are inadequate. They agree that, in some sense, "democracy is not working."

As the global justice movement has matured, segments of the movement have seen the links between the global political economy and their local communities. Many now argue that demonstrations at large international summits are insufficient and have thrown support behind the

²³ Kim Moody, *Workers in a Lean World: Unions in the International Economy* (London: Verso Books, 1997) at 120.

²⁴ See e.g., Armine Yalnizyan, *The Growing Gap: A Report on Growing Inequality Between the Rich and Poor in Canada* (Toronto: Centre for Social Justice, 1998).

work of organizations that are fighting the effects of neo-liberal globalization at the local level. One group in particular that has received a great deal of support from some segments of the global justice movement is the Ontario Coalition Against Poverty (OCAP), a militant anti-poverty group based in Toronto. OCAP address neo-liberal processes at the local level, where its members fight what they see as a war against the poor marked by attacks on workers' rights, cuts to social assistance, and the criminalization of the results of these policies through banning panhandling. There is significant overlap in analysis, tactics, and participation between the two movements. For these reasons, I include OCAP within my analysis of the global justice movement.

The segments of the global justice movement that are particularly relevant to a consideration of bail have embraced the tactic of civil disobedience. This tactic has been one of the most visible characteristics of the anti-globalization demonstrations—spectators around the world have seen images of protesters blockading the entrances to the sites of international meetings, breaking windows of major banks and fast food enterprises, and battling with police in extended street fights. OCAP carries out frequent direct actions in government offices, taking delegations of supporters to demand the release of a social assistance payment or to stop the deportation of a refugee family.

These actions fall within the category described earlier as constructive civil disobedience, flowing from the analyses activists have made of neo-liberal globalization. Believing that there is no legitimate democratic process in which dissenters can participate, activists have created their own sources of political power through mass mobilization. These mass demonstrations aim to interfere with the ability of powerful states to carry forward the neo-liberal agenda. Lawbreaking is not itself the goal of the demonstrations, and it is done only insofar as it is necessary in order to have the desired effect. However in using the label civil disobedience to describe some of the tactics used by the global justice movement, it must be acknowledged that discretionary decisions by police about arrest and charging practices have severely narrowed the scope for lawful protest.

Virtually all political demonstrations involve some element of illegality, even if this means only that demonstrators have taken over part of a street or are obstructing a sidewalk.²⁵ A large range of offences could be applied to a protest including trespass, unlawful assembly, causing a disturbance, mischief, and breach of the peace. In practice this means that

²⁵ Jonathan B. Eaton, "Is Picketing a Crime?" (1992) 47 *Relations Industrielles* 100; Mary Heath, "Policing and Self-Policing in the Shadow of the Law" (1999) 17(1) *Law in Context* 15.

the police have a powerful discretion to decide when a demonstration has crossed the boundary between lawful protest and civil disobedience.

Thus where the state wishes to curb the power of a particularly effective social movement, the criminal law is a powerful tool. Canadian history is replete with examples of political movements that have been subject to criminalization and repression by the state. Thomas Berger has documented the use of such tactics against the Communist Party of Canada, First Nations people, as well as the arrest and detention of hundreds of people associated with a broad range of political dissent during the October Crisis.²⁶ The criminalization of dissent expands the boundaries of civil disobedience, raising the risk that the state can treat political expression as criminal in order to avoid civil rights obligations. As shall be seen, the bail system has played a significant role in the narrowing of space in which the global justice movement can carry out lawful political activity.

III. THE LAW OF BAIL IN CANADA

A. *The Function and Law of Bail in Canada*

Canadian bail provisions codified in the *Criminal Code* create a basic entitlement to bail.²⁷ Unless there is specific provision to the contrary, there is a presumption that an accused person will be released without conditions, and the onus rests with the prosecutor to show cause why an accused person should be detained or conditions should be imposed.²⁸ This basic entitlement is also reflected in section 11(e) of the *Charter*, which states that any person charged with an offence has the "right not to be denied reasonable bail without just cause."²⁹

The bail system is designed to achieve a number of goals, and all decisions made at a bail hearing must serve at least one of these goals. Courts, which administer the bail system, have interpreted the purposes of the bail system to include the need to ensure the accused's appearance in court, to protect the public, and to prevent interferences with the

²⁶ Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Irwin Publishing Inc., 1982).

²⁷ *Criminal Code*, R.S.C. 1985, c. C-46, s. 515; *R. v. Morales* (1992), [1993] 77 C.C.C. (3d) 91 at 106 (S.C.C.) [*Morales*].

²⁸ Section 515(6) of the *Criminal Code* sets out the situations in which the onus lies on the accused to demonstrate why they should be released pending trial.

²⁹ *Supra* note 3 at s. 11(e).

administration of justice.³⁰ More recently, another purpose was codified, providing that conditions may be imposed or bail may be denied where restrictions are required to maintain confidence in the administration of justice.³¹

A key principle underlying the bail system is the presumption of innocence, which is a right guaranteed by the *Charter* to all accused persons until they have been found guilty at the conclusion of a fair trial.³² Thus pretrial detention should be based on factors that are completely independent from the guilt or innocence of the accused since it is a proceeding where "guilt or innocence is not determined and where punishment is not imposed."³³

Where a person is released from detention with conditions, these should be the least onerous conditions required in the circumstances.³⁴ Section 515(2) of the *Criminal Code* provides for a ladder approach with a series of increasingly onerous conditions. The prosecutor is required to demonstrate why an order under paragraph (a) should not be made before any consideration is given to paragraph (b) and so on until the end of the list. All bail conditions imposed must be reasonable and must otherwise comply with the *Charter*.³⁵

The circumstances under which an accused person can be denied bail are set out in section 515(10) of the *Criminal Code*:

For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

(c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's

³⁰ Gary T. Trotter, *Law of Bail in Canada*, 2nd ed. (Toronto: Carswell, 1999) at 124-25.

³¹ *Criminal Code*, *supra* note 27 at s. 515(10)(c).

³² *Charter*, *supra* note 3 at s. 11(d); *Morales*, *supra* note 27.

³³ *Morales*, *supra* note 27 at 105.

³⁴ *Criminal Code*, *supra* note 27 at s. 515.

³⁵ *R. c. Manseau*, [1997] A.Q. No. 4553 (Qc. Sup. Ct. (Crim. Div.)), (QL) [*Manseau*].

case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.³⁶

These three grounds for detention are referred to as the primary, secondary, and tertiary grounds, and essentially state that a person can only be detained where such a detention forwards one of the goals of the bail system.

Detention of accused persons prior to trial has significant repercussions on their ability to defend themselves and to have a fair trial. Pretrial detention can lead to loss of income or even loss of employment. It can affect an accused person's social relationships with family and friends. Most troubling is the evidence demonstrating that a defendant held for pretrial detention is more likely to be convicted and is more likely to be given a custodial sentence upon conviction.³⁷

Given the impact on an accused's fair trial rights, pretrial detention should only occur in very narrow circumstances. This caution is supported by the Supreme Court of Canada's interpretation of the protection offered by section 11(e) of the *Charter*.³⁸ First, the denial of bail must occur only in a narrow set of circumstances. Secondly, the denial of bail must be necessary to promote the proper functioning of the bail system and must not be undertaken for any purpose extraneous to the bail system.³⁹

B. *Limiting Civil Rights: The Law of Bail Applied to Demonstrators*

Bail conditions imposed on accused persons are often geared towards preventing further criminal activity from occurring. When

³⁶ *Criminal Code*, *supra* note 27. In *R. v. Hall*, 2002 SCC 64, the Supreme Court of Canada struck down as unconstitutional the following words from section 515(10)(c): "on any other just cause being shown and without limiting the generality of the foregoing." The decisions discussed in Part IV, below, were rendered prior to the *R. v. Hall* decision.

³⁷ This is so even where factors such as the gravity of the offence have been controlled for: National Council of Welfare, *Justice and the Poor* (Ottawa: Minister of Public Works and Government Services Canada, 2000) at 30-32; Trotter, *supra* note 30 at 11. Remanded prisoners have less access to counsel. They have more difficulty accessing witnesses and gathering evidence. Remanded prisoners are also unable to take the steps to improve their social status that can have such an impact on their ultimate sentence. For example, they cannot get employment, return to school, or engage in volunteer activities.

³⁸ *Morales*, *supra* note 27; *R. v. Pearson* (1992), [1993] 77 C.C.C. (3d) 124 (S.C.C.) [*Pearson*].

³⁹ Despite the clear prejudice arising to remanded prisoners and the direction from the Supreme Court of Canada, the statistics demonstrate that pretrial detention is a frequent occurrence. In 1999-2000, 21 per cent of persons in custody were in remand on any given day, in all federal and provincial/territorial jurisdictions, representing approximately 31,600 people. Since 1995-1996, the average count of individuals in remand has increased by 27 per cent. See Statistics Canada, "Adult Correctional Services in Canada, 1999-00" (2001) 21 Juristat 5 at 3-4.

protesters are arrested, most of their alleged criminal activity has occurred at demonstrations. Bail conditions prohibiting participation in demonstrations may seem the most straightforward method of preventing future offences. However, the difficulty with attempting to prevent future criminal activity in this manner is that demonstrations depend on a number of constitutionally protected rights such as freedom of peaceful assembly, freedom of expression, and freedom of association.⁴⁰ Moreover, the Supreme Court of Canada has recognized that political expression and dissent lie at the very heart of the values protected by the freedom of expression guarantee in the *Charter*.⁴¹ Restrictions on political speech are justified only where they are absolutely necessary for the achievement of a very compelling objective. As such, conditions intended to prevent further criminal activity must be carefully drafted to protect civil and political rights.

Courts have held that while complete bans on demonstrations are not permitted, some types of restrictions on civil and political rights are justified.⁴² In revoking a condition prohibiting a peace activist from participating in demonstrations directed against a manufacturer of cruise missiles, the Ontario County Court in *R. v. Collins* stated that in order to override *Charter* guarantees of freedom of lawful assembly and expression, the prosecution must show

that the restriction furthers an important or substantial state interest unrelated to the suppression of expression, and the limitation sought on this basic freedom is no greater than is necessary or essential for the protection of the public.⁴³

District Court Justice Hogg suggested that in balancing these interests the following factors should be considered: the nature of the offence, the accused's criminal record, or other information to show violence or anti-social behaviour of a dangerous nature; all surrounding circumstances; whether the restrictions further a compelling state interest; and whether the restrictions are precisely drawn without any unnecessary erosion of rights. Restrictions on freedom of expression should not be imposed on the basis of a speculative concern of danger. However, the case did not explain which kinds of conditions would constitute permissible restrictions.

⁴⁰ *Charter*, *supra* note 3 at ss. 2(b), 2(c), 2(d).

⁴¹ *Libman v. Québec (Attorney General)*, [1997] 3 S.C.R. 569.

⁴² *R. v. Collins* (1982), [1983] 31 C.R. (3d) 283 (Ont. Co. Ct.) [*Collins*]; *Re Lawrence Francis* (1979), 4 W.C.B. 31 [*Francis*]; *Manseau*, *supra* note 35.

⁴³ *Supra* note 42 at 285.

Manseau is the leading case addressing that question.⁴⁴ The case involved a request for a bail review by three men who were arrested at a high-profile anti-poverty demonstration in Montreal in 1997.⁴⁵ During the demonstration, organized by the *Comité des Sans-Emploi*, a group of people went into a hotel and brought food from the buffet outside to the rest of the demonstrators. Three of those arrested were given a condition prohibiting participation in *any* demonstration until the end of the proceedings.

On review, the condition was varied. Justice Greenberg recognized the significant and important role that political protest plays in a liberal democracy:

In a [free and democratic society], everyone, as long as they act in a peaceful way and respect the rights of others, has the right to free expression, to speak out against social conditions and to effectively militate to change things, since no society is perfect.⁴⁶

The two accused who were identified as members of the *Comité*, one of whom was described as a leader, were given conditions prohibiting them from participating in demonstrations on private property and in non-peaceable demonstrations in public places. They were also required to leave any peaceable demonstration in the event that it became non-peaceable and unlawful. The third man, who was not a member of the *Comité*, was given a condition that he “keep the peace and be of good behaviour.”⁴⁷ It is questionable whether these conditions meet the requirements set out in *Collins*.

Although the requirement to keep the peace and be of good behaviour is frequently imposed as a bail condition, it is not a statutory condition—as it is for probation. Gary Trotter, the author of an authoritative volume on the law of bail in Canada, has argued that the condition is not appropriate in the bail context, where the presumption of innocence remains in effect.⁴⁸ The condition to be of good behaviour requires compliance with legal obligations in federal, provincial, and municipal statutes and regulatory provisions, as well as obligations in court orders.⁴⁹ The requirement to keep the peace prohibits a violent disruption

⁴⁴ *Supra* note 35.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at para. 40 [translated by author].

⁴⁷ *Criminal Code*, *supra* note 27 at s. 732.1(2)(a)

⁴⁸ *Supra* note 30 at 267.

⁴⁹ *R. v. R.(D.)* (1999), [2000] 138 C.C.C. (3d) 405 (N.C.A.).

or disturbance of public tranquility, peace, and order.⁵⁰ It may include behaviour that is not otherwise unlawful. It is arguable that this condition alone—to keep the peace and be of good behaviour—could include all public demonstrations, most of which breach the peace in one way or another. Such a condition places an accused at risk of breaching bail conditions for contraventions of provincial or municipal legislation or even for legal behaviour that does not necessarily place the public at risk.

This same critique could be applied to the condition prohibiting participation in non-peaceable demonstrations. The ambiguity surrounding the phrase non-peaceable, and its potential application to *any* demonstration, gives the police enormous discretion to arbitrarily decide when the condition has been breached.

In effect, the *Manseau* conditions constitute a complete ban on demonstrations, and thus could not be said to meet the requirement that the limitation on *Charter* rights be no greater than necessary. Nor could the activities carried out by the Comité—taking food to feed homeless people—reasonably be argued to pose a danger to the public. Nonetheless, as shall be seen, the conditions imposed in *Manseau* have provided a model for other bail cases involving protestors.

Despite potentially serious restrictions on key *Charter* rights, bail decisions are fairly insulated from review. The bail review process provided for by section 520 of the *Criminal Code* allows an accused person to have bail conditions reviewed by the Superior Court. However, no appeal to an appellate court is permitted. The only option available to an accused is to bring a bail review to the Superior Court every thirty days. Bail decisions that have reached appellate courts have generally done so by bringing a writ of *habeas corpus*⁵¹—a remedy that is not available for those who have been released on conditions. Further, people charged with breaching bail conditions they believe to breach the *Charter*, are prohibited from challenging the constitutionality of the condition at trial. The doctrine of collateral attack requires that challenges to bail conditions be done through the bail review process.⁵²

The result has been that there are few reported decisions that deal with the law of bail as it applies to civil disobedience and demonstrators. Trends that are obvious to activists are invisible in the reported case law. For this reason the material in the following case studies draws almost

⁵⁰ *R. v. S.(S.)* (1999), [2000] 138 C.C.C. (3d) 430 (N.C.A.).

⁵¹ See e.g., *Pearson*, *supra* note 38.

⁵² *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Lee (J.)*, [1999] 120 O.A.C. 286.

entirely from unreported decisions that are, nonetheless, well-known to activists.

IV. CRIMINALIZATION OF POLITICAL DISSENT THROUGH THE IMPOSITION OF BAIL CONDITIONS

A. *APEC Alert! and the Use of Undertakings*

One of the first mass anti-globalization demonstrations in Canada took place in Vancouver in late November 1997, in response to the APEC Conference held at the University of British Columbia (UBC) campus. Social justice groups were outraged that world leaders they considered to be brutal dictators and violators of basic human rights would attend the meetings. APEC-Alert!, a group organized on the basis of opposition to APEC and a commitment to non-violent civil disobedience, was one of the organizations that mobilized to demonstrate at the conference. The conference was greeted by one of the largest peaceful demonstrations in recent decades, which also included a significant civil disobedience component such as the blockading of roads leading to the conference site. The demonstrations were faced with one of the largest police mobilizations in Canadian history.

Media images of these events showing peaceful protesters being pepper sprayed, evidence of political interference in the RCMP plans, and some well-founded anger on the part of demonstrators lead to the calling of an inquiry into the RCMP's conduct. The resulting report, written by Commissioner Ted Hughes, attempts to provide a concrete statement on the appropriate balance between the policing of public order and the rights of protesters.⁵³ The Hughes Report documents a number of instances where police substantially interfered with the *Charter* rights of protesters who were engaged in entirely lawful conduct—for example, by removing a Tibetan flag,⁵⁴ by ordering the removal of signs expressing support for free speech and democracy,⁵⁵ and by arresting a protester on the basis that he

⁵³ Regarding the Vancouver demonstrations see: Commission for Public Complaints Against the RCMP, *Commission Interim Report: Following a Public Hearing Into the Complaints regarding the events that took place in connection with demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver, B.C. in November 1997 at the UBC Campus and at the UBC and Richmond detachments of the RCMP* (Vancouver: Commission for Public Complaints Against the RCMP, 2001) [Hughes Report].

⁵⁴ *Ibid.* at 242-62.

⁵⁵ *Ibid.* at 263-73.

was using a walkie-talkie.⁵⁶ Hughes also decried several instances of political interference by the federal government in the RCMP security plans.⁵⁷

Often overlooked among all of the RCMP actions that have come under fire in the time since the conference, is the extremely serious threat to political expression and participation arising out of some of the arrests of civil disobedients prior to the conference itself. One such case was the high-profile arrest of Jaggi Singh, the person the police believed to be the leader of APEC-Alert!.

1. Targeting leaders of civil disobedience organizations

Jaggi Singh's arrest, three days before the conference began, was dramatic. While walking on the UBC campus he was suddenly surrounded by four officers and taken to the ground with a police officer covering his mouth so that he could not scream. A police car then rushed up alongside the group, and he was thrown into the car, face down, with his hands handcuffed behind his back.⁵⁸ The car rushed off, with the whole operation completed in a matter of minutes. Singh was charged with assaulting a UBC security officer three weeks earlier, at another demonstration. The security officer claimed that his ear was injured when Singh spoke too loudly into a megaphone.⁵⁹

When Singh was eventually brought before a Justice of the Peace, a condition prohibiting him from being on the UBC campus or the University Endowment Lands was imposed. This effectively prohibited him from attending the site of the APEC conference or participating in any of the planned demonstrations.⁶⁰

It is clear from documents disclosed at the Inquiry that the police had planned to arrest Singh just prior to the demonstrations and to impose bail conditions that would prevent him from participating. But it is also clear that in so doing, the RCMP had a larger purpose. In an e-mail written by Staff Sergeant Plante to four detachments in the Lower Mainland, Plante stated the following:

⁵⁶ *Ibid.* at 291-300.

⁵⁷ *Ibid.* at 55-74.

⁵⁸ *Ibid.* at 195-97.

⁵⁹ *Ibid.* at 182.

⁶⁰ *Ibid.* at 199.

It is hoped that we can obtain support from Crown which may result in a charge of assault against the obvious leader of the group, JAGGY SINGH. It is our intention if we can obtain a "no-go UBC" with respect to SINGH, we may basically "break the back" of this group [APEC-Alert!].⁶¹

APEC-Alert! was one of the key groups that prepared for the conference. It also carried out a series of demonstrations and educational events in the months leading up to the APEC conference.

At the inquiry, Commissioner Hughes found that Plante's motive in Singh's arrest was "to eliminate Mr. Singh from campus on November 25 and 'break the back' of APEC Alert, thereby making the job of providing security easier than it likely would have been had Mr. Singh been present to give leadership to the protest movement."⁶² In so doing, the RCMP attempted to prevent Singh from participating in the demonstrations and expressing his opposition to APEC's policies.

Such a bail condition clearly violates the principles set out in *Collins*, which require that bail conditions restricting expression be imposed for reasons unrelated to the suppression of expression.⁶³ The bail conditions were imposed with the sole purpose of suppressing expression. Nor could Hughes identify any pressing state interest to justify such restrictions on Singh's *Charter* rights, given his finding that Singh did not pose a threat to any of the delegates to the conference, to the security guard in question, or to the public.

As troubling as this violation of Singh's *Charter* rights may be, it is equally troubling that these conditions were imposed as a direct attack on APEC-Alert!. Singh was singled out because he was seen as APEC-Alert!'s leader. It forms part of a trend, appearing throughout these case studies, of police targeting perceived leaders. This practice serves as a warning to other demonstrators to curb their behaviour, but may also have the effect of undermining activist organizations by removing key organizers who cannot easily be replaced. It involves the justice system, and the bail system in particular, in a direct attack on political organizing by groups expressing dissent to neo-liberalism.

⁶¹ *Ibid.* at 186. In British Columbia every potential criminal charge is subject to a "pre-charge screening" which allows the Crown to vet charges before they are laid. Therefore consent from the Crown would have been required before the assault charge could have been laid.

⁶² *Ibid.* at 211.

⁶³ *Supra* note 42 at 285.

2. Prohibiting participation in demonstrations

Singh was not the only demonstrator prevented from participating in the demonstrations by bail conditions, though he was the only specifically targeted individual. In advance of the demonstrations, the RCMP prepared a set of bail conditions to be imposed on all other demonstrators arrested. These conditions were much more explicit in prohibiting participation in the anti-APEC demonstrations than those imposed on Singh.

Corporal Harrison of the RCMP was the head of prisoner handling for the conference. He prepared an operational plan, part of which read: "The unit is responsible for ensuring that any prisoner released prior to Court be released before a Justice of the Peace with appropriate conditions to limit their access to any of the Conference venues or dignitaries."⁶⁴ Despite the fact that bail decisions are to be individually tailored to meet the goals of bail in each case, a blanket list of conditions was prepared to apply to all arrestees, regardless of their alleged offence or circumstances:

1. I will not attend within 100 metres of any venue or site where officials of foreign governments participating in the Asia Pacific Economic Cooperation may be in attendance between the dates November 18th, 1997, and November 26th, 1997, [named locations deleted];

2. I will, upon being notified by any peace officer that I am within 100 metres of an internationally protected person or official delegate to the Asia Pacific Economic Cooperation immediately depart from that location following the direction of such peace officer;

3. I will not participate or be found in attendance at any public demonstration or rally that has gathered together for the sole purpose of demonstrating against the Asia Pacific Economic Cooperation or any nation participating in the so named conference.⁶⁵

As events unfolded, the RCMP did make use of these prepared conditions.

On November 17, 1997, a tent city dubbed Democracy Village was set up outside the Student Union building. A satellite camp called Freedom's Outpost was set up outside the Museum of Anthropology on November 20, 1997, with the intention of symbolically reclaiming the campus and providing a focal point for information and discussion.⁶⁶

⁶⁴ Hughes Report, *supra* note 53 at 158.

⁶⁵ *Ibid.* at 158-59.

⁶⁶ For a description of the events, see Karen Pearlston, "APEC Days at UBC: Student Protests and National Security in an Era of Trade Liberalization" in Gary Kinsman, Dieter K. Buse and Mercedes Steedman, eds., *Whose National Security?: Canadian State Surveillance and the Creation of Enemies* (Toronto: Between the Lines, 2000) 267 at 271. See also Hughes Report, *supra* note 53 at 184.

Although the campers did not present any security threat to the APEC conference⁶⁷ and were exercising important citizenship rights to freedom of expression,⁶⁸ the RCMP ordered all the protesters to leave the grounds of the Museum of Anthropology on the evening of November 22.⁶⁹ When six individuals refused to leave, they were arrested. They were all required to agree to the planned conditions by signing an undertaking in front of the officer-in-charge to obtain their release.⁷⁰

To address the last condition first, a requirement that those arrested not participate in any anti-APEC demonstrations is clearly an explicit ban on protest, and is not constitutionally permitted.⁷¹ As the RCMP later agreed, such wording was “unfortunate.”⁷² Commissioner Hughes also noted that the ban on demonstrations went far beyond a police officer’s power to impose conditions of release as provided for in the *Criminal Code*.⁷³

Commissioner Hughes found that the first two undertakings were unlawful. The condition prohibiting the arrestees from being within one hundred metres of any conference delegate or Internationally Protected Person was over broad because it essentially created a “moving bubble zone around a large number of unnamed persons.”⁷⁴ The police bail provisions of the *Criminal Code* do not empower the police to make orders of this nature.⁷⁵ Prohibitions preventing the accused from being within one hundred metres of conference locations did not constitute reasonable bail, because the accused persons were arrested on very minor offences, and there was no hint of suspected violence or threat to the Internationally Protected Persons at the Summit nor to any other APEC officials.⁷⁶

These findings came too late for those arrested, because the police goal of preventing known civil disobedients from attending anti-APEC demonstrations was achieved, and this goal could not be effectively

⁶⁷ Hughes Report, *supra* note 53 at 55.

⁶⁸ *Ibid.* at 98.

⁶⁹ Hughes found that the removal of these demonstrators was directly attributable to improper interference by the federal government: *ibid.* at 101.

⁷⁰ As provided for in *Criminal Code*, *supra* note 27 at s. 498.

⁷¹ Collins, *supra* note 42; Francis, *supra* note 42; Manseau, *supra* note 35.

⁷² Hughes Report, *supra* note 53 at 162.

⁷³ *Criminal Code*, *supra* note 27 at s. 503(2.1).

⁷⁴ Hughes Report, *supra* note 53 at 64.

⁷⁵ *Criminal Code*, *supra* note 27 at ss. 497-99.

⁷⁶ Hughes Report, *supra* note 53 at 168.

challenged at a time when it would have made a difference. For example, when Singh attended the demonstrations on November 24 despite conditions prohibiting him from doing so, he was arrested for a second time. Regardless of his finding that Singh's bail conditions were inappropriate and unconstitutional, Hughes soundly denounced Singh for defying the court order: "With his deliberate disrespect for and disobedience of a court order and the undertaking which he had signed, this self-styled anarchist could not have expected otherwise from police officers sworn to uphold and respect the law."⁷⁷

Bail is an area of law over which police have a great deal of influence, either through the direct imposition of conditions prior to release from a station, or by recommendations made to Crown counsel.⁷⁸ It is also an area of law that can be effectively shielded from review because, as explained in Part III, above, there are no reviews by appeal courts for those who have bail conditions imposed by a Justice of the Peace.

The use of conditions to prohibit political participation by civil disobedience groups was condemned by Commissioner Hughes in his report on the RCMP actions at the anti-APEC demonstrations. This condemnation is significant, given the paucity of reported decisions on bail with respect to activists. Unfortunately, the public outcry regarding RCMP actions and the findings of the inquiry had little impact on policing at mass protests. In fact, the APEC inquiry has been surpassed by history, as policing at mass global justice demonstrations since 1997 make the APEC scandal appear tame in comparison. As the treatment of OCAP will show, the use of bail conditions to control dissent has continued unabated.

B. *"Breaking the Back" of the Ontario Coalition Against Poverty*

OCAP is an organization based in Toronto that has chosen direct action as its method of challenging poverty. Most of OCAP's work involves "direct action casework," through which the organization assists individuals who approach them for help with housing, social assistance, or immigration matters, among other things. OCAP begins by attempting to negotiate a just resolution with the relevant government agency. If this does not work

⁷⁷ *Ibid.* at 233-34. Hughes appears to be somewhat hasty in judging the police actions in the second arrest to have been appropriate. Since the second arrest was not the subject of a complaint, he did not investigate all of the circumstances surrounding it. Significantly he did not address the real motivation for the arrest, given that no charges—of breaching a bail condition or otherwise—were ever laid (Interview of Jaggi Singh 17 March 2002 [Singh]).

⁷⁸ Ontario, *Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) at 147, 151.

an “action” may be called where, for example, a delegation of people may hold a demonstration at the relevant office until a welfare cheque is released or a deportation order has been stayed. OCAP has successfully assisted hundreds of people in this way.

OCAP is better known for the large demonstrations it has organized, largely due to the major confrontations with police that have sometimes resulted. As OCAP has grown and its influence has spread beyond its relatively small membership, it has been faced with increasingly severe police repression. Massive police operations are now the norm at OCAP demonstrations, and arrests are increasingly common.⁷⁹

As has been seen, arrests related to demonstrations and political organizing can pose a challenge to the bail system, since concerns about *Charter* rights must be balanced with concerns about re-offence. Examining bail decisions concerning those arrested at OCAP demonstrations highlights the importance of achieving a proper balance. Through the bail system, participation in OCAP activities has been restricted and criminalized in two ways: through conditions that prohibit participation in demonstrations or association with OCAP and through the denial of bail for leaders of the organization. When all of these tactics are seen together, it appears that the criminal law is being used to try to break the organization.

1. Conditions that prohibit demonstrations and association

The case law relating to bail conditions and demonstrations makes it extremely clear that complete bans on protest are not permitted. This important principle was reaffirmed by Commissioner Hughes in his report on the APEC inquiry. Despite this seeming clarity, it is not uncommon for the Crown, when prosecuting persons arrested at OCAP protests, to seek conditions barring participation in all demonstrations. This trend began with a high profile demonstration at Queen’s Park on June 15, 2000.

The demonstration was called to protest three elements of the Ontario government’s social policies—the 22 per cent reduction of welfare benefits, the passage of the *Safe Streets Act*,⁸⁰ and the attack on tenant rights

⁷⁹ Although some would justify this response by the state by referring to OCAP as a violent organization bent on anarchy, I would argue that a careful assessment of OCAP demonstrations would show that any violence that has occurred has been in direct response to police attacks. Furthermore, many OCAP actions involving loud, angry, or insistent tactics have been wrongly characterized as violent—for example the peaceful occupation of a public park in 1999 to highlight the problem of homelessness. Militant organizing should not automatically be equated with violence.

⁸⁰ 1999, S.O. 1999, c. 8.

in the *Tenant Protection Act*.⁸¹ The organizers demanded that a delegation be given the opportunity to speak to the Legislature. When this request was denied, demonstrators moved forward, intent on entering Queen's Park to speak to the Legislature. What ensued was a spectacular confrontation between the police and demonstrators. The police called it a riot. The demonstrators claimed that they were attacked by the police.

Three leading members of OCAP were arrested several weeks after the demonstration and, as a condition of release, all three were ordered to abstain from communicating with any member of OCAP, and were prohibited from participating in any demonstration, march, or protest. On review before Justice Grossi, these conditions were varied based on the principles in *Manseau*.⁸² The new conditions read:

From now until the end of the current proceedings, each is prohibited from participating in demonstrations taking place in a public place or on public land unless said demonstration is peaceable and lawful. From now until the end of the current proceedings, if while participating in or being present at a demonstration which was peaceable and lawful, said demonstration becomes non-peaceable and/or unlawful, each must leave the premises immediately. And I would further add the condition: From now until the end of the current proceedings, each is prohibited from participating in organizing, aiding or abetting any unlawful acts or demonstrations.⁸³

These new conditions were then imposed on all those arrested at the same demonstration.

On the surface, the latter condition merely imposes a requirement that all individuals are required to meet—no one is permitted to organize, aid, or abet unlawful acts. The requirement that the accused leave any demonstration that has become unlawful seems to address the concern that the accused will re-offend at future demonstrations. As in *Manseau*, these conditions effect a blanket ban on protest, interfering with political expression.

First, as discussed in Part II, above, the line between lawful and unlawful protest is difficult to pinpoint. There are a large range of offences that could be applied to even the most peaceful demonstration. In the abstract, it is possible for a person to breach bail conditions simply by attending a demonstration for which a permit has not been obtained. Second, the prohibition on being present at a non-peaceable demonstration is potentially even broader than the restriction to lawful demonstrations, since it does not even require that any illegal act occur. Third, these bail

⁸¹ 1997, S.O. 1997, c. 24.

⁸² *R. v. Clarke*, [2000] O.J. No. 5738 (Ont. Sup. Ct. Just.) (QL) [*Clarke I*].

⁸³ *Ibid.* at para. 15.

conditions place accused people at risk of breaching their bail conditions based on the illegal or non-peaceable activity of *other people*. Breach occurs by the accused person's mere presence during the commission of a non-peaceable or unlawful act at a demonstration. It would be difficult to imagine any demonstration that a person under such conditions could attend without resulting in a breach.

Although Justice Grossi was attempting to satisfy his concern that the three accused would engage in further acts of civil disobedience, these conditions limit far more than civil disobedience. They limit the exercise of basic civil rights, including freedom of expression, association, and peaceful assembly, as well as interfering with political organizing for social change. These limitations are particularly troubling when they arise in a context where the presumption of innocence remains a guiding principle.

One of the other conditions that was challenged in *Clarke 1* was an order that all three accused abstain from communicating or associating with any member of OCAP. At the time, all three were members of the OCAP executive. One was employed on a full-time basis by the organization. Conditions of non-association with co-accused or witnesses are fairly common in the context of bail. These types of conditions are imposed in order to protect victims from harassment by an accused and to prevent co-accused from colluding with each other in terms of their evidence.⁸⁴ There must be a legitimate basis for restricting the accused person's associations and activities prior to trial, as the constitutionally protected freedom to associate is implicated.⁸⁵ The non-association condition in this case went far beyond the typical condition, prohibiting the three accused from associating with an entire political organization.

Justice Grossi struck down this condition, acknowledging that OCAP carries out very important work with and for marginalized people in the City of Toronto, which the non-association condition would have prohibited. Justice Grossi stated that the condition was "over broad in that it restricts communication for peaceful and lawful employment purposes and association with the non-violent elements of the organization."⁸⁶ This holding is in keeping with Commissioner Hughes's finding at the APEC inquiry that mere membership in a group, "some of whose members may have broken the law or may intend to break the law," does not justify overriding a person's *Charter* rights.⁸⁷

⁸⁴ Trotter, *supra* note 30 at 259.

⁸⁵ *Ibid.* at 260.

⁸⁶ *Clarke 1*, *supra* note 82 at para. 16.

⁸⁷ Hughes Report, *supra* note 52 at 205.

Despite this precedent, it is now routine in cases involving OCAP activists for the Crown to demand a condition that they be prohibited from "communication or association, directly or indirectly, with any member of the Ontario Coalition Against Poverty and not to be found at any public or private meetings of the Ontario Coalition Against Poverty."⁸⁸ This condition is requested even in cases where the basis of the charge before the court has no connection to OCAP.⁸⁹

An Ontario Common Front demonstration on October 16, 2001, provides an excellent example of the imposition of the non-association condition in circumstances that only indirectly involved OCAP. The Ontario Common Front was a loose coalition of approximately seventy social justice and labour organizations from across the province. OCAP was one of these seventy member organizations. The stated goal of the demonstration was to shut down Bay Street, in order to highlight the links between Ontario government policies and big business. Demonstrators defied police attempts to keep them out of the financial district, but remained peaceful. Nonetheless, there were approximately forty people arrested, twenty-three of which were charged criminally. All twenty-three were required to agree to a non-association with OCAP condition in order to secure their release from custody, regardless of the fact that the demonstration was organized by the Ontario Common Front. No other member organizations of the Ontario Common Front were named.

The impact of imposing such a condition on all activists connected to OCAP, however tangentially, is fairly predictable. Where the condition is imposed in sufficient number, it affects the ability of the organization to function by preventing new members from joining, and by preventing current members from participating in the work of the group. The persistence on the part of the Crown in requesting restrictions on association with OCAP must be assessed in light of this foreseeable consequence. If the motive is to break the back of the Ontario Coalition Against Poverty, the condition was not imposed to meet a legitimate purpose of the bail system and violates the freedom to associate.

⁸⁸ *R. v. Porter* (27 June 2001), Toronto 5259/01 (Ont. Ct. Just.) at 7 (Show Cause Hearing).

⁸⁹ The same Crown Counsel has appeared at many OCAP related bail hearings. He is well aware of the *Clarke* decision regarding the constitutionality of the non-association condition with OCAP, having acted for the Crown in that matter. In *Antonioni*, a homeless and developmentally disabled man who had received a great deal of support from OCAP, was arrested for assault when he spit on a security guard who was forcing him to get off the park bench where he was sleeping. He was among those awaiting trial on charges arising from the Queen's Park demonstration. At his show cause hearing on the security guard assault, he was told by the Crown Attorney that if he did not agree to the "non-association with OCAP" he would not be granted bail: *R. v. Antonioni* (15 June 2001), Toronto (Ont. Ct. Just.) (Show Cause Hearing, Jewitt J.P.).

2. Detention and denial of bail of perceived leaders

On at least three occasions, bail has been denied altogether to persons arrested at an OCAP demonstration: *R. v. San Martin*,⁹⁰ *R. v. Lee-Popham*,⁹¹ and *R. v. Clarke and Zareian*.⁹² All three cases involved accused persons who were described by Crown Counsel as leaders or ringleaders. All three were released after a bail review, demonstrating that in some situations the bail review process can be effective in overturning unjustifiable detention orders. In *Lee-Popham* and *Clarke 2*, each accused was seeking to be released on bail after having been charged with breach of a condition that they immediately leave any demonstration that became non-peaceable or unlawful, and that they keep the peace and be of good behaviour. These two cases therefore provide an opportunity to examine the way in which bail conditions restricting political activity can build up over time, thus justifying further restrictions when they are broken.

Sean Lee-Popham was arrested at an OCAP action on June 12, 2001. The demonstration was called to draw attention to the fact that there have been up to one thousand evictions of tenants every month in Toronto since the introduction of the *Tenant Protection Act* by the Ontario government. OCAP members allegedly went to the offices of Ontario's Finance Minister and carried out a symbolic eviction—allegedly removing the furniture and throwing it in the street. At the time Lee-Popham was out on bail, under the same conditions imposed by Justice Grossi in *Clarke 1*, which meant that he bore the onus of showing why he should be released.⁹³

Lee-Popham was described by police as being part of a "core nucleus of ... radical extremists."⁹⁴ The Crown revoked his former bail under section 524 of the *Criminal Code* and requested that he be detained under the secondary and tertiary ground. The Justice of the Peace willingly obliged, after she reserved her judgment for one week, during which time Lee-Popham remained in detention. She denied bail on the secondary ground for the following reasons:

⁹⁰ *R. v. San Martin* (16 June 2000), Toronto (Ont. Ct. Just.) (Show Cause Hearing) [*San Martin*].

⁹¹ *R. v. Lee-Popham* (27 June 2001), Toronto 104998-11 (Ont. Ct. Just.) (Judgment at Show Cause Hearing) [*Lee-Popham*].

⁹² *R. v. Clarke and Zareian* (29 June 2001), Toronto 4998/01, 4609/01, 4929/01, 4938/01 (Ont. Ct. Just.) (Judgment at Show Cause Hearing) [*Clarke 2*].

⁹³ *Criminal Code*, *supra* note 27 at s. 515(6)(c).

⁹⁴ *R. v. Lee-Popham* (21 June 2001), Toronto 104998-11 (Ont. Ct. Just.) (Transcript of Show Cause Hearing) at 45.

The offences before this court, if taken individually, are serious. Taken collectively, they are frightening. The evidence describes a group of people, including Mr. Lee-Popham. They entered a business premises in Whitby, terrorized four employees, ransacked the premises, threw glue-filled files, desks, and computers onto the street. ... The Crown's case, in my opinion, is solid. There is positive identification by several independent eye-witnesses, as well as convincing statements by the terrified employees of the business establishment.⁹⁵ ... All offences before us, including both Toronto and Whitby incidents are offences that put the general public in jeopardy. ... From evidence heard to date, *he has indeed breached his outstanding bail conditions.*⁹⁶

The Justice of the Peace then concluded that since Lee-Popham had been "[thumbing] his nose at court orders,"⁹⁷ he would continue with his criminal activity and would interfere with the administration of justice. He was therefore denied bail on the secondary ground.

By basing her decision to deny bail on her finding that Lee-Popham had breached his bail conditions, Justice of the Peace Kay clearly violated the presumption of innocence.⁹⁸ Although she may have felt that the case against Lee-Popham was strong, if the presumption of innocence is to have any meaning, the decision to deny bail cannot be based on a finding that the person is guilty. At a bail hearing the accused does not have many of the procedural and evidentiary protections that are available at trial, and generally is not able to put forward a defence. The strength of the Crown's case can be assessed as one factor, indicating that the accused is likely to flee, for example. But it remains only one factor to be considered among others.⁹⁹ The same error was made in *Clarke 2*, where a finding that Clarke was guilty of breaching his bail conditions was the basis for denying bail on the secondary ground.

The tertiary ground, found in section 515(10)(c) of the *Criminal Code*, provides for detention where it is necessary to deny bail in order to maintain confidence in the administration of justice. Section 515(10)(c) delineates four factors to be considered in making this determination: the apparent strength of the prosecution's case, the gravity of the nature of the

⁹⁵ A reading of the transcript of the bail proceedings indicates that there was, in fact, only one eyewitness identification. There were no statements from the "terrified employees" either identifying him or describing the actions of anyone that could possibly have been the accused: *Lee-Popham, supra* note 91.

⁹⁶ *Lee-Popham, supra* note 91 at 4-7 [emphasis added].

⁹⁷ *Ibid.* at 5.

⁹⁸ It should be noted that this was only one of many errors in the judgment. Other notable errors included findings of fact that could not be supported by the record and a decision to deny bail on the tertiary ground on the basis only that "the notional member of the public would be alarmed" if Lee-Popham was released on bail: *ibid.* at 8.

⁹⁹ Trotter, *supra* note 30 at 128-29.

offence, the circumstances surrounding its commission, and the potential for a lengthy term of imprisonment. As interpreted by the Supreme Court of Canada, the provision allows a judge to deny bail only if that judge is satisfied that, in view of the four specified factors and related circumstances, a reasonable member of the community would be satisfied that denial of bail is necessary to maintain confidence in the administration of justice.¹⁰⁰ This provision appears to be geared toward allowing the courts to consider the possible public reaction to the release of accused people, particularly where they have committed an offence that has generated a lot of publicity and public outcry. In effect, Parliament has provided the courts with an utterly discretionary ground for detention.¹⁰¹ As discretionary as this ground appears, at the time that these cases were decided, the tertiary ground was even more broadly construed; prior to the Supreme Court's decision in *R. v. Hall*, courts were also permitted to deny bail "on any other just cause being shown."¹⁰² The dangers of misuse, which are so likely to occur when courts have total discretion to deny bail, are readily apparent in *San Martin*.¹⁰³

Magaly San Martin, an activist who has been vigorous in opposing police brutality, was arrested shortly after the OCAP demonstration at Queen's Park in June 2000. She is originally from Chile, though she has lived in Canada for close to 30 years. The police described her as a ringleader. At the end of the bail hearing, Justice of the Peace Lewin ordered the detention of the fully employed Canadian citizen and Ph.D. student with no prior record or arrests. She was denied bail on the tertiary ground:

The secondary ground gives me some concern because it's obviously not a one-shot affair. Being a ringleader she's been involved in these prior or before.

The greatest concern I have is the public at large, what they would think, the tertiary ground.

The public would be outraged, in my opinion, when the Legislature of this province is stormed by protesters and when they don't get their way they then turn to some form of violence, either rocks, bottles, cans, whatever they throw, to get their way. This is not a democratic way of doing things. It may be very well from where this lady comes from that they do things like that, but this province [interruption as spectators in the courtroom are cleared after a disruption] ... this may be the way they do—do protests or carry on from

¹⁰⁰ *R. v. Hall*, *supra* note 36 at para. 41.

¹⁰¹ For a critique of the tertiary ground, see: Louis P. Strezos, "Section 515(10)(c) of the Criminal Code: Resurrecting the Unconstitutional Denial of Bail" (1998) 11 C.R. 43 at 48.

¹⁰² *R. v. Hall*, *supra* note 36 at para. 18.

¹⁰³ *Supra* note 90.

where this lady comes from, but in this country, this is democratic, go—if you don't like what we're doing, but you don't riot on the Legislative steps.

I'm satisfied that on the tertiary ground alone, and that's the only ground that I find that the Crown has satisfied me, this lady will be detained.¹⁰⁴

When asked by defence counsel to reconsider his comments, Justice of the Peace Lewin repeated his comments about Chile *three times*.¹⁰⁵ San Martin was forced to remain in jail for a further four days, until the decision was easily overturned on review. She was released on a \$1,000 surety with a condition that she stay away from the Legislature and not possess weapons.¹⁰⁶ San Martin made a complaint to the Justice of the Peace Review Council regarding Justice of the Peace Lewin's comments. In a letter to San Martin dated July 9, 2001, the Council stated that while Justice of the Peace Lewin's comments with respect to Chile were inappropriate and unacceptable, his decision was based on legal criteria alone.

As can be seen, the language employed in the prosecution of these leaders is inflammatory, ranging from explicit xenophobia to moral hysteria. As a further example, in seeking (and achieving) pretrial detention of OCAP organizer John Clarke, the Crown Prosecutor repeatedly referred to him as a terrorist.¹⁰⁷ Targeting leaders of social movements is a time-honoured tactic employed by the state in order to intimidate and to attempt to curb the effectiveness of the movement.¹⁰⁸ The loss of leadership can be a great loss to an organization, and can force it to focus on legal matters at the expense of its everyday advocacy.

Attempting to render an organization ineffective by removing its key organizers is far beyond the purposes of bail. Nevertheless, implicit in the operation of the three tactics that have been discussed—prohibitions on protest, pretrial detention of leaders, and conditions preventing participation in OCAP—is a concerted attempt to criminalize OCAP, to demonize OCAP in the public eye, to frighten potential recruits to the

¹⁰⁴ *Ibid.* at 16-17.

¹⁰⁵ *Ibid.* at 17-18.

¹⁰⁶ "Accused in Riot Calls JP 'Racist'" *The Toronto Sun* (20 June 2000) 5.

¹⁰⁷ *Clarke 2*, *supra* note 92 at 143.

¹⁰⁸ See Michael E. Deutsch, "The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists" (1984) 75 *Journal of Criminal Law and Criminology* 1159; Richard Eiden & Dolores W. Warner, "Defense of Political Activists: Some Pretrial Procedures in Criminal Defense Arising from Demonstrations and Other Political Activity" (1986) 18 *University of West Los Angeles L. Rev.* 77 at 79; I. Umoja, "Misuse of the Grand Jury Apparatus to Indict African (Black) Political Activists in the U.S.A." (1986) 13 *S.U.L. Rev.* 63.

organization and to break the organization itself. Whether these results are intended or not, they are a predictable outcome.

The three tactics also operate together, placing OCAP members in situations where they must choose which *Charter* right they wish to maintain. For example, in order for one member to be released from pretrial detention, he had to agree not to attend *any* demonstrations.¹⁰⁹ Others have been forced to agree to not attend demonstrations in order to have a non-association with OCAP condition varied. The result is an organization facing enormous legal fees, with many of its key members either in the position that they cannot attend demonstrations or that they cannot associate with OCAP itself—and all this is accomplished through the normal functioning of the bail system.

C. *Demonstrations at the Summit of the Americas, Quebec City 2001*

The protests at the Summit of the Americas in Quebec City at the end of April 2001 were widely anticipated by those in the global justice movement. The demonstrations were called to protest the creation of the Free Trade Area of the Americas (FTAA), a free trade agreement that protesters argue is fundamentally undemocratic. They argue that the agreement will give corporations control over key social policies, leading to the privatization of resources and services. Civil disobedience was to be one aspect of the demonstrations, as some protestors hoped to have an impact on the ability of the world leaders to pursue their free trade agenda.

The preparations for the protests triggered the largest police operation in Canadian history (an honour previously reserved for the anti-APEC demonstrations).¹¹⁰ Police predicted that there would be hundreds of arrests, and the Orsainville prison was emptied to prepare for this eventuality. Protesters were greeted by a security fence surrounding much of the Old City, which effectively shielded the Summit participants from any view of the protests. This fence became the target of much of the civil disobedience over the course of the weekend, as protesters made repeated attempts (occasionally successful ones) to breach the security perimeter.¹¹¹

As predicted, there were hundreds of arrests over a three-day period, mostly of those protesting near the security fence. Given the huge number of arrests, it is not surprising that there were lengthy processing delays. However, there is evidence of a deliberate effort to use bail

¹⁰⁹ *Clarke 2, supra* note 92.

¹¹⁰ Hughes Report, *supra* note 53 at 14.

¹¹¹ For an account see McNally, *supra* note 22.

provisions in order to keep protesters off the streets for the duration of the Summit.

Several weeks before the Quebec City demonstrations, a report appeared in the (*Montreal*) *Gazette* about a defection from the special eight-member team that had been put together to prosecute any protesters arrested at the Summit.¹¹² One member of the team resigned to protest an order by provincial Justice Minister Paul Begin, directing them to delay all bail hearings for a maximum of three days as a way of “keeping them [protesters] off the street for the duration of the Summit.”¹¹³ This order is in direct violation of the bail provisions of section 503 of the *Criminal Code*, which provides that upon arrest a person must be brought before a Justice within twenty-four hours where a Justice is available unless that person is released by the police at an earlier time. Where a Justice is not available within twenty-four hours, the person must be brought before a Justice as soon as possible—however the delay before remand cannot exceed three days.¹¹⁴ The only exception to a bail hearing within twenty-four hours occurs when there is no Justice available.¹¹⁵ Thus a high-level government representative was giving direct orders to prosecutors, which would have the effect of unlawfully detaining protesters, for the express purpose of preventing demonstrators from expressing their opposition to the FTAA.

Despite the defection of one member of the prosecution team, all evidence indicates that the rest of the special team of prosecutors followed these orders. The *Ligue des droits et libertés*, a group engaged in legal observation throughout the Summit, found that very few of those arrested were arraigned within the usual twenty-four-hour period and that many did not have a bail hearing within seventy-two hours.¹¹⁶ Since the demonstrations occurred over the course of the weekend, the prosecutors argued that the days spent in custody over the weekend were not to be included when assessing whether those arrested were brought before the court within three days—an interpretation that cannot be supported by the legislation.

¹¹² William Marsden, “Prosecutors Say They Are Being Used to Control Protestors” *The (Montreal) Gazette* (5 April 2001) A6.

¹¹³ *Ibid.*

¹¹⁴ *Criminal Code*, *supra* note 27 at s. 516.

¹¹⁵ *Ibid.* at s. 503(2).

¹¹⁶ Sam Boskey, “Report: Observing Civil Liberties at the Québec Summit” (2001) 63 *Socialist Studies Bulletin* 60 at 63.

Furthermore, most arrestees were denied access to a lawyer until their bail hearing began.¹¹⁷ The Quebec Legal Collective had provided lawyers to assist any protesters arrested at the Summit. When the lawyers asked for a few minutes to consult with their clients, most of whom had not had an earlier opportunity to speak with their lawyer, the judge presiding insisted on adjourning the bail hearing to the next day.¹¹⁸ Lack of access to a lawyer was compounded by the fact that bail hearings took place by video-conference, with the accused remaining in the prison. Since the lawyer representing the accused was in the courtroom, it was very difficult for the lawyer to give, and for the client to receive, meaningful advice.

At the end of the Summit, the *Ligue* was unable to come to any conclusion other than that the police responsible for the Orsainville prison were deliberately terrorizing the people who found themselves there.¹¹⁹ The special team of prosecutors contributed to this atmosphere of terror by illegitimately forcing those arrested to spend more time in jail for the improper purpose of preventing them from taking part in the demonstrations against the FTAA.

Jaggi Singh, the presumed leader of APEC-Alert!, reappeared among those detained in the Orsainville prison. He found himself arrested in virtually the same fashion as he was in British Columbia. Six police officers quickly surrounded him as he was peacefully walking at some distance from the site where the apparent riot was taking place. Within thirty seconds he was grabbed and thrown, face first, into a waiting vehicle.¹²⁰ He was charged with possession of a dangerous weapon, participating in a riot, and breach of recognizance.

The evidence lead against him at his bail hearing, five days later, consisted of the testimony of an arresting officer, who described Singh as having a leading role in the demonstrations. The officer stated that Singh gave direct orders to so-called agitators to advance to the perimeter and to take down the fence.¹²¹ After the fence was torn down, Singh was described as having ordered the advancement of a large catapult to be used for

¹¹⁷ *Ligue des droits et libertés, Violations des droits et libertés au Sommet des Amériques, Québec Avril 2001* (Montréal: Ligue, 2001) [Ligue Report] at 27-28.

¹¹⁸ For further information on the Québec Legal Collective see online: <<http://www.quebeclegal.org>> (date accessed: 1 January 2003).

¹¹⁹ Ligue Report, *supra* note 117 at 54.

¹²⁰ *R. c. Singh* (25 Avril 2001), Québec 200-01-062331-016, 200-01-062332-014 (C.Q.) at 23 (Transcript of Show Cause Hearing) [*Singh 2a*].

¹²¹ *Ibid.* at 11.

launching Molotov cocktails.¹²² The officer stated that identity was not in issue because all of the police officers in his section received pictures of Singh *before* the demonstration.¹²³

The problem with this testimony was that the officer had not witnessed any of the events he described, nor did he know the source of the information. He was not able to say how many people along the chain of command had communicated the information about Singh's actions before it got to him.¹²⁴ While hearsay is permitted in a bail hearing, the court should be cautious in attributing too much weight to such information.¹²⁵ This is particularly so where, as here, the origins of the information are unknown. Since the laws of evidence are relaxed at the bail stage, it is even more important that courts not make findings of guilt in this forum.

Singh's case is an excellent example of how bail conditions, such as those described with respect to OCAP, have the effect of restraining protest. At the time of his arrest, Singh was out on bail with respect to two other demonstrations. First, he was arrested at a demonstration in the Montreal suburb of Westmount in May 2000, and charged with unlawful assembly, causing a disturbance by yelling and mischief (spray painting). At this bail hearing he was described as a ringleader, and released on bail conditions virtually identical to those imposed on OCAP members, except that they were limited to the City of Westmount. As stated orally by Justice Ham in court, the conditions were to be of good conduct; to keep the peace; "to not participate in any demonstration on private property in the City of Westmount without having previously obtained the consent, the express consent of the owner"; "to not participate in any demonstration in any place or public lot in the City of Westmount unless such demonstration is peaceful and legal"; and if participating or found on the premises "where a demonstration which is peaceable in origin and legal and, during which such demonstration becomes not peaceable or illegal, to immediately leave the premises without any delay."¹²⁶ Unfortunately, the written version of the conditions did not include the reference to the City of Westmount, a fact that has caused significant problems for Singh ever since.

¹²² *Ibid.* at 17.

¹²³ *Ibid.* at 20, 50.

¹²⁴ *Ibid.* at 56.

¹²⁵ Section 518(1)(e) of the *Criminal Code* permits the justice or judge to hear any evidence it deems to be credible and trustworthy: *supra* note 27 at s. 518(1)(e).

¹²⁶ *R. c. Singh* (2 May 2000), Montreal 1005-7095 (M.C.) [*Singh 1*] at 9-10 (Transcript of Decision at Show Cause Hearing).

Singh was arrested again at a demonstration organized against a meeting of the G-20 in October 2000. The police accused him of inciting and leading a crowd of one hundred people with masks and baseball bats. The charges arising from the demonstration were participating in a riot and violating his bail conditions from the Westmount protest—even though these conditions were only supposed to apply in Westmount. The charge of violating the Westmount conditions was eventually dropped, but in the meantime he was released on conditions extending the Westmount recognizance to all of Canada. At the time of his arrest in Quebec City, neither the Westmount nor the G-20 charges had gone to trial, and both sets of conditions remained in place. However, the Crown prosecutor was only aware of the Westmount conditions throughout Singh's bail hearing.¹²⁷

At the end of his bail hearing, Singh was denied bail on the secondary ground. In doing so, Justice Mercier relied on the hearsay testimony of the police officer, whom he described as having personally seen Singh directing the riot.¹²⁸ The court dismissed the direct evidence of a witness who was involved in constructing and directing the catapult and who testified that Singh had nothing whatsoever to do with the catapult that was designed to throw teddy bears.¹²⁹ Then, having described the statutory provisions providing for the denial of bail as exceptions to the presumption of innocence,¹³⁰ Mr. Justice Mercier gave the following reasons for ordering Singh to be remanded into custody:

An accused who, on May 2, 2000, a little less than a year ago, undertook before a tribunal to not participate in any—I will use the precise terms here—to not participate in any demonstration on public property unless that demonstration is peaceable and lawful. So I have just one question. An individual who, after having entered into such an undertaking, and who then does not respect it, how can he convince the court that if he is released he will respect any conditions that the Court should impose?¹³¹

Armed with a transcript demonstrating that the conditions he was charged with breaching were only to apply in Westmount, Singh intended to request a bail review of the decision to deny him bail. When the Crown prosecutor discovered the G-20 conditions, he agreed to allow Singh to have a new bail hearing on the condition that charges for breaching the G-

¹²⁷ Singh, *supra* note 77.

¹²⁸ *R. c. Singh* (26 Avril 2001), Québec 200-01-062331-016, 200-01-062332-014 (C.Q.) [*Singh 2b*] at 23 (Transcript of Decision at Show Cause Hearing).

¹²⁹ *Singh 2a*, *supra* note 120 at 94-97.

¹³⁰ *Singh 2b*, *supra* note 128 at 54.

¹³¹ *Ibid.* at 57-58 [translated by author].

20 conditions be substituted for the charge of breaching the Westmount conditions. Singh was released at the end of the second bail hearing on the G-20 conditions with the following additions: he was prohibited from using a megaphone in Canada and prohibited from being a leader. The saga does not end there. After Singh made a speech at an anti-war demonstration—using a microphone—he was charged both with violating his condition that he not use a megaphone and that he not be a leader. Currently Singh is facing approximately six different charges for breaching bail conditions.¹³²

These examples demonstrate the dangers of imposing bail conditions limiting political activity as well as the way that they can accumulate against an activist who refuses to curb his political work. An arrest at a demonstration leads to a bail condition limiting participation in future protests including lawful ones. It may be arguable that such a condition represents a reasonable response to an activist arrested for carrying out civil disobedience. However, Singh's presence at another demonstration lead to another arrest, and so on, until he is now prohibited from carrying out activities that are otherwise completely lawful and beyond reproach. The criminalization of dissent, and the attack on movement leadership, could not be more explicit than it is for Jaggi Singh.

V. CONCLUSIONS: THE GLOBAL JUSTICE MOVEMENT AND TERRORISM

The global justice movement is raising important questions about democracy and equality, both globally and locally. Because activists believe that there are no legitimate democratic processes through which they can express their opposition to neo-liberalism, global justice activists have created their own sources of political power through mass mobilization. Civil disobedience is one of the tactics used by the movement to interfere with the ability of powerful states to carry forward the neo-liberal agenda. The current public debate about the merits of free trade, neo-liberalism, and their effects can be attributed to the organizing efforts of the movement as a whole.

One of the major obstacles the movement faces in pushing forward its (sometimes contradictory) vision for global justice, is the criminalization of political activity such as association and assembly. The bail system has played a significant role in this disturbing trend. When protesters are arrested at demonstrations in which civil disobedience occurs, they are invariably released on conditions that limit their ability to participate in

¹³² Singh, *supra* note 77.

political activity. These conditions—which include requirements to keep the peace and be of good behaviour, to leave any demonstration that becomes non-peaceable or unlawful, or to avoid association with militant political organizations—are so broadly stated that they include almost any collective political action. Thus activity that is so crucial for a free and democratic society that it is protected by the *Charter*, such as political expression or assembly, becomes unlawful. Breaches of these sorts of conditions can lead to the imposition of even stricter conditions. Where activists charged with breaching bail conditions are perceived as movement leaders, they are at risk of being denied bail, often in violation of the presumption of innocence.

It is noteworthy that all of the case studies refer to events that took place before the attacks on the World Trade Centre on September 11, 2001. In the uncertain times that followed that tragic event, concerns were expressed by many that the space available for exercising important civil and political rights would contract. These concerns were compounded, in the Canadian context, by the hasty passage of the *Anti-Terrorism Act*.¹³³ Although the men who piloted the planes into the World Trade Centre seem a world apart from the youthful activists filling the streets of Quebec City, the kinds of demonstrations and tactics that have characterized the global justice movement are not excluded from the ambit of the new *Act*. Rather, it appears that the *Act* has been specifically designed to capture them.

The new definition of “terrorist activity” is the most important section of the *Act*, since it dictates the application of all of the other provisions. Section 83.01(1) provides that “terrorist activity” includes:

an act or omission, in or outside Canada,

(i) that is committed

- (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
- (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

¹³³ *Anti-Terrorism Act*, S.C. 2001, c. 41. For an analysis of the new legislation see the collection of essays in Ronald J. Daniels, Patrick Macklem & Kent Roach, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

- (A) causes death or serious bodily harm to a person by the use of violence,
- (B) endangers a person's life,
- (C) causes a serious risk to the health or safety of the public or any segment of the public,
- (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
- (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C).¹³⁴

This definition is extraordinarily broad and includes many of the tactics used by global justice activists.¹³⁵ The statement “an act committed for a political purpose with the intention of compelling a government or an international organization to do or to refrain from doing any act, with the added intention of causing a serious disruption” could be a definition of terrorist activity within the *Act* or a definition of the actions of the protesters who marched in Quebec City to pressure Summit participants into changing their approach to the global economy. In fact, the legislative definition of terrorist activity is broad enough to capture many different kinds of political activity, including many of the tactics used historically by the labour movement.¹³⁶

The global justice movement is traversing a different political and legal terrain, the full consequences of which it is still too early to discern. However, the political context is such that it is likely that the trends observed in the law of bail as it applies to activists will continue without serious opposition. There is also the possibility that attacks on civil and political rights through the bail system could become worse as the state makes use of the new tools it has at its disposal, including new reverse onus provisions for terrorist offences, preventive detentions, and peace bond provisions.¹³⁷

¹³⁴ *Criminal Code*, *supra* note 27 at s. 83.01(1)(b).

¹³⁵ David Schneiderman & Brenda Cossman, “Political Association and the Anti-Terrorism Bill” in Ronald J. Daniels, Patrick Macklem & Kent Roach, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 175.

¹³⁶ *Ibid.* at 180-81.

¹³⁷ For a description of the scope of these powers, see Gary Trotter, “The Anti-Terrorism Bill and Preventive Restraints on Liberty” in Ronald J. Daniels, Patrick Macklem & Kent Roach, *supra* note 135 at 239.

The Canadian state—through the police, government, and judiciary—has made the choice to treat political protest and dissent as a criminal matter. This reinforces, at least for social justice activists, the precedence of the rights of corporations and foreign dictators visiting Canada. Given the importance of the issues raised by the global justice movement, the tactics employed to suppress dissent must seriously call into question the state of democracy in Canada.

