REPORT OF THE REVIEW OF THE PUBLIC WORKS PROTECTION ACT

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Submitted to the Honourable James J. Bradley, Minister of Community Safety and Correctional Services

REVIEW OF THE PUBLIC WORKS PROTECTION ACT

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SECTION 1: INTRODUCTION

A. **Terms of Reference and Scope of Review**

In September 2010 I was retained by the Ministry of Community Safety and Correctional Services to conduct a review of the *Public Works Protection Act* (the "PWPA"). ¹

The Terms of Reference² for this review provide that I am to identify areas of the PWPA for reform and, if appropriate, make specific recommendations for amendment or repeal (the "Review"). As part of the process of conducting this Review, I was requested to take into account the historical context of the PWPA and examine its current uses. I was also requested to undertake discussions with key stakeholder groups and other interested parties³ and to review other relevant reports.

The focus of this Review, as stated in the Terms of Reference, is "to develop a foundation for future legislation."

В. Factual Background

On June 19, 2008, Prime Minister Stephen Harper announced that Huntsville, Ontario would host the G8 Summit scheduled for June 25 - 26, 2010.

On December 7, 2009, the Prime Minister announced that Toronto, Ontario would host the G20 Summit scheduled for June 26 - 27, 2010. It was not until February 19, 2010 that the specific site of the G20 Summit was announced to be the Metro Toronto Convention Centre in downtown Toronto.

¹ R.S.O. 1990, c. P.55.

² Attached as Appendix 1 is a copy of the Terms of Reference.

³ Attached as Appendix 2 is a list of all key stakeholder groups and interested parties with whom I met during the course of this Review.

An Integrated Security Unit ("ISU") was established in 2008 to deal with the security issues relevant to the G8 and later the G20. Memorandums of understanding entered into between the Royal Canadian Mounted Police ("RCMP") and its ISU partners for both Summits detailed that the RCMP was to be responsible for protecting Internationally Protected Persons ("IPPs") as well as the defined "controlled access zones" and the other partners were to be responsible, depending on whether it was the G8 or G20, for the areas immediately adjacent to the controlled access zones, referred to as the "interdiction zones." For the G8 Summit, the Ontario Provincial Police ("OPP") was to be responsible for the interdiction zone. For the G20 Summit, the Toronto Police Service ("TPS") was responsible for the interdiction zone.

It was TPS's concern regarding its legal authority to establish and secure the interdiction zone for the G20 Summit which resulted in the use of the *PWPA*.

The TPS requested that the Ontario Government enact a regulation pursuant to the $PWPA^4$ which would designate the interdiction zone as a "public work" and thereby give the TPS the powers granted by the PWPA. The regulation enacted pursuant to the PWPA, O. Reg. 233/10, and the exercise by the police of their powers provided by this legislation triggered this Review.

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⁴ Attached as Appendix 3 is a copy of the May 12, 2010 letter.

SECTION 2: THE PUBLIC WORKS PROTECTION ACT

A. History of the Public Works Protection Act

The PWPA was enacted in 1939. It, in addition to other legislation, was passed during an emergency session of the Ontario Legislative Assembly in response to Canada's entry into World War II and was considered important in supporting the war effort. Lieutenant Governor Albert Matthews, in his throne speech, outlined the context in which the legislation was being passed:⁵

We meet today under circumstances of the utmost gravity. The possibility of war, in which we are now engaged, was fully realized and debated by you at the last session, when you passed unanimously a resolution calling, in such event, for the complete mobilization of all our resources.

Legislation calculated to give effect to the determination then expressed will be immediately submitted to you. You will be asked to pass measures designed to increase agricultural and industrial production, and for the protection of our vital public works and services. (emphasis added)

Reports of the legislative debates held in 1939⁶ indicate that protecting the province's hydroelectric facilities from sabotage was of particular concern. The Ontario Government had asked the Federal Government to provide members of the Canadian military to guard these works. The Federal Government refused and the PWPA was the provincial response. Concerns about restriction on civil liberties were raised in relation to another bill that would have required permits for the holding of public meetings in public places, however, no such concerns were raised in relation to the PWPA. The only constitutional issue raised in debate regarding the PWPA related to whether the Federal Government was responsible for providing the necessary guards to protect public works as opposed to requiring provinces to establish "private armies."

⁵ Ontario. Speech of the Throne. 20th Parl., 4th Sess., (19 September 1939).

⁶ Attached as Appendix 4 is a copy of the reports of the legislative debates. Note: This is the best available copy.

The *PWPA* has undergone only minor amendments since 1939. Shortly after it was enacted, two Orders in Council were passed designating areas around the Canadian General Electric Company Limited and The Canadian Car and Foundry Company as "public works." In 1950 a provision regarding the recovery of certain fines was deleted. In 1960 the provision regarding the appointment of guards was moved from near the end of the *PWPA* to closer to the beginning. In 1972 the *PWPA* was amended to reassign certain responsibilities from the Attorney General to the Solicitor General. It was amended again in 1989 to increase the fine for an offence under the *PWPA* from \$100 to \$500. There have also been some other minor changes of wording since 1939.

B. <u>Current Uses of the Public Works Protection Act</u>

Although there is legislation in other provinces that defines "public works" for other purposes, there is no jurisdiction in Canada which has legislation similar in nature to the *PWPA*.

As the *PWPA* was enacted in 1939 as an emergency wartime statute, it is perhaps not surprising that it is relied upon today in only limited circumstances. Prior to the G20, the *PWPA* had only been relied upon to conduct searches at courthouses, in the context of providing courthouse security. This use of the *PWPA* was upheld by the courts.⁷ In addition, since September 2001, the *PWPA* has been used by Ontario Power Generation ("OPG") to empower its guards to secure its nuclear and non-nuclear power generating facilities.

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⁷ See, for example, *R. v. Campanella*, [2002] O.J. No. 5104 (S.C.J.); aff'd [2005] O.J. No. 1345 (C.A.) and *R. v. S.S.*, [2005] O.J. No. 5002 (S.C.J.).

C. Outline of the Public Works Protection Act

Given the fact that the *PWPA* is a short statute, I am reproducing it here in its entirety for ease of reference:

The Public Works Protection Act

Definitions

1. In this Act,

"guard" means a guard appointed under this Act; ("gardien")

"highway" means a common or public highway or a part thereof, and includes any street, bridge and any other structure incidental thereto and any part thereof; ("voie publique")

"public work" includes,

- (a) any railway, canal, highway, bridge, power works including all property used for the generation, transformation, transmission, distribution or supply of hydraulic or electrical power, gas works, water works, public utility or other work, owned, operated or carried on by the Government of Ontario or by any board or commission thereof, or by any municipal corporation, public utility commission or by private enterprises,
- (b) any provincial and any municipal public building, and
- (c) any other building, place or work designated a public work by the Lieutenant Governor in Council. ("ouvrage public") R.S.O. 1990, c. P.55, s. 1.

Guards, appointment

- 2.(1) For the purpose of protecting a public work, guards may be appointed by,
- (a) the Solicitor General:
- (b) the Commissioner of the Ontario Provincial Police Force;
- (c) any inspector of the Ontario Provincial Police Force;
- (d) the head or deputy head of the municipal council or the chief of police of the municipality in which the public work is located, or the person acting in the place or stead of the head or deputy head;
- (e) the chair or other person who is the head of a board, commission or other body owning or having charge of the public work, or the person acting in the place or stead of the chair or other person.

Powers of guard

(2) Every person appointed as a guard under this section has for the purposes of this Act the powers of a peace officer.

Duties of guard

(3) Subject to the regulations and to any special direction of the Solicitor General or the Commissioner of the Ontario Provincial Police Force, every guard shall obey all directions of the person appointing him or her, any inspector of the Ontario Provincial Police Force, the chief of police of the municipality in which is located the public work that he or she is protecting, and the person who is in charge of the protecting of the public work.

Breach of duty of guard

- (4) Every guard who,
- (a) neglects or refuses to obey a direction that he or she is required to obey under subsection (3);
- (b) fails in any manner to carry out his or her duties as guard;
- (c) leaves the location to which he or she is assigned as guard or ceases to act as guard without leave of any of the persons mentioned in subsection (3); or
- (d) otherwise conducts himself or herself in a manner not consistent with his or her duties as guard,

is guilty of an offence and on conviction is liable to a fine of not more than \$500 or to imprisonment for a term of not more than two months, or to both. R.S.O. 1990, c. P.55, s. 2.

Powers of guard or peace officer

- **3.**A guard or peace officer,
- (a) may require any person entering or attempting to enter any public work or any approach thereto to furnish his or her name and address, to identify himself or herself and to state the purpose for which he or she desires to enter the public work, in writing or otherwise;
- (b) may search, without warrant, any person entering or attempting to enter a public work or a vehicle in the charge or under the control of any such person or which has recently been or is suspected of having been in the charge or under the control of any such person or in which any such person is a passenger; and
- (c) may refuse permission to any person to enter a public work and use such force as is necessary to prevent any such person from so entering. R.S.O. 1990, c. P.55, s. 3.

Statement under oath to be conclusive evidence

4. For the purposes of this Act, the statement under oath of an officer or employee of the government, board, commission, municipal or other corporation or other person owning, operating or having control of a public work, as to the boundaries of the public work is conclusive evidence thereof. R.S.O. 1990, c. P.55, s. 4.

Refusal to obey guard, etc.

 $\underline{5.(1)}$ Every person who neglects or refuses to comply with a request or direction made under this Act by a guard or peace officer, and every person found upon a public

work or any approach thereto without lawful authority, the proof whereof lies on him or her, is guilty of an offence and on conviction is liable to a fine of not more than \$500 or to imprisonment for a term of not more than two months, or to both.

Arrest

(2)A guard or peace officer may arrest, without warrant, any person who neglects or refuses to comply with a request or direction of a guard or peace officer, or who is found upon or attempting to enter a public work without lawful authority. R.S.O. 1990, c. P.55, s. 5.

Regulations

- **6.** The Lieutenant Governor in Council may make regulations,
- (a) providing for the organization, co-ordination, supervision, discipline and control of guards;
- (b) defining the areas that constitute approaches to public works, either generally or with regard to a particular public work;
- (c) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act. R.S.O. 1990, c. P.55, s. 6.

1. Discussion of Key Sections

(a) Definition of "Public Work"

Section 1 defines "public work" very broadly. There are at least three classes of public works. The first class includes certain transportation infrastructure ("railway, canal, highway, bridge"), energy infrastructure ("power works including all property used for the generation, transformation, transmission, distribution or supply of hydraulic or electrical power, gas works"), other public utilities ("water works, public utility") and other "works" generally ("or other work"). This first class of public works may be publicly or privately owned ("owned, operated or carried on by the Government of Ontario or by any board or commission thereof, or by any municipal corporation, public utility commission or by private enterprises").

The second class of defined "public works" includes all provincial and municipal buildings. "Public building" is not defined. It would appear to clearly include buildings

such as the Legislative Assembly, courthouses and city halls, and likely includes provincially or municipally owned buildings used for governmental purposes. It would also seem to include provincially or municipally owned buildings used for other purposes, such as libraries, for example.

The third class of "public works" includes any other building, place or work designated as a public work by the Lieutenant Governor in Council. The word "place" would appear to be a very broad term that could include a public park, for example. The area designated by O. Reg. 233/10 fell into this class of "public work."

(b) Appointment and Powers of Guards and Peace Officers

Section 2 of the *PWPA* provides for the appointment of "guards", the powers and duties of peace officers and guards, and the penalties for any breach of duty by these peace officers and guards. The *PWPA* provides that anyone who is a head of a board, commission or other body having charge over a public work can appoint a guard. This is very broad and arguably allows for the appointment of a private army by someone "having charge of" a public work, whoever that may be. Pursuant to s. 2(2) the "guards" have the same powers as a "peace officer."

Section 3 sets out the powers a guard or peace officer acquire pursuant to the *PWPA*, including that a guard may require people entering or approaching a public work to identify themselves and to state the purpose for which they desire to enter the public work. In addition, the guard or peace officer may search, without warrant, any person or vehicle entering or attempting to enter a public work. The guard or peace officer can

refuse to permit a person to enter a public work and can use as much force as necessary in this endeavour.

(c) Boundaries of Public Work

Section 4 provides that a statement under oath by an officer or employee of the person or entity operating or having control of a public work regarding the boundaries of the public work serves as conclusive evidence with respect to the boundaries.

(d) Offence / Power of Arrest

Section 5 provides that any person who neglects or refuses to comply with a request or direction made by a guard or peace officer is guilty of an offence. In addition, a person who enters a public work or an approach to a public work without lawful authority is guilty of an offence. A person found guilty of an offence is liable to a fine of not more than \$500 and/or imprisonment of not more than two months. A guard or peace officer has the power to arrest, without warrant, any person who refuses to comply with a request or direction of a guard or peace officer and who enters or attempts to enter a public work without lawful authority.

(e) Regulations

Section 6(b) provides that the Lieutenant Governor in Council may define the areas that constitute approaches to public works, while s. 6(c) permits regulations to be made regarding any matter necessary to carry out the intent and purpose of the *PWPA*.

D. Events Leading to Passage of O. Reg. 233/10

There was no apparent reference to the possible use of the *PWPA* until fairly late in the planning process for the security for the G20 Summit. The Province of Ontario originally

attempted to obtain support for its security measures through reliance on a federal statute, the *Foreign Missions and International Organizations Act* ("*FMIOA*"), which provides that the RCMP can take "appropriate measures" to ensure the proper functioning of an intergovernmental conference "in a manner that is reasonable in the circumstances."

On May 7, 2010, John Burke, Deputy Minister of Community Safety and Correctional Services of Ontario, wrote to William Baker, Deputy Minister of Public Safety Canada, stating that security would be enhanced by the existence of an agreement pursuant to s. 10.1(4) of the *FMIOA* which provides that the Federal Minister of Public Safety may enter into arrangements with the government of a province concerning the responsibilities of members of the RCMP and provincial / municipal police forces with respect to ensuring security for the proper functioning of a conference.

On June 11, 2010, the Provincial Deputy Minister received a reply¹⁰ from the Federal Deputy Minister indicating that such an agreement would not be required for the Summits since "the current suite of powers and authorities that peace officers possess at common law or by virtue of any other federal or provincial Act or regulation were sufficient for the G8 and G20 Summits."

The Federal Deputy Minister was clear that in his view the police had sufficient authority at common law and in statute to secure these conferences. Similarly, the OPP were of the view that it was not necessary for the police forces to have any additional police powers,

⁸ S.C. 1991, c. 41, s. 10.1(2). Attached as Appendix 5 is a copy of selected sections of the *FMIOA*.

⁹ Attached as Appendix 6 is a copy of the May 7, 2010 letter.

Attached as Appendix 7 is a copy of the letter received on June 11, 2010.

other than those already conferred by virtue of common law and statute (excluding the PWPA) in order to secure the interdiction zones for the Summits.

On May 12, 2010, Chief William Blair of the TPS wrote to the Honourable Rick Bartolucci, Minister of Community Safety and Correctional Services¹¹ stating that a "cornerstone" of the TPS security plan for the G20 Summit would be the establishment of a security perimeter in an area around the Metro Toronto Convention Centre. The purpose of this security perimeter, as explained in the letter, was to "ensure the safety and security of those attending the Summit, the Summit site itself and people and property within the area close to the Summit site." Chief Blair indicated that the TPS would rely upon the authority granted to it pursuant to the common law and, if certain conditions are met, the FMIOA, 12 to establish and control the security perimeter. However, he believed that the provisions of the PWPA "would also offer legal support for the extraordinary security measures" he believed would be necessary. Chief Blair therefore requested "the Lieutenant Governor in Council to designate the area of, or highways within, the intended security perimeter as a public work for the period from June 21, 2010 through the end of the Summit on June 27, 2010." A detailed description of the area requested to be designated as a public work was provided to Minister Bartolucci as well as an aerial photograph of the area.

I am not aware that any organization publicly questioned the inherent police <u>power to</u> <u>erect fences</u> defining the interdiction zone. The Canadian Civil Liberties Association

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¹¹ See Appendix 3.

¹² This probably is in reference to s. 10.1(4) of the *FMIOA*, which provides the authority for the Minister of Public Safety and Emergency Preparedness to enter into arrangements with the government of a province concerning the responsibilities of members of the RCMP and members of the provincial and municipal police forces with respect to ensuring the security for the proper functioning of an intergovernmental conference.

("CCLA") published a document entitled "Protecting civil liberties and human rights at the G20: statement of concerns" on May 21, 2010.¹³ In this document, the CCLA expressed concern with the size of the security perimeter: "Particularly where there is a primary fence to ensure safety around conference venues and delegate hotels, any further restrictions on mobility or protest must be fully and carefully justified." However, the CCLA supported "the overall goal of ensuring that the G20 is conducted in a manner that is safe for delegates, protesters, and Toronto residents in general" and noted the RCMP's authority under the FMIOA. There was no doubt expressed by the CCLA concerning the power of police to erect security fences.

By letter dated June 15, 2010, ¹⁶ Minister Bartolucci wrote to Chief Blair acknowledging the request and stating in part:

I agree that there are various sources of legal authority to support the security perimeter. I also recognize the desirability of having additional sources of legal authority to ensure clarity regarding the ability of the Toronto Police Service to take the steps that it will be taking. Accordingly, I am pleased to inform you that a regulation has been made under the PWPA in response to your request.

The Minister informed Chief Blair that O. Reg. 233/10 had been filed with the Registrar of Regulations and would come into force on June 21, 2010 and would be revoked as of June 28, 2010. The area requested by Chief Blair to be designated as a "public work" was so designated in O. Reg. 233/10.

¹³ Canadian Civil Liberties Association. Protecting civil liberties and human rights at the G20: statement of concerns, May 21, 2010, online: Canadian Civil Liberties Association .

¹⁴ *Ibid.*, p. 4.

¹⁵ *Ibid.*, p. 3.

¹⁶ Attached as Appendix 8 is a copy of the June 15, 2010 letter.

Four days earlier, on June 11, 2010, Mike McDonell, the Assistant Commissioner of the RCMP, sent a letter to Chief Blair¹⁷ containing a thorough review of the statutory sources of the RCMP's duties and powers to secure intergovernmental conferences. Assistant Commissioner McDonell outlined the police authority to fully secure the G8 and G20 Summits.

More specifically, in relation to the Summits, the RCMP will be taking measures to fulfill duties related to the protection of Internationally Protected Persons (IPP's) that befall police in general and the RCMP in specific. The official visit of the head of state or high ranking dignitary of a foreign country is an event that frequently engenders a real or apprehended threat to the preservation of peace which demands the adoption of proper and reasonable security measures in and by the host country.

Furthermore, Canada is a signatory of the United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. In that regard, Canada has specifically adopted laws requiring peace officers to protect IPPs, as defined in section 2 of the *Criminal Code*, in accordance with its international obligations...

Legal authorities also permit the RCMP to collaborate with other police forces such as the OPP in the fulfillment of its duties, including in relation to securing the perimeter. Such collaboration is essential in light of concurrent mandates of policing partners, particularly in relation to the legal duties to preserve the peace and protect life and property.

E. O. Reg. 233/10

On June 2, 2010, Cabinet's Legislation and Regulations Committee passed O. Reg. 233/10. It was signed by the Lieutenant Governor on June 3, 2010 and published on June 16, 2010 on e-Laws, a website maintained by the Government of Ontario not frequently accessed by the public. This website provides access to official copies of Ontario's statutes and regulations. O. Reg. 233/10 came into force on June 21, 2010 and was

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¹⁷ Attached as Appendix 9 is a copy of the June 11, 2010 letter.

revoked on June 28, 2010. It was not published in *The Ontario Gazette*¹⁸ until July 3, 2010 after it had already been revoked. Section 23(2) of Ontario's *Legislation Act*, 2006, ¹⁹ provides that a regulation is not effective against a person before the earliest of when the person has actual notice of it, the last instant on the day on which it is published on the e-Laws website, or the last instant of the day on which it is published in the print

version of *The Ontario Gazette*. As a result, though the technical requirements for

providing notice of O. Reg. 233/10 were met, I have concerns whether adequate notice

was given to the public, especially in light of the fact that the regulation was not

published in *The Ontario Gazette* until it had already been revoked.

The regulation set out the area where the security fence was to be erected and designated

that area as a "public work" which then called into play all the powers provided by the

PWPA.

ONTARIO REGULATION 233/10

made under the

PUBLIC WORKS PROTECTION ACT

Made: June 2, 2010 Filed: June 14, 2010 Published on e-Laws: June 16, 2010

Printed in *The Ontario Gazette*: July 3, 2010

DESIGNATION OF PUBLIC WORKS

Designation

1. The following are designated as public works for the purposes of the Act:

1. Everything described in clause (a) of the definition of "public work" in section 1 of the Act that is located in the area described in Schedule 1, including,

without limitation and for greater certainty, every sidewalk in that area.

2. The places described in paragraphs 1, 2 and 3 of Schedule 2.

¹⁸ The Ontario Gazette contains Ontario's legal notices and regulations.

¹⁹ S.O. 2006, c. 21, Sched. F.

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Revocation

2. This Regulation is revoked on June 28, 2010.

Commencement

3. This Regulation comes into force on the later of June 21, 2010 and the day it is filed.

SCHEDULE 1 AREA REFERRED TO IN PARAGRAPH 1 OF SECTION 1

The area in the City of Toronto lying within a line drawn as follows:

Beginning at the curb at the southeast corner of Blue Jays Way and Front Street West; then north to the centre of Front Street West; then east along the centre of Front Street West to the east curb of Windsor Street; then north along the east curb of Windsor Street to the centre of Wellington Street; then east along the centre of Wellington Street to the centre of Bay Street; then south along the centre of Bay Street to a point directly opposite the north wall of Union Station; then west along the exterior of the north wall of Union Station to the centre of York Street; then south along the centre of York Street, continuing east of the abutments under the railway overpass, and continuing south along the centre of York Street to the centre of Bremner Boulevard; then west along the centre of Bremner Boulevard to the east curb of Lower Simcoe Street; then south along the east curb of Lower Simcoe Street to the north curb of Lake Shore Boulevard West; then west along the north curb of Lake Shore Boulevard West to the south end of the walkway that is located immediately west of the John Street Pumping Station and runs between Lake Shore Boulevard West and the bus parking lot of the Rogers Centre; then north along the west edge of that walkway to the bus parking lot of the Rogers Centre; then west along the south edge of the bus parking lot of the Rogers Centre to the west edge of the driveway running between the parking lot and Bremner Boulevard; then north along the west edge of that driveway to the north curb of Bremner Boulevard; then west along the north curb of Bremner Boulevard to the east curb of Navy Wharf Court; then north along the east curb of Navy Wharf Court to the southwest point of the building known as 73 Navy Wharf Court; then east along the exterior of the south wall of that building; then north along the exterior of the east wall of that building to the curb of Blue Jays Way; then north along the east curb of Blue Jays Way to the curb at the southeast corner of Blue Javs Way and Front Street West.

SCHEDULE 2 DESIGNATED PLACES REFERRED TO IN PARAGRAPH 2 OF SECTION 1

1. The area, within the area described in Schedule 1, that is within five metres of a line drawn as follows:

Beginning at the south end of the walkway that is located immediately west of the John Street Pumping Station and runs between Lake Shore Boulevard West and the bus parking lot of the Rogers Centre; then north along the west edge of that walkway to the bus parking lot of the Rogers Centre; then west along the south edge of the bus parking lot of the Rogers Centre to the west edge of the driveway running between the parking lot and Bremner

- Boulevard; then north along the west edge of that driveway and ending at Bremner Boulevard.
- 2. The area, within the area described in Schedule 1, that is within five metres of a line drawn as follows:
 - Beginning at the southwest point of the building known as 73 Navy Wharf Court; then east along the exterior of the south wall of that building; then north along the exterior of the east wall of that building and ending at the curb of Blue Jays Way.
- 3. The below-grade driveway located between Union Station and Front Street West and running between Bay Street and York Street in the City of Toronto.

F. **Information Given to Public Regarding Security Protocol**

Attempts were made to inform the public about the security measures that would be in place leading up to and throughout the G20. The City of Toronto, in consultation with the ISU, produced an information article²⁰ and flyers.²¹ No mention is made in the article or flyers of the PWPA or O. Reg. 233/10 and the powers given to the police. The City of Toronto also prepared an advertisement which appeared in local newspapers.²² The original version of the advertisement made no reference to the fact that people would be subject to a search when attempting to access the security perimeter, although reference was made to the requirement to show identification and to have a valid purpose for entering the restricted area. A later version of the advertisement included additional text advising that anyone requesting access to the security perimeter may be subject to a search. However, just as with the article and flyers, no specific mention was made of the *PWPA* or O. Reg. 233/10.

²⁰ A million copies of the newsletter *Our Toronto*, which contained an article entitled "What to expect during the G20 – June 26 & 27, 2010" were delivered to homes in the City of Toronto.

²¹ Approximately 10,000 flyers were sent to homes and businesses within the affected area. The flyer contained general information about security and the anticipated effects on traffic.

22 The advertisement appeared in the *Toronto Star*, *Toronto Sun*, and Metroland community papers.

In the days leading up to and throughout the G20 Summit, there was apparently a misunderstanding on the part of the police regarding a purported "five-metre rule." This confusion likely emanated from the "five-metres" referenced in Schedule 2 of O. Reg. 233/10. However, the purpose of Schedule 2 was to designate as "public work(s)" three specific private property locations on which the security fence was to be erected that were not "public works." The remainder of the fence was on public sidewalks and streets which are "public works." To ensure that the fence was located on a "public work," the drafters designated the area within five metres of the security fence in these three locations as a "public work." Unfortunately, the wording of Schedule 2 was very cumbersome and the relationship between the area defined in Schedule 1 and the five-metre reference in Schedule 2 was difficult to understand.

Because of this confusion, unfortunately the message was conveyed that the regulation provided for a five-metres zone <u>outside the entire security fence</u> and that therefore the *PWPA* applied to this entire area.²⁴ The media reported during the G20 summit that the police had "sweeping" powers pursuant to the *PWPA* within five-metres outside of the exterior security fence.²⁵ O. Reg. 233/10 did not provide the police such authority.

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²³ Attached as Appendix 10 is a copy of a map showing the three specific areas designated in Schedule 2 of O. Reg. 233/10.

²⁴ Jennifer Yang, "Just being near the G20 security zone can get you arrested" *Toronto Star* (25 June 2010), online: thestar.com http://www.thestar.com/news/gta/torontog20summit/article/828498--just-being-near-the-g20-security-zone-can-get-you-arrested.

²⁵ David Rider et al., "Dalton McGuinty, Bill Blair defend quiet boost in arrest powers" *Toronto Star* (26 June 2010), online: thestar.com http://www.thestar.com/news/gta/torontog20summit/article/828974-dalton-mcguinty-bill-blair-defend-quiet-boost-in-arrest-powers.

SECTION 3: COMMENTARY

A. Public Policy Considerations

There are some overarching public policy considerations which affect the issues I have been asked to address in the Terms of Reference.

As stated earlier, the legislation was the product of emergency World War II concerns related to the possibility of enemy sabotage of important infrastructures. The legislative debates in September of 1939 were particularly concerned with the province's hydroelectric facilities. However, notwithstanding these apparently specific concerns when drafted, the definition of "public work" is extraordinarily broad and, from a policy standpoint, raises questions of overbreadth, especially given the ability to designate almost anything a public work. In a mere definition section, s. 1 of the legislation allows the Lieutenant Governor in Council to designate "any other building, place or work" as a "public work." However, taken to its logical conclusion, an entire city or more could be designated as a "public work." The definition of "public work" includes "any provincial and any municipal public building," but "public building" is not further defined, thereby creating an element of uncertainty as to the specific provincial and municipal buildings captured by this definition. While perhaps extreme measures in times of war require flexibility, in all other circumstances, legislation of this nature requires limitations and a more specialized approach.

The expression "private army" was used in the Ontario legislative debate in 1939. Theoretically at least, private armies could be created through the use of the "guard" appointing authority by the many individuals who are authorized to appoint guards pursuant to the *PWPA*. This authority was apparently in response to the Federal

Government's refusal to assume, through the Defence Department, the responsibility of guarding utilities and industries essential to the war effort. While such a result might not have been contemplated in a parliamentary democracy, it is clearly unwise to leave such a possibility open.

Section 3 of the *PWPA* provides in part that a guard or a peace officer:

(a) may require any person entering or attempting to enter any public work or any approach thereto to furnish his or her name and address...and to state the purpose for which he or she desires to enter the public work, in writing, or otherwise.

The primary problem I see with this section is the vagueness of the term "approach thereto." An approach could begin at a considerable distance from the public work. Section 6(b) also provides for the making of regulations "defining the areas that constitute approaches to public works, either generally or with regard to a particular public work."

In addition, s. 3(b) of the *PWPA* provides that a guard or peace officer "may search, without warrant, any person entering or attempting to enter a public work." This section does not permit any person to abandon any attempt to enter a public work in order to avoid being subjected to a warrantless search. Such conduct is adopted by persons who decide not to enter a secured courthouse in order to avoid a warrantless search.

Section 4 provides that for the purposes of the *PWPA*, the statement under oath made by persons engaged in the operation of a public work "as to the boundaries of the public work is conclusive evidence thereof." Section 4 should be considered with s. 5(1) which provides that "every person found upon a public work or any approach thereto without lawful authority, the proof whereof lies on him or her, is guilty of an offence...(emphasis

added.)" The provision in s. 4 that "the statement under oath...is conclusive evidence thereof" appears to remove from a court's consideration what could be a legitimate dispute as to the boundaries of a public work or the approach thereto. Furthermore, the apparent reversal of the onus of proof regarding lawful authority to be found in a public work or an approach found in s. 5 is also troublesome from a policy and legal point of view.

Accordingly, if utilized to the extreme, many government officials could appoint many private armies to restrict access to many (in fact any) public places, where the mere statement under oath by the private guard of the boundaries of the areas under restricted access is conclusive proof thereof. Such potential for abuse is beyond troubling, to say the least.

B. Review of other Public Reports

As is evident from the foregoing discussion, many issues arise regarding the operation of the *PWPA* in today's context. These considerations and others also formed the basis of concerns raised in public reports which I was asked to review.

1. Reports of the Canadian Civil Liberties Association

The CCLA preliminary G20 report²⁶ dealt with most of the police related events that occurred in Toronto during the G20 conference during the weekend of June 26th and 27th, 2010. I will only make reference to a few portions of the report that deal with the Terms of Reference.

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²⁶ Canadian Civil Liberties Association. *A Breach of the Peace – A Preliminary Report of Observations During the 2010 G20 Summit*, June 29, 2010, online: Canadian Civil Liberties Association http://ccla.org/wordpress/wp-content/uploads/2010/06/CCLA-Report-A-Breach-of-the-Peace-Preliminary-report-updated-July-8.pdf.

The report of the CCLA called for the repeal or significant amendment to the *PWPA* "to meet basic constitutional standards."²⁷ The CCLA "suggests that the broad police powers granted under the *Act* are inconsistent with current Charter requirements."²⁸

I agree with the observation of the CCLA that the provisions of the *PWPA* led to a "lack of clarity as to the scope of the search and seizure powers" which created many difficulties and conflicts that probably could have been avoided. I would also certainly agree with a conclusory comment in this preliminary report that "it is the duty of police officers to act with fairness and equanimity toward all citizens in accordance with the law of the country. The presumption of innocence and the protection against arbitrary arrests and detention are at the core of a commitment to justice."

The CCLA, in partnership with the National Union of Public Employees, organized public hearings for two days in Toronto and one day in Montreal in November of 2010, which they referred to as a Citizens Inquiry. The Citizens Inquiry heard from 63 members of the public who had witnessed policing incidents or had been detained. Several lawyers and academics also participated in the hearing and offered commentary on the events of the G20 from a legal or policing perspective including issues related to the *PWPA*. A report of the hearings titled "G20 Toronto Breach of the Peace Public Hearings" was released on February 28, 2011, which also referred to the *PWPA*.

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²⁷ *Ibid.*, p. 22.

²⁸ *Ibid.*, p. 9.

²⁹ *Ibid.*, p. 12.

³⁰ *Ibid.*, p. 21.

³¹ Canadian Civil Liberties Association and the National Union of Public and General Employees. *G20 Toronto Breach of the Peace Public Hearings*, February 2011, online: Canadian Civil Liberties Association http://ccla.org/wordpress/wp-content/uploads/2011/02/Breach-of-the-Peace-Final-Report.pdf.

2. The Ontario Ombudsman Report

The Ontario Ombudsman commenced an investigation after receiving complaints relating to a variety of issues concerning the G20. The Marin Report recognized that "typically, international summits attract protests, and protests can turn violent and even deadly."32 The report therefore does not quarrel with the requirement that a high level of security is required for such events.

The report, in my view, accurately describes the PWPA as "unique in Canada in terms of the breadth of its reach and the powers it confers...no other Canadian statute defining 'public works' contains provisions similar to those found in Ontario's Act."³³

³² Ontario. Ombudsman report: Investigation into The Ministry of Community Safety and Correctional Services' Conduct in Relation to Ontario Regulation 233/10 under the Public Works Protection Act: "Caught in the Act" by André Marin (Toronto: Ombudsman of Ontario, December 2010), online: Ombudsman of Ontario http://www.ombudsman.on.ca/media/157555/g20final1-en.pdf ("Marin Report") at para. 7. ³³ *Ibid*. at para. 97.

SECTION 4: POWERS OF THE POLICE

Pursuant to the Terms of Reference, I have been asked to consider, for future purposes, whether the powers given to peace officers and guards under the PWPA are necessary to protect public works, secure intergovernmental conferences, or for any other purposes. To answer that question it is necessary to assess whether the current common law and statutory regime provide the police with sufficient powers to perform these vital services.

Α. **Common Law Powers and Powers Pursuant to Police Services Acts**

The police have extensive common law powers that can be used in protecting and securing intergovernmental conferences and in protecting public works. It is necessary to examine those powers in order to assess whether and what, if any, additional powers are needed, such as those provided by the *PWPA*.

Of particular assistance in this regard is R. v. Knowlton, 34 where the Supreme Court of Canada considered whether the powers possessed by peace officers at common law and statute in securing an area for the protection of a foreign dignitary were lawful. The Supreme Court of Canada held that in order for the exercise of peace officer powers to be lawful, the powers must satisfy the two step test set out in R. v. Waterfield.³⁵ First, the power must be in furtherance of a lawful duty. Traditional common law peace officer duties include the preservation of the peace and the prevention of crime. These common law police duties, amongst others, are now statutorily enshrined in s. 42(1) of Ontario's Police Services Act (and other provincial police services acts). The second part of the test requires an evaluation of whether the conduct of the peace officer was "justified." To

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³⁴ [1974] S.C.R. 443 ["*Knowlton*"]. ³⁵ See, for example, *R. v. Dedman*, [1985] 2 S.C.R. 2.

³⁶ R.S.O. 1990, c. P.15.

do so, one applies the standard of what is reasonably necessary in light of the totality of the circumstances. In evaluating whether the conduct of the peace officer was justified, it is important to consider "the duty being performed, the extent to which some interference with individual liberty is necessary in the performance of that duty, the importance of the performance of the duty to the public good, the nature of the liberty being interfered with, and the nature and extent of the interference."³⁷

In *Knowlton*, police in Edmonton cordoned off an area as part of the security arrangements for the visit of Premier Kosygin of the U.S.S.R. Premier Kosygin had been assaulted in Ottawa a few days prior to his visit to Edmonton. Knowlton entered the secured area, questioning the power of the peace officer to prevent his entry. He was arrested without a warrant and charged with obstructing a peace officer in the execution of his duties. Knowlton argued that the peace officer did not have the power to prevent his entry and was not acting in the execution of his duty.

The Supreme Court of Canada emphasized the heightened importance of security when there are visiting foreign dignitaries:³⁸

It is notorious and of common knowledge that the official visit of the head of state or high rank dignitary of a foreign country, friendly as either may be, is an event that frequently engenders a real or apprehended threat to the preservation of peace and that calls, therefore, for the adoption of proper and reasonable security measures in and by the host country...The restriction of the right of free access of the public to public streets...was one of the stepsnot an unusual one--which police authorities considered and adopted as necessary for the attainment of the purpose aforesaid. In my opinion, such conduct of the police was clearly falling within the general scope of the duties imposed upon them.

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³⁷ R. v. Mann, [2004] 3 S.C.R. 59 at 79.

³⁸ *Supra* note 34 at 447-448.

In addressing the first part of the *Waterfield* test, the Court referenced provisions of the Alberta *Police Act* and the *Criminal Code* and concluded that the conduct of the peace officers fell within the general scope of the duties imposed upon them, for example, preservation of the peace and prevention of crime:³⁹

According to the principles which, for the preservation of peace and prevention of crime, underlie the provisions of s. 30, amongst others, of the *Criminal Code*, these official authorities were not only entitled but in duty bound, as peace officers, to prevent a renewal of a like criminal assault on the person of Premier Kosygin during his official visit in Canada. In this respect, they had a specific and binding obligation to take proper and reasonable steps. The restriction of the right of free access of the public to public streets, at the strategic point mentioned above, was one of the steps--not an unusual one--which police authorities considered and adopted as necessary for the attainment of the purpose aforesaid. In my opinion, such conduct of the police was clearly falling within the general scope of the duties imposed upon them.

In analyzing the second step of the *Waterfield* test, the Court concluded that there was no evidence indicating the police officers resorted to an unjustifiable use of the powers associated with the duties imposed on them.

The Court in *Knowlton* recognized broad police powers to cordon off areas as part of the security arrangements involving internationally protected persons. In addition, the Court found that the warrantless arrest in that case was not an unjustifiable or unreasonable use of powers associated with the police duties to preserve the peace, order, public safety and to enforce the law and prevent crime. Finally, the Court found that peace officers were duty bound "to prevent a renewal of a like criminal assault on the person of Premier Kosygin during his official visit in Canada." Furthermore, it stated the closing of public

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³⁹ Ihid.

⁴⁰ *Ibid.* at 447.

streets "was one of the steps -- not an unusual one -- which police authorities considered and adopted as necessary."41

The *Knowlton* decision clearly acknowledged that the police had the duty and authority to establish and enforce a secured area to protect a foreign dignitary. In order to carry out these duties, the police may do what is reasonably necessary in light of the totality of the circumstances.

Though Knowlton was decided prior to the enactment of the Canadian Charter of Rights and Freedoms (the "Charter"), this does not, in my view, affect the clear statement by the Supreme Court of Canada regarding the duty of the police under the common law and the Alberta *Police Act* to provide this security. While the facts of *Knowlton* were quite compelling in relation to the obvious need to provide adequate security for Premier Kosygin, the decision is equally important authority regarding the general responsibilities of the police at common law and statute in relation to the preservation of the peace.

В. **Other Statutory Powers**

1. Criminal Code

Some specific powers are provided to peace officers pursuant to the Criminal Code. 42 Section 31 gives peace officers the power to arrest an individual for breach of the peace. Peace officers can arrest those committing the breach of the peace or those who, on reasonable grounds, he/she believe are about to join in or renew the breach of the peace. Peace officers also have powers at their disposal under ss. 63-69 of the Criminal Code to deal with the offences of unlawful assembly and riots.

⁴¹ *Ibid.* at 447-448. ⁴² R.S.C. 1985, c. C-46.

2. Trespass to Property Act

The Ontario *Trespass to Property Act*⁴³ is a potential source of police power to arrest without warrant those who are unlawfully on certain premises or who were recently unlawfully on the premises and refuse to give their name and address.⁴⁴ This statute deals with illegal entry into both private and public property by creating the offence of trespass for those who, without the express permission of the occupier, enter on to premises or engage in an activity on the premises when it is prohibited by the statute.⁴⁵ Though this statute is primarily used by private property owners to keep unwanted people off of their property, it has also been invoked by the Speaker of the House⁴⁶ and by the City of Toronto.⁴⁷ It must be noted, however, that using the *Trespass to Property Act* in relation to removing individuals from "public" places may raise *Charter* issues.⁴⁸

3. Foreign Missions and International Organizations Act

The RCMP, as peace officers, have the general duty to preserve the peace and prevent crime and offences as set out in s. 18 of the *Royal Canadian Mounted Police Act*.⁴⁹ Additional duties found in s. 17 of the *Royal Canadian Mounted Police Regulations*, 1988⁵⁰ include the protection of "internationally protected persons" as defined in s. 2 of the *Criminal Code*. Internationally protected persons include heads of state and their

⁴³ R.S.O. 1990, c. T.21

⁴⁴ *Ibid.*, ss. 9(1), 10.

⁴⁵ *Ibid.*, s. 2(1).

⁴⁶R. v. Behrens, [2004] O.J. No. 5135 (C.J.). The Court held that the issue of the trespass notices fell under the Speaker's parliamentary privilege and were not reviewable, even on the basis of a *Charter* argument. ⁴⁷R. v. Semple, [2004] O.J. No. 2137 (C.J.).

⁴⁸ In *R. v. Semple*, the defendants were charged under the Ontario *Trespass to Property Act* for entering the grounds of Toronto City Hall after being banned from doing so. In the end, the Court held that the defendants' peaceful entry onto the grounds was an expression as per s. 2(b) of the *Charter*, Toronto's notice under the Act infringed on this freedom and, in these circumstances, it could not be justified under s. 1 of the *Charter*.

⁴⁹ R.S.C. 1985, c. R-10.

⁵⁰ SOR/88-361.

family members. The RCMP's duty to protect internationally protected persons is also found in s. 6(1) of the *Security Offences Act*.⁵¹

In addition, Canada is a signatory of the United Nations *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*. This Convention provides that the Government of Canada must protect visiting heads of state or government, foreign ministers, representatives or officials of a state or any official or other agent of an international organization of an intergovernmental character, and the family members that accompany him or her. The RCMP has the responsibility to carry out these security measures.

Pursuant to s. 10.1(1) of the *FMIOA*, "The Royal Canadian Mounted Police has the primary responsibility to ensure the security for the proper functioning of any intergovernmental conference in which two or more states participate, that is attended by persons granted privileges and immunities under this Act and to which an order made or continued under this Act applies."

The powers to carry out this mandate are found in s. 10.1(2) of the *FMIOA*: "the Royal Canadian Mounted Police may take appropriate measures, including controlling, limiting or prohibiting access to any area to the extent and in a manner that is reasonable in the circumstances." It is noteworthy that the *FMIOA* has legislated the same powers provided to the police under common law and statute.

In order to trigger the RCMP powers described in s. 10.1, the Governor in Council, on the

⁵¹ R.S.C. 1985, c. S-7.

⁵² UNGA, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 20 February 1977, UN Doc. I-15410.

recommendation of the Minister of Foreign Affairs, and, pursuant to s. 5 of the FMIOA, made the G8 Summit Privileges and Immunities Order, 2010⁵³ on December 10, 2009. This order was repealed and a subsequent order⁵⁴ was made on January 13, 2010. A similar order⁵⁵ for the G20 Summit was made on March 11, 2010.⁵⁶

Therefore, during the G20, the RCMP had the specific, statutory power to limit or prohibit access to any area and to any extent as long as the measures were appropriate and done in a manner that was reasonable in the circumstances. "The RCMP may secure the perimeter of the security zone on land with fencing and restrict access to this zone through the use of checkpoints and other measures."57

Though not invoked during the G20, s. 10.1(4) of the *FMIOA* provides that arrangements can be entered into with a province concerning the responsibilities of members of the RCMP and members of the provincial and municipal police forces with respect to ensuring the security for the proper functioning of an intergovernmental conference. No information was provided to me as to why such an arrangement was not entered into for the G20.

These intergovernmental security provisions of the *FMIOA* were enacted just prior to the G8 being held in Kananaskis, Alberta, in 2002. In light of violent protests at international events and the 9/11 terrorist attacks in the United States, the Federal Government

⁵³ SOR/2009-336.

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⁵⁴ SOR/2010-13.

⁵⁵ SOR/2010-62.

⁵⁶ Supra note 17: "Upon such an Order being made, the RCMP, in co-operation and collaboration with other police forces, becomes impressed with the primary responsibility of ensuring not only the protection of the IPPs, but also ensuring 'security for the proper functioning' of the intergovernmental conference. To that end, the FMIOA provides that the 'appropriate measures, including controlling, limiting or prohibiting access to any area to the extent and in a manner that is reasonable in the circumstances' may be taken." *Ibid.*

considered it timely "to clarify in statute the present common law authority for police to provide security and protection for high profile international events."58 At such events, it was intended that "the RCMP is the lead to make sure that security is provided." ⁵⁹

Given that it was clearly the intention of the Federal Government to have the RCMP as the lead police force at these international events, consideration should be given to expand the use of the FMIOA to cover all large scale international events, such as the Olympics, the Pan American Games, and international trade fairs, as these events are routinely attended by heads of state and senior government officials. Most recently, Vancouver held the 2010 Olympic and Paralympic Winter Games.⁶⁰ Though federal and municipal legislation were passed to assist in securing the Games, expansion and application of the FMIOA would have been a better approach. The RCMP, as the national police force, ought to be in charge pursuant to their authority under the FMIOA.

4. **Emergency Legislation**

Through my consultations with the parties listed in Appendix 2, I heard that while we are not in a time of war, as in 1939 when the PWPA was enacted, we live in an age of international and local terrorism threats. Our democratic society must be vigilant in

⁵⁸ Canada, *House of Commons Debates*, 37th Parl., 1st Sess., No. 93 (5 October 2001) at 1000.

⁵⁹ Canada, *House of Commons*, Standing Committee on Public Safety and National Security, 40th Parl., 3rd Sess., Evidence (25 October 2010).

60 In anticipation of this event, the Governor General in Council, on the recommendation of the Minister of

Transport, pursuant to the Aeronautics Act (R.S.C. 1985, c. A-2). and the Canadian Air Transport Security Authority Act (S.C. 2002, c. 9, s. 2) passed the Vancouver 2010 Aviation Security Regulations (SOR/2009-298). The purpose of the regulations was to enhance aviation security during the Games. The Regulation provided for extra security and extra authorized means to conduct screenings. In addition, the Vancouver City Council passed the very lengthy By-law No. 9962, known as the "Vancouver 2010 Olympic and Paralympic Winter Games By-Law." Specific security measures to be employed at a city live site (described thoroughly in a Schedule to the By-Law) that were enabled by this By-Law included: The installation and monitoring of airport style and other security measures including magnetometers and X-ray machines, the installation and monitoring of closed circuit television cameras, the searching of any person who wished to enter on to a city live site, and any bag, luggage, or other container carried by such person, and the prohibiting of access to, or removal from, a city live site any person who refused to submit to a search.

maintaining a proper level of security while recognizing that democratic values and security issues can conflict where public order is at issue. It is important to highlight that provincial legislation exists dealing with both terrorism threats and emergency situations. I have been informed that federal and provincial counter-terrorism plans exist that address preventing and responding to acts of terrorism.

The *Police Services Act* regulations mandate police forces to establish procedures consistent with federal and provincial counter-terrorism plans⁶¹ and to have policies with respect to counter-terrorism.⁶² In addition, the *Emergency Management and Civil Protection Act* allows for orders to be made in situations specifically designated an "emergency"⁶³ by the Lieutenant Governor in Council or the Premier that regulate or prohibit travel and movement to, from or within any specified area.⁶⁴ Therefore, the *PWPA* is not needed to deal with these emergency situations, as specific, more recent, emergency legislation is in place for that very purpose.

C. Gaps in Canadian Police Powers?

The Ministry of Community Safety and Correctional Services provided me with an interesting article published in 2010 entitled "The Gap in Canadian Police Powers:

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⁶¹ Adequacy and Effectiveness of Police Services, O. Reg. 3/99, s. 28.

⁶² Ibid., s. 29.

⁶³ Section 1 of the *Emergency Management and Civil Protection Act* defines an "emergency" as "emergency" means a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise; ("situation d'urgence").

⁶⁴ R.S.O. 1990, c. E.9, s. 7.0.2(4).

Canada needs 'Public Order Policing' Legislation", and co-authored by Wesley Pue and Robert Diab. 65

This article was prompted by the debate over the cost, nature and extent of security to be employed at the Vancouver 2010 Winter Olympics. The authors criticized the fact that policing authorities in Canada "lack specific statutory authorization to take measures commonly thought necessary to their mission."66 These measures included security fences in public areas, designated protest areas, restricted access to public space, police surveillance and searches without cause.

The authors recognize that such powers may be necessary but note that "no legislature has ever expressly conferred such powers on policing authorities outside the context of international intergovernmental conferences. Nor does the common law accord such powers to state officials on its own."⁶⁷ I, respectfully, disagree with this latter statement. It is my view the police have powers pursuant to the common law and statute as I have discussed in the preceding section.

The authors referred to R. v. Knowlton⁶⁸ which I have previously discussed. While the authors give *Knowlton* a very narrow interpretation, stating that "its binding principle is a good deal narrower than the words taken out of context might suggest,"69 I, however, am of the view that the decision supports the proposition that police have a broad range of

⁶⁵ Wesley Pue and Robert Diab, "The Gap In Canadian Police Powers: Canada Needs 'Public Order Policing' Legislation" (2010) 28 Windsor Rev. Legal Soc. Issues 87. Wesley Pue is a professor of legal history at the University of British Columbia and Robert Diab is a PhD candidate at the UBC Faculty of Law.

⁶⁶ *Ibid.*, p. 88.

⁶⁷ Ibid.

⁶⁸ Supra note 34.

⁶⁹ *Supra* note 65, p. 92.

responsibilities with deep historical roots in the common law and codified in statute, a position shared by the Federal Government when it introduced amendments to the FMIOA. The actions of the police in Knowlton were necessarily incidental to their common law police duties and powers.

The authors conclude that this "authority of police to create zones of exclusion either as an incident of the general and ancient duties of constables...has never been established in the courts."⁷⁰ I am of the view, however, that the role of the police in establishing security zones relating to a crime, a serious accident or other emergency is a routine and well-accepted use of police powers pursuant to their common law and statutory duties. I am not suggesting that this common law authority permits the police to establish security zones "for the proper functioning of any intergovernmental conference in which two or more states participate", larger than necessary to fulfill their purpose. The FMIOA, as amended in 2002, provides the RCMP with "primary responsibility to ensure the security for the proper functioning of the intergovernmental conference."⁷² It is interesting, however, that when the Federal Government was enacting this specific authority, the legislative debates indicated that the government was merely clarifying "in statute the present common law authority for police to provide security and protection for high profile international events."⁷³

Security perimeters are routinely erected by police in the context of the commission of a crime, motor vehicle and other accidents, as well as the Santa Claus parade and other

⁷⁰ *Ibid.*, p. 96. ⁷¹ *Supra* note 8, s. 10.1(1).

⁷² *Ibid*.

⁷³ Supra note 58.

parades. It would, in my view, be quite impractical and unnecessary to legislate an extensive code of police powers given their common law and statutory responsibilities to generally maintain public order. It is not advisable, in my opinion, to be prescriptive in any way regarding what actions the police can take since they must assess what the situation warrants, while at the same time considering individual rights and freedoms. The details of any police response to an emergency must be tailored to the exigencies related to the situation.

The police clearly have common law and statutory authority to conduct warrantless searches in specific situations ("in exigent circumstances").⁷⁴ However, when warrantless searches must be carried out on a regular, routine basis, the police are acting more like full time security guards, and there should be specific statutory authority provided to give such powers.

I certainly accept the general proposition the authors assert that the mobility rights of citizens should not be unreasonably or unfairly dealt with. However, one only need be aware of the massive amount of construction taking place on the streets of Toronto as this Report is being written to appreciate that it is not always reasonable to expect that "the rights of businesses, homeowners, and ordinary citizens to go about their routine activities without interruption"⁷⁵ will go unhindered. While generally desirable, it cannot be legally guaranteed. At the same time, the authors do concede that "important as they

⁷⁴ *Supra* note 42, s. 487.11. ⁷⁵ *Supra* note 65, p. 89.

are, the rights of assembly, movement and protest are not unqualified. They can – and should – be balanced against other important public needs."⁷⁶

In my view public policing, at times, requires innovation, as it often benefits from creative problem solving. If police abuse their common law powers related to "public order policing," they are accountable to a multiplicity of authorities and the rule of law, most particularly the *Charter*. The legal rights outlined in the *Charter* such as "the principles of fundamental justice,"⁷⁷ security "against unreasonable search and seizure,"⁷⁸ and "the right not to be arbitrarily detained or imprisoned," 79 are described very generally. However, they were chosen deliberately, as it was recognized that in each case there is an inherent tension between imposing security measures and fundamental rights and freedoms. Determining which is paramount will be based on the facts of each case.

⁷⁶ *Ibid.*, p. 91.

⁷⁷ Canadian Charter of Rights and Freedoms, s. 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

⁷⁸ *Ibid.*, s. 8. ⁷⁹ *Ibid.*, s. 9.

SECTION 5: LEGAL ANALYSIS OF THE PUBLIC WORKS PROTECTION ACT

A. **Legal Analysis of the Legislation**

Many stakeholders have questioned the constitutional validity of the *PWPA* and O. Reg. 233/10. The Ontario Ombudsman seriously questioned whether O. Reg. 233/10 could pass "constitutional muster." The CCLA suggested that the broad police powers granted under the *PWPA* were inconsistent with the *Charter*.⁸¹

To the same effect were comments made by Premier Dalton McGuinty, who described the PWPA as "an archaic law that was used to undermine Torontonians' civil rights during the G20."82 He elaborated:83

The issue is whether it's appropriate given our present-day values and given an old law, which I am confident doesn't strike the balance that you and I would want today in terms of public safety and individual freedom of expression...When you start talking about civil rights, individual freedoms, you're talking about those things that in fact define us as a free and democratic society...It's something that is real and meaningful and important to all of us.

The Terms of Reference for this Review do not require that I conduct a constitutional analysis of the PWPA. I have however been asked to consider areas for reform and, if appropriate, make specific recommendations for amendment or repeal. This does require that I therefore consider whether the legislation may be vulnerable to constitutional challenge.

Section 2(b) of the *Charter* guarantees everyone the fundamental freedom of expression. The definition of "expression" has been interpreted broadly: "Activity is expressive if it

⁸² Robert Benzie and Rob Ferguson, "McGuinty shifts focus to fixing G20 law" Toronto Star (10 December 2010), online: thestar.com http://www.thestar.com/news/canada/article/905436--mcguinty- shifts-focus-to-fixing-g20-law>. 83 *Ibid*.

Supra note 32 at para. 233.
 Supra note 26, p. 9.

attempts to convey meaning."⁸⁴ While freedom of expression is not absolute, there is very little that is not considered expression. However, expression that advocates violence is not protected under s. 2(b).⁸⁵

The Supreme Court of Canada in *Committee for the Commonwealth of Canada v. Canada*, held that s. 2(b) "does not encompass the right to use any and all government property for purposes of disseminating one's views on public matters, but I have no doubt that it does include the right to use for that purpose streets and parks which are dedicated to the use of the public, subject no doubt to reasonable regulation to ensure their continued use for the purposes to which they are dedicated." It seems clear that protesting in public streets is a form of expression protected by s. 2(b). Protesting at an intergovernmental conference is clearly expressive in nature.

In challenges alleging that a statute contravenes s. 2(b) of the *Charter*, a court would examine whether the purpose or effect of a law contravenes section 2(b).⁸⁷ There is no reason to suggest that the <u>purpose</u> of the *PWPA* was to infringe the freedom of expression. The purpose of the *PWPA* is to protect important public infrastructures. A court would then have to consider whether the <u>effect</u> of the *PWPA* may have resulted in an infringement of freedom of expression.

O. Reg. 233/10 defined significant portions of downtown Toronto as a "public work." Section 3(c) of the *PWPA* allows peace officers to refuse entry into public works, which therefore limits the areas in which protesters could express themselves. By creating the

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⁸⁴ Irwin Toy Ltd. v. Québec (Attorney General), [1989] 1 S.C.R. 927 at 968.

⁸⁵ *Ibid.* at 970.

^{86 [1991] 1} S.C.R. 139 at 165-166.

⁸⁷ Peter Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 7 January 2011), 5th ed. (Toronto: Thomson Reuters Canada Limited, 2007) at 43-6.

relatively large security perimeter designated by the regulation, individuals may allege they were not permitted to communicate directly with those they were protesting against. Furthermore, individuals could not communicate in public places, such as public streets, where the right to freedom of expression has previously been found to exist.⁸⁸

Commissioner Ted Hughes completed an interim report following a public hearing into the complaints regarding events that took place with respect to the Asia Pacific Economic Cooperation (APEC) Conference in Vancouver, British Columbia, in November 1997. Commissioner Hughes recommended that generous opportunity should be afforded to peaceful protesters to be seen in their protest activities by guests at the event.⁸⁹

Section 7 of the *Charter* provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The PWPA raises issues regarding the liberty and security of the person in providing for warrantless searches and stopping for identification. Furthermore, vague laws offend two fundamental values of our legal system. Firstly, individuals are not provided with sufficient guidance as to what behaviour a law prohibits. Secondly, those in charge of enforcing the law are not provided with clear guidance as to how to enforce it. A vague law can lead to inconsistent and arbitrary enforcement. 91

⁸⁸ Supra note 86.

⁸⁹ Canada, Commission for Public Complaints Against the RCMP, APEC – Commission Interim Report (31 July 2001) at s. 31.1.1. (Commissioner: Ted Hughes, O.C.), online: Commission for Public Complaints Against the RCMP http://www.cpc-cpp.gc.ca/prr/rep/phr/apec/apec-31-eng.aspx>. Supra note 87 at 47-60.

⁹¹ "A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such

As described by Professor Hogg:⁹²

The requirement that any limit on rights be prescribed by law reflects two values that are basic to constitutionalism or the rule of law. First, in order to preclude arbitrary and discriminatory action by government officials, all official action in derogation of rights must be authorized by law. Secondly, citizens must have reasonable opportunity to know what is prohibited so that they can act accordingly. Both these values are satisfied by a law that fulfils two requirements: (1) the law must be adequately accessible to the public, and (2) the law must be formulated with sufficient precision to enable people to regulate their conduct by it, and to provide guidance to those who apply the law.

As I stated earlier, the phrase "any approach thereto" contained in s. 3(a) of the *PWPA* is potentially vague. No criteria are provided to assist in determining when one is on "any approach thereto." A phrase such as "any approach thereto" is subject to many potential interpretations. It is arguable that this language does not provide reasonable guidance for individuals to obey the law and for the law to be consistently enforced.

Section 8 of the *Charter* provides that "Everyone has the right to be secure against unreasonable search or seizure." A warrantless search or seizure is only reasonable if the search was authorized by law, the law itself is reasonable, and the manner in which the search carried out was reasonable.⁹³ The fact that no reasonable or probable suspicions are needed to carry out a search pursuant to s. 3(b) of the *PWPA* raises some issues. The only prerequisite to such a search is that the person or vehicle being subjected to a search is entering or attempting to enter a public work.

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a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate." (R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at 639-640)

⁹² Supra note 87 at 38-12.

⁹³ *R. v. Nolet*, [2010] S.C.J. No. 24 at para. 21.

Whether the *PWPA*'s s. 3(b) authority to undertake warrantless searches is "reasonable" depends on the reasonableness of the impact on the subject of the search. "The individual's reasonable expectation of privacy must, of course, be balanced against the public interest in effective law enforcement." It is harder to justify a warrantless search where the reasonable expectation of privacy is higher. For example, interference with bodily integrity will raise the standard of reasonableness. Conversely, in situations where people expect to have a lower level of privacy, the standard to prove reasonableness is lower.

One rightfully has some expectation of privacy when in public, but it does not rise to the level of privacy that one expects in one's home. The expectation of privacy further decreases when one attempts to enter a "public work", especially in the context of a secured barrier to an intergovernmental conference.

Section 9 of the *Charter* provides that "Everyone has the right not to be arbitrarily detained or imprisoned." Under s. 3(a) of the *PWPA*, a person entering or attempting to enter or approach a public work must provide his or her name and address and state the purpose for which he or she desires to enter the public work. In order for a guard or peace officer to carry out this duty, the guard or peace officer may "stop" the person from further approaching or entering the public work and the person is not permitted under the statute to decide not to enter. By so doing, it is arguable the guard or peace officer has assumed control over the movement of the individual by a demand or direction. The

⁹⁴ R. v. Rao, [1984] O.J. No. 3180 at para. 79 (C.A.).

⁹⁵ "Detention under s. 9...of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply." (*R. v. Grant*, [2009] S.C.J. No. 32 at para. 44)

PWPA provides for a significant legal consequence if the demand or direction is not followed, since "Every person who neglects or refuses to comply with a request or direction made under this Act by a guard or peace officer, and every person found upon a public work or any approach thereto without lawful authority, the proof whereof lies on him or her, is guilty of an offence and on conviction is liable to a fine of not more than \$500 or to imprisonment for a term of not more than two months, or to both."

Pursuant to s. 3(b) of the *PWPA*, a guard or peace officer may search any person entering or attempting to enter a public work. These searches would necessitate the detention of a person. If a guard or peace officer performs such a search, he or she has taken control over the movement of the person by a demand or direction. The same serious legal consequence results from failing to obey this demand or direction as that which results from failing to obey the demand or direction pursuant to s. 3(a) of the *PWPA*. As a result, "detentions" could occur pursuant to both s. 3(a) and s. 3(b) of the *PWPA*.

The question that would need to be addressed in any challenge to the *PWPA* is whether the detentions permitted by the *PWPA* are arbitrary in nature. The use of the term "any approach thereto" is vague and imprecise. A person could be deemed to be on "any approach thereto" a great distance from the entrance of a public work and their detention might very well be arbitrary. In addition, the fact that the guards and peace officers determine the boundaries of the "approaches", which cannot be contested, seems arbitrary, as well as who they chose to search.

⁹⁶ It should be noted that not all communications with state authorities and police officers will amount to a detention. The question is whether a person may reasonably believe that he or she is free to refuse to comply.

Section 11(d) of the *Charter* provides that "Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." This requires that the Crown have the burden of proving the guilt of an individual charged with an offence.⁹⁷ Provisions that place the burden on the accused to disprove, on the balance of probabilities, an essential element of an offence raises s. 11(d) concerns because convictions would be possible even if reasonable doubt existed.⁹⁸ The presumption of innocence is not only infringed upon by a requirement that an accused disprove an essential element of an offence but also any requirement on an accused to prove a fact on the balance of probabilities to avoid conviction.

Section 5(1) of the *PWPA* states that "Every person who neglects or refuses to comply with a request or direction made under this Act by a guard or peace officer, and every person found upon a public work or any approach thereto without lawful authority, the proof whereof lies on him or her, is guilty of an offence and on conviction is liable to a fine of not more than \$500 or to imprisonment for a term of not more than two months, or to both." For the offence of being found upon a public work or on any approach to a public work without lawful authority, the burden of proof has been "shifted" from the Crown to the accused to prove lawful authority.

As the foregoing analysis reveals, there are certainly many concerns that arise when one places the PWPA under the lens of the Charter. However, the rights and freedoms provided by the *Charter* are not absolute. They are "subject only to such reasonable

⁹⁷ R. v. Oakes, [1986] 1 S.C.R. 103. ⁹⁸ Ibid. at 132.

limits prescribed by law as can be demonstrably justified in a free and democratic society." ⁹⁹

In assessing whether a law which infringes the *Charter* is saved by s. 1, a court examines both the object of the law and the measures taken to achieve that objective. A law's objective achieves the status of being sufficiently important to justify overriding a *Charter* right only when it is consistent with the values of a free and democratic society. The objective must relate to pressing and substantial concerns and not concerns that are trivial and must be focussed on "the realization of collective goals of fundamental importance." The measures adopted must be "rationally connected" to the objective of the law. The measures "should impair 'as little as possible' the right or freedom in question." Furthermore there must be "a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'." 103

An issue that may affect whether the potential limitation on rights and freedoms of the *PWPA* and O. Reg. 233/10 were "prescribed by law" is whether the regulation was adequately accessible to the public. The Ontario Ombudsman, the CCLA, and the Ontario Bar Association ("OBA") all noted a lack of notice regarding O. Reg. 233/10 and its effects prior to and during the G20. While the text of the regulation was available prior

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⁹⁹ Charter, s. 1. The Superior Court of Quebec decision of *Tremblay v. Québec (Attorney General)*, [2001] J.Q. No. 1504 (C.S.), involved an interim injunction brought by an applicant who was denied entry into the secured perimeter during the 2001 Summit of the Americas in Québec City. The applicant sought an injunction to either eliminate the security barrier or to be given a pass to let him within the secured perimeter. Even though, the Court held that the erection of the security zone violated the applicant's right to freedom of expression and peaceful assembly. The court held that the infringement was "demonstrably justified in a free and democratic society."

¹⁰⁰ Supra note 97 at 136.

¹⁰¹ *Ibid.* at 139.

¹⁰² *Ibid*.

¹⁰³ *Ibid*.

to the G20, it was only available on a website not frequently accessed by the public. Since O. Reg. 233/10 was not published in *The Ontario Gazette* until after it was revoked, it may be that the regulation was not adequately accessible to the public.

Reverse onus offences have been found to be "rationally connected" when there is plainly a rational connection between the proven fact and the fact to be presumed. Reverse onuses have also been upheld when the burden placed on the Crown would be virtually impossible to meet (such as proving sanity). 104 Even if the accused only has the burden of disproving the fact that he/she did not have lawful authority to be in a public work or on an approach thereto, there may not be a rational connection between the proven fact and the fact to be presumed.

The history of threats and violence at previous intergovernmental conferences demonstrated that the protection of G20 participants was a pressing and substantial concern. However, given the broadness of the PWPA, every exercise of it raises the potential for *Charter* scrutiny.

Recommendation

Given the public policy considerations I have raised regarding the PWPA and Charter concerns that could arise, I recommend that the PWPA be repealed after the Province has considered potential policy and security gaps as a result of its repeal.

В. Other uses of the Public Works Protection Act

It appears from my consultations with stakeholder groups that, if the PWPA is repealed,

¹⁰⁴ R. v. Chaulk, [1990] 3 S.C.R. 1303 at 1340.

there are two areas which may require legislation to provide specific peace officer powers. These two areas are court security and the protection of nuclear power facilities and other power generating infrastructures.

1. Court Security

During my decade as Ontario's Attorney General (1975 to 1985) there were three murders in provincial courthouses as well as many threats to members of courthouse staff and others. As violent acts in courthouses can be anticipated, courtroom security is often required.

Individuals are compelled to go to court for a variety of reasons, such as appearing as an accused, as a witness, or for jury duty. To provide protection to those who work there or are compelled to attend, an adequate level of court security may require a search without warrant of each and every individual who seeks to enter a courthouse. It is not reasonable to require prior judicial authorization for each search that takes place.

The courts have considered the constitutionality of these provisions of the *PWPA* in conjunction with section 137 of the Ontario *Police Services Act* in the context of court security.

Section 137 of the Ontario *Police Services Act* imposes a responsibility on municipal police services boards to secure the premises where court proceedings are conducted, and includes:

1. Ensuring the security of judges and of persons taking part in or attending proceedings.

- 2. During the hours when judges and members of the public are normally present. ensuring the security of the premises.
- 3. Ensuring the secure custody of persons in custody who are on or about the premises including persons taken into custody at proceedings.
- 4. Determining appropriate levels of security for the purposes of paragraphs 1, 2 and 3.

In R. v. Campanella, 105 Ms. Campanella was attending the John Sopinka Courthouse in Hamilton. At the courthouse, there were signs posted stating that those who entered would be searched for weapons. When Ms. Campanella's bag was searched, marijuana was found and she was charged with the possession of marijuana. She argued that her s. 8 Charter protection against unreasonable search and seizure had been violated and the marijuana discovered during the search should therefore be excluded as evidence. The trial judge and the summary convictions appeal court rejected the section 8 Charter argument and the appellant appealed to the Ontario Court of Appeal.

The Ontario Court of Appeal agreed that "given the importance of the government objective and the context in which these searches take place it is reasonable to authorize warrantless searches of those entering courthouse facilities." The Court stated: "the only effective way to diminish the risk in a large courthouse is to subject everyone without prior security clearance to some kind of inspection. I can see no other feasible means of achieving the aim." ¹⁰⁷

The Court also pointed out the concern relating to the erosion of the benefits and

 $^{^{105}}$ [2002] O.J. No. 5104 (S.C.J.); aff'd [2005] O.J. No. 1345 (C.A.) ["Campanella"]. 106 R. v. Campanella, [2005] O.J. No. 1345 at para. 17 (C.A.).

¹⁰⁷ *Ibid*. at para. 19.

protections conferred by s. 8 of the Charter: 108

I am sensitive to the concern that we should not erode the benefits and protections of s. 8 by gradually sanctioning ever-greater intrusions into privacy because of unfounded fears. We should not lightly accept that searches in public places are justified solely because people have become used to them and expect them. However, the record in this case establishes the justification for the kinds of searches carried out in this case.

Ultimately, the appeal was dismissed and s. 137 of the *Police Services Act* and s. 3(b) of the *PWPA*) were held to comply with s. 8 of the *Charter*. 109

In its consultations with me, the OBA similarly stated that the existing nature of court security is necessary and is generally "well tolerated." At the same time, however, it submits that the security regime should not be "shoehorned" into the *PWPA* regime and that it would be preferable to provide a legislative framework tailored for the specific security requirements. While the *PWPA* has been relied upon as support for the exercise of powers by the police in providing court security, the OBA submits that the *PWPA*'s "single security scheme" which declares something a "public work" is an "awkward, blunt instrument in a world where more specialized tools are necessary." When warrantless searches are being done on a routine basis, it is advisable to have specific legislation providing peace officers with such power.

Recommendation

Court security legislation is currently in place in many jurisdictions across Canada, and contain provisions that permit warrantless searches of persons wanting to access a

¹⁰⁸ *Ibid.* at para. 25.

The Court in *R. v. S.S.*, [2005] O.J. No. 5002 (S.C.J.) agreed with the findings and rationale of the Court of Appeal in *Campanella*.

courthouse. The constitutional validity of such legislation in Manitoba was upheld by that province's highest court.¹¹⁰

Given the ongoing need for warrantless searches at courthouses, the Province of Ontario should consider specific court security legislation in Ontario to support the security measures in our courthouses if the *PWPA* is to be repealed, taking into consideration the responsibilities of the municipal police services boards provided in s. 137 of the *Police Services Act*. This legislation should only be passed after proper notice, consultation, and legislative debate.

2. Power Generating Infrastructures

It is clear from the submissions that I received from representatives of OPG and the Canadian Nuclear Safety Commission ("CNSC"), that the *PWPA* currently plays a role in providing security officers with the powers to secure power generating infrastructures including the ability to carry firearms and the ability to stop and require identification from those in proximity to those nuclear plants.

Security is of the utmost importance in protecting a nuclear power plant. Members of the public do not need to access a nuclear or similar power facility unless employed at the facility or carrying out work for the facility.¹¹¹

The security of areas within nuclear power plants is governed by the Nuclear Security

¹¹⁰ R. v. Lindsay, [2004] M.J. No. 380 (C.A.).

Though the discussion focuses on nuclear power plants, I have been informed that other power generating infrastructures use the PWPA to designate their security officers as guards. As a result, if the PWPA is repealed, it will be necessary to broaden the consultations in relation to these other power generating infrastructures.

Regulations.¹¹² Every nuclear power plant must be located within a "protected area."¹¹³ This protected area is the area within a fenced perimeter, which is alarmed and continually patrolled. This area must be equipped with devices that employ two independent systems to detect intrusion into the area.¹¹⁴ The Nuclear Security Regulations also provide detailed specifications for the barrier which must enclose the protected area.¹¹⁵ In addition, licensees must "identify all vital areas and implement physical protection measures – including access control and measures designed to delay unauthorized access."¹¹⁶

The *Nuclear Security Regulations* also provide detailed provisions regarding entry into protected areas. No person can "enter a protected area without physical proof of the recorded authorization of the licensee." Further to this, on entry into a protected area, "that person's identity shall be verified by two separate personnel identity verification systems, one of which is an access card reader and the other of which is a biometric personnel identity verification device." Licensees must also "ensure that vehicle portals are used for the entry and exit of land vehicles into and from a protected area." Physical protection measures are also required to reduce the chance of a forced land vehicle entry into a protected area.

The power to conduct searches upon entry to a protected area is also provided by the

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¹¹² SOR/2000-209.

¹¹³ *Ibid.*, s. 8.

¹¹⁴ *Ibid.*, s. 11(a)(i).

¹¹⁵ *Ibid.*, s. 9.

¹¹⁶ *Ibid.*, s. 14.1.

¹¹⁷ *Ibid.*, s. 17(1).

¹¹⁸ *Ibid.*, s. 17.1.

¹¹⁹ *Ibid.*, s. 9.1(1).

¹²⁰ *Ibid.*, s. 9.1(4).

Nuclear Security Regulations. Signs must be posted that are visible to people about to enter the protected area, stating that they must allow a nuclear security officer ("NSO") to "search them and everything in their possession, including any land vehicle, for weapons and explosive substances." ¹²¹ In addition, when leaving the protected area, people must allow NSOs to "search them and everything in their possession, including any land vehicle, for Category I, II or III nuclear material." People are not permitted to enter or leave a protected area unless these searches are carried out. 123 The Nuclear Security Regulations provide for the method of search, including "a hand-held scanner, a walkthrough scanner or any similar device."124 In addition, if an NSO determines it necessary, a frisk search can be carried out by a person of the same sex. 125

I have been informed that the area outside of, but adjacent to, the "protected area" is referred to as the "controlled area." This area includes roadways and waterways within the nuclear facility's property boundaries adjacent to or in close proximity to the nuclear power plant's protected area and may be generally accessible to the public.

As a result of the September 11, 2001 terrorist attacks, the Nuclear Security Regulations were amended to require that high security nuclear facilities maintain an on-site armed Nuclear Response Force ("NRF"). 126 The NRF is composed of specialized NSOs. Section 32 of the *Nuclear Security Regulations* requires the NRF to be capable of making an effective intervention, taking into account the threat.

¹²¹ *Ibid.*, s. 27(1)(a). ¹²² *Ibid.*, s. 27(1)(b).

¹²⁴ *Ibid.*, s. 27(5)(a).

¹²⁵ *Ibid.*, s. 27(5)(b).

¹²⁶ *Ibid.*, s. 32.

Members of the NRF are mandated by the *Nuclear Security Regulations* to be "trained in the use of firearms, authorized to carry firearms in Canada and qualified to use them." However, to satisfy this requirement, the NRF resorts to the *PWPA*, since the federal regulations do not authorize the NRF to carry firearms without a licence. However, under s. 2(1) of the *PWPA*, NSOs are designated as "guards" with the powers of a peace officer, most significantly, to carry and use firearms, without having to be licensed. Such a designation also enables the OPG to acquire and dispose of firearms.

In the consultations I had with the OPG and the CNSC they advised me that NSOs receive training equivalent to Canadian police standards and that NRF officers receive training equivalent to federal and provincial police tactical team requirements.

Another aspect of the *PWPA* used to secure nuclear power plants relates to powers exercised by NSOs in "controlled areas." The federal regulations do not provide the NSOs with any power to demand identification within this area. However, pursuant to the *PWPA*, as appointed "guards," the NSOs have the power to demand identity verification in the controlled area. They also have the authority to arrest anyone who obstructs NSOs in the performance of their duties under the *PWPA*.

In addition to using the *PWPA* to secure the controlled areas, I have been advised by the OPG that NSOs use powers pursuant to the *PWPA* to secure areas within 100 metres of a nuclear facility's property line, immediately adjacent to the controlled area. These powers are exercised under the broad language of the *PWPA* regarding "approaches to public

¹²⁷ *Ibid.*, s. 1 (on-site nuclear response force definition).

Section 117.07 of the *Criminal Code* exempts peace officers from licensing requirements for possessing firearms and other prohibited and restricted weapons.

works." This is an illustration of the problem with the vagueness of this language in the legislation. As these powers are exercised on public land, they could be challenged as a potential infringement on individual rights and freedoms. However, I have been advised that there have been no such incidents to date. The need to ensure the security of these facilities must be taken into the balance.

NSOs must be able to monitor and control access to the controlled areas and areas close to a nuclear power plant's property line. This provides for a more secure perimeter around these facilities. They need authority to challenge individuals acting in a suspicious manner or conducting surveillance of nuclear facilities. The OPG has informed me that areas outside a nuclear facility's property line, immediately adjacent to the controlled area, are still close enough to take advantage of the short distance to conduct intelligence using high-powered surveillance equipment. These nuclear power plants are not located on isolated islands and are therefore vulnerable. Both the Pickering Nuclear Generating Station and the Darlington Nuclear Generating Station operate within major urban areas, being 30 km and 60 km east of downtown Toronto respectively. I am advised that previous events, such as "The Toronto 18," have shown that those intent on targeting vital infrastructure such as power generating facilities often use reconnaissance and intelligence gathering as precursor tactics.

Recommendation

If the *PWPA* is to be repealed, it is imperative that those who secure our nuclear and power generating facilities be given the requisite specific legislative powers to do so.

¹²⁹ See, for example, "Last 2 Toronto 18 accused found guilty" *CBC News* (23 June 2010), online: cbc.ca http://www.cbc.ca/news/canada/toronto/story/2010/06/23/toronto-18-verdict.html.

The source for these powers should be set out in the federal *Nuclear Security Regulations*. However, if this is not a desired option, the Government of Ontario must consider specific legislation setting out the specific powers required to properly secure these facilities and the specific location in which these powers can be exercised. Such legislation should not be passed without proper notice, consultation, and legislative debate.

SECTION 6: CONCLUSION

The *PWPA* was enacted in 1939 to support the war effort. At the time, the protection of Ontario's hydroelectric facilities from sabotage was of particular concern. Since then, the *PWPA* has been used to provide the legal foundation for the powers exercised by the police in providing court security and, even more recently, by the OPG in securing nuclear power facilities. In June 2010 the *PWPA* was used to provide powers to secure intergovernmental conferences. The vagueness of the *PWPA* permits it to be used in situations when it is arguably not necessary and potentially abusive. In my view, the *PWPA* has been used for purposes beyond its original intent.

The time for the *PWPA* seems to have passed. If the Government of Ontario enacts, as I have suggested, specific legislation to provide for courthouse security and power generating infrastructure security, it would appear that there is no longer a need for the *PWPA*. I am also mindful of the existence of counter-terrorism and emergencies legislation to deal with these situations as they arise.

"In determining the boundaries of police powers, caution is required to ensure the proper balance between preventing excessive intrusions on an individual's liberty and privacy, and enabling the police to do what is reasonably necessary to perform their duties in protecting the public." The overly broad and vague language of the *PWPA* does not strike this required balance with individual rights and freedoms.

The late Justice Jackson, of the United States Supreme Court, stated that every emergency power, once conferred, "lies about like a loaded weapon ready for the hand of

¹³⁰ R. v. Clayton, [2007] 2 S.C.R. 725 at 742.

any authority that can bring forward a plausible claim of an urgent need." The need to protect the public must be balanced with the requirement to preserve fundamental rights and freedoms.

Yet, at the same time, "Canadians are entitled to demand the best public order policing possible from their government." ¹³² There is no question that we live in a different world post 9/11. We live in difficult times with constant threats both domestically and from abroad. The police clearly need to be given adequate powers to carry out their duties. The police use their expertise on a daily basis to assess the powers they require. In instances when they take action that exceeds their powers, their actions are examined by various mandated bodies. This process, I believe, results in the proper balance between police powers and individual rights and freedoms. Therefore, any legislation that purports to grant special police powers must be specific and direct and developed in consultation with stakeholders and tested through thorough debate in our transparent democratic system.

¹³¹ *Korematsu v. United States*, 323 U.S. 214 (1944). ¹³² *Supra* note 26, p. 8.