



Submission to the Honourable R. Roy McMurtry's Review
of the *Public Works Protection Act*

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Submitted to: Honourable R. Roy McMurtry

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ONTARIO
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The Ontario Bar Association (the “OBA”) appreciates the opportunity to provide this submission for use in the review of the *Public Works Protection Act* (“PWPA” or the “Act”).

The OBA

As the largest voluntary legal organization in the province, the OBA represents 18,000 lawyers, judges, law professors and students in Ontario. OBA members practice law in no fewer than 36 different sectors. In addition to providing legal education for its members, the OBA has assisted government with several legislative and policy initiatives - both in the interest of the profession and in the interest of the public.

To ensure a broad range of perspectives, representatives of a number of practice areas contributed to this submission. Participants included members of the Constitutional, Civil Liberties and Human Rights; International Law; Criminal Justice; Municipal Law; and Public Sector Law sections, as well as our Young Lawyers’ Division. The submission has had the benefit of review by all 36 of our practice sections.

INTRODUCTION

The Act dates back to 1939. Hence, it is not surprising that it fails to reflect a modern view of what constitutes a critical public work and, more importantly, fails to respect a post-*Charter* view of what is justifiable, or even acceptable, in terms of limits on civil liberties. The advent of technologies such as the Internet, and the emergence of principles such as minimal impairment and the need to prescribe rights’ limitations as specifically as possible, render the PWPA anachronistic.

In the OBA’s submission, the PWPA puts the fundamental rights of Ontarians at risk, without adequate justification or clarity. A fundamental problem with the Act is that it has been inappropriately assigned to triple duty. The Act has been, or might be, employed in:

- (a) unpredictable, amorphous or **emergent situations** such as a terrorist attack or war. Despite the fact that the Act was designed for this situation, it needs to be modernized to better respect the evolution of civil rights and constitutional principles;
- (b) **routine and essentially permanent security protocols** such as courthouse security. This kind of security is generally well-tolerated and certainly did not spark the current concerns about the PWPA. We agree that this type of security is necessary. However, in reviewing the Act, it is clear that routine security measures have been shoehorned into the PWPA’s regime. It would be preferable to provide a legislative framework *designed* for these situations; and



- (c) Dealing with the transient but relatively predictable security risks raised by high-ranking visiting dignitaries or similar **preplanned events**. This is, of course, the context in which the Act is currently under scrutiny. Bending and twisting the inflexible power to designate a “public works” to fit the security needs of these event leads almost inevitably to overbreadth. What is more, the Act’s failure to account for the fact that peaceful protest does, and should, go hand-in-hand with such events, undermines the fundamental freedoms of speech and association.

The PWPA’s single security scheme - the ability to declare something a “public work” - is an awkward, blunt instrument in a world where more specialized tools are necessary. The attempt to create solutions to divergent problems with this one out-dated hammer has recently led to unfortunate consequences. The Act has been enlisted to manage situations for which it was not designed.

We have outlined below broad suggestions for at least three separate pieces of legislation to replace the PWPA and deal more appropriately with the three very different security situations outlined above (the “security situations” or the “three security situations”).

In recent decades parliament has addressed these same security concerns, in the national context, with specialized legislation (see Appendix I). At a minimum, if one piece of legislation is going to be applied to all the security situations, there should be three distinct regimes within that legislation.

For each of the three security situations, we have provided policy suggestions in the following four subject areas:

- I- Triggers for invoking the special restrictions;
- II- Designating restricted or protected areas;
- III- The powers and qualifications of those assigned to protect the designated areas; and
- IV- Notice to the public of whatever restrictions have been imposed.

Each security situation calls for different degrees of flexibility and different means of protecting rights in each of the four areas.

I – TRIGGERS FOR INVOKING RESTRICTIONS

(a) Emergency Situations

The PWPA was designed to deal with the national and international emergency that was World War II. Yet, this extraordinary purpose is not reflected in any specific provision that either defines or restricts a government’s ability to invoke the Act. A regime designed to deal with unpredictable and ever-changing emergent situations is likely to allow for fewer opportunities for the protections outlined below (such as notice) and likely to authorize a broader range of extraordinary powers. It is, therefore, crucial that clear



preconditions to the exercise of such an emergency regime are explicitly outlined in primary legislation (as opposed to being left to subordinate legislations such as regulations). Public debate on these restrictions is critical to a free and democratic society.

Examples of explicit preconditions to the application of emergency powers and prohibitions are found in the federal *Emergency Act* and in Bill 141, *The Health Protection and Promotion Amendment Act* (“Bill 141”), which is currently before the Ontario Legislature. The powers outlined in Bill 141 could only be exercised where there was a health emergency such as

...where the Chief Medical Officer of Health certifies in writing to the Minister that the Chief Medical Officer of Health is of the opinion that,

(a) there exists, or there is an immediate risk of, an outbreak of a communicable disease anywhere in Ontario, or there exists, or there may exist, an immediate risk to the health of persons anywhere in Ontario....

Powers under the *Emergency Act* can only be exercised where there is a “public welfare emergency”, a “public order emergency” or an “international emergency”, each of which is specifically defined. It is recommended that, if the province enacts legislation to deal with emergencies, comparable triggers or pre-conditions should be explicitly outlined in the Act.¹

(b) Routine or Permanent Security Measures

Legislation outlining permanent or routine protection for specific public places, such as court houses, would not require a triggering event or precondition. The legitimacy of protecting the area would be the subject of debate around the legislation itself. The rationale would not be situational.

(c) Planned Events

While legislation designed to deal with preplanned, large-scale conferences or events may require greater flexibility in terms of applicability than the routine-security legislation, its applicability/trigger should be limited both in terms of the nature of the event and the necessity for protection. In addition to identifying the types of meetings covered (by their scale and the

¹ . There is some question about whether it is necessary, practical or even permissible from a federalism perspective, to have a provincial regime that deals with the kind of emergencies contemplated by the *Emergencies Act*. However, there are many conceivable situations in which emergencies, while wide-ranging in importance, are entirely contained within the province and the immediate effects are provincial. In such cases, it would be desirable and permissible for the more agile provincial government to act rather than waiting for a decision from the federal government. Similarly, federal legislation should be employed to deal with most international events but there may be conferences involving Ontario leaders and the leaders of other subordinate jurisdictions. In such a case, the province would not want to have to rely on the federal government to employ its legislation.



characteristics of their attendees for example), legislation dealing with preplanned-event security should also provide that the ability to trigger any special powers should depend on there being an existing or likely threat to the safety of attendees. In the current climate, a meeting between the Premier and Great-lakes governors, for example, may not justify any special powers or restrictions. On the other hand a meeting of provincial officials and their counterparts from a less stable region may indeed require special protective measures. Not every large-scale event will justify extraordinary powers.

II- DESIGNATING RESTRICTED OR PROTECTED AREAS

(a) Emergency Situations

Even for the purpose of managing an emergent situation, the ability to prescribe protected or restricted areas in the PWPA is far too broad. We suggest that the *primary* legislation enumerate, as specifically as possible, the properties or assets that can be subject to the powers and restrictions of an emergency regime. Clearly, the PWPA's existing list needs to be updated as it does not cover technological information infrastructure. To the extent a basket-clause providing regulation-making authority remains necessary, limits on that authority should also be outlined clearly in the authorizing legislation. The ability to designate areas by regulation should be limited:

- (i) in respect of the nature of the property. Despite the use of the term “public works” in the Current PWPA, the broad authority given to the Lieutenant Governor in Council (“LGIC”) to prescribe an area that will be the subject of special protections and restrictions does not even differentiate between government-owned property and private property. Alberta's *Public Works Act*, for example, limits the definition of “public work” to property that was built, purchased or otherwise acquired with public funds.² Bill 141 also makes a public versus private distinction and provides for a much more restricted ability to designate and use facilities not owned by the government. It is possible that some emergencies may require the government's use of private property but this should have an even more restrictive triggering provision and should possibly involve a compensation scheme; and

² While the Alberta *Public Works Act* applies in the context of procurement and tenders, there is no reason that a similar definition cannot be applied in a security context to assist in drawing a distinction between the extraordinary measure of restricting public works and the even more extraordinary measure of government-dictated restrictions on privately-owned property. Note that Alberta's *Government Organizations Act* is the comparable legislation to the PWPA and, like the PWPA, fails to define the nature of property that can be the subject of restrictions. *Special thanks to Luiz Arthur Bihari, law student with the David Asper Centre for Constitutional Rights for his background inter-provincial research.*



- (ii) in respect of the property's purpose. The ability to restrict access should be limited to property that is necessary for the government to continue to function and to manage the particular emergency. In Bill 141, for example, property that can be subject to the provisions of the Act must be “*needed* for use for public health purposes in respect of the risk of an outbreak of a communicable disease, the outbreak of the communicable disease or the risk to the health of persons” (emphasis added).

(b) Routine or Permanent Security Measures

Any protected or restricted areas that are subject to routine and permanent security should be clearly and specifically laid out in primary legislation and a basket clause or regulation-making authority should not be necessary.

(c) Security for Planned Events

The federal *Foreign Missions and International Organizations Act* (“FMIOA”) explicitly provides for the kind of restrictions and prohibitions for which the PWPA was invoked at Toronto’s G20 conference. The FMIOA provides that:

10.1 (1) 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.

(2) For the purpose of carrying out its responsibility under subsection (1), 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.

Where a conference deals with Canada and other national leaders, there is no reason that the province should have to designate areas beyond those areas restricted by the federal government. As outlined earlier, however, there may be instances where the province is dealing with security around meetings of leaders of subordinate jurisdictions or for which the federal government, for whatever reason, refuses to provide adequate protection. Where the province does need to provide its own security protocol for an event, declaring areas to be “public works” is simply awkward, misleading and confusing nomenclature. Instead, provisions designed specifically for any necessary restrictions for large-scale events should be enacted. These provisions could be similar to, but more restrictive than, section 10.1 of the FMIOA. At a minimum, legislation that allows for the event-based designation of restricted areas should provide:

- (i) that restrictions placed on a given area must be strictly necessary for the safety of the event participants; and
- (ii) there should be an explicit recognition of the requirement to minimally impair freedoms, including, without limitation, narrowing the prohibited areas and the temporal length of the and restrictions to what is absolutely



necessary. For example, it would not be justified to restrict access to a highway except for the period of time a protected event participant was scheduled to use the highway. In addition, the ability to prescribe restrictions on an unnecessarily large area could be inappropriately used to keep peaceful protests so far away from political leaders that the protest could not possibly convey its message

A government decision should be made regarding the areas that are affected, rather than leaving the matter entirely in police hands.

(d) Other issues regarding the identification of restricted areas

In none of the three situations would Section 4 of the PWPA be justified. The section provides:

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.

With a modern ability to access schematics for buildings, property lines and roadways, there does not seem to be any justification for this provision. More objective proof of the areas affected would be available and, where charges have been laid, the crown should be put to the strict proof that the arrest was made in relation to the actual designated area.

Similarly, none of the security situations should allow for restrictions on an area as amorphous and ambiguous as the “approach” to a public work (see subsection 5(1) of the PWPA). The entire restricted area should be specifically described or even depicted in a photograph or other image.

III – THE POWERS AND QUALIFICATIONS OF “GUARDS”

Given the size of modern, standing police forces, it is unlikely that any of the three security situations would justify the deputization of completely unqualified guards to protect people or infrastructure. If a large-scale emergency or event did require resources beyond the police, the



permissible personnel should, at a minimum, consist of those licensed under the *Private Security and Investigative Services Act, 2005*.³

The following are the powers of the “guards” under the PWPA and a discussion of the situations in which those powers may or may not be appropriate.

Power: may require any person entering or attempting to enter a restricted or protected area 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

(a) Emergency Situations

While the requirement to outline your purpose may be appropriate to protect infrastructure in war-like situations, the notion that the guard can in his/her own discretion require that purpose to be in writing is inappropriate.

Also, where an attempt to enter is refused or abandoned, there is no reason one should have to identify her/himself.

(b) Routine Security

Particularly in the case of courthouse security, this provision is inappropriate. The security purpose is satisfied when one ensures that there are no dangerous weapons. Many issues of privilege and confidentiality could be raised by the requirement to identify yourself and state your purpose. This would be contrary to the principle of open courts. While Nova Scotia’s *Court Security Act* seems to provide for this, it is in our view inappropriate in that context.

In the context of government offices that require special protection (such as the Solicitor and Attorney General), the requirement to identify and state your purpose may be justified.

³In addition to the many protections, for the public and event participants, that will flow from ensuring professional security providers, there is one ancillary advantage: the unusual and inappropriate provision in section 2 of the PWPA (under which a guard can be charged for failing or neglecting to perform his/her duty) can be eliminated. Where the force is professional, The *Police Services Act*, internal discipline and security-guard licensing restrictions will govern issues of compliance with duties.



(c) Pre-Planned Events

In this context, the requirement to outline one's purpose may be appropriate to protect the event participants. However, as in the case of an emergency security regime, the notion that the guard can, in his/her own discretion, require that purpose to be put in writing is inappropriate. Also, where an attempt to enter is refused or abandoned, there is no reason one should have to identify him or herself.

Power: 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

(a) Emergency Situations

While the ability to search the person actually entering a properly designated protected area may be justified, a search of a vehicle that is not entering the area should be limited to situations in which there were reasonable and probable grounds for the search. If there were reasonable and probable grounds to believe there was an immediate threat (eg. a car bomb), the search could be warrantless. Otherwise, the availability of tele-warrants and other innovations would make it practical for new legislation to provide for a warrant requirement.

Again, abandoned or refused attempts to enter should eliminate the ability to search.

(b) Routine of Permanent Security Arrangements

As outlined in *R. v. Campanella*, 2005 CanLII 10880 (Ont. C.A.), a warrantless search is justified in the case of courthouse security. The same would apply to similar permanent security arrangements for areas, including certain ministries and offices. However, as outlined in the *Campanella* case, where the attempt to enter is abandoned, there is no justification for a search. In fact, the ability to abandon your entry attempt without being searched is one of the reasons the warrantless search was found to be justified. Legislation specifically tailored for court security should also entrench a respect for solicitor/client and related privileges.

(c) Preplanned Events

The same concerns as those outlined above with regard to emergency powers would apply here.



Power: 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.

Given the power to arrest for a refusal to comply with requests or directions, an additional ability to use force seems unnecessary.

In addition, the criteria for admittance should be clearly laid out by the legislation or regulation that outlines the relevant restrictions. Admittance should not be left to a guard's discretion. A complete prohibition on admittance without authorization may be appropriate in some circumstances but, where admittance is more expansive, (eg. admittance subject to a search determining one has no dangerous weapons) a guard should not be left with the discretion to reject someone who they believe may espouse an unpopular view, for example,

These concerns would apply to all three of the security situations

Power: 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.

While refusal to comply with a direction or request to leave or not enter a restricted area may be appropriate grounds for arrest, the strict or absolute liability concept of negligence as a ground for arrest seems inappropriate and should not be included in future legislation for any of the three security situations.

IV-NOTICE

There are very few, if any, instances which justify the imposition of measures that restrict or impair fundamental civil liberties without notice to those affected, or potentially affected.

The three security situations call for varying degrees of notice but, in all three situations, appropriate notice should be given of:

- (i) the fact that restrictions are in force or that regulations have been made;
- (ii) the area that is subject to restrictions; and
- (iii) what the restrictions are.



(a) Emergency Situations

While notice of the designation of restricted areas will be more difficult to give in a true emergency, the prevalence of the Internet makes widespread notice possible and makes a complete lack of notice unjustifiable. Legislation should provide that, where an emergency protocol regime is in effect, the public should be given notice by posting on government websites and releases to the media. In the rarest of cases, there may be an inability to reveal all of the details of the emergency protocol (as it may reveal knowledge gained from confidential sources or threaten security plans) but these details should be given as soon as appropriate and there should be a very high bar for keeping the information secret in the first place.

(b) Routine and permanent Security

Appropriate notice of the restrictions on entry into courthouses, for example, was outlined in *Campanella, supra*. In that case, clear notices posted in front of the restricted area advised that:

- (1) people wishing to enter would be subject to a security search;
- (2) entry would be refused to anyone who was in possession of a weapon or dangerous article; and
- (3) people with illegal articles would be subject to arrest.

Similar notice should be required by any legislation that establishes permanent or routine security arrangements in public places.

(c) Planned Events

Given the wide and amorphous nature of the areas that may be subject to disruption, the requirement to give the public notice in the preplanned event situation is critical. Legislation allowing for special restrictions during preplanned events should require plain-language notice to the public that includes:

- (i) A public release of information indicating what restrictions will be in place, what areas will be affected and the disruption expected. The release should include posting information on the Internet and sending releases to media outlets;
- (ii) Posting of regulations on service Ontario's regulation registry (<http://www.ontariocanada.com/registry/quickSearch.do?searchType=current>) for public consultation prior to their being approved by cabinet or signed by the Lieutenant Governor;
- (iii) Proper signage before and during the applicable restriction period. The signs should clearly indicate the boundaries of the restricted areas, the currency of the restrictions and what restrictions/powers apply (eg. search, prohibited entry etc.);



- (iv) An outline that will provide some guidance as to what is or is not permissible behavior. One of the objects of all notice requirements, particularly this one, is to ensure no one is arrested or charged for being in the wrong place at the wrong time.

In order for the notice requirements to fulfill their objectives, notice needs to be timely. Those directly affected/inconvenienced need to be able to organize their affairs and those who wish to exercise their free speech need to have time to clarify what they are, or are not, allowed to do. Legislation should provide for notice to be given as soon as the security plans are in place and as soon as there are amendments to such plans. The specifics provided should not, of course, compromise the security of the participants.

V-OTHER RECOMMENDATIONS

1. **Public Information Regarding Reform** – Recent use of the PWPA and the consequential arrests may have created a chill. In order to restore appropriate comfort levels for the exercise of free speech and free association, a public information campaign highlighting the government's plan to modernize security legislation should be undertaken;
2. **Ongoing Consultation** - The OBA has outlined broad principles and goals that should be codified in a new legislative framework for security. In order to ensure that any proposed legislation actually achieves these goals and respects these principles, there should be further consultation with stakeholders and interest groups as the government develops its policy and legislation; and
3. **Offence Provisions** - The offence provisions of new legislation should be mindful of the potential Charter sections 7 and 11(d) issues raised by the onus on the accused to prove lawful authority. Whether or not this provision is justified from a constitutional perspective, it is not ideal. Where a citizen is charged with nothing but entering a place that is normally public, the tolerance for even an evidentiary burden on the accused is low. While there may be situations in which the crown could not prove the negative proposition that there was no authority, this will not always be the case. In some cases, for example, there will be a discrete list of those authorized and, therefore, no justification for putting any burden on the accused. Where an authorizing document or reason is promulgated by the accused, it should remain the crown's burden to prove it is not true authority. In addition to the concerns of where the onus lies, reasonable mistaken belief in lawful authority should remain an available defense except perhaps in the most extreme emergencies where threat of attack is very high and notice of the restrictions are clear.



CONCLUSION

The following are the fundamental principles that arise from the OBA's submission:

1. Legislation that grants extraordinary powers or allows for extraordinary restrictions should be specifically tailored to its purpose. The divergent security concerns for which the PWPA is now employed should each receive separate legislative treatment in a new act or acts.
2. Limitations should be prescribed by law, ideally primary legislation, as specifically as possible;
3. Contemplated restrictions, including geographic restrictions, need to be precisely tailored to ensure that any limits to liberty, freedom of speech or other fundamental rights are minimal and necessary for the specific security objective;
4. In all cases, but particularly in the case of planned events, the public must have notice of restrictions. They must be able to plan for disruptions and easily determine what constitutes breaking the law and what does not.



APPENDIX I

The Government of Canada has enacted specific legislation in many of the fields for which the PWPA has been employed, including, among other things, national security, diplomatic and consular immunity applicable to foreign government delegations visiting Canada and challenges to public order posed by large-scale international “summit” conferences hosted by Canada (the latest examples of which were the G8 and G20 conferences of 2010 held, respectively, in the District of Muskoka and the City of Toronto.) The OBA submits that this review and any proposed provincial legislation should be mindful of and, to the extent necessary, specifically address overlapping federal legislation and the relevant jurisdictional issues. A few highlights of this jurisdictional interface are referenced below.

The legal framework of “perimeters” within which both public and private buildings and otherwise “public” spaces would be subject to enhanced police authority for the duration of an international conference was addressed by amendments to the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41, by Bill C-35 in 2002, which, among other things, made the RCMP primarily responsible for ensuring the security of intergovernmental conferences. Particularly relevant to the prospect of amending the PWPA, is Part IV, s. 10.1 of the *FMIOA*, which authorizes the RCMP to (ss. 2) “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.” Further, under ss. 10.1 (4) “the Minister of Public Safety and Emergency Preparedness may, with the approval of the Governor in Council, enter into arrangements with the government of a province concerning the responsibilities of members of the Royal Canadian Mounted Police and members of provincial and municipal police forces with respect to ensuring the security for the proper functioning of a conference....” In short, federal legislation now addresses the necessity of federal-provincial police cooperation in circumstances not foreseen by the PWPA as currently enacted.

Other potentially relevant federal statutes include: the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), replacing the *War Measures Act*, and mandating emergency legislation applying police and military authority in the context of “national emergencies”, “public welfare emergencies”, “public order emergencies” and “international emergencies” as defined therein; and the *National Defence Act*, R.S.C. 1985, c. N-5, particularly, Part VI, ss. 274-285, addressing deployments of the Canadian Armed Forces in “aid of the Civil Power”. A review should also be made of *The Public Safety Act*, S.C. 2004, c. 15, which is comprehensive federal legislation enacted in the wake of the 9/11 terrorist attacks in the United States. All of the foregoing statutes suggest limitations on public authority that has been exercised pursuant to provincial statutes in similar circumstances, and the necessity for cooperation between federal and provincial regimes. In the event of conflict between the two, in the normal course, and subject to the applicable constitutional/legal tests, the doctrine of federal paramountcy would apply.



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