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Security for the Olympics: British Columbia Needs a “Public Order Policing Act”

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Vancouver-Whistler’s 2010 winter Olympic Games will challenge the resources, tact, imagination, and abilities of police and security officials. The routine policing of major public events is challenging. And the Olympics provide an unmatched opportunity for “activists” to leverage media exposure through boisterous demonstrations, disruption, grandstanding, or, if so inclined, violence and property damage. The remote possibility of terrorist attack is real. Yet, as BC premier Gordon Campbell said at a press conference during the Beijing games: “In Canada we will be open to opportunities for people to express whatever views they have,” [...] we will make sure there will be full and equal expression throughout the 2010 Olympics.”¹

The event will be policed under general arrangements similar to those that guided public order policing at APEC, 1997 and at the 2001 Summit of the America’s Conference in Quebec City. This does not reassure.²

Canadian police lack specific statutory authorization to take measures commonly thought essential to good public order policing. The erection of security fences, creation of designated “protest areas,” restriction of access to public space, surveillance, and *search without cause*³ intrude massively

¹ “Campbell fires back at Chinese critics,” Jeff Lee, *Vancouver Sun*, August 12, 2008, <http://www.canada.com/vancouver/news/story.html?id=c6c8fea0-740a-4026-8b03-09b8a3f1389b> (accessed June 14, 2009).

² W. Wesley Pue, ed. *Pepper in Our Eyes: the APEC Affair*. Vancouver: U.B.C. Press, 2000; Pue, “The Prime Minister’s Police? Commissioner Hughes’ APEC report”, 39(1) *Osgoode Hall Law Journal*, 2001, 165-185; Pue, “Executive Accountability and the APEC Inquiry: Comment on ‘Ruling on Applications to Call Additional Government Witnesses’” (2000) 34 *University of British Columbia Law Review*, 335-344.

³ The RCMP have created an “Integrated Security Unit” to deal with the 2010 Olympics. The ISU has not made its security plan public, but a number of details have been noted in the media. The ISU will close the Dunsmuir and Georgia Viaducts near BC Place and General Motors Place, and “security zones” will be erected around both venues. These zones may cover significant portions of public space, including the seawall walkway around False Creek. Jeff Lee, “2010 Olympic Traffic Plans Pose Challenge for Everyone,” *Vancouver Sun*, November 25, 2008, <http://communities.canada.com/vancouver/blogs/insideolympics/archive/2008/11/25/2010-olympic-traffic-plans-pose-challenge-for-everyone.aspx>. The RCMP have sought bids for the supply of forty kilometres of “electronically monitored security fencing” for use around twenty-five Olympic venues. Damian Inwood, “Mounties Looking for Bidders to Supply Security Fencing,” *The Province*, January 17, 2008, <http://www.canada.com/theprovince/news/story.html?id=ae09ad7f-d82f-4ac8-a1a4-091c01716613>. The ISU’s

into the ordinary freedoms of law-abiding subjects. Such measures may be helpful, perhaps necessary. But no Canadian legislature has ever expressly conferred such powers.⁴ They do not reside in the domain of the common law.

British Columbia urgently needs a provincial “Public Order Policing Act” authorizing the creation of police exclusion zones, providing principled and explicit guidance to their proper extent and duration, establishing criteria about who would be allowed admission to “secure” areas (workers, business owners, homeowners, emergency medical personnel, security officials, journalists, and others?), specify decision-making processes, establish principles of compensation, set out “notice” requirements, and so on. Without this, the police will be acting beyond the law.

The absence of a statute empowering police and guiding their conduct is triply unfortunate. First, they are put in the untenable position of being called upon to undertake extraordinarily complex and important tasks in a legal vacuum. Police are *entitled* to direction from the legislature. Second, absent a statutory framework, police officials are forced to make up operational principles as they go, developed in secret, without public scrutiny, and lacking the quality of law. Third, citizens are left in a legal limbo, our rights affected by police actions that cannot be measured against any publicly disclosed standard. Core freedoms including assembly, expression, and protest are all compromised. So too are the rights of businesses, homeowners, and ordinary citizens to go about their routine activities without interruption. For such infringements to be constitutionally justifiable, they need, first, to be authorized by law.

Part 2: Limits of Public Order Policing Power in Canada

Community Relations Group has consulted with activist groups about “possible protest zones sanctioned by police.” Rod Mickleburgh, “Olympic Security Boss Puts Protesters on Notice,” *Globe and Mail*, January 23, 2009, <http://www.theglobeandmail.com/servlet/story/RTGAM.20090123.wbcolympicsecurity23/BNStory/National/?page=rss&id=RTGAM.20090123.wbcolympicsecurity23>. The RCMP also plan “to install hundreds of closed-circuit television cameras for security... [at] both athletic and public celebration venues.” “Vancouver Olympics Security Cameras Raise Privacy Concerns,” CBC Television, May 12, 2008, <http://www.cbc.ca/canada/british-columbia/story/2008/05/12/bc-olympic-security-cctv.html>. The Commission for Public Complaints against the RCMP recently ruled alcohol searches at public events to be improper: <http://www.theprovince.com/cars/Watchdog+rules+Victoria+police+Canada+liquor+searches+lawful/1437260/story.html> ; <http://www.cpc-cpp.gc.ca/nrm/nr/2009/20090327-eng.aspx>. (All sites accessed June 14, 2009.)

⁴ At the time of writing, Vancouver City Council is considering enacting an omnibus “2010 Olympic and Paralympic Winter Games Bylaw” in order to fill the legal void around public order policing. This would authorize a number of practices relating to security including closure of streets and other public spaces, the use of airport-style security checkpoints at certain sites; searches of persons and bags (without reasonable cause or warrant); video surveillance; and restrictions on the use of signage, megaphones, and other methods of expression. The text under consideration seeks to authorize some but not all of the security tactics that may be used at the Olympics. See <http://vancouver.ca/ctyclerk/cclerk/20090721/documents/a4.pdf> (access on July 20, 2009). A by-law cannot take the place of public order policing legislation however: its vires is unclear, its scope limited and its reach is confined to one municipality only.

Acutely aware that they lack statutory authority, Canadian policing officials have falsely presumed that plenary public order policing powers derive from the ancient duties of peace officers to protect life and property, preserve peace, and prevent crime.

The leading authority, *R. v. Knowlton*,⁵ was decided in the Supreme Court of Canada a generation ago. The case arose from a modest policing incident when the premier of the Soviet Union, Alexey Kosygin, visited an Edmonton hotel in the early 1970s. Earlier in his visit he had been attacked by an unarmed man while walking on Parliament Hill with Prime Minister Pierre Trudeau. Fearing a repeat, Edmonton police created a security zone that followed a hotel's property lines but also obstructed a small portion of the sidewalk on an adjacent public street. E.J.N. Knowlton was arrested when he breached the perimeter, telling police he had the right to move freely on a public street in order to photograph Kosygin. Ultimately, the Supreme Court of Canada upheld the police actions as necessarily incidental to their common law obligations. In the particular circumstances, obstruction of a small stretch of sidewalk represented a reasonable instance of the general authority of constables to preserve the peace, prevent crime, protect public safety, preserve order, and prevent offences against provincial laws. The court also thought it proper for police to screen people passing through a security barricade so as to selectively bar some individuals from entry to the *private property* within.

Knowlton's ratio decidendi is narrow. The public's freedom of movement had been (1) minimally restricted, (2) for a limited time, and (3) over a small area of public street directly adjacent to consensually policed private property where the owner clearly consented to police security measures — and in circumstances where there was clearly good reason to fear an assault on a controversial visiting statesman.

Nearly thirty years later similar issues arose during the 2001 Quebec City Summit of the Americas conference. Judge Blanchet in *Tremblay c. Québec (Procureur général)* described the background to the case:

The authorities have set up a substantial security barrier around the third Summit of the Americas, which Quebec City will host for three days beginning on Friday April 20th, to protect the 34 participating heads of state, their delegates and the general public. Among other measures, in the Upper Town there will be a fenced security perimeter which may only be entered by certified persons (dignitaries, journalists, Summit employees and police officers) as well as residents, workers, businessmen and civil servants holding a pass issued by the RCMP.⁶

⁵ *R. v. Knowlton*, [1974] S.C.R. 443 [hereafter *Knowlton*].

⁶ *Tremblay c. Québec (Procureur général)*, [2001] J.Q. no. 1504, para. 1, per Gilles Blanchet J [hereafter *Tremblay*]. The ruling is translated into English in W. Wesley Pue, "Trespass and Expressive Rights," *The Ipperwash Inquiry* (2007), at 52–77 (Appendix),

M. Tremblay, a Montreal lawyer, thought that in the absence of express statutory restrictions, he had a right to move freely within Canada and to make a personal, peaceful protest in front of the Quebec Congress Centre. Police declined to grant him a pass to the walled zone. Tremblay sought a permanent injunction, alleging that the barricades interfered with his rights under the *Charter*.

Curiously, the question of the extent of police authority was approached through a *Charter* analysis, not through an assessment of their statutory or common law powers. This misstep profoundly distorted the analysis. As in *Knowlton* (which went uncited), no statute expressly authorized the actions taken by police. His Lordship concluded that the Charter would not restrict necessary public order policing powers if they existed – as he assumed they did.

The ruling in *Tremblay* skated quickly over difficult questions relating to the general scope of police duties and *necessarily* ancillary police powers. The relevant portions of each of the statutes that Blanchet J. looked to are in fact expressed in broad terms of the sort that would not normally be construed as authorizing significant violations of ordinary freedoms and liberties, and none of them creates a new police power. There is no statutory grant of power for the erection of barriers, the zoning of public space, limiting mobility, constraining — or relocating — free speech, interfering with businesses, impeding access to homes, or establishing a system of “passes” that might have conferred lawful authority on the security arrangements in place for the Summit of the Americas. His lordship, in effect, *presumed* statutory authority.

Mr. Justice Blanchet found the measures taken had violated the rights to freedom of expression and peaceful assembly in section 2 of the *Charter*,⁷ but that they could be upheld under section 1 as “demonstrably justifiable in a free and democratic society.” Section 1 of the Charter, however, authorizes certain infringements of rights *only if* they are “prescribed by law.” Thus, we return to the puzzle that logically precedes a *Charter* analysis: where is the legal source for the powers exercised? Although the ruling is somewhat cryptic in this regard, Mr. Justice Blanchet relied heavily on his understanding of the historical duties of peace officers to preserve the peace and prevent crime (*RCMP Act*). These are the *Knowlton* grounds, now extended to the zoning of a large area of public space in Quebec City, not with a sliver of sidewalk adjacent to a privately owned hotel. So enormous an extrapolation, mooted only in interlocutory proceedings in highly pressured circumstances, cannot be good law.

Although the concept of ancillary police powers has been applied with some frequency in Canadian law, the circumstances of its application have always been limited and precise. The doctrine typically applies where there are questions about when police may search persons, effects, vehicles, or

http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Pue.pdf (accessed June 14, 2009).

⁷ *Tremblay*, para. 102.

premises,⁸ or detain a person for short periods for investigation,⁹ and so on. No reasonable analogy would permit the extension of the present ancillary powers doctrine in Canada to authorize *Tremblay*-style police measures.¹⁰

Property Rights and Protest

What of the rights of property owners — including municipalities and governments — to limit access to their property? The general rule, based on the tort of trespass, is that they may do as they wish with their land.¹¹ The property rights of public authorities, however, are a different matter. They are bound both by the values of common law constitutionalism and by the written constitution.

The seminal authority in this respect is the Supreme Court of Canada's 1991 judgment in *Committee for the Commonwealth of Canada v. Canada*.¹² The principal difficulty became one of determining where and how to draw the line between appropriate regulation of government-owned spaces and improper interference with constitutionally protected rights. The entire court viewed the government's privileges as a property owner as constrained by public rights. Each of the judgments sought to balance expression against the appropriate need to regulate public space (that this was done formally under statute and delegated legislation in this case) and recognized that a sliding scale of protections attaches to different places in different circumstances. Even sites to which a high degree of expressive liberty attaches could be regulated for reasons such as the maintenance of law and order.¹³ All of the justices took the view that constitutional protection of liberty of expression would attach most strongly to the types of public property traditionally associated with expressive activities: public expression in streets and parks and analogous places is *prima facie* entitled to a high level of constitutional protection of freedom of expression.¹⁴

⁸ For example, *R. v. Griffith*, [2003] A.J. No. 312, 2003 ABPC 46 (Fradsham, Prov. Ct. J.); *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.); *R. v. Feeney* (1997), 115 C.C.C. (3d) 129; *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.); leave to appeal to S.C.C. dismissed, [1997] S.C.C.A. No. 571; *R. v. Sharpe*, [2002] B.C.J. No. 1219; 2002 BCSC 213 (Shaw J.); *R. v. Davis*, [2004] A.J. No. 64; 2004 ABCA 33 (Alberta Court of Appeal); *R. v. Godoy* (1998), 131 C.C.C. (3d) 129 (S.C.C.), [affirming] (1997), 115 C.C.C. (3d) 272 (Ont. C.A.).

⁹ For example, *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52, rev'g (2002) 169 C.C.C. (3d) 272, 2002 MBCA 121; *R. v. Greaves*, [2004] B.C.J. No. 1953, 2004 BCCA 484 .

¹⁰ These matters are explored more fully in Pue, Ipperwash, *supra* note 2, and Pue and Diab, Social Science Research Network: <http://www.ssrn.com>.

¹¹ See, for example, Philip Osborne, *The Law of Torts*, 2nd ed. (Toronto: Irwin Law, 2003), Chapter 4, "Intentional Torts," Part D, "Intentional Interference with Land: Trespass to Land." Property rights can be protected by self-help (using such force as is necessary and reasonable in the circumstances), injunctive relief, or action for damages.

¹² *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, [1991] S.C.J. No. 3 [hereafter *Commonwealth of Canada*].

¹³ *Commonwealth of Canada*, Lamer C.J., para. 22. A similar approach was reaffirmed by the Supreme Court of Canada in *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, para. 74.

¹⁴ *Commonwealth of Canada*, Lamer C.J., paras. 3, 5, 9, 14; McLachlin J., paras. 224, 225, 227, 256; L'Heureux-Dubé J., para. 141; La Forest J., para. 45.

Later authorities confirm that attempts by public authorities to restrict expression or assembly under the guise of “property management” will be subject to constitutional challenge and that a high level of scrutiny attaches to public parks and streets.

Part 3: Public Order Police Legislation – a template from Australia

The New South Wales *APEC Meeting (Police Powers) Act 2007* offers a template worthy of consideration.¹⁵ The Australian act deals specifically with the creation of exclusion zones and the scope of police powers with respect to them. It created an “APEC Security Area” and an “APEC period,” both defined terms, with detailed maps provided in a schedule. Police could exercise certain powers within the APEC Security Area, which included a “declared area” (the neighbourhood surrounding the buildings and sites at issue) and a “restricted area” (the buildings and sites themselves). The APEC period lasted only from August 30 to September 12, 2007.

The act authorized police to take a number of measures that would otherwise have been unlawful. It permitted “check points, cordons or roadblocks” to stop vehicles or persons attempting to enter or move through the APEC Security Area and to conduct warrantless searches. Police could also seize anything on a list of “prohibited items,”¹⁶ including spray-paint cans, chains, and flares. Without notice, police could also close roads in the Security Area, but for only the “shortest possible period” and for limited purposes, including the safety of persons traveling to meetings and the protection of property.

The act also created the offence of entering a “restricted area” without “special justification” (a defined term). This could include the need “to be in (or pass through) the area for the purposes of [a] person’s employment, occupation, profession, calling, trade or business or for any other work-related purpose”¹⁷ The act created even wider police powers. A person alleged to have obstructed police or damaged property during the APEC period was subject to a rebuttable presumption against the granting of bail. Other sections provided for the use of force by persons assisting police and for maintaining a list of “excluded persons.” The act immunized the state from liability for nuisance with respect to anything done in the exercise of powers under the act.

It is unclear which of the police powers conferred under the *APEC Meeting Act* would be appropriate in British Columbia or which would survive a *Charter* challenge. The New South Wales legislation does, however, starkly underline the need for explicit statutory authorization for seemingly prudent security precautions. The government of New South Wales demonstrated integrity and courage in

¹⁵ http://www.austlii.edu.au/au/legis/nsw/repealed_act/ampa2007252/index.html#s1 (accessed June 14, 2009). The act was repealed shortly after the event.

¹⁶ Part 3 of the act.

¹⁷ S. 37.

establishing clear guidelines for the policing of a major event. It is telling that in Canada police officials claim similar powers *de facto* and without cover of legislation.

Conclusion

There is a clear need for legislation that would explicitly grant policing authorities the powers that they need in order to lawfully ensure the safety of the public during the Vancouver-Whistler Olympics.¹⁸

Although their exact contours need to be mapped out through legislative processes, many of those powers will prove to be both unusual and intrusive. Police and other citizens alike deserve the direction of the legislature in these important matters.

¹⁸ The *Access to Abortion Services Act*, R.S.B.C. 1996, c. 1, may serve as an important precedent for those drafting public order police law in British Columbia. Section 5 of the act gives the executive the power to establish an access zone around an abortion clinic “for the purpose of facilitating access to abortion services” and establishes a framework for the exercise of that power. The scheme withstood a challenge under section 2(b) of the *Charter* in *R. v. Spratt*, 2008 BCCA 340.