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**Official Report
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(Hansard)**

Jeudi 14 octobre 2004

**Standing committee on
justice policy**

**Emergency Management
Statutes Review**

**Comité permanent
de la justice**

**Examen des lois ontariennes
sur les mesures d'urgence**

Chair: David Orazietti
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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

**STANDING COMMITTEE ON
JUSTICE POLICY**

**COMITÉ PERMANENT
DE LA JUSTICE**

Thursday 14 October 2004

Jeudi 14 octobre 2004

The committee met at 0838 in room 228.

**EMERGENCY MANAGEMENT
STATUTES REVIEW**

CRISIS MANAGEMENT SPECIALISTS INC

The Acting Chair (Mr Mike Colle): I'll bring the standing committee on justice policy to order for Thursday, October 14, 2004.

We're going to begin today with the deputation from Crisis Management Specialists, Alan Bell and Brian Hay, if you could come and sit in the front row there, please. Just to let you know, this is being recorded for Hansard and copies will be available on the Internet, or on hard copy if you wish. I would also mention that the format is that you have approximately a half-hour, and if you would like to use some of that time for questions and comments, leave that open for members of the committee to offer questions and comments, that's usually the format we use.

So if you could begin, and start by identifying yourself for Hansard. I guess you're Mr Bell.

Mr Brian Hay: No, I'm actually Mr Hay.

The Acting Chair: Sorry.

Mr Hay: That's quite all right. Mr Bell couldn't join us this morning.

My name is Brian Hay. I am a retired military officer and I've been chair of the Mackenzie Institute or chair of its advisory board for the past 13 years. I want to thank you this morning for the opportunity to address you.

In that capacity, I've had the opportunity to examine crisis and security situations in Canada, the United States, parts of Europe and Israel. I'm also a senior officer of a small consulting firm, Crisis Management Specialists, which deals with crisis management. We are often invited by larger firms to work with them because of our particular expertise. I've had the opportunity to consider what is needed for responsible preparation in the community to respond to unplanned events, whether occasioned by weather, accident or malicious intent.

The key question you are addressing is whether the Ontario government should enact additional legislation to increase the emergency preparedness in the province. Before I give you my answer to that question, I would like your permission to address some related issues.

No society can ever be 100% secure, but no society can afford to approach the future on the basis of, "It can't happen here." Responsible emergency preparations need to be based on the notion of when, not if. Unfortunately, in our opinion, Canada in general and Ontario in particular suffer from at least two major, some would say cultural, inhibitions when it comes to proper emergency preparedness.

Canadians, specifically Ontarians, do not believe that a terrorist attack or a world-scale crisis will happen here. We suffer from a "deny and repress" syndrome, as it were. Somehow, because we are "nice" people and represent a cosmopolitan community, we should be considered immune to the vicissitudes of other parts of the world.

This is not a new phenomenon. I personally experienced it in 1979 when the then-federal Minister of Energy, Alistair Gillespie, refused to accept that Canada should participate in the world shortfall of oil occasioned by the Iranian revolution because, "Canada doesn't import any oil from Iran." Even though this federal minister was president of the International Energy Agency at the time and the rules of the agency were that all countries should share shortfalls pro rata, for some reason he felt that Canada should be exempt; hence, the myth of the so-called Exxon diversion.

Even though Canada has been placed publicly on the terrorist hit list today by none other than Osama bin Laden, and every country on that list, other than Canada, has been hit with a terrorist event, I've had responsible people in the community ask the question, "Why would they ever commit a terrorist act in Canada? We haven't bothered them." This perception unfortunately undermines not only the ability to take concrete steps, but even to think about the unthinkable. Together, the lack of thought and action leaves us vulnerable. I think we should remember that CNN recognized as recently as two nights ago that Canada is a jihadist incubator. Canada births and grows its own jihadists.

The second problem inhibition is best illustrated by the National Post headline on page 2 of their Monday, October 4, 2004, edition. The headline proclaims, "Millions Spent on Fizzled West Nile Threat." A reasonable inference from the wording of that headline would be that the millions of dollars were spent unnecessarily: The threat fizzled; it wasn't real. Yet the story points out that the way in which the money was spent may have actually reduced the threat, while also suggesting that the

threat was cyclical and could return. The problem with this kind of reporting and this kind of thinking is that it impacts upon and is reflected in our political culture.

I've had a senior minister of the Ontario government say to me, and I quote as best as I recall, "Brian, if I spend \$2 million to fix a problem that nobody knows about or one that doesn't happen, I can be criticized for wasting money. But if I spend \$100 million fixing the problem after it occurs, I can be a hero." Presumably, then, everyone will agree that it needs to be done after the disaster has happened. Suppose the money hadn't been spent on the West Nile threat or that West Nile had been worse this year. Would that headline then have been, "Government Fails to Protect the Public; Inadequate Resources Assigned"?

Let's turn to some real examples of the lack of preparedness, the lack of forethought, the lack of proper planning, and the lack of responsible use of resources. These are only a few situations that I know about; others know much more.

In a high-tech community in Ontario just five years ago, when the municipality wanted to purchase new radios for its emergency responders, it specified that the radios would be on frequencies different from that of adjacent communities so that the other communities could not overhear the communications. Would anyone be surprised that disasters and crises do not follow recognized political boundaries, and that maybe the ability to share communications during a disaster would be a good thing? Apparently this was a lesson also learned in New York from the tragedies of 9/11.

Another example was the major chemical plant fire in Scarborough in April 2000. Aside from the fact that the fire department did not have a complete, current inventory of the chemicals present on the site, nor did they have the means of ascertaining how the chemicals would interact toxically, the standard operating procedures of the fire department and the police department at the time were such that on-site decisions of each agency were in conflict. Each department had to call its superior headquarters in order to reconcile the inconsistent standard operating procedures. Apparently the incompatibility in procedures had not been noticed before or worked out in advance; they hadn't run any actual real-type exercises. Fortunately, this incompatibility appears to have been now addressed, at least in part. But when was the last large-scale exercise involving early responders in Ontario's capital city? Can you recall it?

About the same time in 2000, in Sarnia, there was a major chemical release from one of the plants. The emergency responders arrived on the scene to find 34 people gasping for breath. They immediately gave them oxygen. Unfortunately, when you combine oxygen with hydrogen disulphide gas, to which the people had been exposed, it produces hydro sulphuric acid in the lining of the lungs resulting in tissue burns. Unfortunately, the fire department in Canada's major petrochemical city didn't know what chemical had been inhaled and didn't know how to treat it properly. On another occasion, the city of Sarnia

had to be advised by their American neighbours that there was a noxious leak in Sarnia because Sarnia's detectors didn't pick it up.

More recently, in my commercial capacity, I can tell you that we spent time talking with the Ministry of Health and Long-Term Care and Emergency Management Ontario during the first couple of years of this century. We told these government agencies that we did not feel the province was well prepared for a major epidemiological outbreak, such as the pandemic that so many scientists and medical people believe will occur. We were told that we were wrong, that the province was as well prepared as it could be. I guess that it was felt to be true in a sense, given the resources that were seen to be available.

Then came SARS, a major epidemiological outbreak. I don't think anyone today would argue that Ontario was well prepared. In fact, in both March and April 2003, I personally offered the Minister of Health and/or his agents internationally developed and proven software that would have helped to better manage the resources that were needed to address SARS. I also offered new, admittedly unproven, software that would have helped track in real time those who were exposed and were infected. This offer was declined on the basis of being "too late and unproven." Remember, we had been talking to them for two years. It seems that a proven paper-based system was in place, perhaps for several decades I guess, with which people were comfortable.

I was also told that the province had joined CiPHIS, the Canadian interprovincial health information system, and that that solved the problem. Quite frankly, I did point out that CiPHIS was, at best, a government program still in the design stage with little relevance to the immediate operational needs of hospital emergency wards or intensive care units. Nonetheless, I was told that Ontarians should feel safe as a result of this membership.

Most medical professionals suggest that the coming pandemic will hit those aged 25 to 40 most specifically. That age group is the same as our primary responders, our caregivers and parents in our society. It's hard to feel safe if these folks are not available.

Ontario also houses several nuclear power plants, as we all know. One is protected by an on-site, specifically trained security force dedicated to the facility. The others are protected by a local police force under contract. While the police personnel are implicitly dedicated to that facility, the police procedures and protocols are not facility-specific. As well, these police personnel can be pulled from the site in the event of a major problem elsewhere. I am advised, as well, that there are major staff retention and motivation problems regarding these particular police personnel, as there were also in recruiting them originally.

0850

Emergency Management Ontario's prime mandate concerns the possibility of a nuclear incident. It would perhaps be more assuring if the government agency responsible for the facility and the government agency

responsible for the security worked more in tandem. It would even be more reassuring to the residents of the community of Pickering if there were an agreed-upon, modern community notification system should difficulty arise; 1940s sirens technology is probably not acceptable in 2004.

I know that we have some very dedicated people working as our public servants in Ontario. I've had the privilege of attending, at the invitation of the government, the conference on counter-terrorism in Niagara Falls in February 2002, entitled *Intelligent Responses*. Over 500 of Ontario's best emergency responders and crisis managers were at that conference. Lessons were learned from the experiences of Ireland, England and Israel, among others. Plans were drawn up for better coordination, better communications, more resources and enhanced facilities.

The government of the day actually passed some new emergency measures legislation for Ontario, but it was some eight months later, in November 2002. It appears that some action was taken, but is it enough? Was it properly funded, resourced, coordinated and maintained? Let's look at the record.

The emergency management legislation says that the individual resident of Ontario is the first line of defence—not fire, ambulance or police personnel. Mr Chairman, have you been told this? Have you personally been told that you were the first line of defence? Has the public been told this? Have we been educated as to what we are supposed to do?

In the United States, they actually have community-based volunteer programs. These would help educate the public in this regard. Such a program was started at a modest level in Ontario with a budget of about \$1 million a year for training, hard hats, gloves and safety vests. That program was cancelled last spring due to budget limitations.

The legislation also requires municipalities to have emergency management plans which actually follow a format so that the plans of one municipality might be somewhat compatible with that of their neighbours. This, believe it or not, is actually a major improvement. Before this happened, there was no comparison, or it was, at best, incidental. Specialized training programs were developed to help municipal personnel develop such plans. My understanding is that those programs have also been cut back. Recently, a medium-sized provincial agency tried to sign up its personnel for some incident command training, yet they were told there was no room until next year.

Individual residents and government agencies are not the only entities within our societies. What does legislation require of commercial building owners and managers, where most people spend their working hours? The Ontario building and fire codes do have specific requirements regarding material and construction standards. There are also regulations requiring pre-fire plans for commercial buildings to be filed with the building and fire departments, but over half the buildings in Toronto

do not comply. There are supposed to be regular fire inspections, but overworked staff are hard-pressed to do the job. Every public building is supposed to have an evacuation plan and to exercise it. When was the last time you saw people participating in a fire drill for a major downtown building?

What does the legislation demand of business owners and operators? Are they required to have emergency plans that dovetail with municipal plans? In Australia, such legislation has been in place for the last two years and the effect on preparedness has, in the words of one expert with whom I talked, been startling. Australia's standard is "no deaths, no injuries," but here, we buy body bags. Perhaps they cost less, but only at the outset.

For at least three years running, there has been a request by Ontario's professional emergency managers for a new emergency operation centre. I have visited the current site, which is located on the 20th floor of a downtown government building. The quarters are cramped. There are no breakout rooms. There is some security, but in order to go to the bathroom in this facility, one has to go out of the secure area and then return to the secure area. This is neither convenient nor good security. There are no food facilities, no bathing or sleeping facilities in the building, and yet it is supposed to run on a 24/7 basis. More importantly, there's no blast-proofing on the windows. The building is not over-pressured, so the air conditioning system can ingest any toxic materials from the outside. The building has no reliable independent power supply, so when the power goes out, you can hang a sign on the centre: "Sorry. We're out, too." Rumour has it that they were still picking pieces of pizza out of the computer keyboards a month after SARS was finally over.

If there is a major problem in downtown Toronto, Ontario's capital city, is there a plan to evacuate the cabinet? Has the plan been exercised to see if it actually works? If it became necessary to evacuate the city of Toronto, could it be done in an orderly fashion, in less than 24 hours?

In downtown Toronto, there are trucks on the street every day that have the potential to be powerful bombs. We had a taste—an *hors d'oeuvre*, as it were—of what could happen just last Sunday in Thornhill when the tanker truck exploded. Every day, trains loaded with toxic and potentially explosive materials still run through our cities. The Mississauga train derailment occurred 25 years ago next month, but rail tank cars still use the old, unreliable pressure relief valves they did then. There are also facilities in Toronto which, if ignited under the right wind conditions, will cast a pall of toxic smoke over large parts of the city.

There is at least one storage facility in central Toronto of nuclear industry material which could make the city uninhabitable for quite a few years if the contents were exploded into an aerosol cloud. In another Ontario city, there are large stores of a toxic gas under pressure which can kill in concentrations of more than one part per billion. That's like one drop in this room would kill us

all. Think of what would happen if one unit was exploded or it leaked or if some of the gas was bled off into a container and then released into one of the Great Lakes. There are over 3,000 radiological sites in the province. Each could be a source of material for a dirty bomb. How secure are they? Some people may think I'm acting like Chicken Little. I am not.

May I remind the committee that we are a wonderful cosmopolitan community in Ontario, but we've had some experiences of racial intolerance and religious intolerance here as well. Some of our problems are homegrown, like Ipperwash. May I remind the committee also that there are several indications that some new Canadians, most of whom have brought much richness to this country, have also brought cases of their history of conflict.

The wife of a former warlord in Mogadishu, Somalia, lived on welfare in the city of London, Ontario. We've had tombstones and cemeteries desecrated. We've had hate messages scrawled on walls. A current sitting MP a number of years ago got into considerable hot water for sponsoring the status of a former minister of a Middle Eastern government as a refugee, who ultimately returned home to be executed by the government of that country. Let me remind you that it was in Ontario that a Turkish chargé d'affaires was assassinated. You can talk to the counter-terrorism personnel of the RCMP or the OPP or the Toronto police about the fundraising that goes on in various communities here to facilitate conflict in other countries.

I am not taking sides or pointing fingers at any one group. I am simply pointing out that some people in this community are involved in promoting the conflicts in other countries, and on occasion, those conflicts have spilled over into our community. Those are the human-made events which disrupt our society to which an emergency response is needed. More could well be coming our way, given the unfolding events in the Middle East.

Then there are the so-called normal things, like power outages and blackouts, bad snow storms, ice storms and the like. All of these require reasonably sound forward planning if we are to minimize the disruptive impact on our society and on our economy.

It was recently estimated that the accident on the 401 involving a paint hauler and a garbage truck cost the Ontario economy over \$1 billion in lost productivity in one day. What would the cost be of a radiological explosion or a truck-tanker bomb being ignited in downtown Toronto? What would the cost be of a pandemic outbreak of the avian flu or SARS 3 in an already maxed-out hospital system? What would the cost be of a major terrorist act among an ill-prepared, ill-informed and ill-trained public?

0900

We have spent billions of dollars on our vaunted educational system and our medical facilities. Perhaps it is time we also ensured that our population understood what it can and should do in an emergency. Perhaps it is time that those charged with emergency response be given adequate tools, starting with a modern operations

centre and a communications system that links provincial bodies with appropriate municipal bodies and, yes, federal authorities and indeed our international neighbours. Perhaps it is time to ensure that the legislation and regulations already passed or in place are properly funded and managed before additional legislation and/or regulations are introduced. Paper motions are not a substitute for real-world action.

Perhaps it is time that society demanded that those tasked to protect us—each agency or level of responsibility, whether municipal, provincial or federal—actually work together to protect the community more than their own turf. Perhaps it is time that we actually conducted some large-scale simulations to see if our plans work, and in some cases design and rehearse the plans we don't have today. And perhaps it's time that we changed our thinking to, "It can happen here." It's only a matter of when, not if.

But if this committee or the government deems that new legislation is warranted, let's create legislation that obliges all parts of our society to be responsible for keeping our communities liveable and safe. Let's make it legislation that allows, indeed requires, participation of both public and private sectors and individuals, and provides for repercussions when the necessary or critical participants refuse to participate or co-operate. Let's also make sure that it is properly resourced and funded on an ongoing basis. We are all in this together, and there must be no such thing as a free ride or a "We didn't know."

Perhaps it is time that we allow our political leaders to believe that they would be heroes by preventing problems through proper planning and preparation rather than by putting expensive bandages on gaping wounds. It has been said that those who do not learn from history are condemned to repeat it. In emergency preparedness, as in military operations, proper planning prevents poor performance. Terrorists only have to be right one time, one day; we have to be right 365 days of the year. If it is predictable, it may very well be preventable.

The Acting Chair: Thank you, Mr Hay. Do we have some questions or comments from members of the committee? Mr Kormos?

Mr Peter Kormos (Niagara Centre): No, thank you.

The Acting Chair: Mr Zimmer?

Mr David Zimmer (Willowdale): No, thank you.

The Acting Chair: Anyone else?

I just have one question. Are you aware of the 311 pilot project in Sarnia? We had a deputation from Bell, which has instituted this pilot project where they can do this blast of phone numbers if there is a chemical spill, for instance, in Sarnia. Do you think that kind of approach might be the best way—you mentioned the old 1950s siren approach. Is that feasible?

Mr Hay: Absolutely, sir. As a matter of fact, we're intimately familiar with their program. We're working with Bell Canada on that program, because there's some other software that will integrate very nicely with it. It was tested in 400 homes. It was extremely well received. The people who tested it actually didn't want to give it back. They thought it was a great idea.

There has been a proposal put forward to industry in the city to put those 10,000 units in key homes, schools, office buildings, libraries, medical facilities and so forth, so they can be properly warned of an incident. The question is, who pays? Industry basically doesn't feel—and I cannot speak for industry, let me make it clear, but my conversations with them have suggested that they don't feel they should bear the entire cost. We actually put together a proposal with Bell Canada to put those 10,000 units in and support them with the appropriate personnel and the necessary software, working with the folks at emergency preparedness in Sarnia: Cal Gardner, who has probably spoken with you in this regard.

The Acting Chair: Yes, that's right.

Mr Hay: The whole package over five years is \$1.8 million, which is nothing compared to what could happen and what it would cost if something got loose in that community, wasn't properly dealt with and you ended up having a lot of people in the hospital or in worse shape.

The Acting Chair: The second comment I'll make is that your reference to that story in the National Post basically condemning the government for spending money unnecessarily on the West Nile threat is interesting. Again, you made the point very clearly that the civil servant or government agency that spends money on prevention is accused of wasting money, and yet the civil servant or government agency that spends \$100 million after the fact becomes the hero.

Mr Hay: Absolutely, sir. We've got to change that political culture and that public expectation. It is just—I was going to use a phrase that most of us are familiar with, but let me just say it's backward.

The Acting Chair: Now that there wasn't an outbreak of West Nile, they shouldn't have spent the money. You can imagine what would have happened if there was an outbreak.

You've given us a good overview and a lot of food for thought. I think one of the things we were charged to do is sometimes think about the unthinkable. Hopefully we'll come up with ways of better preparing and protecting Ontarians in case something extraordinary does happen. Thank you very much for your presentation.

CANADIAN CIVIL LIBERTIES ASSOCIATION

The Acting Chair: The next presenter—and I'm sure he came by subway—is the Canadian Civil Liberties Association general counsel, Alan Borovoy. We were talking about the traffic jams and trying to get here with all this construction going on. Those of us who walked or came by subway got here on time. I know you're an avid subway person.

Mr Alan Borovoy: It's a vicious rumour.

The Acting Chair: We're trying to promote public transit.

Mr Borovoy, as you know, the committee's format is that you've got an hour. You can take up the hour yourself, if you want, or you can leave part of it for questions

and comments from the committee. You may proceed by introducing yourself.

Mr Borovoy: Does that include singing as well?

The Acting Chair: Whatever you wish.

Mr Borovoy: I regret that I actually have something in writing. I'm not used to this state of preparation. But since I have it, I'm going to distribute it. There's a convenient way to do this, I'm sure.

The Acting Chair: We also have a copy of a letter that was sent to you on September 13, outlining some of the parameters this committee is looking at. I think members of the committee have a copy of the letter that was sent to you.

Mr Borovoy: Well, I'm glad they have it. I probably have it at the office. You will forgive me if it isn't at my fingertips.

The Acting Chair: We'll give you another copy, in case somebody refers to it. We'll just get some copies made.

Mr Borovoy: I'm in the position, since this was just prepared yesterday, that as uncomfortable as it may be for me, I'm going to read these, but also probably accompany them with some remarks that are not on the paper.

It's all based on the assumption that there is a demonstrated need for additional emergency powers. I know that it has been alleged. So far, I haven't seen the documents, and it may be that I just haven't seen enough of the background papers. I don't know that it's been demonstrated. However, on the assumption that it is demonstrated, these respond to the bill that has been tabled or is before you in whatever form it is.

These are all suggested amendments to the bill, not in precise wording, of course, but in idea.

0910

(1) The first is that you provide that the validity of a declaration will require prompt ratification by the Legislature and empower the Legislature to revoke the declarations and any measures adopted thereunder, in whole or in part.

When we know that emergency powers are going to be promulgated at the discretion of the executive—the cabinet—it's very important that there be a legislative involvement as soon as it's possible to get it.

(2) Upon the declaration of an emergency, require an immediate reference to a court of superior jurisdiction to determine the validity of the declaration.

We would say that even if the emergency is terminated prior to the end of the hearing or even prior to the inception of the hearing of the court, the hearing should go on nevertheless, because it would perform two important functions: first, to create a precedent so that subsequent governments will get a better feel for the correct interpretation of the statutory language; and second, because in the event the court ultimately revokes the declaration, even after the emergency is over, that is likely to create some political issues. In our view, when powers of the sort being contemplated are invoked, it is important there be political issues even after the fact.

That is one of the other important purposes that would be served by an immediate reference to the court to determine the validity of the declaration.

(3) Provide that the measures adopted pursuant to such a declaration be neither more intrusive in subject matter nor extensive in geographic area than what is reasonably needed for the requisite protection against the effects of the emergency.

Our view is that this is an important principle that has to be grafted on to all of these undertakings; that it is the minimum power that's needed that is created, and not beyond that. We say "reasonably needed."

(4) Provide explicitly for a judicial power, on a case-by-case challenge, to revoke or reduce any such measure that the government adopts.

This may be implied already, but you will forgive the insecurity of a civil libertarian if we suggest that it be made explicit and not simply rely on what might be implicit.

(5) Where property is commandeered, provide for reasonable compensation.

(6) Where a person is directed to render services: (a) require that the services be essential—the federal counterpart does require that it be essential services and so should the provincial one; (b) provide a defence to refuse the performance of any services beyond those normally required of such classes of persons where there are reasonable grounds to anticipate serious perils to life, limb or health; (c) provide reasonable compensation to persons who are so directed; (d) provide that such compensation be subject to independent arbitration; (e) in the absence of bad faith, indemnify those who cause injuries in the performance of such services.

(7) Remove the authorization for warrantless entry into private property.

I note that in the federal legislation, for both public order emergencies and public welfare emergencies, there is no provision for a warrantless power to enter.

(8) Provide that the liability of "designated persons" for purposes of section 11(3) apply not only for gross negligence but also for intentional torts.

I don't know if it is assumed that when you say "gross negligence" that implies torts more serious than gross negligence, but I'm not sure it does, and that would look, then, like an oversight. Surely, if they are liable for gross negligence, they ought to be liable for intentional torts.

(9) Provide for the government itself to be liable for gross negligence, intentional torts and for ordinary negligence.

(10) Provide that none of the powers can be exercised for the purpose of terminating a strike or lockout or imposing a settlement in a labour dispute.

As I look at the members of the committee, I think I can safely make the assumption that they are a good deal younger than today's presenter is. This presenter's memory goes back to 1988, when the federal emergency powers legislation was enacted. The apprehension that such power might be used to terminate a labour dispute

was a very controversial issue at that time. They provided explicitly in the legislation that this couldn't be done.

The significant thing about reading this is that I'm doing it without my glasses, and that I have to show off about, even if it isn't otherwise relevant.

(11) Delete the authorization for the government to adopt "such other matters as [it] considers necessary...."

We checked both the public order and public welfare emergency components of the federal legislation. There is no such basket clause there and it's hard to imagine why, for provincial purposes, it would be so much more necessary than it is for federal purposes.

(12) Reduce the duration of declared emergencies to be more in line with the practice in other provinces.

I'm advised they are 10 to 15 days in most other provinces that my colleagues were good enough to check for me.

(13) Provide that the government must publish periodic reports during the emergency as well as at the end and specify the kind of detail that such reports, at least at a minimum, should contain: what categories of persons have done what to whom in respect of what interests, where, when, how.

This contemplates that there may well be some emergencies that will be extended and extended and then go on for long periods. The public should not be deprived for such long periods of some kind of government accounting in the form of this kind of report, so that you might provide a number of days or whatever at the end of which they have to report, or if the emergency terminates earlier, make it whichever is earlier, or whatever.

(14) Provide for the independent auditing of the emergency powers and their exercise, together with interim reports during the course of the emergency and a comprehensive report shortly after the termination of the emergency.

Where extraordinary powers are going to be exercised and they are promulgated by government in this way, it's important that there be some way of providing an additional mechanism for accountability. We recommend an independent audit, something, if I could use the analogy, of the role that the security intelligence review committee plays with respect to CSIS at the federal level; that is, an agency independent of government with ongoing access to the key materials, records and facilities, to keep looking at what's going on and report on it afterwards, with no decision-making power—a power to disclose and propose and perhaps even expose, but not to decide. The idea would be that that acts as an extra check when powers of an exceptional character are being exercised.

All of which is, as always, respectfully submitted.

0920

The Acting Chair: That's your written. Do you have more to add to that, Mr Borovoy, or did you want to start the comments?

Mr Borovoy: I'm happy to respond to questions or comments.

The Acting Chair: Thank you. We'll start with Ms Broten and then Mr Zimmer.

Ms Laurel C. Broten (Etobicoke-Lakeshore): Thank you very much for your thoughtful presentation and attending with us today. Certainly throughout the summer and in almost four weeks of hearings we've had on this, the committee has struggled with what is the balance in terms of protecting civil liberties and giving the powers to the Premier and the province that we might need in these extraordinary circumstances.

When you made your first comments, you commented on a piece of legislation. I just want to clarify. You must have been making these comments with respect to a draft proposed bill that had been drafted by the Attorney General's office that has been part of these proceedings.

Mr Borovoy: I'm not able to identify it that way, but there is a bill that I've seen.

Ms Broten: OK. Just for your clarification, that's not a bill that this committee has produced. That was something produced within the bureaucracy that was provided to us during the context. But it serves as a discussion point nonetheless.

Mr Borovoy: You may be wise to absolve yourself of responsibility for it.

Ms Broten: I want to focus specifically on number 2, "Upon the declaration of an emergency, require an immediate reference to a court of superior jurisdiction to determine the validity of the declaration."

I come at this both as someone who is now part of the government and as a former litigator. My first reaction was that that in and of itself won't be a quick process, having a reference go to a court. I wondered if we could just have a little dialogue about number 2, because it causes me some concern. We're in the context of an emergency. The Premier of the province would have declared an emergency. We would be dealing with a crisis already in the province. At the same time, we're going to have an immediate reference going to a court with this parallel proceeding. It causes me some concern as to whether it creates more harm than good to have this second proceeding ongoing right in the middle of a crisis, diverting people's attention and diverting media attention when we need citizens of the province to pay attention to whatever the emergency is.

I wonder if we could just talk a little bit about this one, because I think the political ramifications for a government of declaring an emergency will exist, if it shouldn't have been done, regardless of having a declaration go to a superior court judge, who may or may not be known to the citizens of the province.

Mr Borovoy: I suppose I have faith in the ability of the population of Ontario to walk and chew gum at the same time. There will be lots of things happening in the news even though there is an emergency, and the rest of the world isn't going to grind to a halt. This provides an ongoing check and it gives the government another incentive not to use powers like this unless they really are needed.

Of course, one always has to remember, and I suppose it's the role of someone like me to say, that there are going to be governments beyond the one in Ontario

today, and you never know how others might want to use powers like this. The idea is to provide the most reasonable checks you can envision. The kind of check this is doesn't interfere with the functioning of the emergency, doesn't stop anybody from doing anything, but it reminds them all that there's going to be some accountability for it.

Ms Broten: OK. With respect to one of the other ones that you made mention of, number 11, "Delete the authorization for the government to adopt 'such other matters as [it] considers necessary...'" if there is one thing that we've heard throughout these number of weeks, it's that we can't anticipate what the next provincial emergency will be. You would know that we've had two provincial emergencies in the history of the province, and that's something, I think, that is important also to acknowledge, that many other emergencies happen and they're not declared provincial emergencies. So we had the blackout and SARS.

Many of the experts who have come before us have said, "You can't anticipate what the next emergency will be." We couldn't anticipate some of the hurdles we would face during SARS; for example, people breaking quarantine because they were concerned that they would lose their jobs, and there was no job protection during SARS. So from our perspective, I guess, giving you a right to do other things that you need to do is important because we don't know that we can list out everything that we would need the province to be able to do. I wonder if you want to comment on that.

Mr Borovoy: I guess the first thing I would say is, please consult your federal counterparts about that, that enacted legislation that doesn't provide for this.

In saying this, I appreciate that there is an ongoing tension. There's always the fear, "Maybe we haven't thought of everything." Of course, when one looks at that panoply of powers, it's hard to imagine what you haven't thought about, because, you see, when you set out all kinds of powers like this, though you are aware of possible emergencies that might take place, those powers go well beyond any that you've already imagined are going to take place. In other words, the powers are not necessarily limited to those emergencies that you've hitherto imagined. The powers surely go beyond that.

That being the case, and in view of the federal experience, I don't think there's that much to lose by deleting this kind of power, remembering also that if you haven't anticipated—and, as I say, it's hard to imagine that you haven't—the Legislature can be called, and if it's a genuine emergency the Legislature can act pretty quickly if there really is something that you haven't thought of in this panoply of powers.

A friend of mine once put it in a very interesting way when he described the security mentality. He said, "It's not enough to put on a belt and then suspenders. You also have to walk around holding your pants up." In a sense, I fear that's what that clause will do, but it could create a tremendous potential for abuse, as I'm sure you appreciate.

Ms Broten: Just two further points on this exact matter. There are some who would say that that power is implied in many of the statutes that don't have it explicitly, given the obligation imposed on a state to act etc. We've also had two witnesses before us, David Collenette and Tony Clement, who both managed crises that we can think about in the last number of years. They said that from their perspective they worked with their deputy ministers and within their structure and made decisions to do what it took and what they needed to do, regardless of whether they actually thought they had the authority to do it, and they would take the political ramifications later. I guess if there's a provision—

Mr Borovoy: I hope you won't be so ungracious as to invite a comment from me on that.

Ms Broten: I would like a comment on it, simply because if the provision isn't there, I guess what those two individuals who were in these emergencies tell us is that they took what they needed to manage the crisis in the way they thought it needed to be managed, acknowledging they would have to respond to the people of the province or the country.

Mr Borovoy: Given that all life is a matter of determining which of the competing risks you'd prefer to live with or that you think would make life the least bad, I prefer that risk in general to this risk. Yes, I can understand that often some additional leeway can be inferred from a lot of the powers that you've already got in there and that exist in other statutes. That I find less troublesome than this kind of explicit mandate to do who knows what.

Ms Broten: Thank you very much for your comments.

0930

Mr Zimmer: Thank you, Mr Borovoy. I too, like Ms Broten, am a lawyer. I've followed your career over these many years and have the greatest of respect for the contribution you've made to civil liberties in Canada.

Mr Borovoy: Now I'm afraid of what's coming.

Mr Zimmer: I had questions surrounding the issue of the intervention or the role of the courts, as did Ms Broten, under points 1, 2, 3 and 4 and also the residual powers question under point 11, but Ms Broten dealt with those and my questions have been answered.

My questions now revolve around three areas. Let me start with point 6, the mandatory recruitment and the limits on the tasks that can be required under mandatory recruitment. In point 6(b), you proposed a limit on what one can be ordered to do under a mandatory recruitment provision, where there are reasonable grounds to anticipate serious perils to life, limb, health and so on.

Is it not inherent, though, in the very nature of an emergency, for instance the SARS crisis or a nuclear meltdown crisis, where it's inherent in the crisis and therefore by definition you can't get away from doing dangerous tasks, and if that's so, how do you provide for or who does the dangerous tasks that are necessary in combatting an emergency? How do you resolve that tension?

Mr Borovoy: Of course, we were careful to say that those classes of people who are normally required to do those dangerous things could not avail themselves of a defence like this. This contemplates that those kinds of people of course will continue doing those things, but to the extent you try to commandeer others to go into a burning building, let's say, something of that kind, they are entitled, in our judgment, to say no to that and to have a defence.

You can't commandeer, you cannot conscript people to do things like that, unless of course you have a much different kind of situation than this contemplates, war or something like that where you might have a draft, but subject to that sort of thing, say no. You will have lots of volunteers. You will have people trained to do those things who know that's part of their job and there will be lots of support functions you may be conscripting labour to do. That you might be able to do because that won't necessarily be dangerous, but it's awfully hard to say you can make it an offence for a person not to go through a burning building to rescue another person.

Mr Zimmer: You used the situation of conscription in the case of war. If there was a crisis such that it put the province or the nation at real risk in an extreme crisis, would you see provision for mandatory recruitment of people to do dangerous things in a really extreme extreme?

Mr Borovoy: I don't like to show off, but I remember the Second World War. We had conscription. Remember, "Conscription if necessary but not necessarily conscription." But we had it and certainly other democracies had it, but that kind of thing, in my view, if you're talking about emergencies of that character, you'd call together the Legislature or you'd have the House of Commons sitting. This couldn't be done by unilateral promulgation by government.

Mr Zimmer: My next question is on point 7, the removal of the authorization of warrantless entry. There's a tension there again, to use the example of the burning building, where firefighter officials or other people may have to enter private property to shut off the gas of a house in the neighbourhood so that the rest of the neighbourhood doesn't go up in smoke. I was a little surprised at the vigour with which you've argued against warrantless entry. What would you do in a situation like that? The burning house—somebody's got to get in and shut down the gas to prevent the neighbourhood from going boom.

Mr Borovoy: We had to face this during the time of RCMP wrongdoing, if you recall the controversies around that. I can recall the argument was made, "Well, what if a building was going to blow up or something?" I remember saying, "There's no way in this world that you have to run downtown to get a warrant first in a situation like that." In those situations, people facing that sort of urgent situation would very likely be able to avail themselves of the common law defence of necessity in those kinds of situations. I don't really think that's a problem in that sort of situation. That's why I say I'm bolstered in

this by the fact that, for public order and public welfare emergencies, the federal emergency legislation does not have such a power.

Mr Zimmer: My last question has to do with not allowing the termination of a strike or lockout in an emergency crisis. I'll just put this hypothetical to you—well, not a hypothetical. There's another SARS-type epidemic rapidly moving through the population, and at that time the hospital workers, nurses and doctors and so on happen to be on strike. How would you deal with that situation where the hospitals and the health care people have to be—

Mr Borovoy: You may have to commandeer their labour, but you don't use that to come up with a settlement for their strike.

Mr Zimmer: Would the commandeering of the labour in a strike situation be all right in your scenario as long as it wasn't—

Mr Borovoy: The labour may have to be commandeered in an emergency, but that doesn't become an instrument to dictate the settlement in the strike.

Mr Zimmer: In effect, if you will, there's a pause or a suspension or a time out during the strike period. The crisis is dealt with, and go back to strike mode.

Mr Borovoy: Then we can go back to fighting each other.

Mr Zimmer: Thank you very much. It was very helpful.

0940

Mr Kormos: Please put that question to Goldenberg, Casselman and Ryan when they're here at 11.

Mr Borovoy: I think I've been a witness to some partisan byplay here.

Mr Kormos: Of course.

You made reference and recommend, can I call it, judicial oversight of governmental action. Why, then, wouldn't you propose putting the matter to the court in the first instance? The cabinet room, an unattractive place at the best of times, is surely no more efficient, no speedier than an ex parte application. So why would this committee not consider a statute that preconditions and then utilizing the court in the first instance?

Mr Borovoy: I don't have any objection to governments governing. I think that's what they're elected to do. They're elected to provide these kinds of protections for people, and I think it's perfectly appropriate that they do it. That's why I say they can go on and do it, and you could have a court hearing occurring even simultaneously. But governments still have to act.

Mr Kormos: The comments on warrantless entry are certainly appreciated, especially your explanation, because over the last several weeks it's been raised persistently—the burning building, the gas main that's ready to rupture.

On the reference to conscription, you should know that many of the professionals—firefighters, among others—who attended here indicated they don't want people pressed off the street to assist them. They want and need trained personnel they can rely on in the context of the kind of teamwork they perform.

Your addition to liability for ordinary negligence—you know that almost every statute that comes before this Legislature has that section in it indemnifying government. You propose including liability for ordinary negligence as well as intentional torts. Is that just with respect to this legislation, or would you propose that for all government legislation? I put this in the context of things like the sex offender registry, which I supported, but I recall very clearly in committee expressing concern about government liability being limited only to gross negligence, in view of the incredible level of care that a government should be using before putting a name on a sex registry, because of the implications.

Mr Borovoy: I think I'm probably best off not taking your invitation to try to figure how these principles might apply in other situations. If I may, I'd prefer to jump off those bridges when I come to them.

Mr Kormos: I was hoping to have a card in the back pocket for the next—we'll simply have to put it to you in the committee hearings on the next subject.

Mr Borovoy: So now I'm the ungracious one.

Mr Kormos: I'm disappointed, but disappointment is my middle name. I have a life of disappointment and pain.

Mr Borovoy: And I know it will take me a long time to live that down.

Mr Kormos: When you talk about commandeering property, would you put limits on the types of property? What are you speaking of? There's been talk about the fact that there's a private sector out there, the business world, that has things like trucks, firefighting equipment, labs and so on—all sorts of things. But then there's also—you know the Hollywood movie with Mel Gibson pulling over a car and flashing his badge, saying, "I'm taking this car."

Interjections.

Mr Kormos: I'm serious. That's what people think about where I come from, somebody flashing a badge and saying, "This taxi is mine now." Then, of course, they riddle it with bullets and roll it over half a dozen times.

What are you talking about in your sense of commandeering? You talk about fair compensation and an arbitration system to guarantee that. But what's your sense when you talk about commandeering? Are there limits in that regard? You put limits on conscription, on pressing people into service, which are not unreasonable. What about commandeering property?

Mr Borovoy: I could be persuaded that there might be some distinctions to draw. Off the top of my head, I might be hard put to spell them out for you. But what this recommendation is designed to do is say to the legislative committee that may be preparing a bill, "Provide for reasonable compensation for the commandeering of property." There may be some legitimate distinctions to draw as to how to commandeer, for what purposes, for how long—questions of that kind that I couldn't possibly get into—but this was to remind you, if you like, that there is a job to do about compensation and there ought to be some right to it included in the bill.

Mr Kormos: It's contemplated that a bill might include—in your instance, you're proposing judicial oversight, but also legislative oversight: that at some point the matter has to be referred to the Legislative Assembly. Again I agree with you. The Legislature can be called back rapidly in a province like this.

What do you say to the proposition, for instance, of somebody saying the matter must be voted on in, oh, one sessional day and thus inherently restricting debate on the issue, knowing that people—politicians and political parties—prolong an emergency or unnecessarily abbreviate it at their own risk, and they're very conscious of that? I've witnessed this Legislature responding very quickly any number of times, quite frankly out of the self-interest of the respective players, because they know that not to have done that would have carried huge consequences.

Mr Borovoy: There are various ways that that might be done. One is that you might say that after a given number of days the declaration will lapse unless the Legislature has ratified it. That's one possible way you might do it. Just figure what a reasonable number of days might be, anticipating debate and the like, and say that if the Legislature doesn't act within that time—given that the government would have the power to shorten debate, but every time that's done, it creates some political consequences as well. The idea is to make the declaration of emergency powers a politically vulnerable exercise. That serves to try to keep it all within legitimate boundaries.

Mr Kormos: There are some who might advocate that among the powers the government—either the Premier or the Lieutenant Governor in Council—ought to have after the declaration of an emergency is the power to require that persons or bodies disclose information necessary in order to prevent, respond to or alleviate the effects of the emergency, which of course would include private information that would normally be protected, like personal medical information. Some would suggest that an appropriate counterbalance to that would be to ensure that that information is destroyed as rapidly as possible once it's utilized for its intended purpose.

What do you say about the proposition that otherwise protected information, without there being a search warrant issued, for instance, as would happen—it happens all the time. What do you say to that proposition?

Mr Borovoy: I could be quite persuaded that to whatever extent information is collected in contravention of the current statutes, it be disposed of. I'm also hopeful that insofar as that power is concerned—it is a disquieting power—that shores up the other recommendation I've made that you write into any such bill a minimization requirement, that they intrude no more than is reasonably needed. That would help also.

0950

Mr Kormos: But in contrast to confiscating property, such as a police officer seizing a taxicab to engage in a high-speed pursuit, which can be compensated for monetarily, clearly and cleanly, you can't adequately

compensate for the revelation of private information, in many cases, so as to nullify the impact. It's a far more onerous, in my view, intrusive seizure than taking a car or an airplane or a dump truck. Because you have here the obligation to submit the declaration of the emergency and, I presume, the powers being declared under it to judicial review after the fact—and I appreciate your comments—what powers or rights would you give to an individual member of the community, who might become aware of the potential of himself or herself being at risk of having personal information disclosed, to challenge that in such a way that they can prevent it; in other words, before the fact rather than after the fact, when the genie's out of the bottle?

Mr Borovoy: There are two types of judicial review that are contemplated here. One concerns the declaration of the emergency itself. That, we say, should be an automatic reference. The other kind of judicial review is that at any time, on a case-by-case basis, there should be an explicit recourse to the courts for anyone to challenge the extent to which, in that person's view, the measure adopted by the government or the action taken under it exceeds the statutory authorization for it. That could be done at any time. One way, of course, is that people could attempt to get an injunction to restrain further use of those powers.

Mr Kormos: That, of course, relies upon your comment that the power should be no more extensive, in geographic area or in subject matter, than necessary.

Mr Borovoy: Or no more intrusive in subject—

Mr Kormos: The difference between a cabinet room and a courtroom is the private versus public nature of the discussion, recognizing the court's ability to keep certain information private. Obviously, what happens in a cabinet room and the facts that are being relied upon don't have to become public information, don't have to become public knowledge. Nobody in cabinet is obligated, under any stretch of the imagination—as a matter of fact, to the contrary—to disclose those things. So how, then, does a member of the community become aware of a plan, for instance, to capture or seize personal information, private information, that could well be beyond the legislative scope? How do they become aware of that in sufficient time to bring the application for an injunction that you talk about?

Mr Borovoy: It wouldn't be able to act prior to the measure being promulgated, it wouldn't be able to do that, but might well be able to act long before his or her own particular information is invaded. Even if they couldn't get into the cabinet room and try to restrain the government, once the measures are promulgated, then it's a public act and everyone can look at it. If somebody thinks one of those powers has gone too far, they can attempt to get an injunction. In the meantime, the government would be free to act in the usual way, or in the exceptional way, but it could be subject to that kind of check.

Mr Kormos: The then Attorney General McMurtry report, which is a couple of decades old now and which

contemplated extraordinary powers, statutory powers, in the event of an emergency, reached the conclusion that the existing law and the common law were sufficient to meet the needs of the state and, furthermore, at least suggested that one should be careful what one wishes for, because to start codifying these things could create more problems than, indeed, remedies. We haven't heard any updating of that. I don't know whether he's changed his mind in the decade since he signed off on that report. Do you have any comments on that?

Mr Borovoy: That was the point of my initial remarks, that all this is based on the assumption that the need for this has been demonstrated. As I say, I'm aware this need has been alleged, and by some experts. I don't know it has been demonstrated. I haven't seen the documents. It may be that I haven't seen enough of them. I'm not sure. But I would say that should be a prerequisite to all of this.

Mr Kormos: That's very important, because I'm simply not sure we have clear evidence. I think the debate is certainly far from over about whether or not the position of McMurtry is still valid.

Mr Borovoy: It would be helpful to have a compendium of the powers and what is anticipated, and then look at it and everyone has to make that judgment. I know some experts have said they don't have it, based on their experience in previous emergencies, but that isn't the same as a demonstration of it. I think that ought to be a prerequisite.

Mr Kormos: Thank you kindly, sir.

Mrs Liz Sandals (Guelph-Wellington): I'd like to talk about some of these powers, and then sort of an overriding concern I would have. To follow up on the conversation you were just having around the collection of personal information, the scenario I would be concerned about with an ability for judicial injunction is in the case of a pandemic situation, where perhaps there was a concern that someone may be carrying whatever the disease is and is continuing to go to work, and the need to get at what is certainly private medical information to determine whether that person is in fact a carrier, and therefore to go from there as to whether they need to be forcibly quarantined. That's not something, if you're infecting a number of other citizens, where I would like to have an injunction while we decide whether one can get at that private medical information, which normally the state would not have access to.

Mr Borovoy: That's why I said right along that all this presupposes that government continues to act. An application can be made for an injunction. This is, of course, a risk you run all the time, every day, that there may be something one group of citizens thinks is terribly important, but it could be subject to judicial interference if, according to the court, whatever the government is doing is not according to law. That's what this is designed to do.

Now, if you were envisioning a pandemic, the question is, do you trust the courts to make sensible judgments, to balance the considerations of law against the

urgency, or don't you? I don't want to put it quite that starkly, but I suppose that's what it comes down to. This is a risk we normally live with. It seems to me that's a sensible way to strike the balance. It's highly unlikely that a court is going to interfere in the middle of a pandemic. On the other hand, you could have situations where there is excessive exercise of some of these powers. Governments have been known to do that. Police have been known to do that. This provides a check on it, some kind of restraint.

Mrs Sandals: Perhaps we could go through a couple of the other powers that have been flashpoints. I understand a lot of these things are sort of instinctively offensive to you, so I'm going to go at it from the point of view of what is the less offensive. I think at the idea of blanket mandatory conscription you have all sorts of alarm bells going off. If, instead, that were stated more in the vein of people can be directed or required to do that for which they are reasonably qualified, is that a less offensive way in which to direct people, rather than willy-nilly mandatory conscription?

1000

Mr Borovoy: The answer to that is, of course. The bill that I've seen does do that, if I recall correctly. But I'm talking about something beyond that. It's one thing to be qualified to do it; it's another thing when it's particularly dangerous for a person. I did not say there couldn't be a power to conscript. I just want to give people a defence to being conscripted, if what they're asked to do is beyond their normal range of activity.

Mrs Sandals: But if the thing which they are qualified to do is something in which you may inherently face health risk or danger, then—

Mr Borovoy: But there's a difference, you see, between "qualified to do" and being especially trained to do or the kind of thing that's normally expected of your occupation. We expect doctors to run some risks of being exposed to contagious diseases. We don't expect ordinary citizens to run that risk. So it's one thing to say that doctors have to do this; it's another thing to say to an ordinary citizen—yes, he might be quite qualified to do something, but it may be awfully dangerous. I'm simply saying they ought to have a defence against doing what's dangerous.

Mrs Sandals: If I can look at another one that is quite contentious, which is the entry without warrant, one of the contexts in which that has consistently come up is within the power to evacuate, so that in order to evacuate, you may need to enter some premises in order to carry out the evacuation. Would you feel more comfortable if one was to be explicitly citing the power to evacuate? As you suggest, then, there may be inherent in the power to evacuate an entry authority, but not to give the blanket entry without warrant.

Mr Borovoy: My discomfort level would be reduced to whatever extent it is possible to narrow powers and be specific about the range of possibilities. Of course, the more you do that, the less risk there is of abuse. There is a countervailing risk that I'm quite aware of, of course.

Again, it's a matter of striking the best balance. Of course, the more you can narrow the exercise of these things, the better.

Mrs Sandals: Finally, because, unlike all my colleagues who have spoken, I'm not a lawyer—

Mr Borovoy: Don't show off.

Mrs Sandals: Your point 8, about intentional torts, is a total mystery to me. Can you explain that one in lay language?

Mr Borovoy: Sure. If X assaults Y, that's an intentional tort. It may be a criminal offence, but it's also something for which the assaulted person could sue in damages. All I'm saying here is, if you're saying these people should be liable for gross negligence, why not for intentional misdeeds as well?

Mrs Sandals: Then you would need to prove intent of misdeed.

Mr Borovoy: Oh, sure. But all I'm saying is, if you provide a compensable remedy for one, why not the other? I would have thought that was the intent and this was just an oversight, but I don't know.

Mrs Sandals: We're probably running short on time here.

The Acting Chair: Yes. Anyway, Mr Borovoy, thank you so much for the colourful and insightful contribution you've made.

Mr Borovoy: I noticed which adjective you put first.

The Acting Chair: As always. It is much appreciated, because it's put a lot of the questions we've been grappling with into better focus for us so we can hopefully come up with better decisions. So thank you very much.

COMMITTEE BUSINESS

The Acting Chair: Members of the committee, the next item on the agenda between 10 o'clock and 11 o'clock is delegated to report writing. Where do you wish to begin with report writing? Is it on the discussion about drafting the bill or on the actual report writing itself with Margaret Drent?

Mr Zimmer: How about a five-minute recess?

Mr Kormos: We haven't heard all of the submissions. We only just heard Mr Borovoy this past hour and we still have three very important submissions to be made by representatives of SEIU, OPSEU and CUPE. Unfortunately, we weren't able to hear from firefighters yesterday, and I have concerns as well about exactly what firefighting group it was that was invited, because I didn't recognize it as the Ontario Professional Fire Fighters Association.

I am concerned about embarking on report writing or legislative drafting—you know I made these comments—before we've heard and contemplated all of the matters that are going to be put before us. Mr Borovoy today articulated an incredibly fundamental consideration, and that is whether or not the McMurtry observations of years ago now, admittedly, are still valid and whether or not they're valid to the extent that they negate the need to introduce legislative change. I appreciate this

isn't report writing, but certainly that consideration is critical to report writing as well.

The Acting Chair: Further comments?

Ms Broten: I think we all acknowledge what Mr Kormos has said. We haven't finished hearing everyone and we are going to continue to do that. However, with respect to the firefighters yesterday, I certainly think many of us queried which group had been invited and why there was not an attendance of that group. I think we wanted the professional firefighters association; I think it was the volunteer firefighters association that ended up being invited and then did not attend. I think that's a common concern we all had. We noticed it yesterday morning.

With respect to where we are at, I think we have an hour now. First of all, if we're doing some report writing, we should be in closed session as we have been throughout these proceedings during that report writing. I would propose we do take a short break, come back in closed session and have discussions about the witnesses we have heard and use the time promptly and prepare for the next witnesses we'll be hearing from at 11 o'clock. I think we can pose some very thoughtful questions to them.

Mr Kormos: I appreciate what Ms Broten says and I thank her for sharing my concern about which group of firefighters would have been speaking here yesterday.

Now she raises yet another matter, and that is the matter of in camera versus on the record. I have the same view with respect to report writing by this committee. This is not the public accounts committee; this is a far different exercise. I have the same concerns about in camera proceedings with respect to the aspect of report writing, at the same time saying that report writing is grossly premature. Ms Broten knows, based on her professional culture, that no determination of facts should occur before one has heard all of the submissions; it's a paraphrase.

Ms Broten: I've started writing my factum many times before the trial has concluded, though. You have to get going.

Mr Kormos: Well, wait a minute.

Ms Broten: You acknowledge that, Mr Kormos. We have a November 1 deadline.

Mr Kormos: So (1) I'm not going to participate in in camera, and (2) it would be premature, in any event. Critical witnesses like Leah Casselman, Sid Ryan and Marcelle Goldenberg haven't been heard from. Mr Borovoy has very effectively put forward one of the fundamental considerations, and I'm not sure we've begun to address that or acquired the information necessary to allow us to address that.

The Acting Chair: What is the wish of the committee?

Ms Broten: Perhaps we can take a five-minute break?

The Acting Chair: OK, take a five-minute break and then return.

The committee recessed from 1010 to 1024.

The Acting Chair: I bring the committee back to order. How does the committee wish to proceed?

Mrs Sandals: I would move that we go into a closed session.

The Acting Chair: All in favour? Opposed, if any? Carried. We're now going into reporting stage, as indicated, in a closed session.

The committee continued in closed session from 1024 to 1103.

ONTARIO PUBLIC SERVICE
EMPLOYEES UNION
CANADIAN UNION
OF PUBLIC EMPLOYEES,
ONTARIO DIVISION
SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 1.0N

The Acting Chair: We'll resume the sitting of the justice policy committee on reviewing the emergency management statutes of the province of Ontario.

We have scheduled at 11 am the Canadian Union of Public Employees, Sid Ryan; Service Employees International Union, Marcelle Goldenberg; and Ontario Public Service Employees Union, Leah Casselman. If you could take a seat.

The format, for our guests, is informal. In essence, it's a combination of a round table panel exchange of ideas and views. Usually, with other panels, we've had presentations by the deputants and then after the presentations there are comments and questions by members of the committee. You can also, at that point, interject or ask to be heard, or you can respond yourselves to a comment or suggestion made by a member of the committee. It's a bit more fluid than the normal committee proceedings. This is all recorded in Hansard. You can begin by identifying yourself for Hansard, and we can proceed. We have an hour for this session.

Ms Leah Casselman: Thank you very much. Good morning. I'm Leah Casselman, president of the Ontario Public Service Employees Union. With me today is Tim Hadwen, our general counsel, so you'll have somebody to talk to. I'll have CUPE introduce themselves when they make their comments.

The Ontario Public Service Employees Union comprises 100,000 members in hundreds of occupations. To name just a few, they are ambulance paramedics and dispatch officers, hospital professionals, public health nurses, psychiatric nursing assistants, psychologists, research scientists, rehabilitation counsellors, environmental officers, air engineers, radiation technicians, highway equipment operators, cartographers, correctional service officers, forest firefighters, steam plant engineers, telecommunications clerks, farm product inspectors, meat inspectors, fire safety officers, emergency health service investigators, transportation enforcement officers, pesticide control officers, public health inspectors, security guards, social and crisis workers, and many other administrative and operational workers who keep public safety operations across Ontario from falling apart. I doubt

whether another organization speaks for such a comprehensive range of occupations concerned with the prevention and resolution of public emergencies.

These front-line workers are spread across the Ontario public service, our hospitals and community colleges and throughout hundreds of agencies in the broader public sector. They are part of the first line of defence that protects the Ontario public from the next Walkerton tragedy, the next SARS epidemic, or cleans up after a train derailment, a truck explosion or, heaven forbid, an act of bio-terrorism. They perform very important work, but they are often overlooked in favour of the managers, the experts, the pundits and the bureaucrats who direct the operations. But in reality, we all rely heavily on the front-line energy and experience of our members to get the actual job done.

That's why we found it curious, but perhaps not unexpected, that it was only as an afterthought to invite the union representatives of these vital emergency workers to address your committee. This attitude is typical of governments who have taken our services for granted, that have cut our numbers, slashed programs, divested and privatized our work. They take public service workers for granted—until they really need us, of course. In an emergency, they sing our praises.

I'm not exaggerating when I say hundreds of OPSEU members have gone through hell to defend our communities, especially those who helped safeguard the public through the SARS episode. How many of the people in this room wore a mask for a month, or perhaps should now? How many of us were quarantined for weeks at a time and kept away from our family and friends?

I also want to remind you that it was our members in the Ontario Clean Water Agency who were called in to resolve the Walkerton situation—this, after years of disrespect for the agency's staff and when their work was offered for sale to the lowest bidder. Thankfully, OCWA had not yet been sold off and was still in the public sector when Walkerton occurred, or else the government would have had to go cap in hand, and hand in wallet, to the private sector. Because history shows that it is the public sector that can be relied upon to come to the rescue, and it is the broad band of dedicated, front-line public employees, united in a web of fail-safe mechanisms, checks and balances, who work to protect public safety and prevent calamities from happening.

But what we have in Ontario today is far from this ideal. If the new government wants to distance itself from the public emergency disasters of the past, if it intends to amend legislation to more effectively plan for emergencies, it had better start taking public sector workers much more seriously.

OPSEU is deeply concerned that in a rush to be seen to be improving emergency preparedness, to pull together a bill by November, you're missing the big picture. Unless this government comes to grips with what it will take to rebuild Ontario's vital public services, your committee's work is going to be fundamentally flawed.

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I submit that to help prevent the next disaster it is imperative that this committee recommend an ongoing, comprehensive dialogue between the province and all the unions that represent workers engaged in public safety issues. Such a dialogue would be aimed at kick-starting a meaningful joint planning exercise to rebuild Ontario's capacity to prevent emergencies and respond effectively when disaster does strike.

It would also be useful if the members of this committee got word to the finance minister before he dives too deeply into his line-by-line assessment of which public services are expendable in his next round of cuts and proposed privatizations. As I've said before, and especially in the context of emergency measures, if a public service in this province could possibly be cut, it was already cut by the previous government. We are now down to the bone.

We're supposed to now be a full year into the rebuilding process promised by the McGuinty Liberals, yet the last budget cut services and staff in at least 15 ministries, with wider repercussions in the broader public service.

If we are to prevent another disaster, can we do without proper staffing levels and adequate equipment? Can Ontarians afford the risk of having even more public programs delivered by profit rather than by the public service?

Time does not permit me to fully outline our views on the legislative reforms needed to help overcome systemic safety problems and ensure that more emergencies are prevented or addressed effectively while still respecting the hard-won rights of employees, but I want to make a few brief suggestions. We have printed materials with us, and hopefully we will have a productive discussion over the next hour with you in relation to some of these ideas.

I want to draw your attention to our letter, dated August 25 of this year, to Justice Archie Campbell on legal lessons learned from the spread of SARS. The recommendations set out in this letter can effectively address shortcomings in emergency planning and also protect employees' interests in the workplace. I would urge the committee to interpret the recommendations as being instructive for necessary reforms to legislation governing the Ontario public service and the broader public sector.

The letter addresses:

- serious consequences of the failure to consult with unions prior to and during emergencies;
- the requirement for comprehensive legal protections for health workers;
- the need to protect employees' rights and collective agreements during emergencies;
- avoiding the circumvention of employers' occupational health and safety obligations;
- the need for detailed emergency workplace plans that are negotiated with unions;
- the need for consistent provincial coordination of health emergencies rather than arbitrary directives made by individual employers like hospitals, for example;

- protection from liability for employees for good-faith conduct required of them during emergencies;

- the need for legislated whistle-blower protection for employees who, in good faith, raise concerns about how a public health or safety risk is being addressed;

- necessary limits to the casualization of workers, which threatens the consistent delivery of many critical public services. You'll recall the part-time nurses and other hospital workers who worked in three or four different hospitals because they couldn't get a full-time job anywhere and were restricted from getting that income because of the SARS epidemic.

We also proposed amendments to the related legislation, including the Emergency Management Act, the Health Protection and Promotion Act, and the Public Hospitals Act.

There's no sense amending the Emergency Management Act if the province fails to also address the staff shortages and cuts in crucial areas of public services directly related to emergency services. There are chronic staff shortages at 11 provincially operated central ambulance communications centres and at the medical air transportation centre, where the new-hire retention rate is just 30%. Try managing a regional health crisis or a major disaster with understaffed dispatch centres.

After the Conservatives laid off 150 permanent meat inspectors, the provincial cabinet was told in 2002 that meat products cause 58,000 food illnesses every year. Meat inspectors, overworked and under serious stress, have a turnover rate of over 30%.

Public health labs have been aggressively starved after the layoff of scientists responsible for researching infectious diseases, superbugs and chemical toxins. Because of this, it took two years for Ontario to respond to the West Nile virus.

Recruitment and retention of hospital professionals—not just nurses and doctors—is the top strategic concern facing health organizations in this country. Our members in the labs, wards and clinics of public hospitals are pivotal when it comes to dealing with emergencies.

I also refer you to the OPSEU/ONA Joint Report on Health and Safety Matters Arising from SARS. This document shows the far-reaching chronicle of troubling inadequacies and inconsistencies in how health care employers responded to SARS. It offers important lessons about sharing vital information and the protection of employees during emergencies. We hope the justice committee will heed its many recommendations, including:

- necessary changes in the operation of the provincial operating centre;

- the need for properly functioning, proactive and accountable health and safety systems within the hospital sector;

- measures to overcome the frustrating and dangerous approach taken by the Ministry of Labour which, during SARS, backed away from its role of enforcing the Occupational Health and Safety Act and its regulations;

—enhanced Ministry of Health and Long-Term Care funding to cover improved infection control programs and related training in hospitals.

To sum up, we're tired of saying, "I told you so." We're tired of saying that. We've said that for the last 10 years. We'll continue for the next four if we have to.

It is time for decision-makers to respect and incorporate the wisdom of the front line. Our members, if consulted, can make a huge difference. In fact, during the SARS crisis we had to step up and fill the void left by management, because we put people first. Fine-tuning emergency legislation is a small part of the problem. Far more pressing is the critically weak state of many emergency and support services. Unbridled enthusiasm for privatizing public services is going to haunt the province again someday, just as it did with private laboratory services at the time of the Walkerton water disaster.

We have yet to experience the full implications of nefarious use of confidential data that has been off-loaded or sold to the private sector. It is frightening to contemplate the ongoing marriage of understaffed, underresourced front-line services with private sector management of sensitive government data.

And how does privatized road maintenance fit with public safety, especially during an ice storm or a major blizzard? What is the impact on emergency management planning of privatized air ambulance services? More than 100 experienced paramedics and pilots left the public service when that brilliant move was made in 2001. And just this week—a year in—the Ministry of Transportation eliminated a number of positions in its road user safety division. These layoffs were done in the name of "managing fiscal challenges," as the ministry put it. With hundreds of people dying on our highways every year, their priorities seem to be a bit skewed.

This government already has one wheel in the ditch, and the primacy of public health and safety demands that it get back on track. I submit that it's easy to hit the ditch when cost-cutting is the primary driver. I submit that "fiscal challenge" cannot continue to be the driver when it comes to protecting the public from disaster and death. Government and public sector employers need to rethink the degree to which the business model has invaded so many senior management offices.

Our collective capacity to protect the public also relies, in part, on ensuring there is strong institutional memory of how to handle a crisis. Institutional memory, consistent safety planning and joint committees reviewing safety measures are all seriously compromised by the history of cuts and the trend to a high turnover of part-time, casual public sector workers.

More than just better organization and communications is necessary when a crisis threatens. We need experienced staff to do the job and to be there when the chips are down.

Thank you very much for listening.

The Acting Chair: OK. The next presenter.

Ms Risa Pancer: I'm Risa Pancer. I'm a lawyer with the Canadian Union of Public Employees. I'm here

representing Mr Sid Ryan. You have been given a letter from Mr Ryan today. I'm briefly going to highlight some of the points in that letter and will also be able to address some of the issues you've raised. I'm here also with Judy Wilkings, who is the legislative liaison with the Ontario division office of CUPE.

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Mr Ryan isn't able to be here, given the short notice we were given for this consultation. He had another obligation today. In addition, given the short notice of this, we were unable to consult with our stakeholders in the CUPE membership on this matter.

CUPE is the largest union in Canada and represents 200,000 employees in Ontario in all types of work: health care, education, municipalities, libraries, universities, social services and emergency services and transportation. We represent white collar, blue collar, technicians, labourers, seasonal employees and professionals. In particular, in hospitals and home care, we represent clerical employees, dietary employees, the regulated health professions and non-regulated health professionals. They may work in providing direct patient care, but also in providing cleaning services, dietary areas, housekeeping and secretarial. We also represent about 3,000 ambulance employees, who are made up of paramedics and dispatch. We also represent a large number of non-managerial municipal employees across the province, and they also work in the communities.

We looked at CUPE in Ontario and at our past experiences in terms of emergencies and declared emergencies. What we did, as a base, was look at what happened during the ice storm, SARS, the power outage of August 2003 and the most current Peterborough flood. When we compared SARS to the ice storm, the power outage and the flood, we realized it was different. In terms of the Peterborough flood, the power outage and the ice storm, there had been very little impact on the labour relations between employers, the unions and employees in the workplace. You compare that with the absolute labour relations chaos that occurred in our hospitals and public health units, and we had to ask ourselves why.

In part, the difference was that this current piece of legislation works—there are some good things in it—and that when you compare and contrast the two situations, you realize that the current Emergency Management Act does work. When applied properly, and when employers and unions and employees have to apply plans and put them in place, then the parties sit down, work it out and give notice to each other to know what's going to happen in the future. That is a result of this plan.

I think what we have to do, very much along the lines of OPSEU's presentation, is look at what happened with SARS, that type of emergency, and how we can work together to ensure that this doesn't happen again, that there are measures in place to ensure that SARS and the chaos that occurred in the many agencies and workplaces doesn't happen.

The most critical issue is health funding, hospital funding. Until there is adequate hospital funding, no

matter how much tinkering we do with this act, it won't change the outcome and the chaos that often arises. Many of the problems that arose from SARS related directly to the funding shortages faced by the health care system in Ontario. There have to be immediate improvements to infection control procedures and increased full-time staffing levels. We have to provide immediate funds for the training of health care employees in the province, including managers, supervisors and the regulated and non-regulated health care workers, to avoid future outbreaks of serious infections.

As OPSEU pointed out, the staffing shortages and problems within the workplaces were that you could have an outbreak of SARS at one site and employees often, due to the lack of full-time jobs, worked at many hospitals, would work at a hospital and work at a nursing home, and their employment was jeopardized.

A situation at a hospital caused a shortage at a nursing home as a result of someone who had worked at a hospital for a couple of shifts and was not able to go and carry out their regular duties at their nursing home job or at another hospital. This created great shortages. Until there is money put toward full-time staff—whether you're a housecleaner or a registered nurse or a registered practical nurse, full-time positions will help to avoid some of those problems that arose.

Certainly one of the greatest problems that arose, and OPSEU again referred to this, was the marked confusion and lack of communication during the outbreak between the employees, the hospital and government. Somehow something happened and employees were left confused and angry and unsure and absolutely scared in the workplace. They are knowledgeable and they know about infection control, but they weren't consulted. In fact, they were asked not to have input into their workplace protocols.

There was a lack of communication to the employees. But in addition, there was a very serious lack of communication with the union representatives of each of the unions in each workplace. They were bypassed and, as a result, the collective agreements were suspended and basically ceased to apply to the employees working throughout the SARS outbreak.

That's what's different with the other types of emergencies that have occurred in the province. As a result, there were individual employees very concerned, not getting the message, being very scared to work, very concerned about what type of mask to wear, who hadn't been properly trained on the masks. They were getting different information on what was the best type of mask.

Certain examples of that are that a registered practical nurse when going to a SARS patient's room was told during SARS 1 that she had to mask up. A dietary aide delivering a tray to that same room was told she did not have to wear a mask. Those are the types of things that happened. Then when certain new rules and procedures are put in place during an emergency, it is very difficult to train everybody, given the circumstances. It's very

important that training and protocol be put in place in advance.

We're also concerned about that issue of the suspension of the collective agreements during this period, that all of the terms and conditions of employment, the hours of work, the overtime, where people were working, what their rights were, were ignored and set aside, and that created additional chaos.

We want to make a number of recommendations. They follow OPSEU's and ONA's recommendations. Certainly one that they put before Justice Campbell in the SARS report—and it's our first recommendation—is that you have to look at necessary legal protections for the employees in these situations. If you keep that in mind in terms of how you're looking at this legislation, it should be able to guide you.

We certainly want the government itself to identify and trigger the emergency in that the definitions section is not all-encompassing of what type of emergencies there are. We would not want individual employers declaring a SARS emergency if that was not the case.

We want to recommend that employers and unions and employees be ordered or told or that it be recommended that they sit down to a negotiating table and bargain the protocols and bargain the procedures in advance of this, that they can address all of the issues that I've raised, that CUPE has raised in this, when they do it face to face at the table. We've recommended what should be the basis of those protocols and how the parties should collectively bargain it. It will avoid confusion; it will avoid chaos.

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We also, as OPSEU has, recommend that you look at all the other types of legislation in looking at this. I know, in terms of your questions, one of them was, what happens if someone's ordered to work out of their jurisdiction? For example, in terms of hospitals, sometimes you have a health care aide who has a limited scope of practice and may, in an emergency, be ordered to do something that is beyond her scope of practice. That could lead to all kinds of problems and liabilities and legal implications, and we want to raise that. These are serious issues. Collective agreements and the relationship between the parties are very long-established. Hospitals and unions and employee associations are very sophisticated, mature negotiators and bargainers and have a very long-term relationship. It should be left to them to bargain the scopes of practice within the workplace and what happens in an emergency, but you have to turn your minds to the Regulated Health Professions Act, which also guides this.

We also support whistle-blowing legislation to protect employees in the workplace during emergency acts and also all the time, and certainly increased health and occupational health and safety concerns. For example, when masks were not properly fitting during SARS 1 and SARS 2 and different hospitals had different masks, employees wanted to raise a concern why one hospital was getting a certain mask and another hospital was getting a totally different mask. They were very con-

cerned that there would be reprisals and retaliations for them bringing forward this issue. So whistle-blowing protection is very important when you're looking at legislation.

Finally, we welcome this opportunity to dialogue with you and we hope that it continues on this and on other matters.

Ms Marcelle Goldenberg: Good morning. My name is Marcelle Goldenberg. I'm here representing the Service Employees International Union Local, 1.0n. I think copies of the submission have been distributed.

We want to thank you, the members of the standing committee on justice policy, for providing us with this opportunity to comment on SEIU's position on various issues. Our comments are going to centre mainly on issues dealing with occupational health and safety legislation, regulations and the way that Ontario health care institutions and agencies deal with occupational health matters. We support both of the submissions that have been made to this committee by OPSEU and CUPE. You will see that in our presentation we echo most of the recommendations that have been presented by our two sister unions.

Just some brief background on our union: We represent 40,000 members across Ontario, approximately 90,000 members across Canada, and part of the 1.7 million members in the US and Canada.

We represent workers in hospitals, nursing homes, retirement homes, home care workers, community living settings and also a number of other workers in the private sector, such as building cleaning services, hotels and manufacturing.

Our membership includes registered practical nurses, environmental and housekeeping staff, clerical workers, dietary personnel, porters, personal support workers in various institutional and home care settings, technicians and the skilled trades. We also have representation of paramedical officers.

We perform critical work in preventing the spread of disease and infection in the health care delivery environment, which is often overlooked and undervalued.

Even though this committee is examining all legislation regarding emergency measures in Ontario, SEIU wants to make some specific observations and recommendations that arose from our experiences with the SARS epidemic last year.

The role that our members play on the front line of the health care system is most powerfully underscored by the fact that at least 10 SEIU members were diagnosed with and treated for SARS. The majority of those members were in our service category, either in housekeeping or nursing professions, but we also had a number of clerical workers working in the hospitals who were diagnosed and treated for SARS. Health care workers accounted for approximately 40% of SARS infections between SARS 1 and 2. Hundreds of others were at home in quarantine or unable to report to work.

SEIU members are proud of and committed to the work they do. Our members were front and centre during

efforts to address and contain the SARS outbreak. Like other professionals in hospital environments, they courageously accepted the very real and heightened risks associated with working during the SARS outbreak. At the same time, and understandably, many of our members were concerned and frightened by the risks and uncertainties of having to work in a SARS environment simply because a government might authorize it under an emergency measure directive.

Of particular concern is the very real fear that they will expose and infect members of their families, should they unknowingly be infected with an infectious disease such as SARS. For months, our members lived with these fears and with the stresses of working under quarantine, always putting the health and well-being of their patients first. They did their best to understand and support their institutions' efforts to combat SARS.

Unfortunately, as we now know, much of the risk and uncertainty was unnecessary and could have been avoided. This is particularly true of the failure of the workplace health and safety system to perform in many hospitals that were directly impacted by SARS. Health care institutions' health and safety committees have an essential role to play not only in protecting workers, but in providing a conduit for exchanging information to and from workers. That many joint health and safety committees were circumvented or neutralized by hospital administration during SARS is a reality. The concept that hospital administrators know best in protecting workers is neither true nor can it stand the test of due diligence.

In most Toronto hospitals, workplace health and safety systems and procedures were either ignored or marginalized. During SARS, the joint health and safety committees were overshadowed by hospital management. Many workers don't trust the system any more to protect their health and safety. In one hospital during SARS, a cleaner received a reprimand on his file because the supervisor felt the worker was being argumentative and unprofessional when he had been assigned to clean a SARS-related isolation room. The letter to the worker stated, "it is my expectation that when you are asked to do something, you will do it. If you have personal issues, you need to address them directly with your supervisor, not other people ... I recognize these are difficult times ... these are not normal circumstances ... I would like to remind you that the hospital has made every effort to ensure the safety and protection of all of our employees." Rather than reassuring the worker or trying to understand the health and safety concerns the worker may have had, the attitude of the hospital administration was, do just as you are told because we know best.

It is within this background and context that we will comment on possible emergency measures legislation that may impact our members.

Workers should not be afraid to refuse unsafe work. Too many workers during SARS were afraid to push the red button, afraid to stop the line, so to speak, until the defect is fixed. We note that the OHA, in a presentation to this committee, said that there's a need for an expeditious ability to address the potential for worker re-

fusals. It asked what essential work is and where health care providers can or cannot work.

Critical to all this, in our view, is the definition of the essential worker. SEIU is not willing to have hospital management determine who is an essential worker and who can be forced to work. We think in an emergency health crisis, such as an infectious disease epidemic like SARS, an outside authority—experts in all aspects of infection control and worker health and safety issues—should be the authority to determine who is an essential worker.

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For much of the 1990s, the province dismantled, downsized or delegated its responsibility for workplace health and safety to the workplace parties. In many workplaces, there was simply no way for workers to address their concerns where the framework for workplace health and safety was neglected or has essentially been abandoned.

In this paper we illustrate how the workplace health and safety system in health care has gone terribly off the rails. It simply was incapable of effectively rising to the challenges presented by SARS.

SEIU submits there is a great need to integrate efforts to deal with health and safety issues, along with those relating to disease and infection control. As this submission indicates, too often hospitals approached these problems as if they existed independently of each other.

SARS demonstrated the need for better coordination between the various regulatory bodies and the institutions responsible to them. Who had the authority during SARS? Was it the Ministry of Health, the hospitals, the city of Toronto's chief medical officer of health, the province of Ontario's provincial operations centre or the Commissioner of Public Security?

Until the Ontario government can guarantee the health and safety of workers, it cannot force them to perform emergency work of an unknown nature. SEIU believes the province should not legislate a statutory provision empowering the Lieutenant Governor to direct any person or member of a class of persons to render services of a type that the person may reasonably be qualified to perform in emergency situations. Rather, a recommendation is that it may be wiser for the province to develop emergency preparedness teams for various disaster situations that are staffed on a volunteer basis. Depending on the emergency, these teams could be assembled on a geographical basis or on a province-wide deployment basis.

The province must take a proactive approach to assembling these teams. Depending on the emergency, human, financial and capital resources need to be determined as to what each team requires. We can't stress enough that training for personnel should be provided much along the lines already now provided in the system we have in effect for the army reserves. This means that specific volunteer teams may require training for a week or two annually. Demanding services from qualified personnel at the height of a real crisis means we may have already been too late. One cannot train and deploy during

an emergency. The province must assemble specific response teams now to ensure training has been done before any deployment or human resources are necessary.

We believe it is a civic duty for people who have the skills during an emergency to offer them. If services are offered on a voluntary basis, the people providing them must have their jobs protected. Every volunteer in an emergency situation must be assured their jobs and all related benefits continue, including premium payments maintained. We take the position that there are no provisions of any collective agreement or the ESA that are to be waived. People working in emergency situations already shoulder a heavier burden. They should not be asked to waive any employment rights they currently have.

Other emergency laws may override other statutes, regulations and bylaws that the province of Ontario may want to legislate. SEIU cannot accept any suspensions of civil rights for persons who may be designated essential workers during an emergency.

Under an emergency infectious disease outbreak such as SARS, if a vaccine were available, would the government have the power to inoculate everyone? Currently, not all health care workers take an annual flu shot, not because it is not worthwhile, but because some people are allergic to the vaccine.

Yes, the state, or in this case the province, has a legal and moral authority to protect its citizens. There are already federal laws that allow the government almost unlimited power to deal with emergency situations.

We quote on page 5 both in terms of a highlight of the War Measures Act and the federal Emergencies Act dealing with the breakdown of emergencies. We note also that the federal Quarantine Act, which gives some powers to the government of Canada, has just been introduced for some changes.

In a public health context, we abhor the notion of conscription. We emphasize that for any emergency planning to work well, the context must always be that a person is willing—ie, volunteer—and qualified.

We're deeply troubled that public health provisions will override privacy rights of workers. One cannot trump the other. They must be given equal weight. During the SARS crisis in Ontario, we never got to the stage of developing volunteer teams. These discussions did surface during the stage of SARS 2, but only because hospitals were desperate to find willing volunteers to work on SARS units. It is little wonder these volunteers were difficult to employ, given the fact that too many institutions were found to be severely lacking in occupational health and safety standards.

SARS demonstrated that the cutbacks in the funding to public health had a devastating effect on the provision of services during an emergency and the capability of the system to cope. Health care emergencies are different from terrorist or environmental emergencies. SARS proved that we have to be proactive in our contingency plans for infectious disease emergencies.

Until health care workers are assured that they will receive the proper training and personal protective equipment for the infectious diseases they must encounter, they cannot be ordered by any authority to put their lives on the line.

Anyone volunteering for an emergency task force must be assured that there can be no liability against the person, such as a patient's family suing a health care institution or health care provider because the patient contracted the infectious disease from a caregiver because it was later deemed that the caregiver did not have all the personal protective equipment necessary that could have prevented the disease.

SEIU is a strong proponent of the whistle-blower protection for all workers who work in all health care institutions. Whistle-blower protection should not just be granted during an emergency crisis; it should also become an integral component of our health care team. Protecting lives is an everyday function for health care providers. If health care providers find institutional practices and policies that may endanger a patient or a client, they must be able to report it to the appropriate authorities without jeopardizing their jobs.

If new emergency legislation is enacted in Ontario, it is vital that the protection of the health and safety of workers be a major consideration in that legislation. Province-wide standards need to be developed for infection control so that all institutions practise the same infection control procedures.

Further to the emergency measures, the province of Ontario must strengthen the role of health and safety committees in our health care institutions. The role of the joint occupational health and safety committees in health care institutions and hospitals needs to be enhanced. Health care workers, particularly support staff such as housekeeping, dietary and clerical workers, must not be afraid to speak out for fear of losing their jobs. These workers must have full access to training and the right to know about any infectious diseases, substances or hazards that may affect their health and safety. Involuntary assignments to hazardous environments without proper training, education and complete protection must be prohibited.

Specific certification programs for health care workers' health and safety representatives need to be developed and must include training in the control of infectious disease. WHMIS training is still lacking in many health care institutions.

Subsection 9(12) of the Occupational Health and Safety Act prescribes that an "employer shall ensure that at least one member of the committee representing" an employer and workers be certified. In multiple union workplaces such as Ontario hospitals, each union should be entitled to have at least one member certified. This will enhance the training and, more importantly, the communication within the entire employee group the certified member is responsible for.

The Ministry of Labour inspection branch needs to adopt a more proactive, interventionist approach to en-

sure employers are complying with the Occupational Health and Safety Act and its regulations.

Infection control training and communication strategies need to include institutional support staff. Communication delays result in misinformation and fear. All health care workers have the right to know how their health and safety may be jeopardized and how they can take preventive measures to minimize exposure. Proper health and safety training and precautions should be a mandatory part of a health care institution's hiring practices and employee orientation programs.

Health care institutions need to have an adequate supply of personal protective equipment on hand. From now on, it is not adequate to say that only X personnel get to wear the gowns, the gloves and the N95 masks; however, Y personnel get only substandard protection.

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Hospital management teams must be educated and trained in occupational health and safety policies and procedures, with particular emphasis on health and safety policies as they relate to the health care sector.

Staffing of all hospital departments needs to be desperately reviewed. During an infectious disease outbreak, there's not enough staff available to handle the workload. Human resources policies must be developed to address health care staff recruitment and retention issues.

Part-time work in health care institutions must be reduced. Part-time workers must work at several health care sites to earn a living wage. During an infection/disease outbreak, they are restricted to work in only one site. This is the right policy to arrest disease transmission, but restricting part-time workers from working at multiple sites puts added stress on the staff who remain available at only one site.

Health care workers quarantined for infectious disease must be provided full wage and benefit loss replacements.

We've tried to raise a number of the issues that we received in the letter from the committee, and we're available to answer any questions. Thank you.

The Acting Chair: OK. We have questions or comments from the MPPs.

Ms Broten: Thank you for the detailed presentations you've provided to us today and, especially, thank you for the detailed written presentations that I can tell you we will take with us and further study after the hearing today.

I also want to, on behalf of the committee, ask you to thank all of your members for the work they do each and every day. This committee was cognizant from the beginning about the importance of speaking to front-line workers. We did that throughout the consultations to have an opportunity to talk to folks in what has somewhat been an unprecedented type of hearings, asking groups to come forward to us and talk about a piece of legislation that's not yet drafted and does not yet exist, to get that feedback from groups such as yourselves, and asking groups that had similar views or perhaps similar

perspectives to come so we could have a dialogue at the same time.

I wanted to respond to the concern that it was a quick process, and perhaps you did not have quite enough turnaround time within your organizations. I know we tried to reach out earlier in the summer. I want to let you know, you're not the only organizations that have suggested to us that it's a quick process. We have obviously been having these hearings throughout the summer, and there will be opportunity for more debate and more dialogue on this topic once we put forward legislation and a report.

I know we don't have a lot of time today, but I want to raise with you one of the issues. We heard from Alan Borovoy, and one of the provisions that Mr Borovoy suggested to us was with respect to authorizing or directing the workers. I know that many of you have commented on that.

One issue the committee needs clarification on is the circumstance where a worker in one of your organizations would want to volunteer and would be prohibited from doing so without a direction. We've talked about that topic throughout. So that's the first question.

The second one is, if I could just propose to you the provision that Alan Borovoy suggested to us and get your comments on it:

"Where a person is directed to render services: (a) require that the services be essential; (b) provide a defence to refuse the performance of any services beyond those normally required of such classes of persons, where there are reasonable grounds to anticipate serious perils to life, limb, or health; (c) provide reasonable compensation to persons who are so directed; (d) provide that such compensation be subject to independent arbitration; (e) in the absence of bad faith, indemnify those who cause injuries in the performance of such services."

Could I just get a comment from all or each?

Mr Tim Hadwen: I think our position is that the concept of some kind of overriding essential services scheme is fundamentally wrong. The provision of the services that need to be provided during an emergency can occur and will occur within the current framework, but to create some kind of essential services regime to get this kind of situation dealt with is unnecessary and intrusive and is pro-management in a way that's fundamentally unhelpful to actually properly dealing with the emergency. Within the current context, the legislative framework and collective agreement framework, emergencies have been, are and will be addressed in the way they need to be by the workers involved. The problems that exist don't relate to the legislative framework. They relate to all of the other issues that have been put before you in the speeches you've heard. So the whole idea of some additional essential services regime to address these issues is wrong.

Ms Broten: Were there situations during SARS—we've heard through other presentations that individuals wanted to volunteer, nurses from out of province,

paramedics etc, but they were prohibited from doing so. Can you comment on that? Was that an issue?

Mr Hadwen: I can't comment directly about a specific instance of a difficulty with somebody being able to volunteer. But in a general sense, if you go to the parties involved in a workplace and you have a sensible discussion with them about the availability of volunteers to help out, you're going to get the resolution that you need. These parties are quite capable of addressing the issue of persons who want to volunteer to do these kinds of things.

You just heard the submission that was made about the idea of having a proactive discussion about volunteering and being available to work in these kinds of emergencies. The idea of volunteering and being available to do so is something that these parties are entirely in favour of. How you go about implementing the volunteering is the point. And the point is that it can be done within the current framework in a way that will be entirely successful.

Ms Broten: So to sum up, I guess your position to us would be that if there were no volunteers coming forward, that should be alarm bells going off for all of us that there were serious issues in the workplace, and that's why dedicated people were not volunteering or coming forward; they were raising concerns.

Mr Hadwen: That's at least part of it. The other part of it is that all of these emergencies were, of course, dealt with by a whole level of volunteerism that occurred within the existing frameworks. All kinds of people stepped up and did things, made themselves available and worked extra time, all of those kinds of things, throughout without even getting into the issue of some extra-provincial volunteer. I'm just talking about a whole level of volunteerism that has occurred on every one of these occasions.

Ms Broten: Those are helpful comments.

The Acting Chair: Mr Zimmer?

And then I'll let you comment.

Mr Zimmer: No, thank you.

The Acting Chair: Marcelle, would you like to comment on that?

Ms Goldenberg: I'd just wanted to add to what Mr Hadwen was saying in terms of volunteers. One of the issues that arose in SARS 2, where we actually knew it was arising at some of the hospitals, was that the parties actually agreed that, to create a sort of fairness within a type of volunteer, new jobs were posted, and people applied for them. The parties agreed that the position wouldn't be posted for seven days, but would be posted for 24 hours, and then all of the volunteers and those people who were interested were able to apply. Then a properly qualified person was put in the position. So it was the parties, after SARS 1, turning their mind to a protocol that would work, that would allow volunteers to work in the workplace, and that also allowed the provisions of a collective agreement to remain in place.

The Acting Chair: You said those were 24 hours, time specific?

Ms Pancer: Yes. That's an example of how we made something work between the union and the employer in the workplace. We suspended a particular time period in the collective agreement for SARS 2, to get people who were volunteering to work directly with SARS patients and were agreeing to do that work. Everyone was being given an opportunity to apply for that work. There were many interested people, and they were able to apply sort of the normal provisions of the collective agreement—

The Acting Chair: Sorry. Before I go to Mr Kormos, is it possible that the committee could get a copy of that posting or something as an example, just for our own—

Ms Pancer: I can try, but I'm not sure if I can.

The Acting Chair: If it is available, I just thought it might be interesting to look at.

Mr Hadwen: But if the point that you take from that example is you need to make sure that management is given the power to direct and require, as a unilateral action, that there be 24-hour postings, you're missing the point of the example. The point of the example is that, within the current framework, this arrangement was sensibly arrived at by the parties in that workplace. That's the point of the example.

The Acting Chair: Anyway, sorry to ask.

Mr Kormos?

Mr Kormos: This may simply be a conflict in recollections. As I recall, discussions around volunteers by various participants were of two classes. One was the reluctance of some professionals—firefighters were an illustration—to have pressed upon them volunteers who had no training whatsoever, who, however enthusiastic they were, had nothing by way of background that would permit them to be an effective member of a firefighting team. I suppose the analogy could be made with health care, other health professionals and any emergency response team. That was number one.

Number two: I recall some comment about a reluctance to assume that certain regulated professionals from other provinces had the same qualifications as regulated professionals in Ontario, and hence a reluctance to automatically bring them into the teams when there was uncertainty about whether they were going to be performing at the same level with the same fundamental premises. That's just my recollection.

There was never, insofar as I recall, an indication by anybody that said that volunteers in any way were not acceptable to professionals, health professionals and others working in Ontario.

I also want to comment around this business of directing work, and put to you a question, in contrast to authorizing work. You're right; Mr Borovoy earlier today spoke specifically about the provision for directing work, and he made some recommendations around it. That is the conscription concept, or the press gang concept.

This committee has before it material that goes beyond merely directing work. It has a phrase that it's going to be contemplating that would permit the government to not only direct a person to perform certain work—the

conscription, and you folks have responded to that, as did Borovoy earlier—but also the—

The Acting Chair: Excuse me for a moment. If we could just recess quickly to go and vote, and then we'll return right back in about seven minutes. If you could just bear with us.

The committee recessed from 1202 to 1211.

The Acting Chair: We've got about 15 minutes, because everybody, I'm sure, on the other side has the same type of commitment problem. Peter, do you want to resume?

Mr Kormos: Yes. The issue is one of conscription directly and authorization. On conscription, Borovoy talked about there being defences; in other words, not forcing people to take on a task or a role that was dangerous, that they felt incapable of doing. Reference was made to Second World War Canadian conscription, but as I recall the history, even in Canadian conscription there was the phenomenon of zombies, in that people who were conscripted, rather than volunteering, weren't necessarily compelled to put themselves in the line of fire.

The more interesting one is the authorization of any person or any person of a class of persons to render services of a type that that person or a person of that class of persons is reasonably qualified to provide. My interpretation of that would mean that the government—the Lieutenant Governor in Council—could make a silk purse out of a sow's ear, that it could authorize people, for instance, unlicensed to perform a particular role, to perform that role. It could turn bus drivers into ambulance drivers, authorize a person or a class of persons to do a particular line of work. There was concern expressed during submissions by some participants that that was necessary, that we wanted to have flexibility in terms of the roles people were performing. Front-line emergency response roles: There has already been some experience within your fields in terms of licences to drive ambulances. What do you say to a government's arbitrary stand-alone power to override the regulation and licensing of professionals? If you don't share that interpretation, and I appreciate I'm posing this to you without a text, what do you say to that, in a most general way?

Ms Casselman: If I could, before I hand it over to Tim to see if he can wrap his head around this, there are no ambulance drivers.

Mr Kormos: I'm being colloquial.

Ms Casselman: I know. I want to make sure the committee understands that our ambulance paramedics are highly trained.

Mr Kormos: That's right.

Ms Casselman: So you can't just stick someone in there.

Mr Kormos: Precisely the point.

Ms Casselman: Exactly. One side comment on that is that you've already lost one of the abilities to have even an ambulance paramedic move from one employer to another and perform the duties they are trained to do, because of the procurement and outfitting of ambulances

which has been lost as a result of the Judson Street sell-off. One of our members who worked at Judson Street, where they actually bought all the ambulances for all the municipalities across the province and ensured they were outfitted the same—our procurement officer was also in charge of getting those masks for every hospital outside of Toronto. That has been lost to you as well because Smitherman thought the Tory idea of laying off a bunch of those folks was a good idea. So that's another emergency measure you may want to look at: How would you get those kinds of equipment required, because you now have lost that ability?

Mr Hadwen: I don't think there's anything to add. The fundamental point is that there are a whole bunch of reasons why people are able to do certain things and are not able to do other things. It's because they have the training, the background, the experience, the regulation, the warrant, the authority to properly do those things and to safely do those things. That's how you get those things done sustainably and well, even in an emergency. As a basic approach to this, to focus on authorizing people to do those things for which they are not properly licensed, equipped or trained is not a fundamentally helpful approach to the problem.

Mr Kormos: Thank you. Mr Borovoy also—and to his credit, but certainly not unexpectedly—cautioned that it should be clear in any legislation that the extraordinary powers that a government acquires in an emergency should not be capable of being used to terminate a labour dispute by imposing a contract or conditions on those particular workers. Can you tell us what the experience has been with respect to the kind of workers that you folks work with and represent who may have been locked out or on strike in the context of responding to, let's call it, even a mini-emergency within the context of their work?

Mr Hadwen: During the course of certain kinds of strike situations in public service environments, you have the ongoing provision of the services that the public needs occurring. Then an emergency will occur and, lo and behold, everybody will rush in and deal with the emergency. Then, if there's a dispute about anything, it will be about who pays for the coffee and doughnuts, but there won't be any disputes about actually getting the emergency looked after. So that has been the practical experience in these issues.

Mr Kormos: I suppose I'll end with this. The phrase came up, particularly during CUPE's submission, very pointedly about the need—this was implicit in what they said—to bargain and sit down—you, speaking on behalf of your membership, your workers, your health professionals, among others—with the government to develop emergency response, emergency planning, emergency training structures.

I appreciate Ms Broten's comments that no legislation has been written, but legislation had been written, not by this committee but by the Ministry of the Attorney General, which was a wish list of powers by the government. Nobody really knows why, or nobody's prepared to—it's like the little boy who wet the bed. He isn't quite sure

how it got there. Nobody's quite prepared to admit why and how and for what reason this bill came into existence, but it's there.

Tell me about your bargaining experiences, the recent ones, and the inclusion of emergency management preparation, training and preparedness.

Ms Pancer: I can speak to that on behalf of CUPE because, as a result of SARS at a number of hospitals, we are currently attempting to do that. We are currently sitting at bargaining tables, trying to reach an agreement on protocols and training, and it's very difficult when employers are not given any guidelines to follow.

It's made much worse because we are in the process of trying to do that. We're trying to put in training. We're trying to put in how staff shortages are going to be dealt with. We're trying to deal with how extra things like bonuses are going to be dealt with, because we certainly had the situations where those who worked in particular areas of a hospital and by their work were given spa treatments, were given getaway weekends, were given significantly different rates of pay, and that was different from what our other members were getting working with SARS patients at other sites of the same hospital. I'm talking, actually, about the same hospital. So you actually had members of a bargaining unit—people who do the same work, who worked at different sites for the same employer—with one getting triple pay and the other getting their regular rate of pay.

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We're trying to deal with that now. We're also trying to bargain about how we're going to deal with it in the future. We're bargaining that. We are determining, if you are going to have people working in infection controls, what hours of work they may work. They'll keep, possibly, their rates of pay the same. They may have to have additional breaks. They may have to have different hours of work. We are looking, if the hospital receives gifts from the community as a result of trying to show some gratitude to the health care workers, which often happens, at how that might be distributed.

We're trying to do that now as part of our bargaining process, so that everyone will be aware of it. Trying to do that in a vacuum without any guidance from the province is very difficult—in addition, without the funding, because we're trying to deal with the protective measures and trying to put in everyone's concerns about protective wear. We're trying to do that up front.

We are also, though, putting in it how we're going to deal with occupational health and safety concerns, that the act will apply and everyone will have the right to raise concerns during an emergency and feel no fear of retaliation.

So we are trying to capture that now in documents, in an agreed-to protocol that will be signed off, hopefully, by the union and the employer to deal with an emergency. We think that is the right way to go. We'll be able to have that document. We'll be able to post that document in a workplace. The members will know what their rights are. The employer will know what their rights are. If they have staff shortages, if there's a unit that's short

or something, everyone will know how it's going to work. It is also guaranteeing that the collective agreement will remain in place and will apply to everybody.

The Acting Chair: And that's in process right now, you're saying.

Ms Pancer: It is.

The Acting Chair: OK. Thank you.

Ms Goldenberg: If I could just add to CUPE's comments, most of the unions right now are in bargaining for their hospitals, as they're all open, so SEIU and CUPE are in provincial bargaining.

We also wanted to put in comprehensive proposals to deal with the same issues that CUPE raised, so that there would be a framework. Unfortunately, the OHA took the position that health and safety issues and occupational health and safety language could not be negotiated at the provincial level. They insisted that it be negotiated hospital by hospital. We think that this is one of those issues that absolutely needs, if we're able to develop a protocol, to have a proactive approach to it, to have it province-wide. There should be no differentiation in terms of how we react to an emergency, whether you're up in Thunder Bay or whether you're in Cobourg. So just to underline, in terms of our need and that we felt there was some urgency in terms of developing this protocol and having it applicable to all of our members across the province, that we're not going to be able to meet that time frame because, as we relegate this issue down to a local-by-local level, it will probably take us a much longer period of time.

The Acting Chair: That's very helpful. Anyway, I think we've run out of time.

Mr Kormos: Mr Hadwen wants to make a brief comment.

The Acting Chair: Did you want to make a comment?

Mr Hadwen: I was just going to say that, to the same effect, in our August 25 letter to Mr Justice Campbell of the SARS commission, on page 6 we specifically recommend that the Public Hospitals Act be amended to provide that each hospital negotiate a health emergency plan. That's an example of the kind of idea that's being put forward. If you want to impose requirements in this area, require people to get together and plan ahead.

The Acting Chair: Thank you for being here. Just to let you know, this is quite an unusual process in that we're having presentations made before the bill is introduced. Once the bill is introduced, then there will be first and second reading and more public hearings. So this is the beginning of a long process here. Thank you very much for your very informative input here today.

Ms Casselman: Will there be public hearings across the province?

The Acting Chair: That's determined by the House leaders.

Mr Kormos: It's determined by the government.

The Acting Chair: You're pretty jaundiced in terms of your outlook on—anyway, meeting adjourned.

The committee adjourned at 1226.

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