

## PART I – NATURE OF THE MOTION

1. Long Range Acoustic Devices are largely untested, “sub-lethal” devices capable of causing extreme pain and permanent hearing loss. Due to their weapon-like qualities, they are commonly referred to as “sonic cannons”. Originally developed for use on the high seas, and subsequently used in war zones in Iraq and Afghanistan, sonic cannons recently have been deployed in urban settings to disperse crowds and force compliance through pain and discomfort.
2. This is a motion for an interlocutory injunction restraining the Respondents’ use of the “alert” function on sonic cannons and the “communications” function at a sound level above that prescribed by Ontario occupational health and safety legislation pending the disposition of the Rule 14 Application in this matter.
3. An interlocutory injunction is required in order to restrain the Respondents from deploying sonic cannons:
  - (i) without the Ministry approval required for the use of weapons under Regulation 926 of the *Police Services Act*.
  - (ii) in a manner that restricts and/or completely deprives affected individuals of their freedoms of expression, peaceful assembly and association; and
  - (iii) in a manner that risks the violation of the security of the person of the Moving Parties and other members of the public against whom the sonic cannons are deployed.
4. As detailed below, the Moving Parties have met all three steps of the test for an injunction.
  - (i) There is a serious issue to be determined as to whether the Respondents would be breaching Regulation 926 by deploying sonic cannons in the manner sought to be enjoined without the required approval. There is also a serious issue as to whether the deployment of the sonic cannons in this way violates ss. 2(b), 2(c), 2(d) and 7 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).

- (ii) The Moving Parties and other members of the public would suffer irreparable harm if the sonic cannons are deployed in the manner described above. Damages ordered by the Court if the Application is successful would not compensate the Moving Parties and other members of the public for the temporary or permanent loss of hearing that reasonably could be caused by the deployment of the sonic cannons. Damages also would not compensate the Moving Parties and other members of the public for the lost opportunity to effectively assemble and express their views to G-8 and G-20 leaders during the Summits. Finally, damages would not compensate harm to the rule of law and the public interest caused by the Respondents' breach of legislation in deploying sonic cannons as weapons without the required approval.
- (iii) The balance of convenience lies with the Moving Parties. The Moving Parties seek a limited restraint on the Respondent's law enforcement arsenal in order to prevent the irreparable harms detailed below. The Moving Parties do not seek to restrain the Respondents from enforcing the law, controlling crowds, or communicating with protestors in a lawful manner. The Respondents would remain free to do so using all of the traditional means and tools. They would also remain free to use the "communications" function on sonic cannons at a sound level equal to or below that prescribed under occupational health and safety legislation.

## **PART II -- FACTUAL BACKGROUND**

- 5. In addition to the following brief review of the factual background to this motion, the Moving Parties rely upon the evidence contained in the supporting affidavits included in their Motion Records.

### **A. The Applicants/Moving Parties**

- 6. The Corporation of the Canadian Civil Liberties Association ("CCLA" of "Association") is a non-profit corporation whose objects are identical to those of

the CCLA. Its governance is closely linked to that of the CCLA. The CCLA is a national organization that was constituted in 1964 to protect and promote respect for and observance of fundamental human rights and civil liberties. The Association has organized a team of human rights monitors to monitor police conduct and to ensure that the civil liberties and human rights of participants at public rallies and demonstrations are respected.

Affidavit of Nathalie Des Rosiers ("Des Rosiers Affidavit"), Applicants' Motion Record ("AMR"), Tab 2, paras. 2-5

7. The CLC is the umbrella organization for dozens of affiliated Canadian and international unions, as well as provincial federations of labour and regional labour councils. The CLC is co-sponsoring a G-8 and G-20 public rally and march on the afternoon of Saturday, June 26, 2010.

Affidavit of Kenneth Georgetti, AMR, Tab 7, p. 177, paras. 2-3

Affidavit of Chris MacDonald ("MacDonald Affidavit"), AMR, Tab 8, p. 182, para.2

8. The Applicant Nathalie Des Rosiers is General Counsel of the CCLA. The Applicant Abigail (Abby) Deshman is a lawyer and the Director of the CCLA's Fundamental Freedoms Project. Both Ms. Des Rosiers and Ms. Deshman will be attending public rallies and marches as independent human rights monitors during the Summits.

## **B. G-8 and G-20 Summits**

9. The G-20 is a group of finance ministers and central bank governors from countries around the world who meet to discuss international economic issues. This year's initial G-20 Summit will be held in Toronto on June 26-27, 2010. It follows the G-8 Summit of leaders from eight of the world's most industrialized countries which will be held in Huntsville on June 25-26, 2010. As a result, leaders of industrialized countries, finance ministers, and central bank governors will be in Toronto and Huntsville before and during the Summits.

10. The decisions taken by the governments of G-8 and G-20 countries will have a significant impact on millions of lives in Canada and around the world. For this reason, many individuals and organizations plan to peacefully assemble and associate to engage in expressive activity before and during the G-8 and G-20 Summits. Such activity may include protests, rallies, marches, and other expressions of dissent with respect to the G-8 and G-20, the policies and actions of the government of Canada, international affairs, and the actions of international governments and economic institutions.
11. For example, a number of community groups and associations will be organizing events, including a People's Summit and other forums, marches and rallies, during the days preceding and during the G-8 and G-20 Summits (i.e., June 18-27, 2010). These events will provide a rare and meaningful opportunity for groups and individuals to pronounce on issues that concern them before a wide, international and powerful audience.

Affidavit of Abigail Deshman ("Deshman Affidavit"), AMR, Tab 3, p. 43, para. 2

Affidavit of Mark Calzavara ("Calzavara Affidavit"), AMR, Tab 10, p. 192, para. 4

Affidavit of Chris MacDonald ("MacDonald Affidavit"), AMR, Tab 8, p. 182, para. 2

12. The planned use of sonic cannons by the Respondents has created an atmosphere of fear and intimidation amongst members of these community groups. The planned use of sonic cannons has lead to a reasonable apprehension of harm on the part of the organizations and individuals who are planning to attend to the various expressive activities organized in response to the G20 Summit.

Calzavara Affidavit, AMR, Tab 10, p. 193, para. 8

Affidavit of Danielle McLaughlin ("McLaughlin Affidavit"), AMR, Tab 9, p. 189, para. 6

MacDonald Affidavit, AMR, Tab 8, p. 183, paras. 7-12

Deshman Affidavit, AMR, Tab 3, p. 47, para. 17

Transcript of cross-examination of Abigail Deshman, p. 8, lines 20-24, p. 9, lines 7-11, 20-23, p. 10, lines 13-25, p. 11, lines 9-12, p. 12-13, lines 35-18

13. The Moving Parties, as well as other organizations taking part in expressive activities linked to the Summits, have provided evidence that the Respondents' security measures, including the proposed use of the sonic cannons, has had, and will continue to have, a significant "chilling effect" on attempts to organize expressive activities.

MacDonald Affidavit, AMR, Tab 8, para. 11

Calzavara Affidavit, AMR, Tab 10, para. 8

### **C. Sonic Cannons**

14. The Integrated Security Unit ("ISU") is managing security for the Summits. The ISU is a joint security team led by the Royal Canadian Mounted Police ("RCMP") in partnership with the Toronto Police Service ("TPS"), the Ontario Provincial Police ("OPP"), the Canadian Forces, and Peel Regional Police ("PRP"). However, the RCMP, OPP, TPS and PRP will retain an effective enforcement capacity within their respective jurisdictions.

G20 Integrated Security Unit homepage, Exhibit "A" to Des Rosiers Affidavit, AMR, Tab 2A, p. 24

Transcript of cross-examination of OPP Superintendent Charlebois, p. 1-2, paras. 4-7

15. The TPS has purchased four sonic cannons which it intends to use at large gatherings during and after the Summit. The OPP has also purchased three sonic cannons.
16. Sonic cannons were originally developed to protect American naval warships in international waters. The devices have distinct "communications" and "alert" functions. The former blasts loud, pre-recorded human-voice messages urging crowds to disperse. The "alert" function is used to direct a high-pitched piercing sound at a target.

Affidavit of Dr. David Murakami Wood ("Dr. Murakami Wood Affidavit"), Applicants' Supplementary Motion Record ("ASMR"), Tab 4, p. 44

17. Sonic cannons have been employed in different contexts since 2003. Sonic cannons are in use in war zones in Iraq and Afghanistan, where United States forces deploy them for crowd control, area denial, and clearing buildings. They have also been used to deter maritime piracy against both military and commercial vessels, and have been used by Japanese whalers to repel anti-whaling activists. While police in the United States had used the “communication” function on sonic cannons to broadcast information to large crowds on a number of occasions, the 2009 G-20 Summit in Pittsburgh was the first time that the “alert” function was deployed in a civilian setting in the US.

Dr. Murakami Wood Affidavit, SAMR, Tab 4, pp. 44, 46

“Toronto Police get ‘sound cannons’ for G20” Toronto Star article, dated May 27, 2010, Exhibit “B” to Des Rosiers Affidavit, AMR, Tab 2B, pp. 27-28

“Sonic gun like ‘root canal,’ former G20 protester says” Toronto Star article, dated May 27, 2010, Exhibit “C” to Des Rosiers Affidavit, AMR, Tab 2C, p. 30

#### **D. RCMP Internal Report**

18. The RCMP has confirmed to the CCLA that it does not plan to deploy its sonic cannons during the Summits. The RCMP has limited its use of sonic cannons to marine operations.

Des Rosiers Affidavit, AMR, Tabs 2D-E, pp. 32, 35-36

19. An RCMP internal review does not support the use of sonic cannons as crowd-control devices due to limitations in the technology when used on land and the possibility that the weapon will “caus[e] hearing damage to those targeted or in close proximity”. The RCMP’s internal review concluded:

Until further medical research has been completed/compiled and supporting data can provide practitioners assurances that these acoustical devices can be used safely and effectively, [the RCMP] have adopted the stance that the potential risks associated with their use currently outweigh the benefits that the RCMP can draw from utilizing this technology in a crowd control situation

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of Tim Charlebois, p. 3

20. The RCMP internal review raises several inter-related concerns about the use of sonic cannons, including the following:

- **Manufacturers' claims are misleading:** "While the demonstration received was, at first blush, 'impressive', subsequent research has taught us that not all claims professed by the manufacturer/representatives proved to be wholly accurate, hence the need for prospective clients to be vigilant (i.e. buyer beware)" (p. 1). "Manufacturer claims that LRAD can communicate effectively at ranges in excess of 500m are greatly exaggerated. Dr. Brungart (sic) studies have shown that most Off-the-shelf products will work effectively at distances closer to 100m range. Anything beyond this distance requires the use of higher, distorted sound pressure, which diminishes the effectiveness of the communication and, conversely, increases the likelihood of causing hearing damage to the receiver (listener)." (p.2)
- **Risk of hearing damage due to need to increase volume level when used on land:** "As the span of distance one wishes to transmit communications over increases, the requirement for substantial projection authority of the acoustical device must also be greater. The insertion loss experienced by the presence of various structures surrounding the intended receiver (listeners) can render the effectiveness of the intended communications ineffective. Both of these factors will invariably result in forcing operators to significantly increase the volume level of the LRAD to achieve their objectives. In doing so, this substantially increases the accompanying sound pressures emitted by the system, which may result in causing hearing damage to those targeted or in close proximity." (p.2)
- **Harmful effects on by-standers:** "While the manufacturer's claim that their LRAD has a very narrow band of audio directivity (+/- 15 degrees) independent field tests prove this to be false. Consequently, whenever a LRAD communication is directed under demanding circumstances, higher sound pressures will be produced by the acoustical

levels being emitted towards unintended bystanders or personnel found within the directional periphery.” (p. 2)

21. The RCMP internal review further reports that the Boston Police Department, after having deployed its sonic cannon “in the streets in live situations”, has “since ceased using their LRAD in crowd control situations out of a concern for public safety and fear of civil litigation issues”.

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of Tim Charlebois, p. 3

22. Similarly, in response to pressure from civil liberties groups, and in accordance with the RCMP’s recommendations, the Vancouver Police Department undertook to disable the “alert” function on its sonic cannons during the recent Vancouver Olympics.

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of Tim Charlebois

“Mounties shun ‘sound cannons’ in urban settings ahead of G20,” Toronto Star article, dated June 3, 2010, Exhibit “E” to Des Rosiers Affidavit, AMR, Tab 2E, p. 36

“VDP will disable ‘sonic cannon’ Chu tells police board, Mayor Robertson gives Chief his vote of confidence”, Vancouver Observer article, dated November 18, 2009, Exhibit “B” to Deshman Supplementary Affidavit, ASMR, Tab 2B, pp. 24-30

## **E. TPS and OPP’s Sonic Cannons**

23. By contrast, both the TPS and OPP have both declined to disable the “alert” function on their sonic cannons during the G-8 and G-20 Summits. The TPS and OPP intend to use the sonic cannons’ “alert” function in two to five second blasts “to get people’s attention”. As of the date on which this Application was commenced, neither the TPS nor the OPP had disclosed detailed protocols for the deployment of their sonic cannons at the G-8 or G-20 Summits.
24. The TPS’ conic cannons include three handheld units that can be heard 600 meters away and whose volume can reach 137 decibels (LRAD 100X model). The TPS also purchased a fourth vehicle-mounted unit which can reach 143 decibels audible from as far as 1500 meters (LRAD 300X model).
25. The OPP has purchased one handheld LRAD 100X model and two tripod-mounted LRAD 300X sonic cannons.



Affidavit of Tim Charlesbois ("Charlesbois Affidavit"), Ontario Provincial Police Motion Record ("OPP MR"), paras. 11-12

26. Sonic cannons are largely untested. There has been little to no independent Canadian scientific research into the short-term and long-term effects of sonic cannons, particularly for their use in a city like Toronto. Most of the existing information that is available is produced by the manufacturers of sonic cannons.

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of Tim Charlebois

Affidavit of Dr. Robert Harrison ("Dr. Harrison Affidavit"), AMR, Tab 5, p. 81, paras. 12-13

Dr. Murakami Wood Affidavit, SAMR, Tab 4, p. 45, para. 12

27. The TPS and OPP have relied almost exclusively on the information supplied by the manufacturer and distributor of the sonic cannons. OPP and TPS Superintendants directly involved in the G-8 and G-20 Summit security first learned of the RCMP's concerns for the inaccuracy of the manufacturer's claims and the health and safety risks of using sonic cannons in urban settings in June, 2010. None of the OPP or TPS members contacted the RCMP to discuss the research and rationale behind its refusal to approve the use of sonic cannons for crowd control in urban settings. It was not until after the filing of the Application that the OPP performed its first tests on the sonic cannons. These tests took place on an airstrip in Huntsville. Neither of the Respondents has reviewed or carried out an independent study relating to the possible hearing damage which may be caused by sonic cannons in an urban setting.

Transcript of cross-examination of OPP Superintendant Charlebois, p. 4, lines 9-15, p. 8, lines 17-25, p. 9, lines 1-5

Transcript of cross-examination of TPS Staff Superintendent McGuire, p. 10, lines 1-7, lines 22-25, p. 11, lines 15-25, p. 12, lines 22-25, p. 13, lines 1, 9-25

Transcript of cross-examination of TPS Constable Breeze, pp. 5-7, paras. 12-21, p. 19, paras. 87-90, pp. 20-21, paras. 95-100, p. 24, paras. 114-116

## **F. Risk to Hearing Caused by Sonic Cannons**

28. The very reason why sonic cannons are considered "effective" as crowd control tools is because they focus sound into a beam or cone. The pitch of a sonic

cannon is intended to be intolerable and to force dispersal of crowds. Sonic cannons belong to a new and increasingly used class of weapons which were originally marketed as “non-lethal”, but have now been acknowledged to be “less lethal” or “sub-lethal”. Sonic cannons belong to the same class of weapons as Conducted Energy Weapons, commonly referred to as “Tasers”.

Dr. Harrison Affidavit, AMR, Tab 5, p. 83-84, para. 27

Dr. Murakami Wood Affidavit, SAMR, Tab 4, p. 45, paras. 11-12

29. As recognized in the RCMP Internal LRAD Report, despite the manufacturers’ claims to safety, sonic cannons – like Conducted Energy Weapons – can cause harm and injury. Based on the levels of sound produced, these devices are capable of producing sound that can cause hearing loss. Hearing damage can occur at 90 decibel sound pressure level, where the exposure is over 30 minutes. One hundred decibel sound pressure can cause hearing damage in about 15 minutes. At 120 decibel sound pressure, hearing damage can occur in a matter of seconds. As an illustration, 120-140 decibels is akin to standing next to a jet plane as it is taking off.

Dr. Harrison Affidavit, AMR, Tab 5, pp. 80, 82, paras. 11, 18

Dr. Murakami Wood Affidavit, SAMR, Tab 4, p. 45, para. 10

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of OPP Superintendent Charlebois

30. The human threshold of pain occurs between 110-120 decibel sound pressure. Physiologically, pain is a sign of damage being caused to the ear. Even the smallest available sound cannon is capable of producing painfully loud sound over a distance of 16 meters. Pain is a sign of potential hearing damage or injury.

LRAD Operations and Safety Training, Exhibit “B” to affidavit of police constable Paul Breeze, p. 72

Dr. Harrison Affidavit, AMR, Tab 5, pp. 82-83, paras. 19, 24

31. The “alert” function on sonic cannons emits sound beams at one frequency or a narrow range of frequencies. This is most harmful to the ear because it can cause localized damage to the inner ear. The “communications” function can also cause painfully loud sound and cause hearing loss or damage at close range. Moreover, in an urban setting, the focused sound beam from sonic cannons can reflect off buildings and other solid structures and thereby place by-standers at risk.

Dr. Harrison Affidavit, AMR, Tab 5, pp. 83-84, paras. 25-27

32. Exposure to very intense noise can cause damage to the cochlea of the inner ear which may not show up until years later. Disruption to the delicate mechanics of the inner ear can sometimes improve within a few hours or days, but most often there is not a complete recovery and there is permanent hearing loss. On the other hand, where the hair cells in the inner ear are damaged by very loud sounds it *invariably* results in permanent hearing loss. As stated by expert research scientist, Dr. Harrison:

“Humans are born with only one set of these hair cells. These hair cells [if damaged] do not recover or regenerate.”

Affidavit of Dr. Marshall Chasin (“Dr. Chasin Affidavit”), AMR, Tab 6, p. 172

Dr. Harrison Affidavit, AMR, Tab 5, pp. 81, paras. 15-16

33. Moreover, the focused sound beam of a sonic cannon may in fact not be as narrowly focused as manufacturers claim. The RCMP’s internal review notes that “independent field tests prove this [claim of a very narrow sound beam (+/- 15 degree)] to be false”. The sonic cannon at high sound pressures can therefore have “the undesired effect of having excessive audio levels being emitted towards unintended bystanders or personnel found within the directional periphery”.

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of Tim Charlebois, p. 2

34. Expert audiologist Dr. Marshall Chasin warns that the directionality of the sound beam decreases further when lower frequency sounds – such as the human

voice – are amplified by the sonic cannon. As Dr. Chasin noted, police personnel may themselves be at risk of hearing loss.

Dr. Chasin Affidavit, AMR, Tab 6, pp. 169, 171

Transcript of cross-examination of Dr. Chasin, p. 10, lines 4-12, p. 20, lines 7-16

## **G. Guidelines on Use of Sonic Cannons are Insufficient Protection**

35. The Respondents only recently drafted Standard Operating Procedures (“SOP”) for the use of the sonic cannons during the Summits. These SOP are still being revised. Currently, the SOP for both the OPP and TPS permit the deployment of the alert function at maximum volume for 2-5 second blasts, 75 meters from members of the public. The blasts can be repeated every 30 seconds and while affidavits filed on behalf of the TPS suggest a limit of one blast per “incident”, the SOP for both the TPS and OPP are silent with respect to the number of blasts members of the public can be exposed to in a given timeframe. According to TPS Constable Breeze, the officer responsible for training members on the sonic cannon, the 2-5 second limit is a “guideline” and a certain amount of “responsible usage” is expected of officers.

Transcript of cross-examination of TPS Staff Superintendent McGuire, p. 21, paras. 63-64

Transcript of cross-examination of TPS Constable Breeze, p. 30, paras. 141-143, p. 30, paras. 141-145

36. The maximum volume of the smaller sonic cannon is 137dB at one meter and 143 dB at one meter for the larger unit. Due to the lack of independent study, there is no reliable scientific evidence as to the experienced sound level when sonic cannons are deployed in urban settings. However, given that the volume of the sound blasts in an urban setting likely reduces by approximately 3-6 dB for every doubling of distance, members of the public standing 75 meters from the sonic cannons will be subjected to high-pitched blasts that range from a minimum of 102-119 dB for the small units and 108-125 dB for the larger unit. Significantly, these ranges provide only the minimum sound exposure because sound levels

are amplified by up to 6 dB due to the reflection off walls and other solid structures in an urban setting. As previously noted, 110-120 dB is the human threshold of pain and, as detailed above, hearing damage can be caused at lower sound levels.

LRAD Operations and Safety Training, Exhibit "B" to affidavit of TPS Constable Paul Breeze, p. 72

Dr. Harrison Affidavit, AMR, Tab 5, paras. 18 and 21

Tim Kelsall, "Ministry of Community Safety and Correctional Services Expert Opinion on OPP LRAD Units 100x and 300x, Exhibit "B" to Tim Kelsall's Affidavit, OPP MR, p. 7

37. Also concerning is the TPS' proposed deployment of sonic cannons at "less than maximum" volume at distances as close as 10 and 22 meters from the general public, for the smaller and larger units respectively. While the SOP is silent with respect to the length of the alert blasts and the decibel value of "less than maximum" volume, the TPS has stated that the "less than maximum volume will be at volume up to the yellow/red line but no higher unless it is necessary in order to communicate in an emergency situation in which case the operator may increase the volume but not to full volume within those parameters". Some discretion is left to the operator.

Transcript of cross-examination of TPS Staff Superintendent McGuire, p. 3, lines 6-16

Transcript of cross-examination of TPS Constable Breeze, p. 16, para. 73, pp. 30-31, paras. 141-145

38. However, operators of the sonic cannons are provided with minimal training. TPS officers completed a mere 2 hours of training on the use of sonic cannons, while OPP officers completed 3 hours of training. Half of this time was spent in the classroom. The officers' competency in the use of the sonic cannons was assessed by a three page quiz. TPS officers were not provided with training with respect to the risks associated with sound beams reflecting off of solid structures in an urban environment. Rather, TPS officers are expected to "just use a bit of common sense as to what's around them..." and "their own responsible usage".

Transcript of cross-examination of TPS Constable Breeze, pp. 16-17, paras. 73-75, p. 31, para. 151, p. 32, paras. 156-158

39. Research into the use of new technologies such as sonic cannons has shown that operators of new technologies often do not follow the guidelines governing their use. For example, the Police Bureau of Pittsburgh bought sonic cannons for deployment at last year's G-20 Summit. The Pittsburgh police had been trained to use the sonic cannons following guidelines from the LRAD Corporation. The guidelines advised that the sonic cannons' "alert function" should be used for no more than four seconds and generally between two and four seconds. As reported in the media and shown on videos posted on the Internet (the YouTube website), the police – contrary to their training – operated the sonic cannons for several minutes at a time rather than two to four seconds.

Dr. Murakami Wood Affidavit, SAMR, Tab 4, p. 46, paras. 15-17

40. This same phenomenon of "usage creep" was documented by the Braidwood Inquiry into the police's use of conducted energy weapons in British Columbia.

Braidwood Commission on Conducted Energy Weapon Use, *Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons in British Columbia* (June 2009) at p. 318

41. There is a very real risk that this same scenario would occur at the G-8 and G-20 Summits, where emotions may run high as police seek to protect the world's political leaders. As in Pittsburgh, despite any protocol or training, there is a risk that, faced with what they perceive to be an unruly crowd, police may deploy the sonic cannons in ways contrary to manufacturer guidelines and in ways that cause injury and harm to activists and others exercising their free speech rights.

Dr. Murakami Wood Affidavit, *ibid.*

42. It is significant that, although the RCMP has primary responsibility for security at the G-8 and G-20 Summits, it has decided that the deployment of sound cannons is not appropriate for use in a crowd control context. Among other concerns detailed in the RCMP's internal report is this same concern that police will have to significantly increase the volume level of sonic cannons beyond the

manufacturer's guidelines when deployed in the urban crowd control context. The RCMP have refused to approve the sonic cannons for crowd control in part because "should the devices be used inappropriately or by untrained personnel", the police will be held liable for, *inter alia*, "undesired consequences, in the form of partial or permanent hearing damage to those exposed".

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of Tim Charlebois, pp. 2-3

#### **H. Sonic Cannons as Weapons**

43. The issue of whether certain sonic cannon functions qualify as "weapons", and therefore need approval as such, has been a live issue in various jurisdictions and contexts in the last several years. For example, was a debate over the categorization, and required approval, of sonic cannons as weapons before the recent Vancouver Olympics. As noted above, ultimately, the Vancouver Police undertook to disable the "alert" function on the sonic cannons during the Olympics and to seek approval from the Police Board before using the "alert" function in the future. Moreover, online defence publications refer to the sonic cannons as "acoustic non-lethal weapons".

Supplementary Deshman Affidavit, SAMR, Tab 3, p. 11-12, paras. 3-5, and Exhibits "A", "B", "C" attached thereto, pp. 20, 24, 28, 32

44. The RCMP's internal review of the sonic cannon even refers to its areas denial instrument/"weapon" capabilities (p. 2)
45. The Respondents have not obtained approval from the Solicitor General or the Ministry of Community Safety and Correctional Services as they do not consider the sonic cannons to be "weapons", but "communications tools".

### **PART III – ISSUES AND LAW**

46. The sole issue to be decided on this motion is whether the Moving Parties are entitled to the injunctive relief requested in its Notice of Motion.

### **A. Test for an Injunction**

47. In order for an injunction to be granted the three-pronged test set out in *R.J.R Macdonald* must be met:

1. there must be a serious issue to be tried;
2. there must be a risk of irreparable harm if the injunction is not granted;  
and
3. the balance of convenience must favour the granting of an injunction

*RJR-Macdonald v. Canada*, [1994] 1 S.C.R. 311 at para. 43 (“*RJR-MacDonald*”)

### **B. Serious Issues to be Determined**

48. The first step of the injunction test requires that there exist a serious issue to be determined. The serious issue threshold is a low one. It is satisfied where the applicant establishes that a claim is neither vexatious nor frivolous and the applicant’s claim for final relief has some prospect of success.
49. The Court must not attempt to decide the merits of the case. Rather, the Court must determine whether there is simply a serious question to be determined.

Once satisfied the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if on the opinion that the Plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is neither necessary nor desirable.

*RJR-MacDonald*, *ibid.* at para. 50

50. Cases involving an alleged breach of a *Charter* right will usually meet the serious issue threshold because they often will turn on the application of s. 1 of the *Charter* which requires a complex factual and legal analysis. Courts have found that there will be a serious question in cases in which an applicant demonstrates that the government actor must justify the *Charter* violation under s. 1 of the *Charter*.



*Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 at para. 4

*Khadr v. Canada*, [2006] 2 F.C.R. 505 at para. 19 (T.D.) (“*Khadr*”)

51. The Moving Parties note that the Supreme Court of Canada has warned that a higher “*prima facie* case” threshold should only be applied in “exceedingly rare” cases. In *RJR-MacDonald* the Court held that a motions court “should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law.”

*RJR-MacDonald*, *supra* at para. 78

52. Courts have accepted that injunctions in *Charter* cases may not provide a final determination of the applicants’ *Charter* rights. Even if an injunction may provide applicants with a result they seek in the short-term, they will often not provide the broader declarations and orders which can only be determined based on a complete factual record and full submissions on the merits.

*Hall (Litigation Guardian of) v. Powers* (2002), 59 O.R. (3d) 423 at para. 13 (S.C.J.)

53. A “*prima facie* case” threshold is inappropriate in this case as an injunction would only apply to restrain the use of sonic cannons pending the disposition of the underlying Application. The injunction will not provide a final determination on the issue of whether sonic cannons are “weapons” and therefore subject to Regulation 926. The injunction will also not address the future use of sonic cannons following the hearing of the Application. For these reasons, this injunction will not finally dispose of this matter. Therefore, the lower “serious issue” threshold commonly applied in *Charter* cases must be applied.
54. The Moving Parties submit that this motion raises two sets of serious issues to be determined: (a) whether the Respondents’ planned use of the sonic cannons would breach applicable legislation, and (b) whether the Respondents’ planned use of the sonic cannons would violate *Charter* rights and freedoms.

**(a) Breach of Applicable Legislation**

55. The Moving Parties have raised a serious issue as to whether the Respondents' deployment of sonic cannons breaches applicable legislation -- specifically s. 14 of the Regulation 926 ("Equipment and Use of Force") under the *Police Services Act* ("PSA" or "Act"). It must be emphasized that it is not necessary for the Court to determine the outer limits of the term "weapon" in this case. The sole issue in the Application is whether sonic cannon -- in particular the "alert function" and the "communications" function when deployed at a sound level exceeding the maximum prescribed under occupational health and safety legislation -- constitute weapons within the meaning of Regulation 926. The sole issue on this motion is whether the Moving Parties have met the low serious issue threshold as to whether sonic cannons constitute weapons and are therefore governed by Regulation 926.
56. The PSA governs the provision of police services in the province. The Act applies to the OPP and municipal police forces in Ontario. Among other things, the Act sets out the duties of police officers which include preserving the peace and preventing crimes and other offences.
57. Regulation 926 under the Act regulates and prescribes the use of equipment and the use of force by a police force or any of its members. Sections 14 and 14.1 of the Regulation govern the use of "weapons" other than a firearm.

*Police Services Act*, R.S.O. 1990, c. P.15, s. 135(1) 15. and 16.

*Equipment and Use of Force*, R.R.O. 1990, Regulation 926

58. Section 14 expressly prohibits a member of a police force from using a weapon, other than a firearm, on another person unless the following conditions have been met:
- (a) that type of weapon has been approved for use by the Solicitor General [now Ministry of Community Safety and Correctional Services];
  - (b) the weapon conforms to technical standards established by the Solicitor General; and
  - (c) the weapon is used in accordance with standards established by the Solicitor General.

59. The Ministry has regulated the use of weapons such as Tasers under Regulation 926.
60. The term “weapon” is not defined in the Regulation or the PSA. Only the terms “firearm” and “handgun” are defined in the Regulation. The term “firearm” is defined with reference to the definition of the term contained in s. 2 of the *Criminal Code*.
61. It is submitted that a purposive interpretation must be given to Regulation 926. Such an interpretation must give effect to the Regulation’s purpose of regulating the police’s use of force and ensuring that police use equipment that can cause harm in a safe and appropriate manner. The reference to tear gas and aerosol weapons as falling under the heading of “other weapons” in the Regulation demonstrates the legislature’s intention that “weapons” not be limited to lethal devices. The inclusion of tear gas and aerosol weapons indicates the legislature’s intention that devices and substances used for the purposes of crowd control also fall within the term “weapon” as used in the Regulation.

Regulation 926, *supra* at s. 14.1

62. The definition of other terms in the Regulation with reference to the *Criminal Code* would suggest that the term “weapon” should be given a broad interpretation such as that given to the term under s. 2 of the *Criminal Code*. However, this definition would have to be tailored to the police context since the definition in s. 2 of the *Criminal Code* applies to all persons and all contexts.
63. Section 2 of the *Criminal Code* defines a “weapon” as follows:
- “weapon” means any thing used, designed to be used or intended for use
- (a) in causing death or injury to any person, or
- (b) for the purpose of threatening or intimidating any person
- and, without restricting the generality of the foregoing, includes a firearm.  
[emphasis added]

64. Courts have used an objective analysis of the *Criminal Code* definition of “weapon”. Courts have held that objects or devices may be considered weapons if they are used in causing death or injury, regardless of whether they were used with the subjective intention of doing so. It is sufficient that the object be recklessly used in circumstances where injury was reasonably foreseeable. Further, courts have found that the addition of the terms “designed to be used” to the definition of “weapon” in the 1992 amendment to the *Criminal Code* makes clear that the test for whether something is a weapon is not purely subjective. That is, there is no need to show that the person using an object or device intends to use it as a weapon. It is sufficient to show that the object or device *could* be used as a weapon or was designed to be used as a weapon.

*R. v. Lamy*, [2002] 1 S.C.R. 860 at paras. 15-17

*R. v. Johns* (1995), 177 A.R. 42 at para. 8 (Alta. Prov. Ct.)

65. It may be argued that such an objective analysis is overly broad if applied to police officers. The Respondents may argue that a definition which does not depend on the intention of police officers or the police force would capture other day-to-day objects that could potentially be used to cause injury (e.g. flashlights). The Moving Parties note that the Court is not asked to pronounce upon any other items in this case, only the sonic cannon functions at issue.
66. As well, it should be noted that if only a purely subjective intention to cause injury or death were required, it could be argued that Tasers are not weapons if the police officers using them claimed they did not intend to cause death or injury. Such a result would be widely seen as perverse and unacceptable. In recent years, the previously underestimated weapon-like qualities of Tasers have come to be widely recognized and addressed. The Moving Parties submit it is time that the same scrutiny be applied to other “sub-lethal” devices such as sound cannons.
67. The Moving Parties submit that sonic cannons – in particular, the “alert function” and the “communications” function when deployed at a sound level exceeding the maximum prescribed under occupational health and safety legislation --

constitute “weapons” within the meaning of Regulation 926. Sonic cannons are commonly categorized by experts, and even in defense publications, as non-lethal, less than lethal or sub-lethal “weapons”. Even the RCMP internal LRAD report, refers to one of the purposes of sound cannons as an “Area Denial instrument (weapon)”. The level of sound produced by a sonic cannon can exceed the human threshold for pain. Sonic cannons are designed to induce individual compliance through human discomfort and pain, as evidenced by the widespread use in military contexts. Therefore, they constitute weapons since they are used and/or designed to be used in causing injury or for the purpose of threatening or intimidating persons against whom they are deployed.

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of Tim Charlebois, p. 2  
Dr. Murakami Wood Affidavit, SAMR, Tab 4, pp. 44-46, paras. 4-5, 11, 12, 17

68. At a minimum, there exists a serious issue as to whether sonic cannons are “weapons”. Therefore, there is a serious issue as to whether the Respondents have violated and/or would violate Regulation 926 by deploying them without obtaining the required approval.

**(b) Violation of Section 2 (b) of the *Charter***

69. Section 2 of the *Charter* provides, *inter alia*:

2. Everyone has the following fundamental freedoms: ...

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly;
- (d) freedom of association.

70. A section 2(b) analysis requires a determination of: (1) whether the claim involves expressive activity; (2) whether the manner or location of the expression removes it from the scope of s. 2(b) protection; and (3) whether there has been an infringement.

*Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, para. 56 (“*City of Montreal*”)

71. With respect to the first leg, *any* activity which conveys or attempts to convey meaning *prima facie* comes within the scope the s. 2(b) guarantee.

*Greater Vancouver Transportation Authority v. Canadian Federation of Students*  
-- *British Columbia Component*, [2009] 2 S.C.R. 295, para. 27 ("*BC Transit*")

72. With respect to the second leg, acts of violence are not protected under s. 2(b), nor are individuals free to express themselves in *all* government-owned locations.

*BC Transit*, *ibid.* para. 28

73. The activities in which the Moving Parties wish to engage – participating in public rallies, marches, and human rights observing – are undeniably expressive and therefore *prima facie* fall within the protection of s. 2(b). The method or form of the expressive activities sought to be protected by this application cannot be objected to, as they consist of peaceful and non-violent expression. The location of the expression – city streets and parks – have a long history of being important spaces for free public expression and are places where one would expect constitutional protection for expressive activities. Indeed, the public's right to disseminate political ideas in public spaces such as city streets and parks is at the heart of the s. 2(b) guarantee:

... in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.

Prof. Harry Kalven, Jr. "The Concept of the Public Forum: *Cox v. Louisiana*", [1965] Sup. Ct. Rev. 1, at pp. 11-23, cited by then Chief Justice Lamer in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 ("*Commonwealth Committee*"), para. 3. See also paras. 11-12, 133

*City of Montreal*, *supra* para. 61

*BC Transit*, *supra* paras. 27, 41-42

74. Having established that the expressive activities at issue in this case are protected under s. 2(b), it must be determined whether the impugned government action infringes the s. 2(b) rights of individuals participating in the public rallies and demonstrations. Government action which has the *effect* of restricting value-promoting speech infringes s. 2(b).

*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at paras. 52-53

75. The expression at issue in this case – the voicing of political dissent with respect to G-8 and G-20 governments and policies, as well as the public affirmation of civil liberties conveyed by the presence of the CCLA human rights monitors – are at their core political expression that go to the heart of the values which the s. 2(b) guarantee is intended to promote.
76. The sonic cannons unquestionably have the effect of restricting the value-promoting expression of participants in the rallies and marches, including the Moving Parties and members of the general public. The sonic cannons produce a high-pitched, high decibel, ear-splitting sound beam that can cause extreme pain and permanent hearing damage and that is intended to disperse crowds. The sonic cannons are incapable of discerning between those individuals in the crowd whose expression is constitutionally protected and those whose expression is not. People young and old, families, visitors, groups and individuals gathered in public spaces for the purpose of exercising their constitutional right to free expression are at serious risk of becoming the casualty of an indiscriminate weapon.

Dr. Harrison Affidavit, AMR, Tab 5, pp. 80, 82-84, paras. 11, 18-19, 24-27

Dr. Murakami Wood Affidavit, SAMR, Tab 4, p. 45, paras. 11-12

77. The very real threat and substantial likelihood of physical injury posed by the sonic cannons has a chilling effect on the thousands of Canadians, including the Moving Parties, and their families and children who were planning to march, protest and express core political beliefs during the G-8 and G-20 Summits. The sonic cannons suppress constitutionally protected activities in at least two ways:

(1) by deterring individuals from attending public demonstrations, effectively silencing those who cannot or do not want to risk physical harm to themselves or their children; and (2) by limiting the manner in which individuals participate in public demonstrations, including by forcing them to remain on the periphery and even abandon key opportunities for political expression.

78. The suppression of constitutionally protected activities in these two manners is evidenced in the record:

- Key organizers of public rallies and marches note a significant reduction in anticipated numbers at the events.
- Individuals, including the Moving Parties, who are willing to attend public demonstrations in the face of a substantial risk of physical harm caused by the sonic cannons are forced to limit their participation in an effort to remain out of the sonic cannon's way. For example, some individuals may have to position themselves carefully, on the outskirts of expressive activity, and/or leave early.

MacDonald Affidavit, AMR, Tab 8, pp. 182-183, paras. 3, 8-12

McLaughlin Affidavit, AMR, Tab 9, pp. 188-89, paras. 4, 6

Calzavara Affidavit, AMR, Tab 10, p. 193, paras. 8-9

Deshman Affidavit, AMR, Tab 3, p. 47-48, paras. 18-19

### **(c) Violations of Sections 2(c) and (d)**

79. Section 2(c) guarantees everyone the freedom of peaceful assembly. Section 2(d) guarantees the right of individuals to freely "combine together for the pursuit of common purposes or the common the advancement of common causes".

Reference *Re Public Service Employment Relations Act (Alta)*, [1987] 1 S.C.R. 313 at para. 22

80. Both of these *Charter* rights are closely related to s. 2(b) in so far as individuals who wish to express themselves may choose to exercise that right in association with others and while peacefully assembling in the streets, parks or other



locations. For the reasons set out under s. 2(b), the fundamental freedoms of individuals to freely associate and peacefully assemble in city streets and parks during the G-8 and G-20 Summits are infringed by the threat of physical harm by the sonic cannons.

**(d) Violation of Section 7**

81. Section 7 guarantees everyone “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”
82. A s. 7 analysis requires two distinct steps. First, there must first be a finding that there has been a deprivation of the right to “life, liberty and security of the person”. Second, the deprivation must be contrary to principles of fundamental justice.

**(i) Violation of Security of the Person**

83. The use of the sonic cannons in the manner sought to be enjoined puts the Moving Parties’ and the general public’s security of the person at risk. As recognized in the RCMP internal report, sonic cannons are a largely untested, device capable of causing pain and permanent hearing loss. Their “alert” function, in particular, is capable of causing permanent damage in a matter of seconds.

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of Tim Charlebois, pp. 1-3

Dr. Harrison Affidavit, AMR , Tab 5, pp. 80-83, paras. 11-24

Dr. Chasin Affidavit, AMR, Tab 6, pp. 172-173

Dr. Murakami Wood Affidavit, ASMR, Tab 4, p. 45, paras. 11-12

Deshman Affidavit, AMR, Tab 3, p. 45, para. 10

“Achtung” article in the Pittsburgh Tribune-Review, dated October 18, 2009, Exhibit “C” to Deshman Affidavit, AMR, Tab 3C, pp. 32-33

84. Therefore, use of sonic cannons in the manner sought to be enjoined in this motion would infringe the right to security of the person of the Moving Parties as well as other members of the public.

*Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, at paras. 117-121  
*R. v. Morgentaler*, [1988] 1 S.C.R. 30 at paras. 22 and 120

**(ii) Use of the Sonic Cannon Violates Principles of Fundamental Justice**

85. Use of the sonic cannon in a manner sought to be enjoined in this motion would not accord with principles of fundamental justice. Use of the sonic cannons in this manner would violate the fundamental principle that police must act strictly according to law.
86. In *Dedman*, the Supreme Court of Canada laid out the principle that police must act only as allowed to by law. The Court described this principle both as a fundamental legal principle and as one that attracts a significant societal consensus.

*R. v. Dedman*, [1985] 2 S.C.R. 2, at paras. 12 and 58

87. As noted above, the Respondents have not obtained the required approvals to use sonic cannons as weapons. The authority to use sonic cannons is also not justified under the doctrine of ancillary police powers at common law.
88. Under the *Waterfield* test for common law police powers, a police action must meet two criteria: First, it must be carried out “in the exercise of a lawful duty;” and second, it must “amount to a justifiable use of police powers associated with that duty.”

*R. v. Clayton* (2005), [2007] S.C.J. No. 32 at para. 22

89. As noted above, the sonic cannons are largely untested devices, developed for military use. The indiscriminate nature of these devices is only compounded in an urban setting since the sound beam reflects off of solid structures such as buildings, glass and cars. As noted by the Respondent OPP’s own expert, Mr. Tim Kelsall, “In a city, measurements out to 100 m could in some cases be typically 3-6 dB higher due to building reflections”. Moreover, as noted in the RCMP internal review, the directionality of the sound beam is not as narrow as

the manufacturer claims and innocent individuals on the periphery of the sonic cannon's sound tunnel can unintentionally be exposed to high intensity sound. The use as a crowd control weapon in cities therefore runs a serious risk of not only permanently injuring protesters, but of endangering innocent bystanders and even police personnel as well. To use such a device in a dense and urban environment like Toronto without proper independent research and testing would amount to an unjustifiable use of common law police powers.

Dr. Murakami Wood Affidavit, ASMR, Tab 4, p. 44, para. 4

Tim Kelsall, "Ministry of Community Safety and Correctional Services Expert Opinion on OPP LRAD Units 100x and 300x, Exhibit "B" to Tim Kelsall's Affidavit, OPP MR, p. 7

Dr. Harrison Affidavit, ARM, Tab 5, p. 83-84, para. 27

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of Tim Charlebois, pp. 2-3

Dr. Chasin Affidavit, ARM, Tab 6, pp. 169, 171

90. For these reasons, the Respondents use of sonic cannons in the manner sought to be enjoined would violate s. 7 of the *Charter*. It would deprive the Moving Parties' and other members of the public of the right to security of the person. This deprivation would not accord with the principles of fundamental justice as the Respondents do not have the authority to use the sonic cannon either by statute or by the common law of police powers.

**(e) Violations Not Saved Under Section 1**

91. Courts have found that there will be a serious question in cases in which an applicant demonstrates that the government actor must justify the *Charter* violation under s. 1 of the *Charter*. Therefore, it is not necessary to consider s. 1 under the serious issue branch of the injunction test.

*Khadr, supra* at para. 19

92. In any event, the Moving Parties submit that the serious issue step is made out even if s. 1 of the *Charter* is considered. The infringements of the *Charter* rights which result from the deployment of the sonic cannons cannot be justified under s. 1.

93. First, as set out in paragraphs 58-71 above, the use of the sonic cannons as weapons is not “prescribed by law” as required by the opening words of s. 1. As stated by Professor Hogg:

*Charter* violations that take place on the initiative of a police officer (or other official), acting without clear legal authority, are outside the protection of s. 1.

Peter Hogg, *Constitutional Law of Canada*, 5th ed., supplemented, vol. 2 (Carswell: Toronto, 2007) (looseleaf updated 2009) at 38-12.

*BC Transit*, *supra* paras. 51-52

*Commonwealth Committee*, *supra* paras. 156-57

94. Alternatively, the infringements of the *Charter* rights of the Applicants and general public cannot be said to be demonstrably justifiable in a free and democratic society.

*R. v. Oakes*, [1986] 1 S.C.R. 103

95. While the objectives of the Respondents’ use of sonic cannons during the G8 and G20 Summits, namely for effective “communication” and “crowd control”, may be pressing and important, the means chosen to do so are not minimally impairing of the important *Charter* rights at issue in this case. As noted in the RCMP internal report, it is debatable whether sound cannons are even effective as communications devices except over short distances – the same distances at which “most [o]ff-the-shelf products work effectively”. As also documented in the RCMP report, sonic cannons can cause permanent physical harm to participants and innocent bystanders. The sonic cannons indiscriminately affect the crowds gathered to exercise their constitutional freedoms, regardless of whether or not participants are committing any wrongdoing. As a result, it is submitted that other more targeted and less damaging methods of crowd control are available and far less impairing of the rights and freedoms of individuals.

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of Tim Charlebois, pp. 1-3

“A glimpse behind the G20 security curtain”, Toronto Star articles, dated June 3, 2010, Exhibit “D” to Des Rosiers Affidavit, AMR, Tab 2D, pp. 32-33

Transcript of cross-examination of OPP Superintendent Charlebois, p. 15, paras. 58-62, p. 17, paras. 74-78

### **C. Irreparable Harms to the Moving Parties and Members of the Public**

96. An interlocutory injunction is an equitable remedy available to persons who risk irreparable harm before the disposition of the pending claim. Harm is irreparable where it cannot be quantified in monetary terms or cannot be adequately remedied by the final adjudicator.

*RJR-MacDonald, supra*, at para. 59

97. The courts will consider the irreparable harm not just to the parties but also to the public, particularly in cases brought by an applicant who can be said to be representing the public interest.

*RJR-MacDonald, supra* at paras. 65, 67-68

*Hall (Litigation Guardian of) v. Powers, supra* at para. 52

*Chicken Farmers of Ontario v. Drost*, [2005] O.J. No. 3973 at para. 42 (Div. Ct.)

98. The CCLA has a long history of acting in the public interest. It is well-suited and positioned to advocate in favour of upholding the *Charter* rights of individuals and the rule of law in this country.

Des Rosiers Affidavit, AMR, Tab 2, pp. 2-3, paras. 7-9

99. The Moving Parties submit that that they and members of the public will suffer at least three forms of irreparable harm in the absence of the requested injunctive relief: (1) serious physical harm; (2) loss of a significant opportunity to exercise constitutionally protected freedoms; and (3) serious harm to the rule of law caused by the Respondents acting without lawful authority.

#### **(a) Serious Physical Harm**

100. The Moving Parties and members of the public are at serious risk of suffering temporary and permanent hearing loss as a result of the use of the sonic cannons in the manner sought to be enjoined in this motion. The substantial physical injury that the sonic cannons are capable of causing cannot be adequately or appropriately compensated. Temporary and permanent hearing loss is an irreparable harm.

Dr. Harrison Affidavit, AMR, Tab 5, pp. 81-84, paras. 11, 14-27

Dr. Chasin Affidavit, AMR, Tab 6, pp. 172-74

*Photo Engravers and Electrotypes Ltd. v. Fell et al.*, [1989] O.J. No. 1442 (S.C.J.) at p. 4 (QL)

101. Courts have held that “evidence of a reasonable probability of personal injury is sufficient justification for concluding that the irreparable harm test has been satisfied.”

*United Nurses of Alberta v. St. Michael's Health Centre* [2002] A.J. No. 1627 at paras. 11-13

102. The use of the sonic cannons on mass crowds in an urban setting, at the sound levels that the Moving Parties seek to enjoin, creates a reasonable probability that the members of the public -- including the Moving Parties, families, children and innocent bystanders -- will all be subjected to temporary or permanent hearing loss. The serious likelihood of such harm is well documented in the RCMP internal report. As noted in the RCMP report, and also supported by one of the Moving Parties' experts, the limitations of sonic cannons and the context of their use invariably cause police to substantially increase the level on the sound cannons in order to achieve their objectives. The possibility of such harm, including the potential liability associated with it, is one of the primary reasons that the RCMP has decided not to use sound cannons in a crowd control situation.

RCMP Internal LRAD Review, Exhibit 1 to cross-examination of Tim Charlebois, pp. 2-3

Dr. Murakami Wood Affidavit, ASMR, Tab 4, p. 44, para. 4

Tim Kelsall, “Ministry of Community Safety and Correctional Services Expert Opinion on OPP LRAD Units 100x and 300x, Exhibit “B” to Tim Kelsall’s Affidavit, OPP MR, p. 7

Dr. Harrison Affidavit, ARM, Tab 5, pp. 83-84, para. 27

Dr. Chasin Affidavit, ARM, Tab 6, pp. 169, 171

103. For these reasons, the irreparable harm that would be caused by the use of the sound cannons in the manner sought to be enjoined is far from speculative or overblown. If the likelihood of harm was great enough for the leading agency

providing security at the Summit, the RCMP, to decide not to use sonic cannons, the likelihood of harm is great enough to be considered irreparable harm for the purposes of the injunction test.

**(b) Loss of key opportunity for meaningful expression**

104. The Moving Parties and other members of the public are also at risk of losing a key opportunity to express themselves upon issues that affect millions of people with G-8 and G-20 leaders and governments, the broader Canadian society and the international community as an audience. As provided in the record, the G-8 and G-20 Summits provide a rare and important opportunity for the Moving Parties and other members of the public:

- to speak out on priorities that the world's most wealthy and powerful nations should adopt, including maternal health, sustainable jobs, a green economy and an education for all initiative;
- to affect positive and critical changes with respect to G-8 and G-20 policies; and
- to ensure and promote respect by police for the civil liberties and human rights of demonstrators from Canada and abroad.

MacDonald Affidavit, AMR, Tab 8, p. 182, para. 2

Calzavara Affidavit, AMR, Tab 10, p. 192, para. 4

McLaughlin Affidavit, AMR, Tab 9, p. 188-189, paras. 3, 6

Des Rosiers Affidavit, AMR, Tab 2, p. 15-16, para. 12

Deshman Affidavit, AMR, Tab 3, pp. 43, para. 2

Calendar of events for the Peoples' Summit, Exhibit "A" to Deshman Affidavit, AMR, Tab 3A, pp. 50-59

105. Damages after the fact cannot compensate the Moving Parties and other members of the public for the loss of this rare and key opportunity to meaningfully express their views freely to such a wide and important audience. The Court cannot remedy this harm at a later date.

106. Contrary to the suggestion of the Respondents, this irreparable harm is not speculative. The Respondents' planned use of sonic cannons has already had a chilling effect on organizing efforts. The number of individuals planning to partake in expressive activities during the Summits is substantially lower than previously expected. There is evidence on the record from individuals stating that the use of sonic cannons will limit their ability to participate in the public rallies and marches.

MacDonald Affidavit, AMR, Tab 8, pp. 182-83, paras. 3, 8-12

Calzavara Affidavit, AMR, Tab 10, p. 193, paras. 8-9

Deshman Affidavit, AMR, Tab 3, pp. 47-48, para. 18

107. In the absence of the requested relief, the irreparable harm to the *Charter*-protected rights of the Moving Parties and other members of the public to assemble peacefully, and associate and express themselves freely will continue and only intensify as the Respondents implement their plans to deploy sonic weapons.

**(c) The Respondents Seek to Act Without Lawful Authority**

108. The Respondents' use of the sonic cannons in the manner sought to be enjoined – that is, in violation of the requirements of Regulation 926 – would cause irreparable harm to the rule of law and the public interest.
109. Courts have held that damages are not adequate compensation for conduct which is unlawful.

*Photo Engravers and Electrotypers Ltd. v. Fell et al.*, [1989] O.J. No. 1442 at p. 4 (H. C.J.)

*Falconbridge Ltd. v. Sudbury Mines, Mill & Smelter Workers Union Local 598*, [2000] O.J. No. 4168 at para. 20

110. Courts have recognized that the public has an interest in ensuring that the law is applied. Courts have permitted the Attorney-General to enjoin individuals from “flouting the law”. Courts have also found that the public interest has suffered



irreparable harm where a statutory scheme is undermined or ignored or where local government has attempted to enforce an invalid regulation.

*Attorney General of Ontario and Bear Island Foundation et al.* (1989), 70 O.R. (2d) 758 at para. 8 (Ont. H.C.)

*Chicken Farmers of Ontario v. Drost*, *supra*, at para 42

111. The Respondents' proposed use of sonic cannons in the manner sought to be enjoined by this motion is unlawful and in defiance of the statutory regime established to regulate the police's use of new weapon types. It is submitted that the requirement of Ministry approval under Regulation 926 is aimed at ensuring accountability, consistency and a measure of public oversight in the police's deployment of weapons and use of force. It is also aimed at ensuring that new weapons technologies conform to established technical standards, and may be safely deployed. The Respondents' failure to comply with this regulatory scheme causes irreparable harm to the public interest in ensuring that police forces act in accordance with the law and deploy only those weapons which have been adequately tested and approved by the appropriate authorities.

Letter to TPS Police Chief Blair, dated June 1, 2010, Exhibit "F" to Des Rosiers Affidavit, AMR, Tab 3F, pp. 39-40

112. For all these reasons, the Moving Parties submit that irreparable harm will be caused unless an injunction is granted in this matter.

#### **D. The Balance of Convenience Favours Granting the Injunction**

113. The third stage of the injunction test, the balance of convenience, favours granting the requested injunction.
114. The balance of convenience test was summarized in *RJR-MacDonald* as follows:

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits" ...

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

*RJR-MacDonald*, *supra* at paras. 62-63 [citations omitted]

115. What the Moving Parties seek is a very limited restraint in the Respondent's law enforcement arsenal. The Moving Parties do not ask that the Respondents refrain from enforcing the law and controlling crowds. The Respondents would remain free to do so using all of the traditional means and tools at their disposal. The Moving Parties seek only a minimal restraint: the Respondents can still use sonic cannons using the "communication" function at an appropriate level.

Des Rosiers Affidavit, AMR, Tab 2, p. 21, para. 35

116. Denying the injunction will cause the serious irreparable harms set out above. When weighed against a very minimal intrusion on the Respondents, the harm to the Moving Parties and the public, the balance must be struck in favour of an injunction.
117. While the Respondents can avail themselves of enormous resources to control crowds and deal with unlawful activity, the only way the Moving Parties can express their constitutionally-protected views is by their physical presence. Discouraging this presence by a real apprehension and substantial likelihood of physical injury to protesters engaged in constitutionally protected activities as well as to innocent bystanders will cause the irreparable harm described above but will add little to the Respondents' ability to maintain crowd control.

"A glimpse behind the G20 security curtain", Toronto Star Article, dated June 3, 2010, Exhibit "D" to Des Rosiers Affidavit, AMR, Tab 2D, p. 32-33

118. Where constitutional rights are at issue, courts take into account the "public interests" at stake in granting or refusing an injunction. In doing so, the Supreme Court has observed that the Respondents, as public authorities, do not hold a

monopoly over the public interest. The Moving Parties are entitled to rely on their interests and the broader public interests at stake.

*RJR-MacDonald*, supra at paras. 65 – 67

119. In the case at bar, the Moving Parties do not seek an injunction to prevent the enforcement of a statute or other enactment pending a hearing to determine the enactment's constitutional validity. Indeed, the Moving Parties submit that the use of the sonic cannons as a "weapon" lacks any legal authority at all. Accordingly, the concern expressed in *RJR-Macdonald* and other decisions against granting injunctions due to the "public interest" in the enforcement of duly enacted legislation is not a concern here. There is no legislation under challenge which the Court should presume must be enforced.

*Harper v. Canada (Attorney General)*, [2000] S.C.J. No. 58 at paras. 9 – 10

120. This Court has in the past granted injunctions to ensure that Moving Parties' *Charter* rights are respected pending a further hearing. Where refusing an injunction would have the effect of causing physical/emotional/psychological damage in breach of s. 15 of the *Charter* pending trial (*Lowrey* and *Bettencourt*) or would deprive a claimant of a potential s. 15 right to attend a prom with a gay boyfriend (*Hall*), this Court has held that the public interest in favour of an injunction outweighed the inconvenience to public authorities and the public generally. This is particularly so where there is no real way to ensure the respect of the *Charter* unless the injunction is granted. Thus, in *Hall*, the possibility of declarations or damages after trial could not undo the damage Mr. Hall would experience if he could not attend his prom with his date.

*Lowrey (Litigation Guardian of) v. Ontario*, [2003] O.J. No. 1197 (S.C.J.)

*Bettencourt (Litigation Guardian of) v. Ontario*, [2005] O.J. No. 70 (S.C.J.)

*Hall (Litigation Guardian of) v. Powers*, [2002] O.J. No. 1803 (S.C.J.)

121. It is submitted that the lost opportunity of thousands of Canadians to march, protest, and express core political beliefs without the apprehended and real threat of physical harm are the kinds of rights which cannot be compensated at a later stage of this Application with damages. There is now a one-time, unique

opportunity to be heard by the world's most influential leaders, and with the world's media and the world's attention focused on the G20. We submit that the urgency of the situation compels the Court to grant the injunction.

122. Finally, the Court in *RJR-MacDonald* cautioned that, all things being equal, it is prudent to grant or refuse injunctions to preserve the *status quo*.

*RJR-MacDonald*, *supra* at para. 75

123. Refusing an injunction would enable the Respondents to use, without prohibition, the sonic cannons in an untested, unproven manner. Refusing the injunction would introduce a new weapon into the Canadian social fabric when such a “weapon” has not been tested, has never been used by the Respondents, and was expressly not used during the Vancouver Olympics. Refusing the injunction would also permit the Respondents to use a new weapon which Canada's leading law enforcement agency and the primary agency responsible for security at the Summit, the RCMP, does not approve for use for crowd control purposes. It is submitted that a prudent approach is required to restrain the deployment of sonic cannons in the manner sought to be enjoined pending disposition of the underlying Application.

124. Such an approach would be consistent with the recent application of the “precautionary principle” in different legal contexts. This principle holds that, in situations where there is scientific uncertainty about risk, it is appropriate to err on the side of safety pending a sufficient level of testing and scientific certainty. The Walkerton Inquiry into Ontario's drinking water and the Campbell Commission reviewing the use of precautionary measures during the 2003 SARS outbreak both endorsed the precautionary principle. These inquiries held that public authorities should follow the precautionary principle when determining how to discharge their public duties in the face of scientific uncertainty regarding particular environmental and health risks.

The Honourable Dennis R. O'Connor, *Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water*, pp. 76-78

The SARS Commission, *Spring of Fear*, December 2006, in particular Vol. 1, pp. 11-13, and 29-30, and Vols. 2-3, pp. 25-26, 607, 1047, and 1116

125. The precautionary principle is a recognized principle in environmental law. It was also recently adopted in legislation as a standard for the issuance of health directives.

*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. No. 42 at para. 32

*Health Protection and Promotion Act*, R.S.O. 1990, c. H.7, s. 77.7(2), added by S.O. 2007, c. 10, Sched. F, s. 15

126. In the case at bar, application of the precautionary principle would tip the balance of convenience scales in favour of the Moving Parties. As documented in the RCMP report, very little independent research has been conducted into the medical risks associated with the deployment of sonic cannons. In light of this scientific uncertainty, the evidence and reasonable concerns that the Moving Parties' experts have raised, and the magnitude of the harm that could be caused, this Court should take a precautionary approach and grant the requested injunction.

#### **PART IV – ORDER REQUESTED**

127. For all the foregoing reasons, the Moving Parties submit that this case meets the test for an injunction. Accordingly, the Moving Parties request that the Court grant an interlocutory injunction restraining the Respondents, their respective agents, employees and persons acting under their instructions, or instructions of any of them, from using the “alert” function on sonic cannons and the “communications” function at a sound level above that prescribed by Ontario occupational health and safety legislation pending the disposition of the Rule 14 Application in this matter.

**ALL OF WHICH IS RESPECTIVELY SUBMITTED THIS 21<sup>st</sup> DAY OF JUNE, 2010.**

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**Michael D. Wright, LSUC # 32522T**

Lawyers for the Applicants