

**Analysis of Police Provisions in Bill C 35
An Act to amend the Foreign Missions and International
Organizations Act**

Testimony of:

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**House of Commons Standing Committee on Foreign Affairs and
International Trade**

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I am here to comment on one part of Bill **C-35, *An Act to amend the Foreign Missions and International Organizations Act*** (First reading, October 1, 2001). My comments are directed to clause 5, which would amend the *Foreign Missions and International Organizations Act* by adding the following after section 10:

Security of Intergovernmental Conferences

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

(2) For the purpose of carrying out its responsibility under subsection (1), the Royal Canadian Mounted Police may take appropriate measures, including controlling, limiting or prohibiting access to any area to the extent and in a manner that is reasonable in the circumstances.

(3) The powers referred to in subsection (2) are set out for greater certainty and shall not be read as affecting the powers that peace officers possess at common law or by virtue of any other federal or provincial Act or regulation.

Time is short so I will be direct.

This is a terribly unfortunate piece of legislation. Obviously directed toward entirely proper ends, it shows every sign of having been drafted in haste. Though expressed in simple language to address straightforward need, this clause has the potential to significantly re-shape Canadian law.

There must, of course, be lawful mechanisms by which to provide effective security at international conferences. Both the safety of delegates and the proper functioning of international meetings must be assured. The police must work toward these goals and they must do so within the framework of the Rule of Law. It is quite proper for the Parliament of Canada to seek to clarify the duties and obligations of police and government in these respects.

Virtually every expert commentator who has looked into the policing of international conferences over the past number of years has called for legislation to clarify these matters.

This clause, however, does

- little to help police,
- nothing to protect citizens and
- nothing to clarify the relationship between Government officials and police in the management of international conferences.

It simultaneously reaches too far and is under-inclusive. It fails to provide appropriate guidance to either police officers or government officials. It has the potential to significantly warp the delicate web of convention, constitutional principle, common law and statute that governs relations between police, citizens, and the political arm of the executive.

I wish to direct my comments to three points:

- 1) the novelty of this legislation
- 2) the issue of security perimeters
- 3) RCMP primacy and the related issue of how the RCMP should interact with the executive branch of the federal government

the novelty of this legislation

It is a mistake to imagine that C35 merely restates existing common law principles governing the police.

If it were merely that then legislation would be unnecessary. Statutes are enacted to fill gaps in the law, to change the law, to clarify the law, or to “freeze” the law from future judicial interpretation. Certainly no Canadian court called upon to interpret this clause would begin from the presumption that the Parliament of Canada enacted for no reason whatsoever.

- i) This clause asserts the “primacy” of the RCMP over other police forces and other public agencies in particular circumstances. This may be an innovation in Canadian law. To the extent that it represents a “freezing” of a developing practice it is something that Members of Parliament will want to consider very carefully indeed.
- ii) It will be the first statute to explicitly give the RCMP power to establish security perimeters (outside of situations governed by the Emergencies

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Act). This is a significant innovation. Absent careful delineation – not present in the clause as drafted – it is a dangerous one.

- iii) Finally, the clause accords the RCMP special duties in an area (international affairs) in which the federal executive enjoys wide, often invisible, and almost always unreviewable discretion. The “binding” of the police to executive function raises significant concerns about many sensitive matters. The relations should be clearly defined by statute.

The **saving clause** (“*The powers referred to in subsection (2) are set out for greater certainty and shall not be read as affecting the powers that peace officers possess at common law or by virtue of any other federal or provincial Act or regulation*”) reflects a desirable goal but is of little effect. In this statutory context it looks like a non-derogation clause rather than a limitation on the powers conferred.

Let us think for a moment about the real world where real police officers work. In that world this clause will be the primary or only point of reference for police officers making decisions about how to conduct themselves. Police officers simply do not have the time or resources to research the “common law” governing the policing of international events. If they were to do so they would find the law difficult to find and harder to interpret.

In the real world RCMP officers will understand this statute on its most natural meaning: that they can do anything they consider reasonable and appropriate. What is reasonable however lies in the eyes of the beholder. Looking to this statutory context, RCMP officers will be invited to measure what is “appropriate” against the requirements of security alone. Because these powers are conferred in an international relations statute the temptation will be to assume that the ordinary rules of policing may not apply. Such thinking would leave considerations of citizen rights and civil liberties in a distinctly secondary place. The temptation to think this way is compounded by the surrounding context in which these powers are to be exercised: conferences involving the highest political offices in the land; possibly high security threats; necessity of liaison with foreign security agencies, and the presence of “internationally protected persons”.

Knowing that the RCMP enjoys primacy, they will make their own assessments. They will know they can do so without need to defer to the constitutional sensibilities of other police forces or other Canadian institutions – apart from their masters in the federal executive.

At first glance this clause seems to empower the police. But it does so in one sense only. The clause fails to provide police officers with any guidance whatsoever as

to what is appropriate or proper or as to what criteria to employ in reaching their conclusions about policing matters in this peculiar context. This leaves RCMP officers at all levels in a terribly vulnerable position if they are faced with improper demands couched as “security” concerns be put to them by foreign governments. It leaves them unable to negotiate effectively in their dealings with Canadian political figures. It leaves them with myriad difficult decisions to make - but provides no guidance as to how to make them.

It is they however who will face disciplinary action, civil suit, extended review processes, and, possibly, criminal prosecution when they get the balance wrong. The nature of these things is that mistakes will happen and some police officers sometimes will inevitably get the balance wrong. They deserve the clearest possible statutory guidance for their own protection.

This is important not just for their protection, however. It is also important for the protection of the rest of us. Citizen’s rights should not turn on an unqualified “police officers’ discretion”. Let me illustrate this point with a few remarks about security perimeters.

the issue of security perimeters

Surprisingly, perhaps, there is presently no statutory authority that clearly authorizes the RCMP or other police forces to erect security perimeters. They do so by an argument that extrapolates a very long way indeed from their duties with respect to “the preservation of the peace”:

RCMP ACT

18. It is the duty of members who are peace officers,
subject to the orders of the Commissioner,

- (a) to perform all duties that are assigned to peace officers in relation to **the preservation of the peace**, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;

This is slim statutory justification for the exercise of power as extensive and intrusive as the construction and maintenance of security perimeters, issuance of security passes,

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defense of the perimeter with armed force, and so on. The law clearly needs to be brought into line with modern needs. The proposed clause 10 fails by a wide margin. Recall that it says, in part,

“(2) For the purpose of carrying out its responsibility under subsection (1), the Royal Canadian Mounted Police may take appropriate measures, including controlling, limiting or prohibiting access to any area to the extent and in a manner that is reasonable in the circumstances.”

Let us note immediately that there are two problems with this:

- i) First, curiously, the police are given the power to create security perimeters *ONLY* at international conferences. One wonders if it is only international events at which such measures might be proper?
- ii) Secondly, there is absolutely no guidance given to police officers in determining what is “appropriate” in which circumstances.

The RCMP have a right to expect the sort of clear and direct statutory guidance that provides them with legal protection – and citizens have a right to expect the extraordinary powers of Police to be clearly limited and defined in statute. Consider the rights that might be infringed by the erection of a security perimeter:

- The right of free movement within Canada
- The right of assembly
- The right of free expression
- The right to enjoyment of property (extending a security perimeter so as to enclose private property is tantamount to an expropriation, albeit for limited time)
- The right to work
- The right to go lawfully about one’s daily life without interruption or harassment by the police.

A security perimeter affects all these rights, amongst others. Depending on when and where a security perimeter is established, it can affect the freedoms of thousands of individuals. This vague statutory wording provides no guidance to police as to what might be “appropriate”. How are police to decide issues such as:

1) **Duration:** the period of time before an event when a security perimeter might be properly enforced? One day? A week before? A month before? Longer?

2) Violation of Property Rights:

- Whose property rights can be derogated from in this way: private Canadian businesses? private businesses from other NAFTA countries? Home owners? Municipalities? Churches? Religious organizations? Media outlets? Provincial Governments? Indian Bands?
- What is the legal recourse if property owners object?
- What happens if another level of government or an Indian band objects?
- Where there is a governmental “taking” of private property for these purposes, is compensation to be paid? If so will the payment be *ex gratia* or as of right? From what fund?
- Does what is “appropriate” depend on *whether* compensation is to be paid to property owners who are interfered with?
- If so, who is to pay and how are the RCMP to evaluate this?

The clause is silent on all these things.

3) **Notice:** Are police to be required to give potentially affected parties advance notice of their intent to create a “secure zone”? If so, who is to be notified? How far in advance?

4) **Extent of Security Perimeters.** One assumes that the larger a perimeter, the more secure an event. Are there to be limits on the apparently ever-increasing size of security perimeters? How are police to balance size against safety against constitutional rights?

5) **The Rights trade-off.** The Canadian Constitution is clear that law-abiding Canadians have the right to assemble, speak, protest. Alan Borovoy of the Canadian Civil Liberties Association has said that “*to be minimally effective, a demonstration must be able to create an atmosphere of*

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political and social tension for those whose decisions it is trying to influence. While it is appropriate to keep protesters far enough away so that they cannot physically intimidate, they must be sufficiently close in order to politically castigate.” (Letter of A. Alan Borovoy, General Counsel, Canadian Civil Liberties Association, to Shirley Heafy, Chair, RCMP Public Complaints Commission, July 25, 2001). This statute fails to remind police officers of their duty to protect these rights. It fails miserably in failing to provide them with guidance as to how to balance security against freedom.

- 6) Security Passes.** The erection of expansive security perimeters requires the police to issue security passes, media accreditation, and so on in order to permit some people but not others to go into secure zones. The clause gives no guidance as to the criteria to be applied, the information police can properly rely upon for this purpose, their responsibilities regarding stating their reasons to citizens who might be denied passes, or the procedure to remedy any wrongs that might occur.
- What level of evidence must be available against someone in order to deny them a security pass? Who does the onus lie with?
 - What procedures will be followed in making these decisions?
 - Can a home-owner be denied access to her or his home?
 - Can a tenant?
 - What is to happen where some individuals in a household meet security clearance requirements and others do not? Will spouses be separated? Parents from children? The aged or sick from their caregivers?
 - What will happen to individuals or businesses if employees are denied access to their place of work?
 - Can racial or religious profiling be relied upon in this context?
 - Should the RCMP rely on information provided by foreign security agencies? Which ones? Who should they defer to in Canada? Other police forces? CSIS? Provincial governments? The Federal Executive? If the Federal Executive, which specific authority is to have the right to communicate with the police about such matters?

- What about political profiling? Is it appropriate? If so, who should be covered? Greenpeace activists? Individuals who donate money or time to environmental causes? Anti-globalization activists? Individuals with a background in pro-life demonstrations? Supporters of political causes or charities (which?) in the Middle East? Asia? Ireland? Spain? Latin America? Supporters of Quebec sovereignty? Will there be a list of unacceptable politics?
- By what criteria will some journalist but not others be allowed beyond security perimeters?

These are serious matters.

One can presume, of course, that most RCMP officers will wish to act responsibly. The desire of police officers to do the right thing is not, however, sufficient protection for citizens.

Nor is the imposition of a bare duty sufficient from the point of view of ordinary police officers.

The Rule of Law requires that the clearest possible statutory guidance be given where such significant violations of fundamental rights are contemplated.

RCMP primacy & Relations with the Federal Government

The proposed Clause 10.1 (1), providing that the RCMP is to have “the primary responsibility to ensure the security for the proper functioning of any intergovernmental conference in which two or more states participate” is inadequate.

These words *might plausibly be construed* as an attempt to clarify the principle, stated by Mr. Justice Hughes, that the RCMP “are to brook no intrusion or interference whatever from government officials as they meet the responsibilities of providing the agreed upon security services” (CPC RCMP, Hughes Report, 451). To the extent that it *may* be intended to recognize the fundamental democratic principle that police are to be independent of political control some such clause would be a move in the right direction. Unfortunately, the meaning here is opaque - and statutes governing matters such as these should never be unclear.

IF that is indeed the intent, the clause is poorly drafted. It is open, in fact, to exactly the opposite construction: one presumes that it is unidentified senior government officials who will tell the RCMP what is required for the “proper functioning” of the particular intergovernmental conference. There is much uncertainty here. We need

statutory clarity as to who is allowed to communicate with the RCMP and what form those communications might properly take.

The clause does not sufficiently clarify the relationship that is to exist between government and police. Some communications are necessary around such events and the demarcation lines must be clearly and publicly established. In failing to do so, this clause would leave the RCMP in a position of confusion as to who they should liaise with in government (DFAIT? Solicitor General? Attorney General? Prime Minister's Office, Privy Council Office? – and which level of Official from each?). It simultaneously leaves them potentially vulnerable to improper political pressures and to *ex post facto* legal challenges impugning their conduct. Possible improvements might include:

- publicity requirements surrounding government communications to the police,
- a statutory reassertion of the principle that it is the duty of both the RCMP Commissioner and the Solicitor-General to protect ordinary police officers and police officers with planning and command authority alike from improper pressures,
- provision for independent legal advice to be available to the RCMP (not through other Government agencies), and
- explicit recognition of the paramountcy of the Canadian constitution and of constitutional freedoms and liberties for all Canadians.

In other respects this clause may move in the wrong direction altogether. It effectively displaces the role of both Provincial and Municipal police forces and as such may trench on matters properly within the realm of the Provinces.

In “contract policing” provinces it muddies the distinction between “federal” and “provincial” policing roles to a disturbing extent. This aspect needs re-thinking from first principles and much clearer statutory definition of what precisely the role contemplated for the federal police force is to be.

Finally, because the policing environment in these contexts clearly trenches on “property and civil rights” within provinces there should be:

- an explicit statutory requirement for consultation with the Province or Provinces concerned about all matters affecting citizens' rights and

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police duties whenever these powers are to be acted upon (as required when the *Emergencies Act* is invoked).

- those consultations should be a matter of public record.